

Robards' Conscript Cases



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FOREWORD

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SYNOPSIS

TEXAS REPORTS.

HABEAS CORPUS CASES.

SYNOPSIS
OF THE
DECISIONS OF THE SUPREME COURT
OF THE
STATE OF TEXAS,

RENDERED, UPON APPLICATIONS FOR WRITS OF HABEAS
CORPUS, ORIGINAL AND ON APPEAL, ARISING FROM
RESTRAINTS BY CONSCRIPT AND OTHER
MILITARY AUTHORITIES,

DURING
THE TERMS IN 1862, 1863, 1864, AND THE GALVESTON TERM, 1865.

BY
CHARLES L. ROBARDS.

AUSTIN:
BROWN & FOSTER, BOOK AND JOB PRINTERS.
1865.

SUPREME COURT OF TEXAS.

1862, 1863, GALVESTON AND TYLER TERMS, 1864.

HON. ROYALL T. WHEELER, CHIEF JUSTICE.
" JAMES H. BELL, } ASSOCIATE JUSTICES.
" GEORGE F. MOORE, }

N. G. SHELLEY, Esq., Attorney General.

JAMES F. JOHNSON, Esq., Clerk.

AUSTIN TERM, 1864, AND GALVESTON TERM, 1865.

HON. ORAN M. ROBERTS, CHIEF JUSTICE.
" GEORGE F. MOORE, } ASSOCIATE JUSTICES.
" REUBEN A. REEVES, }

B. E. TARVER, Esq., Attorney General.

JAMES F. JOHNSON, Esq., Clerk, Austin, 1864.

CHARLES ROSSIGNOL, Esq., Clerk, Galveston, 1865.

CHARLES L. ROBARDS, Esq., Reporter.

Entered according to Act of Congress, in the year one thousand eight hundred and sixty-five,
by

CHARLES L. ROBARDS,

in the Clerk's office of the District Court of the Western District of Texas, at Austin.

THIS pamphlet is published in pursuance of the provisions of an act of the Legislature, "to provide for the publication of the Synopses of the Decisions of the Supreme Court," approved Nov. 15th, 1864. It contains the synopses of the decisions on applications for writs of habeas corpus, made originally in the Supreme Court, in cases arising from restraints made by conscript and other military authorities, and on appeals in like cases, rendered during the terms held in the years 1862, 1863, and 1864, and during the Galveston Term, 1865. As this class of cases is of present importance to the country, and as it will be impracticable to publish them at an early day, in the regular order of their rendition; it was suggested by the Court, that a pamphlet, embracing the synopses of this class of cases, be published in advance of the series to be published under the act and to contain the synopses of all the cases rendered since the publication of the last volume of the Reports, in the regular order in which they were rendered. The Reporter being limited by the law to the publication of the synopses alone, and it being impracticable to make the synopses in the usual form, as found in the Reports, which, in the absence of the customary statement of facts, argument of counsel, and the opinion of the Court, would clearly show all the points decided, in each case; he has, in the preparation of this pamphlet, endeavored to embody in each synopsis, such a brief statement of facts as to render more intelligible the points decided in each case, and to thereby make the pamphlet, as near as practicable, under the provisions of the act, answer the purposes of the Reports in full.

The Reporter acknowledges the assistance of JAMES B. MORRIS, Esq., of Austin, in the preparation of the pamphlet.

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ERRATA.

The case of Ex Parte F. L. Randle, page 10, was decided at the Galveston Term, 1863. The balance of the cases under the head "Austin Term, 1863," were decided at the latter Term.

Page 10, line 8, for "April 6th," read "April 16th."

SUPREME COURT OF TEXAS.

AUSTIN TERM, 1862.

EX PARTE FRANK H. COUPLAND.

On the 16th day of July, 1862, in vacation, F. H. Coupland applied to the Hon. R. T. Wheeler, Chief Justice, for a writ of Habeas Corpus, alleging, that he was illegally restrained of his liberty, upon Onion Creek, in Travis County, by R. T. P. Allen, and, as he believed, without any order or process whatever, or any color of either. On the 21st day of July, 1862, the respondent made his return, in which he says, that on the 25th day of June, 1862, he received an order from R. J. Townes, Provost Marshal of Travis County, commanding him to receive, and have the applicant securely imprisoned within his lines, not permitting him to communicate with any person of doubtful or suspicious character; he having been arrested on a charge of disloyalty. In obedience to this order, the respondent detained the applicant within the lines of the regiment of Confederate States troops, of which respondent was Colonel, at Camp Terry, in Travis County, until the 16th of July, at which time, under authority from Col. John S. Ford, Commandant of Conscripts, District of Texas, the respondent enrolled applicant, under the act of Congress of the Confederate States, entitled "an act to further provide for the public defence;" and thereupon discharged him from imprisonment. The discharge was in obedience to instructions from the Provost Marshal; the applicant was enrolled with his consent, and at his request was attached to Co. B, of respondent's regiment. Since the date of enrollment, respondent has had no other control over applicant than such as vests in him as a Colonel in the Provisional Army of the Confederate States, over a soldier in the army under respondent's command and attached to his regiment, and holds him as such. Applicant was twenty-one years old. The writ was granted July 18, 1862, and service had upon respondent subsequent to the enrollment of applicant. *Held*, that the restraint of applicant was legal.

The respondent moved a continuance, because the applicant, since he was remanded by the Chief Justice into the custody of the respondent, as a soldier, in the regiment of which he was in command, has deserted, and is no longer in the custody or under the control of the respondent. This motion is based upon an affidavit of a Lieutenant belonging to respondent's regiment; from which it appears that the applicant, after his return to it, was furloughed until the 15th September last; at the expiration of which time, he was ordered to report for duty at Tyler, Smith County, Texas, where the regiment was ordered to rendezvous, but that up to the 26th of September, when affiant left camp, the applicant had not joined the regiment or been heard of by him. The motion was

urged upon two grounds: 1st, the Court has no jurisdiction on the application, if the applicant has escaped from the custody to which he was remanded by the judgment from which he appeals; 2d, if the Court has jurisdiction, it will not act upon his appeal while he is at large. *Held*, that this Court has jurisdiction to try the cause on appeal under the circumstances; that the second ground is well taken, as a mere question of practice, if the facts of the case called for its application—but the facts of this case do not call for its application.

The respondent must produce the body of the person alleged to be illegally detained, before the Judge or Court issuing the writ, if in his custody or under his control at the service of the writ, unless excused from so doing by the circumstances indicated in Art. 149, Code Criminal Procedure; and a return not accompanied by the body will be scanned with great caution.

If a party has been released from custody previous to the service of the writ, its object and purpose has been accomplished, and the Court will make no order on the subject.

A different rule prevails when the Court has obtained jurisdiction by service of the writ; when once obtained, it cannot be defeated by the wrongful act of either party.

The object of the writ is to relieve the party from illegal restraint, and not to afford him redress for the illegal restraint.

Upon the hearing of an appeal in cases of Habeas Corpus, the applicant need not be personally present.

The rule of the Court, not to hear appeals in criminal causes when the defendant has escaped, is merely a rule of practice, depending, in its application to particular cases, upon the discretion of the Court.

A party's right to a writ does not depend upon the legality or illegality of his original caption, but upon the legality or illegality of his present detention.

The act of the Confederate Congress, entitled an "act to provide for the public defence," approved April 10th, 1862, commonly known as the "Conscript Law," is constitutional.

It is a general proposition that it is incumbent upon those who maintain the constitutionality of an act of the Confederate Government, to show that the authority assumed by the Confederate States, is sanctioned by an expressly delegated power, or that the act itself is necessary and proper for the carrying into effect an expressly delegated power.

In determining the constitutionality of a law passed by the Confederate government, it is important to consider whether the act in question is done in the exercise of a power expressly granted, or under the implied powers granted by the 18th paragraph of the 8th section of the 1st article of the Constitution: if it is the first, then the Confederate Government may use its discretion in the mode and manner of its exercise, unless it is limited or restrained in so doing by some other express provision, or by some clear and necessary implication; and the burthen of showing this is upon those who assert the limitation.

The authority given "to make all laws which shall be necessary and proper for carrying into execution" the expressly granted powers, was not intended merely to authorize Congress to exercise by legislation the powers previously granted; its right to do so depends in no manner upon this clause, but it is itself a direct grant of all such subsidiary and incidental powers as shall be "necessary and proper" to carry into effect the previously granted powers; and it is incumbent upon those who maintain it, to show not merely that it is a "necessary" law, but that it is a "necessary and proper" law for carrying into effect the expressly granted power.

If there were no express grant "to raise and support armies," the right of the Confederate Government to raise and support armies could be sustained under the general granting clause contained in the 18th paragraph, 8th section,

article I, of the Constitution; and the law in question is in strict accordance with it.

The "power to raise and support armies" is an express constitutional grant to the Congress of the Confederate States; and there is no limitation as to the mode or manner of exercising it, by any other express provision or by any necessary implication.

The Conscript Law does not violate any of the abstract or guaranteed rights of the citizen, nor assume over him any control not delegated by the Constitution.

The grant of the power to make war, carries with it, by necessary implication, unless expressly withheld, the right to demand compulsory military service from the citizen; this express power, together with the implied powers, is vested in the Congress of the Confederate States.

The power to call out the militia, which is a compulsory service, does not limit the power to raise and support armies; nor is the right to raise and support armies to be taken in subordination to the power conferred over the militia.

The general government is not dependent upon the will either of the citizen or of the State, to carry into effect the power to raise and support armies.

While both the Confederate Government and the State Government possess some of the powers which are called by law-writers in distinguishing different forms of government, "sovereign powers," neither of them are themselves sovereign, but each of them represents the sovereign, and both have within their mutual spheres of action, just such powers and functions as have been conferred upon them by the Constitutions creating them.

Congress can exercise, in its judgment and discretion, the "power to raise and support armies," to the extent of raising and supporting such armies as are absolutely essential to enable it to carry into effect the powers granted to it; beyond this Congress cannot go; so long as the necessity exists, the exercise of the power is constitutional; when the necessity ceases to exist, its continuance would be unconstitutional.

Appeal from the Judgment of Hon. ROYAL T. WHEELER, Chief Justice of the Supreme Court, sitting in Chambers, at Austin.

Hancock & Paschal, for appellants.

Attorney General, for appellee.

MOORE, J.—Delivered the opinion of the Court, and cited the following authorities, to wit: Hurd, on Habeas Corpus, 256, 244, 294; Commonwealth vs. Olander, 11 Mass., 83; U. States vs. Davis, 5 Cr., C. O. Rep., 622. Dews' Case, 18 Penn., 37; Rex vs. Gordon, 1 Barn, and Ala., 672, n; 4 Elliott's Debates, 459; 7 vol. Niles' Register, p. 137-294; ib. vol. 8, p. 281.

