# IN RE IRONS.

Case No. 7,066.
[5 Blatchf. 166.][1]

Circuit Court, N. D. New York. Sept., 1863.

ARMY—PRIVATES—LEGALITY OF DRAFT—EXEMPTION FROM SERVICE.

1. A person who is drafted into the service of the United States, under the act of March 3, 1863 (12 Stat. 731), is in the custody and under the control of the provost-marshal from the time he reports to him for duty, at the designated rendezvous, in pursuance of notice to that effect, after the draft has taken place.

2. After the board of enrolment has, under that act, made and published a decision declaring a person exempt from draft, on an election to that effect made in regard to him by his widowed mother, it has no power to revise or reverse that decision.

This was a hearing on a habeas corpus. The petition for the writ stated that the petitioner [Daniel Irons] was drafted into the service of the United States, at Norwich, Chenango county, New York, on the 28th of August, 1863, under the act of congress of March 3d, 1863 (12 Stat. 731); that, on the 31st of August, a notice was served on him, signed by S. Gordon, captain and provost-marshal of the Nineteenth district, New York, notifying him that he was drafted for the period of three years, in accordance with the said act, and that he was required to report, on or before the 7th of September, at the place of rendezvous, in Norwich aforesaid, or be deemed a deserter, and subject to the penalty prescribed therefor, and that transportation would be furnished him on presenting such notification at such headquarters; that, in obedience to such order, he reported himself to the provost-marshal at Norwich, on the 4th of September, and his name was entered on the books of the said provost-marshal, with the day he reported; that, since that time, he had been in the custody of the said provost-marshal, who claimed a right to restrain him of his liberty, as a drafted soldier, under the said act; that his mother, residing in Madison county, New York, caused to be presented to the provost-marshal and board of enrolment, on the 8th of August, 1863, affidavits and certificates, in due form, setting forth that she was a widow and the mother of the petitioner and other sons named, with their ages and residences, that they were enrolled in the first class, and liable to military duty under the said act, that she was infirm, (setting forth the nature of the infirmity,) and had no property, and was dependent upon the labor of the petitioner for support, and that she elected him to be exempt from the draft; that the papers, thus duly authenticated, were received by the provost-marshal and the board, and they decided them to be sufficient in form and substance, and allowed the application; that an endorsement to that effect was made upon the papers, and the petitioner was declared by the board to be exempt from the draft; and that his name, as he was informed by the board, was stricken from the enrolment. The return of the provost-marshal to the habeas corpus stated that the petitioner

was not then, nor at the time of the service of the writ, in his custody or under his control; that he was legally drafted into the service of the United States under the said act; that, on the 8th of August, 1863, the mother of the petitioner made application to the board for his exemption from the draft about to be made; that such application was on that day allowed, and the petitioner was exempted; that afterward, on the 19th of the same month, the board reconsidered the claim and disallowed it; that the name of the petitioner was retained on the enrolment list, and he was subsequently drafted; and that he had not yet been examined by the board, in pursuance of the act.

NELSON, Circuit Justice. The first question presented upon the return is, whether or not the petitioner is in the custody and keeping of the provost-marshal, and thus restrained of his liberty, within the meaning of the law which has provided the writ of habeas corpus as a fit and proper remedy. For, although the provost-marshal denies, in the return, that the petitioner is in his custody, or under any restraint from him, yet, if the facts stated or admitted in other parts of the return contradict, in legal effect, this denial, it must be regarded as the denial of a conclusion of law rather than of a fact

The 12th section of the act of congress provides, that the persons so drawn shall be notified, &c., "requiring them to appear at a designated rendezvous, to report for duty." The 13th section provides, that any person drafted and notified to appear as aforesaid, may, on or before the day fixed for his appearance, furnish a substitute, &c; and that any person failing to report for duty, after due service of notice, &c., shall be deemed a deserter, and shall be arrested by the provost-marshal, &c. The 14th section provides, that all drafted persons shall, on arriving at the rendezvous, be carefully inspected by the surgeon, &c, and that all persons drafted and claiming exemption, &c, shall present their claims to be exempted to the board, whose decision shall be final.

It is quite clear, from a view of these provisions of the act, that the person drafted is in the custody and under the control of the provost-marshal from the time he reports to him for dirty, at the designated rendezvous, in pursuance of notice to that effect, after the draft has taken place. It is true that, on account of the pressure of business, the examination, to ascertain if the conscript is an able-bodied citizen, may not be made immediately on the report. The examination requires time, care, and deliberation, which may occupy days and weeks; but, whatever may be the time required in the given case, the drafted person must, during the intervening period, remain in the custody and under the control of the provost-marshal, unless specially discharged, on a proper application, or otherwise, by the voluntary act of the officer.

The next question on the return is, whether or not it was competent for the board to revise and recall its decision given on the 8th of August, exempting the petitioner from the draft, on the evidence of the election of his mother; or rather, confining myself to the precise question raised by the learned counsel for the provost-marshal, whether or not the board had made and published any decision, upon the evidence presented before them in behalf of the mother, in favor of the exemption of the relator. For, it was candidly admitted by the counsel, that if a decision had been made and published, it was, upon familiar authority, not competent for it to revise or recall that decision, as its powers were quasi judicial, special, and limited, and its power in the special case was exhausted, and it was functus officio. This principle is so well and firmly settled by authority, that it would be useless, after the frank admission of the counsel, to stop to refer to it.

As it respects the question, whether or not a decision was in fact made, it appears from the original papers which were presented to the board, and which were produced before me by the provost-marshal, on the hearing, that not only was a decision made, upon the evidence, discharging the petitioner, but a record was made upon the papers at the time, to that effect and the decision was thereupon announced to the parties interested. Indeed, the fact is not denied, in the return. It is admitted, in terms, that the claim of exemption in behalf of the mother, made on the 8th of August was allowed by the board, but that afterwards, and on the 19th of August, it was reconsidered and disallowed. Therefore, the distinction set up to take the case out of the rule admitted in respect to bodies clothed with special and limited judicial powers, has no foundation, either in fact or in law.

Without pursuing the case further, my conclusion is—1st. That the petitioner was, in contemplation of law, in the custody and under the control of the provost-marshal, at the time of the service of this writ of habeas corpus, and, also, at the time of the hearing; 2d. That the action of the board of enrolment, upon the evidence presented in behalf of the mother, on the 8th of August, exempting the petitioner, and discharging him from the enrolment and draft, exhausted its powers; and that the subsequent revisal of the decision was coram non judice and void.

The petitioner is entitled to his discharge from the custody and control of the provost-marshal, and to be freed from all restraint by him under or by virtue of the authority of the act of congress in question.

[1] {Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.}

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