# Democrat and Sentinel.

THE BLESSINGS OF GOVERNMENT, LIKE THE DEWS OF HEAVEN, SHOULD BE DISTRIBUTED ALIKE, UPON THE HIGH AND THE LOW, THE RICH AND THE POOR.

W SERIES. EBENSBURG, PA. WEDNESDAY, OCTOBER 7, 1863. VOL. 10---NO. 44.

OCRAT & SENTINEL published every Wednesday ONE DOLLAR AND FIFTY CENTS payable in advance; ONE DOLLAR AND TWENTY FIVE CENTS, if not paid months; and TWO DOLLAR if all the termination of the year. ption will be received for a of than six months, and no will be at liberty to discontinue until all arrearages are paid, ex- ption of the editor. Any per- ing for six months will be char- DOLLAR, unless the money advance.

**Advertising Rates.**

| | One insert'n. | Two do. | Three do |
|---|---|---|---|
| 12 lines | $ 50 | $ 75 | $1,00 |
| 24 lines | 1 00 | 1 00 | 2 00 |
| 36 lines | 1 50 | 2 00 | 3 00 |
| | 3 months. | 6 do. | 12 do |
| less. | $1 50 | $3 00 | $5 00 |
| 12 lines | 2 50 | 4 50 | 9 00 |
| 24 lines | 4 00 | 7 00 | 12 00 |
| 36 lines | 6 00 | 9 00 | 14 00 |
| | 10 00 | 12 00 | 20 00 |
| | 15 00 | 22 00 | 35 00 |


IN THE

**t Court of the United States,**

**Western District of Pennsylvania, at Pittsburg.**

| | |
|---|---|
| ED STATES vs. PH WILL | No. Motion in Arrest of Judgment |

MENT OF DEFENDANT'S COUNSEL.

**Nagehan, Phil. S. Noon and R. Johnston, Counsel for Defendant.**

indictment in the above stated case prepared under the provisions of the Congress, entitled "An Act for ing and calling out the National and for other purposes," appro- the third day of March, 1863, and, mon parlance, known as the "Con- Act." The defendant has been of a violations of its provisions, obstructing an enrollment," under the of the act. If it is clear that the that has violated the provisions of law, he must be sentenced; if, on the ary, it is not clear that he has done will be the pleasure as well as the of the court to arrest the judgment. indictment derives its whole vitali- the terms of the 25th section of in question: and it is respectfully that neither that section, nor in the act, furnishes a penalty offence charged in the bill.

briefly examine the act of Con- It seems amply sufficient for the for which it was enacted. Up 23d section, it is mainly *directory*, at two distinct purposes. 1, The "*enrollment*" of all the able- citizens of the United States, (with exceptions,) in a body to be called "National Forces;" and, 2d, The "calling out" these forces by a *when the same should be required*, for of the Government.

first eleven sections give full and directions as to the process of ma- the enrollment. It enumerates the exions, divides the objects of enroll- into classes, divides the country into ment districts, provides for the ap- ment of officers, defines the machin- for enrolling, appoints a board of en- provides for sub-districts, and gen- directs *how* the enrollment shall be , and for what length of time it shall tinue.

Then follow eleven other sections, giv- full and explicit directions concerning draft, or calling out of those who shall been enrolled in pursuance of the ding sections: commencing thus:

"Whenever it may be necessary to call the national forces for military ser- the President is hereby authorized assign to each district the number of to be furnished by said district; and, upon, the enrolling board shall under direction of the President, *make a* draft," &c.

The ensuing sections proceeded to very fully, the manner of conduct- the draft—notices to the drafted, the substitution, and commutation, the in- tion by the surgeon, the traveling ex- and pay of the drafted, their county, manner of service, &c.

After all this, we have the penal clause the bill—the section under which the defendant has been indicted—in the fol- ing words:

"SEC. 25. *And be it further enacted*, that if any person shall resist any draft men enrolled under this act into the service of the United States, or shall counsel or aid any person to resist any such draft, or shall assault or obstruct any officer in making such draft, or in the performance of any service in relation thereto, or shall counsel any person to assault or obstruct any such officer, or shall counsel any drafted men not to appear at the place of rendezvous, or wilfully dissuade them from the performance of military duty as required by law, such person shall be subject to summary arrest by the provost marshal, and shall be forthwith delivered to the civil authorities, and, upon conviction thereof, be punished by a fine not exceeding five hundred dollars, or by imprisonment not exceeding two years, or by both of said punishments."

Now, to us, it seems clear that upon purely technical grounds, this indictment is vicious. It charges the defendant with an "assault and obstructing an officer in making the *enrollment*;" whereas, there is no such offence named in the act. And it is quite clear that, "where the words of a statute are descriptive of the offence, the indictment should follow the language, and expressly charge the described offence on the defendant, or it will be defective." "It is necessary that the defendant should be brought within all the material words of the statute, and nothing can be taken by intendment." "If the indictment profess to recite the statute, a material variance will be fatal or if the statute do not support the verdict, it must fail." "The indictment must show what offence has been committed, and what penalty incurred, by positive enactment. It is not sufficient that they appear by inference.