BELL, J.—Concurred in the opinion of the Court, upon the questions of practice; but dissented as to the constitutionality of the Conscript Law; and delivered a dissenting opinion.

WHEELER, C. J.—Delivered a separate opinion, concurring in the opinion as delivered by Justice MOORE.

Judgment affirmed.

TYLER TERM, 1863.

JACOB McFARLAND v. G. W. JOHNSON.

Appellee was enrolled by appellant as a conscript. On the 2d of March, 1863, appellee sued out the writ of Habeas Corpus, alleging that he was illegally restrained of his liberty by appellant. On the trial in the Court below, appellee was discharged; from which judgment appellant prosecuted his appeal. *Held*, that the respondent, on an application for the writ of Habeas Corpus, cannot appeal from a judgment of the District Court, or a Judge sitting in Chambers; and that an appeal in such cases is restricted to the applicant.

A proceeding upon a writ of Habeas Corpus, when not used to relieve against illegal restraint under a criminal charge, cannot, in the proper senso of the term, be regarded as a civil suit: it should rather, it seems, be held the exercise of a special jurisdiction conferred by the Constitution and laws, upon either the Courts or Judges, for the prompt relief of the citizen against any improper interference with his personal liberty.

Appeal from Bowie. Tried below, before the Hon. B. W. GRAY.

S. H. Pirkey, for appellant.

MOORE J., delivered the opinion of the Court, cited, *Widdington v. Sloan*, 15 B. Mon., 147; *Bell v. The State*, 4 Gill, 304; *Wade v. Judge*, 5 Ala.; *Beury v. Mercier*, 6 How., 103; *How v. The State*, 9 Miss, 690; *Russell v. The Commonwealth*, 1st P. & Watts, 82; *ex parte Perkins*, 2 Cal., 424; *Holmes v. Jennison*, 14th Peters, 540; *Yates v. The People*, 6 Johns., 338; *ex parte La Fonta*, 2 Rob., 405; *Cowan v. Briggs*, 16 Peck., 203; *The State v. Choeman*, 2 South., 445; *The State v. Enet and The State v. Potter*, Dudley Law Rep., S. C., 295.

Appeal dismissed.

EX PARTE E. M. TURNER.

The provision of the Constitution of the State and of the Confederate States, guaranteeing to every citizen a speedy and public trial in all criminal accusations, cannot be held to mean, that in all the possible vicissitudes of human affairs, a person who is accused of a crime shall have a speedy and public trial, in due form of law; but it was intended to prevent the government from

oppressing the citizen, by holding criminal prosecutions suspended over him for an indefinite time; and to prevent delays in the customary administration of justice, by imposing upon the judicial tribunals an obligation to proceed with reasonable dispatch, in the trial of criminal accusations.

This constitutional provision applies to all criminal accusations, without respect to the grade of crime of which the accused may stand charged; and while it is intended for the protection of the citizen, it does not place him upon such a vantage ground, that the State cannot demand from him such services, as under the circumstances of the country he ought, for the public good, or for the public safety, to render.

The State, by her militia law, has not exempted from military service persons who are under bond to answer criminal accusations of any kind; nor does the exemption law of the Confederate States, excuse such persons from service; but, by necessary construction, the militia law of the State and the conscript laws, must be held to operate only on persons who are enjoying the rights of citizens, and in the exercise of personal freedom.

One who is under bond to appear before the civil tribunals, is to a certain extent, in the custody of the tribunal, or of the law; but being in the actual enjoyment of personal freedom, for the time being, a party may be required by the State, to render any service not inconsistent with the qualification which has been, by law, imposed upon the right of a party to enjoy his freedom, and not inconsistent with the policy which the State has declared by her general law for the punishment of crimes.

It seems that the District Court has the power to issue a writ, to a military officer having a party under bond, to appear before such Court, in a camp within its jurisdiction, requiring him to bring the party into Court, for trial; and it would be the duty of the officer to obey the writ.

A party under bond for his appearance, to answer a charge of felony, is not thereby exempted from military service in the State or Confederate army, during the pendency of the accusation.

EXLL J., delivered the opinion of the Court.

Applicant remanded to custody of military authorities.

[Nota.—The Reporter not having been furnished with the record, the usual statement of facts is omitted.]

AUSTIN TERM, 1863.

EX PARTE F. L. RANDLE.

On the 17th of February, 1863, applicant filed his application for the writ of Habeas Corpus, in the Supreme Court, which was resisted by the respondent, Brigadier General John Sayles. On the hearing of the application, the following facts were submitted in evidence: The applicant was a citizen of Texas; on the 7th day of July, 1861, he enlisted in the third Regiment of Georgia to serve in the Army of Confederate States for one year; he was between the ages of eighteen and thirty-five; his term of service was prolonged by the act of Congress, approved April 6, 1862, entitled "An act to provide for the public defence." On the 6th day of August, 1862, in pursuance of the 9th Section of said Act, he furnished a substitute, who was a citizen of Georgia, and thirty-eight years of age; and he was thereupon regularly and legally discharged. Upon his return to his home in this State, he was enrolled with the militia. The Commanding General of the Confederate States for this Military District, having made a requisition upon the Governor of this State, for not less than five thousand militia soldiers, to protect the coast and to repel the invasion of Texas, on the — day of December, 1862, the applicant was, in pursuance of the order of the Governor, for the draft of a sufficient number of the militia of the State, to satisfy said requisition, drafted as a militia soldier of the State, and at the time of his application, was held in custody as such, by the respondent John Sayles, as Brigadier General of the State Militia, but subject to the orders of the Commanding General of the Confederate States Army, of this Military District. *Held*, that applicant was not entitled to the writ.

A person who has been legally discharged from the Army of the Confederate States as a conscript, under the Act to provide for the public defense, of April 16th, 1862, by reason of having furnished a substitute, not at that time subject to conscription, nor at any time amenable to the militia laws of this State, can be required to do service as a militia soldier of this State, under a requisition of the Confederate States, during the period for which he was conscripted.

The Constitution of the Confederate States authorizes Congress to raise and support armies, and also to call forth the militia to execute the laws, suppress insurrections and repel invasions; these are separate and distinct grants of power; under the first, Congress may raise armies by its own immediate and direct action upon the arms-bearing citizens of the State; under the second, by and through the action of the officers of the State, the militia are called for the temporary exigencies indicated in the Constitution, into the service of the Confederate States.

In the one case, Congress determines what portion of the citizens are liable to do military service in the armies, which it has direct authority to raise, and can prescribe the terms and conditions upon which it will exempt them from

this service; in the other, the State alone can determine who are its militia, and whom of its citizens it will hold subject to do duty as such.

A person who has furnished a substitute and received his discharge, is not in fact, nor can he be regarded in legal contemplation or by fiction of law, as still in the military service of the Confederate States, but after his discharge, he is subject to be called upon to perform any of the civil duties which the Government may otherwise require of him.

The Act of April 16, 1862, entitled an "Act to provide for the public defense," was enacted solely under the Constitutional grant of power to Congress, to raise and support armies. This act was not intended and could not have the effect of a negation or limitation of the right of the Confederate Government to call forth the militia, under the other constitutional grant of power conferring this authority.

When the law declares "that persons not liable for duty, may be received as substitutes for those who are," there can be no question that the "duty" for which the person offered as a substitute must not be "liable," is the "duty" which the citizen is liable and called upon to perform under and by virtue of this law, and the constitutional provision, under which it was enacted.

A person furnishing a substitute under this law, is exempt from this "duty," imposed by this law, but he is not exempted thereby from duty imposed upon him by another law, under another constitutional provision, though such other duty may be of a Military character.

Tried before the Supreme Court.

A. M. Lewis, for applicant.

Attorney General & John Sayles, for respondent.

MOORE J., delivered the opinion of the Court.

Application refused.

[On the hearing of this application, the rules prescribed by the Sec'y of War, regulating discharges under the 9th section of the conscript law of April 16, 1862, were not before the Court. Justice MOORE, in this opinion, makes the following remarks: "It is proper, perhaps, that we shall say, that we have examined this case in reference alone to the law under which the applicant was retained in service as a conscript, and under which he obtained his discharge, without reference to the subsequent legislation upon the subject, or rules subsequently made by the Secretary of War, regulating the manner of obtaining discharges upon furnishing substitutes."—*REP.*]

EX PARTE DAVID S. READ.

Applicant was a soldier in Allen's Regiment, P. A. C. S.; on the 15th of September, 1862, he furnished a substitute 38 years of age, who was accepted and applicant discharged; on the 26th of May, 1863, applicant petitioned for the writ of Habeas Corpus, alleging that he was illegally restrained of his liberty, by S. H. Summers, Enrolling Officer for Bell County; the writ issued and return thereto made the same day; respondent claimed to hold applicant as a conscript, enrolled by him previous to the service of the writ, under orders from the Head-Quarters, Conscript Bureau, at Austin, of date May 4, 1863. *Held*, that applicant was not liable to military service as a conscript on the 26th of May, 1863, he having furnished a substitute under the act of conscription, of April 16th, 1862.

The first act of conscription, passed April 16, 1862, permitted a party liable to conscription to furnish a substitute, and he having furnished such substitute, thereby satisfying the call made upon him, was exempt from the operations of the second act of conscription, passed September 27, 1862.

The arrangement between a substitute and his principal, is one to which the Government consents in a solemn manner, by the exercise of the law-making power; such consent is enough to entitle it to be respected, at least until the law-making power declares the purpose of the Government to put an end to such arrangement.

Quere?—Whether the furnishing a substitute by one called into the military service, and the acceptance of such substitute by the military authorities, and the discharge of the party called upon to render the military service, constitutes a contract between the Government and the party furnishing the substitute?

The order of the Secretary of War to the effect, that those who furnished substitutes under the first conscript law are liable themselves to be enrolled as conscripts, whenever the substitutes are embraced within the provisions of either of the acts, goes beyond the law, and is without authority.*

Appeal from the judgment of the Hon. W. Y. McFARLAND, Judge of the 19th District, sitting in Chambers, at Belton.

Walker, for appellant.

Attorney General, for appellee.

Opinion by Justice BELL.

Judgment reversed and applicant discharged.

Chief Justice WHEELER did not sit in this case.

EX PARTE M. C. TALKINGTON.

The applicant is a resident of Collin County; is thirty-one years of age; had been enrolled in the C. S. Army. On the 30th of September, 1863, he furnished a substitute over forty-five years of age, and was regularly discharged from the C. S. Army. On the 4th day of January, 1863, J. Bankhead Magruder, Major General C. S. A., commanding the District of Texas, New Mexico and Arizona, made a call on the Governor of the State of Texas, for the State militia, to the number of 10,000 men. On the 8th day of June, 1863, F. R. Lubbock, Governor of the State of Texas, issued an order, directing a draft of the militia of the State, to fill said call. On the 15th of July, 1863, under and by virtue of said order, the applicant was enrolled and drafted. At the time of applying for the writ, he was held in custody by Lieut. W. A. Portman, in obedience to orders from the said Major General Commanding, disposing of the troops called into service as above stated. The name of the applicant, at the time of the draft, was not drawn until after fifty per cent. of the names had been drawn out of the bat. Writ issued Aug. 6th, 1863, directed to said Portman. *Held*, that the applicant, under this state of facts, was not entitled to be discharged.

A party who has furnished a substitute in the Provisional Army of the Confederate States, under the Conscript Laws, is not thereby exonerated from military service as a militia man, under the laws of the State; nor is he thereby

*See *ex parte*, Abraham Mayer, page 22.

excused from a draft ordered by the Governor, in response to a call made upon him for a part of the militia for Confederate service.

Ex parte F. L. Randle, page 8, cited and affirmed.

The President is authorized by law to call for the militia, which he may do through the Commanding General charged with the duty of executing the laws, suppressing the insurrection, or repelling the invasion, for which the services of the militia are needed; and the recognition of the validity of such a call by the Governor of the State, is sufficient evidence that it was made by the Commanding General, by the direction and in obedience to the orders of the President.

The law provides that those upon whom the duty of responding to the call for a part of the militia is devolved, shall be selected by chance; and this shall be ascertained by drawing, by lot, from among all who are subject, the number that is called for. If the draft has been so conducted as to leave the selection of those who are drafted to fortune, the mere details by which the drawing has been governed, are wholly immaterial.

Appeal from Collin. Tried below, before the Hon. R. L. WADDILL.

Easton, Brown & Breedlove, for appellant.

Attorney General, for appellee.

Opinion by Justice MOORE.

Judgment affirmed.

Chief Justice WHEELER did not sit in this case.

EX PARTE A. W. GREGORY.

On the 11th day of November, 1863, the applicant petitioned for the writ of Habeas Corpus, alleging that he was illegally restrained of his liberty, by J. M. Davis, Eurolling Officer for Limestone County. Writ issued same day. Respondent, in his return, claimed to hold applicant as an enrolled conscript. On the trial of the cause, it was in proof that applicant was a minister of the Baptist Church, and authorized to preach according to the rules of his sect; that he was not an ordained minister, and had no authority to administer the ordinances of the church; that applicant did not have charge of a church, as pastor, and did not make preaching a regular occupation to obtain a livelihood; that he received the assent of the church to preach, about two years previous to the issuance of the writ; was licensed to preach February 14, 1863, and preached only occasionally; that no minister can take pastoral charge of a church, without ordination; that there is no difference between a licensed minister and an ordained minister, except that an ordained minister has the right and authority to administer the ordinances, in addition to that of preaching, and may take charge of a church, as pastor; that according to Baptist usages, no ordination is necessary to constitute a preacher; that any male member of the church may preach, so long as he does not preach heresy; that it is customary to grant licenses to preach in the Baptist church, but it is not necessary to enable a party to preach. *Held*, that the facts of the case are not sufficient to constitute an exemption under the act of Congress, of date April 21st, 1862.

Under the act of April 21st, 1862, a party to be entitled to an exemption, as a minister of religion, must be authorized to preach according to the rules of his sect, and be engaged in the regular discharge of ministerial duties.

The fact that a party, by the rules of his sect, is authorized, by the consent of a congregation, to lead in their religious worship, and that he is recognized

by his brethren as a person who occupies such a position, does not constitute him, within the contemplation of this law, a preacher in regular discharge of ministerial duties.

Appeal from the judgment of the Hon. J. C. WALKER, Judge of the 13th Judicial District, sitting in Chambers, at Springfield.

Attorney General, for appellee.

MOORE, J. delivered the opinion of the Court.

Judgment affirmed.

WHEELER, O. J., did not sit in this case.

GALVESTON TERM, 1864.

EX PARTE S. W. MONTGOMERY.*

The applicant, on the day of 1863, was regularly enrolled in the militia of the State, and drafted for service in the State Troops. On the 20th December, 1863, he made his application for the writ of Habeas Corpus. At that time, he was held in custody by Brig. Gen. W. H. Hori, of the Texas State Troops. At the time he was enrolled and drafted, the applicant was a citizen of the State of Louisiana; was then, and is still, an officer of its militia, and also a member of the police jury of the Parish of Madison, where he resides. He was driven from his home by the public enemy; he brought to Texas his wife and daughter, a few of his servants, and a small part of his household furniture, to seek a temporary asylum from the outrages which were being committed by the enemy in said Parish. He intended to return to his residence in the State of Louisiana, so soon as it could be done with safety to his family. He had not vacated the offices which he held in the State of Louisiana; was expected by the citizens, and intended to return and discharge the official duties thereby incumbent upon him, at such times as the movements of the enemy and the course of events should permit. At the time of his enrollment, he had been in this State about two months. A short time thereafter, he returned to his place of residence in Louisiana, to look after his affairs at home; to attend to his official duties, and while there discharged such of them as the emergency of the occasion required. *Held*, that the applicant was not subject to be coerced to the performance of the military duty for which he was drafted.

The law requiring all able bodied free white male inhabitants of the State, over eighteen and under forty-five years of age, to be enrolled in the militia and made subject to do duty in the State Troops, was not intended to apply to such an inhabitant as the applicant.

His residence is not of that degree of permanency, that he may be justly called an inhabitant of this State, but more appropriately denominated a temporary resident, sojourner, or refugee.

Appeal from the judgment of the Hon. J. W. FERRIS, sitting in Chambers, at Dallas.

John M. Crockett, for appellant.

Attorney General for appellee.

MOORE J., delivered the opinion of the Court.

Judgment reversed, and applicant discharged.

* Chief Justice WHEELER did not sit in the cases decided at the Galveston Term, 1864.

THE STATE OF TEXAS v. J. H. SPARKS.

On the 14th of March, 1864, on the return of the writ previously issued, Rich'd R. Peebles* and others were brought before this Court. Lieut. T. E. Sneed, in his answer, stated that applicants were in his custody as commander of the post, at San Antonio, by order of Maj. Gen. J. Bankhead Magruder, Commander of the Military District of Texas, &c., on the charge of treason and conspiracy against the government of the Confederate States. Case continued until the 21st instant, to give the Major General commanding an opportunity to answer. The Court ordered applicants into the custody of the Sheriff of Travis County, to be kept by him, subject to its control, under proper guard, pending proceedings in the case. On the 21st instant, Horace Cone, Esquire, on behalf of the Major General commanding, filed his answer, which states, in substance, that applicants were arrested and held by his order, as commander of this military district, upon the charge of treason and conspiracy against the Confederate States. On the 25th instant, counsel for respondent moved the Court to remand the prisoners to the custody of the military authorities, accompanied by the affidavit of the commandant of the post at Austin, &c. On motion of applicants, case continued until 26th instant. On the same day applicants were forcibly arrested from the Sheriff, by a detachment of armed soldiers, acting under the orders of the defendant. Writ of attachment issued against defendant, to have him brought before this Court, to answer for contempt. Defendant, in answer, stated: that he had received an order from Major General Magruder, stating that he had been ordered by the Lieut. Gen'l Comd'g T. M. D., to detain, as prisoners, the applicants; and having previously received from the Maj. Gen'l, orders to place the escape of applicants beyond a doubt, by placing a sufficient guard over them; and having once furnished a guard, which was rejected by the Sheriff, and being satisfied that the prisoners were not fully guarded by the Sheriff, and feeling, under the orders of the officers having a right to order him, that he was held by them responsible for the safety and protection of prisoners; and being of the opinion that they were then constructively in the possession of the military; and being ordered to disregard the then existing writ of habeas corpus, or any writ which might be subsequently issued; and designing no contempt of the Court, but a desire to discharge his duty as an officer, in obedience to orders; and having first requested the Court to remand the prisoners to the custody of the military authorities, and the Court having declined to act on his request, but taking it under advisement until the next day, defendant felt it his duty to act as he had done in taking the prisoners. *Held*, that the arrest of the prisoners, by the defendant, from the custody of the Sheriff, was a contempt of this Court; and the showing was no justification of the contempt, but may be regarded as an extenuation of the offence.

No officer or tribunal, civil or military, known to the law of the land, can, without a violation of law and a contempt of this Court, forcibly take from under its control, and without its consent, prisoners held in the custody of the Court, pending an application for a writ of habeas corpus, until the final adjudication thereof.

An illegal act cannot be justified, no matter how high the source from which it emanates, by an order from superior authority.

Military officers are bound to obey all legal orders of their superior officers, but they are not bound to obey illegal orders.

While an officer is not bound to obey an unlawful order of his superior in command, yet as in all cases when he declines obedience to it, he acts at his peril; much indulgence should be shown in extenuation of his obedience to such orders.

Tried before the Supreme Court.

*See Ex Parte R. R. Peebles and others, page 17.

Attorney General, for plaintiff.

J. H. Sparks, for himself.

MOORE J., delivered the opinion of the Court.

Ordered that Maj. Gen. Magruder be made a party defendant, and cause transferred to Tyler.

EX PARTE RICHARD R. PEEBLES, AND OTHERS.

Applicants were arrested by order of Maj. Gen. Magruder, Commander of District of Texas, &c., on a charge of treason and conspiracy against the Confederate States. Writ issued on the 7th of March, 1864, by, and returnable before the Supreme Court. Return specified at length the grounds of the charge of treason and conspiracy. Case submitted on petition and return, without the introduction of any evidence in proof of the charges. *Held*, that the applicants are entitled to be discharged.

A military officer, charged with the defence of any district of the country, may arrest any one who, by his acts, has made himself a public enemy; but his power to arrest, can extend no further than this.

A citizen who commits treason, thereby makes himself a public enemy.

Treason can only be committed, by levying war against the government, or adhering to the enemies of the government, giving them aid and comfort.

When a military commander arrests a citizen, not belonging to the army or navy, or to the militia when in actual service, he holds such citizen, at all times, subject to the demands of the civil power; and when the civil power takes the citizen from the hands of the military officer, if no evidence be offered to make good the accusation against the citizen, he is entitled to be discharged.

Pending trial, motion was made to remand the applicants to the custody of the military authorities. Motion sustained by note of commandant of post at Austin, stating that he received from Major Gen'l Magruder, an order to take charge of, and detain the applicants, by order of Lieut. Gen'l Smith, Commanding T. M. D.; said order being issued in conformity with a recent act of Congress, providing for a suspension of the writ of habeas corpus; also, by an affidavit of said post commandant, stating, in substance, what was stated in his note addressed to the Court; also, by an affidavit of Major Guy M. Bryan, A. A. G., to Lt. Gen. E. K. Smith, that Maj. Gen. Magruder was directed by Lieut. Gen. Smith, in October, 1863, to hold and detain the applicants, upon representations made by said Gen. Magruder to Gen. Smith; also, by a letter to Col. Cone, from Edmund P. Turner, of the staff of Maj. Gen. Magruder, stating that he was instructed by Gen'l Magruder to say, that he wished it to be represented to the Court, that in directing the commanding officer at Austin, to detain the applicants, he acted under the law of Congress, and in accordance with the order of the Lieut. General commanding the Department. *Held*, that the evidence is not legally sufficient to establish the fact, that the applicants are detained by order of the General commanding the Trans-Miss. Department.

Under the provisions of the act of Congress, suspending the writ of habeas corpus, the proper evidence, that a party has been arrested by order of the President, Secretary of War, or the General officer commanding the Trans-Miss. Dept., is the certificate, under oath, of the officer having charge of any one so detained, that such person is so detained by him, as a prisoner, under his authority.

It seems that other evidence may be offered, to establish the fact that a party is detained by such authority.

Pending trial, applicants submitted a statement under oath, that they are informed that this Court will order their discharge from their present custody; that the post commandant at Austin intends to re-arrest them, as soon as they are discharged by the Court, in obedience to orders which had already been shown to the Court; and asked the interposition of the Court to protect them against an intended unlawful arrest. *Held*, that these facts do not warrant the interposition of the Court.

Under the late act of Congress, suspending the writ of habeas corpus, the General commanding T. M. D., has the right to issue an order to arrest and detain parties charged with the offences enumerated in the statute, and it would be the duty of the Court to respect it.

Tried before the Supreme Court.

John Hancock, for applicants.

C. L. Robards, Horace Cone, and Spencer Ford, for respondent.

BULL, J., delivered the opinion of the Court.

Applicants discharged.

AUSTIN TERM, 1864.

EX PARTE LEOPOLD ZALINSKA.

Applicant petitioned for the writ of Habeas Corpus, on the 30th day of September, 1864, alleging that he was illegally restrained of his liberty, by Capt. Lev Sutherland, Provost Marshal. Respondent made his return to said writ on the 3rd day of October, and claimed to hold applicant, as a conscript, liable to do military duty under the C. S. conscript law. On the trial of the cause, Frank Swetze testified, that himself and applicant were born in the same town, in Prussian Poland, where they both lived until some ten years ago, when they immigrated to this State, and have lived here continuously up to the present time; that it was customary in Prussian Poland, for the priest or clerk of court to record the births of children born in the country; that witness and applicant, at the time of their immigration, procured certificates of such records respectively; and that according to these, witness was born in the year 1813, (did not recollect the month) and applicant in July, 1814; that he had kept said certificates until about six years ago, when he lost them. He did not know what officer gave them the certificates, whether a clerk or judge, nor the names signed to them, nor the date, nor any word or words therein, except those concerning the date of his own birth and that of applicant. He looked at said certificates about six months before they were lost, but he had no motive for so doing. Another witness testified that it was customary to record the births of children in Prussian Poland; that it was usual for emigrants, before leaving there, to procure certificates of their ages; that Frank Swetze is a man of good character and veracity. *Held*, that the evidence is insufficient to prove at what time applicant became fifty years of age.

Quests? Is a party liable to perform military service, under the conscript laws, who, though not fifty years of age at the time of the passage of the act of February 17th, 1864, becomes so prior to his enrollment?

Appeal from the judgment of the Hon. JOHN H. DUNCAN, Judge of the 4th District, sitting in Chambers, at San Antonio.

Patrick J. Prior, for appellant.

Attorney General, for appellee.

ROBERTS, C. J., delivered the opinion of the Court.

Judgment affirmed.

EX PARTE WILLIAM A. WINNARD.

On the 5th day of September, 1864, applicant petitioned for the writ of Habeas Corpus, alleging that he was illegally restrained of his liberty, by T. J. Moore, enrolling officer for Nacogdoches County. Writ issued September 6th. Respondent, in his return, claimed to hold applicant as a deserter from conscription, and subject to orders. Applicant was enrolled June 28th; he is 43 years of age. Respondent permitted him to remain at home, pending his application for a detail, as a blacksmith; which application was refused by Gen. Greer, C. B. C., T. M. D.; and an order endorsed thereon, ordering applicant to camp of instruction, without delay. On the 27th of August, in obedience to said order, respondent ordered applicant to report for duty, to Col. D. B. Martin, C. C. D. T., at Rusk, within ten days: applicant disobeyed said order. Applicant was elected to the office of Justice of the Peace, on the 1st day of August. *Held*, that the enrollment of applicant placed him in the military service of the Confederate States, as part of the army, subject to the orders of its officers; and that his election to the office of Justice of the Peace, after such enrollment, does not constitute an exemption from such service.

Art. 180, Code of Criminal Procedure, is an authoritative injunction, upon the Judiciary, by the Legislature, not to discharge any one who is held by virtue of any legal engagement or enlistment in the army, or who, being rightfully subject to the rules and articles of war, is confined by any one *legally* acting under the authority thereof.

Art. 180, Code of Criminal Procedure, presupposes the right to make the inquiry by the writ of habeas corpus, and also to ascertain the facts which may constitute the legality or illegality of the restraint.

Under the laws of conscription, a legal enrollment is that which places a person in the military service of the Confederate States.

The transition from the walks of civil life, to the position of a soldier, is very great; and the facts which determine the change in a person's political status from a citizen, out of military service to a soldier in it, should be of a certain, definite character, calculated to put him upon his guard as to his new responsibilities.

Under the conscript laws, the enrollment of a person liable to military service, determines his status, as a soldier, in the army of the Confederate States; and subjects him to the orders of the military authorities, and the rules and articles of war.

The enrollment prescribed by the laws of conscription, is itself a species of muster, in which the party's name and personal description are placed on the roll by an officer.

An oath is not necessary to fix upon any one the character of a soldier, under our forced system, nor even in voluntary enlistments, when it is evidenced by other facts.

Under the exemption laws, a party to avail himself of an exemption to which he is entitled, must claim it.

The act of Congress of February 17th, 1864, does not, of itself, change the status of a civilian to that of a soldier, and subject him to the rules and articles of war.

Ex parte F. H. Coupland, page 5, cited and affirmed.

The proclamation issued by the Governor, on the 3d day of June, 1864, in obedience to the Joint Resolution of the Legislature, of May 28th, 1864, may be regarded as a certificate in behalf of each and every officer of the State.

In governments where there is an established division of powers, it is presupposed, in their creation, that no one power is competent to absorb the others.

In the formation of the State and Confederate Governments, it was contem-

plated that the two should harmoniously co-exist, as long as the system of government remained unchanged by the people, who made both, and delegated to them their separate or concurrent powers.

The co-existence of one department or government, with its peculiar exclusive and necessary rights, duties and powers, imposes upon every other department and government, a limitation upon the extent to which the general delegated powers of each can be exercised, though none be otherwise expressed.

Each department of government, and each government, in our system, must be confined within the scope of its delegated authority, and the powers of each, when questioned, can be inquired into.

Congress has no authority to pass a law conscribing the officers of a State.

The Joint Resolution of the Legislature, does not assert the right of the State Government to take a soldier, regularly enrolled, from the control of the Confederate States, and retain him as a civil officer.

Wherein the State and Confederate Governments have concurrent powers, the one to which the jurisdiction first attaches has preference, and the other must yield.

Appeal from the Judgment of the Hon. RICHARD S. WALKER, Judge of the 5th Judicial District, sitting in Chambers, at Nacogdoches.

A. Clark, for appellant.

Attorney General, for appellee.

ROBERTS, C. J., delivered the opinion of the Court, and cited the following authorities: Acts of Conscription and of Exemption, U. S. Congress; *ex parte* F. H. Compland; *Williamson v. Berry*, 8th Howard, 640; *Elliot v. Piersol*, 1 Peters, 328, 340; *Jones v. Perry*, 10 Yerger, 59; *Holden v. James*, Adm'r., 11th Mass., 396; *The State v. Fleming, et. al.*, 7 Humph. 152; *Dred Scott v. Sandford*, 19th Howard; *Taylor v. Porter*, 4 Hill, N. Y. R., 146; *Fletcher v. Peck*, 8 Cranch, 87; *Bennett v. Boggs*, 1st Baldwin, 74; 1st Kent's Com., 488; Justice Chase's opinion, *Calder v. Bull*, 3 Dall., 386; *Bowman v. Middleton*, 1 Bays S. O. Rep., 252; *Monaparte v. The Camden & Aniboy R. R. Co.*, 1 Baldwin, C. O. Rep., 223; *Smith's Com.*, 251 to 309; *Inhabitants of Medford v. Learned*, 16th Mass., 215; *Shelby v. Bacon*, 10th Howard, 56.

Judgment affirmed.

MOORE, J., did not sit in this case.

EX PARTE JOHN LUSCHER.

Applicant, a native of Switzerland, came to this country in December, 1860, for the purpose of looking at it; intending to remain, if he liked it; has been in the country ever since. Soon after his arrival here, he declared that he did not like the country; that it was too dry; he should return to Switzerland, but was prevented from doing so, on account of the blockade. He further declared that he had made, or was making, preparations to return to his native country, by way of Matamoros, but was paid for his labor in Confederate money; and not being able to use it, he could not carry his intentions into effect; that he had written a letter to his parents in Switzerland, in which he stated that he should return as soon as circumstances would permit. Applicant had said, before and since the war, that he would return to Switzerland; applicant

had acquired no property, had not voted in this country, nor declared his intention to become a citizen of the United or Confederate States; was unmarried; had been employed as a teamster; was thirty-one years of age; was detained in custody by Capt. F. R. Frankel, Enrolling Officer of Bexar County, as a conscript. Writ issued 2d September, 1864. The Judge, before whom he was tried, held that applicant had failed to prove alienage, as alleged in his petition, and remanded him to the custody of the Enrolling Officer. *Held*, that this does not present such a case as would enable this Court to conclude that the Judge had decided erroneously.

A foreigner, coming to this country in 1860, with the intention of making it his home, and remaining here, in the same locality, nearly four years, following the ordinary avocations suitable to his condition, would find it hard to induce the belief that he had not established a residence, within the meaning of the conscript law, by his declaration of intention to go back to the place of his nativity, without taking any ostensible steps to put that intention into execution.

Appeal from the Judgment of the Hon. JOHN H. DUNCAN, sitting in Chambers, in Bexar.

W. B. Leigh, for appellant.

Attorney General, for appellee.

ROBERTS, C. J., delivered the opinion of the Court.

Judgment affirmed.

EX PARTE ABRAHAM MAYER.

Applicant, previous to the 4th day of June, 1863, was enlisted as a soldier in the army of the Confederate States, for the term of three years. On that day, he offered a substitute, who was fifty years of age, and, on examination, being found capable, was received, and applicant discharged. On the 3d day of March, 1864, applicant was enrolled by the Enrolling Officer for Panola County, and ordered to report to the commandant of a camp of instruction. On the 12th of March, applicant sued out a writ of Habeas Corpus, and prayed for a discharge, on the ground that he had furnished a substitute. *Held*, that applicant was liable to military service, notwithstanding he had furnished a substitute.

There are two limitations imposed on the legislative power: the first arises from the power of construction, and is vested in the Courts, and applied to written law of all kinds, when the laws are ambiguous or contradictory; the second is, the restrictions imposed by the Constitution, and which the judiciary must enforce.

If the legislative power is restricted, it must be exercised in subordination to the restriction; if it is without qualification of any kind, the power of legislation is co-extensive with the power of the grant.

The power to raise armies is conferred in express terms by the Constitution of the Confederate States; but who shall compose the army, or how it shall be raised, or what number shall constitute it, must, to a great extent, be left to the wisdom and discretion of Congress.

The object of such a grant was to confer a real and substantial power, and its exercise is not to be restrained by any rules which are merely technical, and which are applicable as such, to questions affecting rights of property, or con-

tracts relating to property, or arising by implication from legislative action : the grant must receive such interpretation as will accomplish the object intended by the framers of the Constitution, so far as it can be ascertained.

The power to raise armies must not be so construed as that its use, if exercised, might result in the destruction of the State Governments; or, that would impair any right over which Congress has no power to legislate; or, that would render the Confederate States unable to give that protection to the States to which they are entitled, and may demand under the guarantees of the Constitution.

The presumption is not to be indulged, that Congress has transcended or perverted its authority, in enacting a law under the power conferred to raise armies; it must be a clear case of the violation of the Constitution, that will warrant the interference of the Courts.

The contracts designed to be protected by the Constitution are, 1st, contracts by which private rights of property are vested; 2d, in the term contract is not included rights growing out of regulations of the government, relating to public policy, or to statutes giving privileges or granting exemptions; these rights are in the nature of legislation, and not of compact, and dependent on the discretion of the Legislature.

There is nothing in the Constitution of the Confederate States, which prohibits Congress from violating the obligation of contracts, though such a right is denied to the States.

The repeal of the law allowing substitutes, and making the principal liable to military duty, is not a violation of the Constitution of the Confederate States.

Congress has no power to pass *ex post facto* laws, but the Courts have uniformly construed this power to relate to criminal legislation only.

The government, under the exemption laws, is not a party to the contract between the principal and his substitute; nor can it be implied from the language of the statute, that such contracts were contemplated by the law-makers, or that the government would incur any liability beyond the obligation to pay the substitute what was paid to any other soldier for like services.

As long as the law of exemption by substitution remained in force, the rights it conferred, were to be held and enjoyed, subject to the future action of Congress; and it is not to be supposed that the government intended to part with the right to control the subject in the future.

Though there may be a moral obligation to provide for cases of hardship, yet the Courts have ever held, that a moral obligation, only, is not a ground for its enforcement, as a legal right.

Appeal from the Judgment of the Hon. RICHARD S. WALKER, Judge of the 5th District, sitting in Chambers, at Nacogdoches.

Donly & Anderson, and *W. R. Poag*, for appellants.

Morris & Casey, for appellee.

REYNOLDS, J., delivered the opinion of the Court, and cited *Evans v. Eaton*, Peters C. C. R., 337; *Fletcher v. Peck*, 6 Cranch, 136; *Dartmouth College case*, 4 Wheaton, 519; *Butler, et. al. v. The State of Pennsylvania*, 10th Howard, 416; 1st Kent, 463; 10th Howard, 402; 4th Barr, 51; 6th Sergeant & Rawls, 322; *Commonwealth v. Bird*, 12 Mass., 443.

Judgment affirmed.

MOORE, J., did not sit in this case.

GALVESTON TERM, 1865.

EX PARTE SAMUEL BLUMER.

The applicant is a native of Glarus, in the Republic of Switzerland; he came to Texas, on business, in 1854, and remained here a few months, when he returned again to his native home in Switzerland; a portion of the time he was in Texas, he worked as a day laborer for R. H. Peck, at the butcher business. In December, 1858, he again left home to come to Texas, traveling by way of Paris, Havre—passing through New York on the 7th day of June, 1859—and New Orleans, stopping at these and other places, and arriving in Texas on the 24th day of June, 1861. He was sick when he reached here, and remained in bad health for about two years, able to work a month or two, and then sick for a month or two, and did work when able to do so. Since he recovered his health, he has performed manual labor for different persons for pay, such as splitting rails, butchering, and working on a farm, and following the ordinary avocations of the country; and was so employed at the time of his enrollment. On his arrival in Texas, he said he had not come to make this his home, and declared his intention not to remain in Texas, but to return again to Switzerland, as soon as he recovered his health sufficiently to travel, and got money enough. Since he recovered his health, in 1863, he has been destitute of means, and has continuously and often expressed his determination to leave Texas, and to return to his native home to live, as soon as he earned money enough to defray his expenses in travelling from here there; but never stated any particular time when he would start, nor has he, since his return to Texas, ever put himself in motion to leave the State, or manifested, by any act done, an immediate intention to start at any time, during that time. He has never declared his intention to become a citizen of the Confederate States; has never voted at any election, but has, at all times, refused to take any part in elections, alleging, as a reason therefor, that he was not a citizen of the country. He has never purchased property here, or invested money in business; he is a single man, and is thirty-two years old. He was enrolled as a conscript, on the 2d day of July, 1864. Writ issued August 13th. *Held*, that the applicant is not such a resident of the Confederate States, within the meaning of the conscript laws, as to render him liable to military service under those laws.

The laws of conscription embrace all white men of the age of the applicant, "who are residents of the Confederate States."

The word resident is ordinarily used to designate persons in a particular locality, as of a city, town or county.

The word "residents," in the conscript laws, is used to designate a class within the whole limits of the government.

The term "residents," as used in the conscript laws, includes not only citizens, native and naturalized, but also foreigners whose residence in this country

has been such as to attach to them a national character, as members of society.

The inhabitants, as distinguished from citizens, are strangers who are permitted to settle and stay in the country: bound by their residence to the society; they are subject to the laws of the State, while they reside here, and they are obliged to defend it. Such are the foreigners intended to be embraced by the term "residents," used in the conscript laws.

Such a residence, it is believed, will generally be found to correspond with what is meant by domicil, as it is now understood and adjudged by the Courts of England and America.

An act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains.

The rule adopted by the President, that foreigners, not domiciled in the Confederate States, are not liable to enrollment, is in harmony with the law of nations; is based upon an undoubted and recognized right, and is one of certainty and safety.

The order from the Head Quarters, Bureau of Conscription, T. M. D., of date April 9, 1864, subsequent to the passage of the act of February 17th, 1864, which retains the same designating word "residents," cannot be held as evidence of the construction by the President originally, or of Congress at any time.

The domicil of birth remains a party's domicil until a new one is acquired.

A person being at a place, is *prima facie* evidence that he is domiciled there, and it lies upon him to rebut that presumption, when the place of his domicil is brought in question.

This presumption may be rebutted by the party showing that the facts connected with his residence, are not inconsistent with a *bona fide* intention, on his part, of not making the place of residence his domicil, or of retaining his former domicil.

Declarations of a party's intention in relation to his domicil, are admissible as part of the *res gestæ*.

Such declarations are to be credited when not unreasonable in themselves, not inconsistent with other facts, and not under circumstances creating suspicion of insincerity.

In most cases of domicil, the question of intention is made to depend upon declarations, in proportion as they tend to explain, and are not inconsistent with the other facts.

When it is once established, that a foreigner has finally abandoned his domicil of origin, for the purpose of settling here, and does arrive and fix his abode here, his frequent removals from one place to another would not prevent his domiciliation in this country; and any declarations that he might make afterwards of his intention to return to his native home, would amount to nothing, unless accompanied by the act of returning, or something tantamount thereto.

Ex parte John Luscher, page 21, cited and affirmed.

Sickness and pecuniary destitution may assist other facts in rebutting the *prima facie* evidence arising from a party's being in a country, in a question of domicil.

A general residence might be acquired *by lapse of time*, from an accidental detention, continued by the misfortune and necessities of a party.

Appeal from the Judgment of Hon. JAMES H. BELL, Associate Justice of the Supreme Court, sitting in Chambers, at Austin.

M. H. Ewings, for appellant.

Robards & Morris, for appellee.

ROBERTS, C. J., delivered the opinion of the Court, and cited the following

authorities: Vattel, page 160, sec. 213, 218, 219, p. 160-1-2; Bruce v. Bruce, 2d Bos & Puller, 229, and note; The Venus, 8th Cranch, 279; Story's Conflict of Laws, sec. 48, 49, 53, &c.; 1st Binney, 350, and note; Ennis v. Smith, 14th Howard, 428; Ex parte Thompson, 1 Wend., 46; Read v. Drake, decided by Judge W. P. Hill, in November, 1864; Remarks of Sec'y Marcy in the Koszta case, in Messages and Pub. Doc., 1854-5, part I, page 40-45; Murray v. The Charming Betsy, 1 & 2 Cranch, 143; Wheaton's Elements of International Law, 370 and 394 to 405; 1 Black. Com., 366; Kilburn v. Bennett, 13 Metcalf, 20; Thorndike v. City of Boston, 1 Met., 247; 8 Louisiana, 337; 8 Pickering, 476; 5 Greenleaf, 266; Horne v. Horne, 9 Iredell Law R., 108; Leach v. Pillsbury, 15 New Hampshire, 138; Laneuville v. Anderson, Eng. Com. L. & Equity R., 22, 641; 2d Maine, 213 and 420, and 354; Putnam v. Johnson, 10 Mass., 499; Green v. Windham, 13 Maine, 228; Ex parte John Luscher, decided at Austin Term, 1864; Bempde v. Johnston, 3 Vesey, p. 202; Hoskins v. Matthews, 35 Eng. Law and Equity R., 532; Johnson v. Beattie, 10 Clark and Fin., 139; Elhers v. United Ins. Co., 16 Johns, 133; Brown v. Smith, 11 Eng. Com. L. and Equity R., 9.

Judgment reversed, and applicant discharged.

MOORE, J., did not sit in this case.

EX PARTE JOHN C. FRENCH.

On the 21st day of July, 1864, applicant received a certificate from the Board of Medical Examiners, that he was unable to perform military duty, by reason of physical disability; and was recommended to be exempt from field or staff duty; certificate approved by Enrolling Officer of 1st Congressional District. In November, 1864, applicant was re-examined by the Medical Board, and declared fit for service in the field: Writ issued 17th January, 1865. Respondent claimed to hold applicant as a regularly enrolled conscript, liable to military duty, under the Confederate States conscript law. On trial, evidence was overwhelming as to the physical disability of applicant to do military duty in the field. *Held*, that the re-examination was without authority, and that the applicant was entitled to his discharge under the first certificate.

The legal operative effect of a certificate of permanent disability, given under the act of Congress, entitled "An act to establish places of rendezvous for the examination of enrolled men," approved Oct. 11th, 1862, and in pursuance of General Orders, No. 82, of the Adjutant and Inspector General, dated Nov. 3d, 1862, was to exempt the party holding such a certificate, from future examination, unless specially ordered by the Board of Medical Examiners.

A party holding a certificate of decided and permanent disability, given in pursuance of General Orders No. 26, s. 7, of A. & I. G., Richmond, dated 11th March, 1864, is exempted from further molestation by enrolling officers, unless otherwise ordered from the Bureau of Conscription.

Special Order, No. 67, of Lt. Gen. Smith, dated March 19th, 1864, relates to persons who are found able to do duty in any of the staff departments, but does not apply to persons found unfit, on account of permanent disability, to do either staff or field duty.

If a party has been once examined, after the date of this order, and found unable to do duty, either in the field or on the staff, and exempt on account of permanent disability, the board has no authority, under this order, to make a

re-examination, and the party must be held to be exempt, under General Order, No. 26. A. & I. G., dated March 11th, 1864, until some further authority be shown for his enrollment.*

Applicant was President of the San Antonio and M. G. R. R. Co.; the road was destroyed by order of the military authorities, December 10th, 1863, and has not since been rebuilt. *Held*, that, for this cause, applicant is not entitled to an exemption.

The office of president of a railroad company, is not alone a ground for exemption; but the company, of which a party, claiming an exemption as president, must be engaged in transportation for the government, in order to render him exempt.

The act of the officer by whose order a railroad is destroyed, cannot be considered, on the question of exemption of its officers.

The law granting an exemption in such cases, ceases to apply when the cause ceases to exist.

Appeal from the Judgment of the Hon. Jno. H. DUNCAN, Judge of the 4th District, sitting in Chambers, at San Antonio.

I. A. & Geo. W. Puschal, for appellant.

Attorney General, for appellee.

REEVES, J., delivered the opinion of the Court.

Judgment reversed and applicant discharged.

EX PARTE JAMES A. FOSTER.

The Enrolling Officer of Travis County, on the 22d day of September, 1862, administered to the applicant the oath usually administered to conscripts, on swearing them into the C. S. army; and placed the name and descriptive list of applicant on his book of enrollment, which was done without the consent of applicant, he being, at that time, a journeyman printer, actually employed in printing a newspaper. A short time thereafter, the said enrolling officer gave applicant a furlough as such journeyman printer, on the application of D. Richardson, the proprietor of the State Gazette, a newspaper published at Austin. Applicant continued to work in the Gazette office, until the 19th of September, 1864, when he quit that employment voluntarily, having accepted the appointment of Deputy Clerk of the District Court of Travis County. His appointment thereto dated September 17th, 1864. On the 22d day of September, 1864, the Enrolling Officer of Travis County assumed control over the applicant, as a conscript, regularly enrolled on the 22d September, 1862, as above stated, and held him in custody as such. Writ issued 22d September, 1864. *Held*, that at the time of the alleged enrollment, applicant was, unless he waived his pri-

*The orders referred to in this opinion, are the following: Gen. Order, No. 26, section 7, from the Adjutant and Inspector General's Office, Richmond, March 11th, 1864; Special Order, No. 67, Head Quarters Trans-Mississippi Department, Shreveport, March 19th, 1864; Circular to Conscript Officers, dated December 22d, 1863, from Head Quarters, Bureau of Conscription, D. T. M.; General Orders, No. 82, Adjutant and Inspector General's Office, Richmond, November 3d, 1862; Instructions of the Bureau of Conscription, at Richmond, of date June 23d, 1863. Justice REEVES, in delivering the opinion of the Court, remarks: "We have felt some difficulty in disposing of the case, on this ground, as there may be other regulations to which we have not had access; and deem it proper to say, that the question is decided on the orders and regulations used on the trial before the District Judge, and found in the record." [REVERTER.]

vilege, legally exempt from military service, as a journeyman printer actually employed in printing a newspaper; and as long as he remained so exempted, the enrolling officer had no authority to enroll him, without his consent.

The acceptance by applicant, under these circumstances, of a furlough, cannot be held a waiver of his right to an exemption.

Although deputy clerks may not be embraced in, or exempted by, the terms of the law of Congress, and of the Governor's proclamation declaring all the officers of the State necessary for the administration of its laws; and although they may be liable to service, under the law; yet the President may have declined to call them out, or have exempted them, if he saw fit to do so. If he has declined to call them out, or has exempted them, they cannot legally or properly be enrolled.

On the 30th day of August, 1864, orders were issued from the Head Quarters of the Conscript Service, District of Texas, directing enrolling officers not to enroll deputy clerks, who had not been, at any time previous to their appointment, enrolled. *Held*, that the applicant was embraced in these orders; and the enrolling officer, acting under the same, had no authority to go behind them and enroll the applicant, upon the ground of his liability under the law.

**Quere?* Is the position of Deputy District Clerk an office, under the Constitution and laws of the State?

Appeal from the Judgment of the Hon. A. D. MCGINNIS, sitting in Chambers, at Austin.

N. G. Shelley and M. H. Bowers, for appellant.

Roberts & Morris, for appellee.

MOORE, J., delivered the opinion of the Court.

Judgment reversed, and applicant discharged.

EX PARTE J. W. AINSWORTH.

On the 17th October, 1864, applicant petitioned the District Court for Trinity County, for the writ of Habeas Corpus, stating that he, being in the military service of the Confederate States, had, on or about the 28th day of June, 1862, offered a substitute fifty-one years old; that the substitute was received, and himself discharged from said military service; that notwithstanding said discharge, he is illegally restrained of his liberty by one Col. D. S. Terry. The writ was refused in the Court below, on the ground that the petition did not disclose facts sufficient to entitle the applicant to the writ. *Held*, that an appeal to this Court will not lie from the refusal of the District Court to grant the writ.

*In this case, applicant claimed to be exempt from military service, by reason of his holding the office of Deputy District Clerk. The counsel for respondent insisted, that the position of Deputy District Clerk is not, properly speaking, an office under the Constitution and laws of the State; and, consequently, the applicant is not thereby exempt from liability to military service. But the Court having held, that the enrolling officer could not go behind the order from the Head Quarters, Conscript Service, District of Texas, dated August 30th, 1864, directing enrolling officers not to interfere with deputy clerks, who were appointed previous to their enrollment, it regarded the question as not necessarily involved in the decision of the case, and declined expressing an opinion upon it.

Justice MOORE, in his opinion, remarked: "I feel, however, free to say for myself, if the question was properly before the Court, I should be constrained to hold the law adversely to the applicant." [REPEATED.]

An appeal may be taken by the applicant where the Court or Judge has decided against the application for a writ of habeas corpus, that is, after a trial; but the statute makes no provision for an appeal, if the writ be denied.

If the grounds disclosed, on an application for a writ of habeas corpus, are sufficient, the action of this Court in dismissing the appeal, is not conclusive. It is only so after a hearing in the Court below, upon the facts and law arising upon the record, and not when the appeal is from the refusal to grant the writ.

After indictment, as in Art. 125, Code of Criminal Procedure, application for the writ must be made to the Judge of the District in which the indictment was found.

The writ of habeas corpus is one of right; but it is not grantable of course: and cause must be shown, supported by oath, in accordance with the statute. If it be apparent that the applicant is not entitled to any relief, the Judge may refuse to award the writ; and his action cannot be revised on appeal.

Under our statute, the writ ought not to be refused, except in a clear case.

The case of *Ex Parte Abraham Mayer*, page 22, cited and affirmed.

Appeal from Trinity. Tried below, before the Hon. C. L. CLEVELAND.

J. W. Ainsworth, for himself.

Attorney General, for appellee.

REEVES, J., delivered the opinion of the Court, and cited the following authorities: *Ingersoll on Habeas Corpus*, 33, and authorities there referred to; *Ex parte Lawrence*, 5 Binⁿ, 304; *Crispie v. Jones*, 3d Serg't & Rawls, 167; Arts. 126, 122, 131, Code Criminal Procedure.

Appeal dismissed.

EX PARTE THOMAS F. HUDSON.

The applicant, on the 20th of April, 1863, received a certificate of exemption from military service, from the Enrolling Officer of Burleson County, as a stock raiser, under the act of Congress of October 11th, 1862. There was an entry on the books of the enrolling officer, of the above date, containing the name, description, and occupation of applicant. On or about the 25th or 29th of July, 1864, the enrolling officer sent applicant a written order, to report to the camp of instruction near Houston, in five days, which order applicant disobeyed. On the 1st of August, 1864, applicant was elected to the office of Justice of the Peace, and duly qualified as such. Writ issued Nov. 8th, 1864. *Nota*, that applicant must be discharged from the custody of the enrolling officer.

A certificate from an enrolling officer, certifying that a party is exempt from military duty as a stock raiser, is an absolute exemption under the act of Congress of October 11th, 1862; and a party, holding such a certificate, is qualified to be elected to, and hold office under the State.

Ex parte Foster, page 27, cited and affirmed.

A written notice, standing alone, as a single act, sent by an enrolling officer to a party, to report to a camp of instruction—the party not having been regularly enrolled—no authority having been exercised over him as a conscript,—nor attempted to be exercised, nor any notice given him of the assumption of any such authority—is not sufficient to change the status of a citizen to that of a soldier.*

The election of a party to the office of Justice of the Peace, prior to his enrollment as a conscript, constitutes an exemption from military service.

*See *Ex Parte W. A. Winnard*, page 20.

Appeal from Burleson. Tried below, before the Hon. JAMES E. SHEPARD
J. D. Giddings, for appellant.
Attorney General, for appellee.

ROBERTS, C. J., delivered the opinion of the Court.

Judgment reversed and applicant discharged.

EX PARTE A. P. WILEY.

Applicant petitioned the Hon. J. A. BAKER, Judge of the 7th Judicial District, on the 25th of May, 1864, for the writ of Habeas Corpus, alleging that he was illegally restrained of his liberty by J. M. Gury, Enrolling Officer, Walker County, without any writ, order or process for so doing: respondent claimed to hold applicant as a conscript. Applicant insisted that he was not liable to conscription, for the reason, that he was retained in the military service of the State, by virtue of the act of the Legislature of December 16th, 1863. On the trial of the cause, applicant was remanded to the custody of the respondent to this writ, and notice of appeal given. On the 9th day of August, 1864, applicant again petitioned the same authority, for the writ of habeas corpus, alleging that he was illegally restrained of his liberty by Capt. S. M. Drake, Commandant of Camp Greer, Harris County, without any order, writ, or process, as far as applicant was informed, upon diligent inquiry made. Respondent to the second writ, in his return, said, he held applicant in custody, as a person owing military service, under the conscript laws of the Confederate States, as Commandant of Camp Greer,—a camp for the instruction of conscripts. On the hearing of the second application, applicant filed an affidavit stating that, on the 26th of May, 1864, he was adjudged liable to military service, by JAS. A. BAKER, Judge of the 7th Judicial District, who refused to commit him to the custody of the law, pending an appeal to the Supreme Court, of which he then gave notice; and the Enrolling Officer of Walker County, before the expiration of twenty days from said decision, sent him to Col. Kirby, the enrolling officer for the third Congressional District, since which time, he has remained under the control and restraint of the conscript officer of the Western District of Texas; and he would have executed said appeal bond, if he had known that he could have been committed to the custody of the law, pending said appeal,—and having since learned that the Judge afterwards came to the opinion that applicant, and others similarly disposed of by him, about the same time, ought to be committed to the custody of the law pending said appeal, he now desires to avail himself of the privilege of which the former ruling of the Judge deprived him. Upon this showing, the Judge ordered that the applicant be committed to the custody of the Sheriff of Walker County, pending said appeal, provided he executed his appeal bond in said case to the satisfaction of the Clerk of the District Court of Walker County, within five days from the date of the hearing of this application. And the Clerk of the District Court of Walker County was directed to add these proceedings in the transcript of said appeal case, as a part of the record of the Supreme Court. Whereupon the applicant executed his appeal bond, on the 1st day of September, 1864, and prosecuted his appeal from the judgment on the first application. *Held*, that applicant, at the time he applied for the first writ of habeas corpus, was liable to service in the army of the Confederate States, and that all the proceedings subsequent to the judgment upon the first writ of habeas corpus, were irregular and unauthorized.

The 4th section of the act of the legislature, of December 16th, 1863, "to

provide for the defence of the State," expressly prohibits the enrollment or classification among the militia, of persons liable to service in the army of the Confederate States.

When on the trial of a habeas corpus case, judgment has been rendered, and all the papers pertaining thereto have been filed with the clerk, by the judge, he cannot, at any time afterwards, alter or modify his judgment.

The failure of a party to perfect an appeal, because of an erroneous ruling of the Court, is no reason for permitting him to do so at an improper time, or in an improper manner.

Art. 719, Code of Criminal Procedure, does not require an appeal bond to give this Court jurisdiction in cases of appeal, on applications for the writ of habeas corpus.

The custody of an applicant for the writ of habeas corpus, when his body is brought into Court by the respondent, with his return to the writ, devolves upon the Court, pending the original hearing; and it may make such disposition of him as the necessity or justice of the case may require: whether such applicant be placed in prison, in charge of the officers of the Court, admitted to bail, or remitted to the control of the respondent, he is still to be regarded as in the custody of the Court, and held by virtue of its authority and in obedience to its order.

An appeal in cases of habeas corpus was given to secure the rights of the applicant, and not to enable him temporarily to evade the control of the respondent, if liable thereto.

The more appropriate disposition of the applicant, pending an appeal in a habeas corpus case, is to place him in charge of the party to whose custody, in the judgment of the Court, he is justly subject, unless it be shown that some other course is necessary for securing his rights, or accomplishing the ends of the law.

Art. 761, Code of Criminal Procedure, clearly shows that it was not intended, that the applicant should be retained in the custody of the Court or its officers, in all cases, pending an appeal.

Appeal from the Judgment of the Hon. J. A. BAKER, Judge of the 7th Judicial District, sitting in Chambers, at Huntsville.

A. P. Wiley, for himself.

Attorney General, for appellee.

MOORAN, J., delivered the opinion of the Court.

Judgment of the Court below, on the trial of the first writ of habeas corpus, affirmed.

EX PARTE JOHN B. WILLIAMS.

On the 28th day of June, 1864, applicant was examined by the Board of Examining Surgeons, 3d C. D. T., found incompetent to perform military duty in the field, on account of physical disability, but able to do light duty in the Q. M. Department. A certificate to that effect was signed by said Board, and approved by the Enrolling Officer of Harris County. On the 29th day of July, 1864, the applicant was re-examined by said Board, and held liable to active field duty. Writ issued Aug. 31st, 1864. The return thereto made the 15th of September, 1864, by S. M. Drake, commandant of camp of instruction, claiming to hold applicant as a conscript, owing military service to the Confederate

States, under the laws thereof. On the trial before the Judge below, a large amount of evidence was introduced, to show that the applicant was unfit to perform military service in the field. The applicant had been regularly enrolled, and assigned to said camp of instruction. *Held*, that the first certificate of the Examining Board, finding applicant able to do light duty in the Q. M. Dept., fixed his status as a soldier, and placed him under the control of the military authorities, and that the civil courts, in such a case, cannot interfere between the soldier and the officer.

The exemptions embraced in the act of Congress, approved the 17th of February, 1864, entitled "An act to organize forces to serve during the war," are either absolute or conditional: absolute, when they refer to persons who fill certain offices, or occupy certain positions of life, with the attendant circumstances specified in the law, as in the case of the Vice President or an editor of a newspaper; conditional, wherein a state of facts may exist which may be rendered available to secure an exemption, if the party himself, or some one else, performs what is a prerequisite to that end, as in the case of a journeyman printer.

A certificate of disability from a Board of Examining Surgeons, is made by law a prerequisite for securing an exemption from military service, on the ground of personal or physical disability.

A certificate of a Board of Examining Surgeons, finding a party unfit for military service, by reason of decided and permanent disability, is a prerequisite for an absolute exemption; a party holding such a certificate, as long as such recognised disability lasts, retains his status as a citizen, and, in that capacity, can apply to the civil courts for redress, against any unlawful restraint whatever.

An examination of a Board of Surgeons, finding a party unfit for military service in the field, but able to do service in the staff department, puts him in the attitude of a soldier, and, as a soldier, he cannot apply to the civil courts to be relieved from obeying what he considers an unlawful order; or an order not unlawful in itself, but unlawful because he can show facts which entitle him to be a soldier for limited purposes.

It is competent for the Confederate government to place in the service those who are partially defective, as well as those who are entirely able-bodied; and to determine the tribunal, the proceedings, and the standard by which the one or the other capacity may be, at any one time, fixed upon the party; but judges or courts of justice, having no connection with the army, cannot do so.

When the position of an officer and a soldier of the army is relatively occupied by two persons, they, in reference to their military duties, obligations, and rights, become subject to a code of military laws, administered and executed by military officers and military tribunals; when a person occupies the position of a soldier, the jurisdiction of such tribunals and officers, in all matters involving his military duties, has attached, and is, in its nature, within its prescribed limits, exclusive.

The rule prescribed in the Code of Criminal Procedure, Art. 180, that no person shall be discharged under the writ of habeas corpus, who is held by virtue of any legal engagement or enlistment, in the army, applies to those who are held as soldiers, under the conscript laws, in its spirit and reason, as strongly as though they had become soldiers by voluntary enlistment, legally made.

The object of the writ of habeas corpus, is not to determine the degree or manner of the restraint permissible in any case, but whether or not any restraint is lawful or unlawful.

Appeal from the Judgment of the Hon. GEORGE W. SMITH, Judge of the 1st Judicial District, sitting in Chambers, at Columbus.

Jno. T. Harcourt, for appellant.

Attorney General, for appellee.

ROBERTS, C. J., delivered the opinion of the Court.

Judgment affirmed.

EX PARTE E. J. BREEDING.

Applicant received from the Board of Examining Surgeons of the 2d Congressional District, a certificate of permanent unfitness to perform military service, in May, 1863. In December, 1863, after a published revocation by the Board of all certificates of disability, previously granted by them, applicant again presented himself before said Board, and was declared fit to perform military service in the field. Writ issued January 16th, 1864. It was in proof by one witness, not a surgeon, that applicant was unfit for military duty. *Held*, that applicant was liable to perform military service.

A party receiving a certificate of permanent disability, is not thereby conclusively and permanently released from military service in the field: he may be re-examined, and ordered to service in the field, if found of sufficient physical capacity for that service.

Under the act of Congress of October 11th, 1862, "to exempt certain persons from military duty," and the "act" of the same date, "to establish places of rendezvous for the examination of enrolled men," the Secretary of War has authority to prescribe rules and regulations for ascertaining those who are unfit, by reason of physical or mental incapacity, for the performance of military duty. The Secretary of War, in directing that the "certificates of the Board of Examining Surgeons, shall specify whether the incapacity is temporary or permanent, and, if permanent, the party shall be exempt from future examination, unless specially ordered by the Board," is a legitimate exercise of that authority.

It is not the intention of the law, nor can it be held to be its legitimate construction, absolutely to discharge from liability to military service, all persons found, at the time of their examination, unfit for its performance—without reference to their future status.

The word "final," used in the act of Congress, "to establish places of rendezvous for the examination of enrolled men," approved Oct. 11th, 1862, is not used in the sense, that certificates of Boards of Medical Examiners, certifying that a party is permanently unfit to perform military duty, shall have the legal effect of relieving him from re-examination, but he may be re-examined, and it found able for military service, assigned to duty.

Previous to the passage of the above law, the certificate of the Board of Examining Surgeons was merely recommendatory; it had no legal operative effect; to give it such effect, it had to be approved by superior military authority; it was to change the rule in this particular, and to relieve the parties, found unfit for service, from the delay and embarrassment which they otherwise might have encountered, if the certificates must have received the approval of some superior military authority, that the provision of the law making such a certificate "final," was enacted; and it is thus final without reference to the nature or character of the disability.

An order from the Conscrip't Bureau at Richmond, changing or modifying previously existing orders, cannot be presumed to furnish the rule by which

conscript officers here are to be governed, until communicated to them by the Head Quarters of the Bureau of Conscription, in this Department

It is a legal presumption, which cannot be lightly disregarded, that a Board of Examining Surgeons is possessed of the requisite skill and ability, and are actuated by the desire of properly discharging the duty imposed upon them by the law, under which they are acting.

Appeal from the Judgment of the Hon. GEORGE W. SMITH, Judge of the 1st District, sitting in Chambers, at Columbus.

John T. Harcourt, for appellant.

Attorney General, for appellee.

MOORE, J., delivered the opinion of the Court, and cited General Orders, No. 82, A. & I. G., Richmond, November 3, 1862.

Judgment affirmed.

EX PARTE JAMES WALKER.

Applicant petitioned, on the 6th of September, 1864, the Judge of the 7th Judicial District, for the writ of Habeas Corpus, alleging, that he was illegally restrained of his liberty, by Capt. Wm. Holder, in Galveston County. The writ was granted on the 8th of September, and returnable on the 20th of said month. Return made by John Lloyd, Lieutenant commanding company "E," 2d Texas regiment; and in answer to the writ, he states "that as Lieutenant commanding said company E, he restrained James Walker as a soldier; that said Walker was duly assigned to his company, as a conscript, on the 31st of August, 1864; has ever since been, and is now held as a person liable to perform military service to the Confederate States; and that he claims to hold said Walker as a soldier, and not otherwise." On the trial before the judge below, cause submitted, on petition, the return of the officer to the writ, and evidence to the effect, that applicant was, on the 1st day of August, 1864, elected to the office of County Commissioner for Brazos County, and that he was duly qualified as such, September 15th. *Held*, that applicant, having shown that he was elected County Commissioner, prior to his assignment to the respondent's company, and it not appearing from the return, or otherwise, that he was enrolled before his election, is entitled to be discharged.

At common law, the return to the writ of habeas corpus was conclusive, and the applicant was discharged, bailed, or remanded, according to the nature of the case; but he might confess and avoid the return, by admitting the truth of its statements, and alleging new matter in avoidance, not repugnant, and in that way destroy the effect of the return.

The statute enlarges the right of the applicant for the writ, and denies to the return the conclusiveness allowed to it by the common law; the respondent's return is to be taken as true; he is not required to prove its statements; but the applicant may except to the return, and show that it is not true, or admitting it to be true, he may repel its conclusiveness by new matter in avoidance, and in one of these modes may destroy the effect thus given to the return.

The laws of conscription relate to persons of a certain class described by their ages, but where it does not appear that such persons answer to that de-

scription, the presumption does not arise that they are liable to military duty; if they are within the ages, and therefore belong to that class, and are not exempt, they are liable to enrollment for military duty.

Under the conscript laws, and the rules and regulations made in pursuance thereof, the assignment of a party to duty does not fix his liability; it is only an appropriation, or designation to a particular company, and branch of the service, and the authority to make such an assignment depends upon the validity of his enrollment.

Under these laws, rules and regulations, enrollment is the act by which the Confederate government acquires jurisdiction over the person of a citizen, and a right to his services, and by which he is made to sustain a new relation to that government, as a soldier in its armies, and as such, subject to military control.

If the jurisdiction of the Confederate government has attached, before the election of a party to the office of County Commissioner, his subsequent election does not constitute an exemption from military service, nor would he be entitled to a discharge under the act of Congress, approved April 2d, 1863.

Ex parte W. A. Winnard, page 20, cited and affirmed.

Appeal from the Judgment of the Hon. J. A. BAKER, Judge of the 7th Judicial District, sitting in Chambers, at Huntsville.

Jno. W. Harris and *James Masterson*, for appellant.

Attorney General, for appellee.

REEVES, J., delivered the opinion of the Court.

Judgment reversed, and applicant discharged.

EX PARTE W. H. CAMPBELL.

On the 3d day of October, 1864, applicant petitioned for the writ of Habeas Corpus, alleging that he was illegally restrained in his liberty by J. J. Pickett, Enrolling Officer for Washington County. On same day writ issued and executed. On the 5th of October return made, in which respondent says that he restrained the applicant as a conscript, liable to military service. On the trial the following evidence was introduced: a certificate that applicant was elected Constable, on the 1st day of August, 1864, and had given bond and duly qualified; a certificate of said enrolling officer, dated Aug. 11th, 1864, that applicant had produced satisfactory evidence that he is a Constable for Washington County, and on that account he is not liable to conscription; a certificate, signed by the Board of Examining Surgeons, 2d Congressional District, that applicant having filed with the Board, an affidavit that he is physically unable to perform military duty, they, on the 6th day of May, 1864, re-examined the applicant, and found him unfit for field service, but qualified to superintend the duties of wagon-making in Q. M. D., and giving the name, residence and description of the applicant: on this certificate was endorsed, "Re-examined, and former action of the Board confirmed,"—signed by the same Board—also, "Re-approved, Sept. 21, 1864," signed by same enrolling officer; the name of applicant was on the books, under the following caption, "Names of

persons re-examined by the Medical Board, May 6th, 1864, who compose the Board, Drs. R. S. Wiley, J. H. Herndon, J. T. Moore," with the entries contained in the above certificate opposite his name. *Held*, that the facts in this case raise the presumption, that applicant was regularly and legally enrolled as a conscript, previous to his election: and that applicant, at time of his election, and at the time of his application for the writ, was subject to the orders of the military authorities.

The case of *ex parte* W. A. Winnard, page 20, cited and affirmed.

The liability of a party to perform military services being once fixed by his enrollment, such liability is not removed by his subsequent election to the office of Constable.

Appeal from Washington. Tried below, before the Hon. JAMES E. SHEPARD, *J. D. Giddings*, for appellant.

Attorney General, for appellee.

ROBERTS, C. J., delivered the opinion of the Court.

Judgment affirmed.

EX PARTE A. FRETILLIERE.

Applicant, a Frenchman by birth, immigrated to Texas in 1844; he made three visits to France, remaining there each time for one year. The last two visits he made as a French subject, under French passports. He has uniformly declared his intention, for many years back, long prior to 1858, of returning to France to live. In 1858, he left this country, with the intention of not returning. He had married in this country, and left his family here each time, he visited France; he visited France the last time, for the purpose of preparing a home for his family; he inherited valuable real estate in France from his mother; he has purchased real estate in this country, and improved it; he has been engaged in merchandizing, and other ordinary occupations of the country; he has often expressed his anxious desire to return to France, when he could dispose of his effects; he was never naturalized, though he has occasionally voted. In 1862, applicant took the oath of alienage before a Provost Marshal, and had his name registered at the office of the vice consulate of France, as a French subject. Writ issued December 16th, 1864. *Held*, that the facts are sufficient to establish the domicile of the applicant in this country.

A party having once acquired a domicilii in this country, retains it, as against the domicil of origin, until he not only intends to change it, but until he actually does change it, by a removal, or at least a commencement to remove, which leaves no doubt of the intention, and of its being then carried out, by an actual departure from this country to the country of his original domicil.

The intention of a party to return to the domicil of his origin, after having once acquired another domicil, however strong, and whatever preparations he may make in offering his property for sale, and winding up his business, is not sufficient to change the acquired domicil: the change is consummated only by the concurrence of the intention, and the act.

In 1863, F. Guilbeau, the vice consul of France, at San Antonio, entrusted the business of his vice consulate to applicant, and left this country for France. Since then applicant has exercised the duties of vice consul only in one in-

stance, in making a certificate to be used in France. On the 10th of November, 1864, the acting consul of France, in New Orleans, addressed a letter to applicant, accepting his assistance in giving information, &c. A. Superville, a native of France, claiming to be acquainted with the French laws, and especially with those relating to consular organization, testified, that, under the French laws, a consular agent or vice consul, being himself a deputy, cannot appoint any one to act in his place, or transfer his authority. *Held*, that applicant is merely assisting an acting consul of France in New Orleans, and cannot be regarded as a consul of a foreign power, nor embraced within the provisions of Gen. Order, No. 12, from the Bureau of Conscription, T. M. D., in reference to the exemption of consuls.

An order from the Bureau of Conscription, T. M. D., dated 1st day of June, 1864, directs that "consuls" of foreign nations, who might otherwise be liable, shall not be enrolled for service. The word "consuls" in this order, is used in its generic sense, and includes the different grades of such officers, whether they be consuls general, consuls, vice consuls, consular agents, or secretaries or students, when properly acting as consular agents.

The testimony of a person acquainted with foreign laws and customs, is admissible to prove the existence of such laws and customs.

Applicant received a certificate of permanent disability on the 29th day of March, 1864, from the Board of Examining Surgeons for the 1st Congressional District, which certificate was approved by the enrolling officer for said district. In the return of respondent, he claimed to hold applicant as a regularly enrolled conscript, liable to do military duty under the C. S. conscript laws. *Held*, that applicant must be discharged by virtue of said certificate of disability.

A certificate of permanent disability, given by a Board of Examining Surgeons, under the act of Congress, approved February 17th, 1864, and in pursuance of the instructions of the A. & I. G., Richmond, of the 11th of March, 1864, is not final in the sense of preventing the officers of conscription, under the regulations prescribed for their action, from again having the party examined, from time to time, to ascertain whether or not the disability has continued, and if found fit for duty, from having him enrolled and assigned to such duty; such a certificate is final, so as to preclude any exercise of authority over the person holding it, by the officers of conscription, until the Bureau of Conscription shall have issued an order directing a re-examination, and under such order a different determination of a Board of Examining Surgeons shall have annulled his exemption.

Appeal from the Judgment of the Hon. JOHN H. DUNCAN, Judge of the 4th District, sitting in Chambers, at San Antonio.

I. A. & Gen. W. Paschal, for appellant:

Attorney General, for appellee.

ROBERTS, C. J., delivered the opinion of the Court.

Judgment reversed, and applicant discharged.

MOORE, J., did not sit in this case.

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