It would be an effectation of research, to cite authorities for the foregoing propositions. They and many others of like character, may be found in 1 *Chitty's Criminal Law*, 276, *et seq.* and in *Wharton's Criminal Law*, 4th ed. sec. 366. The act of Congress, then, making the obstruction of the *draft* to constitute the offence, and the indictment charging an obstructing of the enrollment, is a fatal variance; and, on this ground, if no other existed, the judgment should be arrested.

But it is the law, and not the officer of the law, that is at fault. Had the learned gentleman who prosecutes for the Government, followed the act under which this bill was framed, the *allegata* and the *probata* would have disagreed, and his prosecution would have failed on facts.

But this is not the only, nor, indeed, the main reason, for moving in arrest of judgment. From such examination as we have been able to give the case, we are firm in the conviction that the so-called "conscription act" provides no penalty for "obstructing the enrollment;" nay, more, that it never contemplated any penalty of the kind; that it is neither to be found in its letter nor its spirit.

The terms of the 25th, or penal section, are clearly expressed and easily understood. The offences to be visited by a penalty commence with the *draft*, and have no reference whatever to the enrollment. Nay, the act of speaking of the draft, uses the word "*enrolled*" in such manner as to forbid the application of any of the penalties to the process of enrolling at all—treating the enrollment as a thing past and finished. It would have been quite as easy for Congress to have made resistance to, or obstructing the *enrollment*, an offence, as obstructing the draft, *but they did not do so.*

But we are gravely told that this act should receive a liberal construction in favor of the government, and against the prisoner. The rule is a novel one to us! Every law, and every section of any law, inflicting a penalty, is certainly a penal law, and to be strictly construed in favor of the citizen. And while that portion of this law, which, for argument's sake, we might call the remedial—that portion which is directory upon the officers—should be liberally construed, to effectuate its general purpose, still its *penal* provisions must be subject to the same rules which govern other penal laws. See Jones vs. Estis, 2 Johnson's Rep. 379. Berry vs. Ripley, 1 Mass. Term Rep. 167. See also, 1 Baldwin, 316; 2 Cowan, 419; 13 Johnson, 497; *et al.*

The reason of this is obvious. Every free government has the most tender care of her citizens; the government is strong, the citizen weak. Here, the Congress of the United States enact a law; the President of the United States gives it his sanction, and executes it; while the judiciary, the remaining branch of the government, sits to expound it.

On the other hand, (and in this case it is a fact, and not a figure,) one of the very humblest citizens is charged with a violation of the law. The law is admitted by the officers of the government, and declared by this court, to be, at least, doubtful in its terms. The question becomes this: shall the law be strained from its plain language, by judicial legislation, to cover what *may* have been intended by its framers, for the purpose of depriving the citizen of his liberty? or shall he have the full benefit of its terms, and even the benefit of a doubt; if doubt there be in the judicial mind? The common law unites with common sense, in yielding the doubt, if doubt there be, in favor of the prisoner.

But let us for a moment (if that were possible) forget that this is a penal statute! Let us give it a liberal construction, according to its terms. And where do we find the act of enrollment referred to, even by implication? Certainly, no where in the whole section. The clause, "or in the performance of any service in relation thereto," is sought to be wrested from its legitimate construction for this purpose, but surely no grammarian would so construe it. The word "thereto" can only refer to its antecedent, "*draft*;" and it would surely not be pretended that the first great and distinct requirement of the law—the enrollment—should be referred to by a clause in reference to a second and totally different requirement, and a requirement which is to happen an indefinite time *after* enrollment; or possibly, not to happen at all.

Take the section, then, as it stands in the statute; take up its several clauses in their proper order, and there is abundance for it to operate on in reference to the draft, or drawing, itself, without applying it to a totally distinct matter. The sections relative to the draft, have a number of directory provisions, preparing lists, giving notices to those drafted, &c. to all of which the clause referred especially applies, and doubtless was intended to apply, and not to what may have occurred an indefinite time previously.

Suppose, that instead of a criminal offence charged upon Joseph Will, he and Mr. Vancey should be engaged in a civil controversy, and a paper similar in its terms to this section were before this court, would not your honor be bound to decide in favor of the defendant, and more particularly, if the paper to be construed was the labor of the plaintiff himself?

But we are told Congress must have *intended* to punish this offence, and because Congress either intended, or *ought to have intended* it, *therefore*, this penal statute should be (not strictly but liberally) construed to punish the offender. Such a doctrine can receive no favor at the hands of this court—and God forbid that it should. Whenever the day arrives that courts of justice shall construe doubtful legislation, so as to secure a victim—whenever hasty or improvident legislation shall be helped out by judicial construction; then, indeed, is our great fabric of republican liberty more endangered than by all the hostile armies that can be set in the field against it. The grandest feature in the whole conscription law, is that it turns over every citizen charged with an offence under its provisions, to the judicial authorities of the country, to be tried according to law, by that branch of our government which, whatever may be said of the others, still retains its original purity.

And here it may not be deemed improper to sustain our construction of the act, by referring to one whose opinions, from his ability as a lawyer, as well as his opportunities for becoming familiar with the question, should entitle them to great weight: we refer to Judge Holt. In his very able paper on the construction of the "Conscription Law," he takes the ground, and so instructs those acting under it, that we must not forsake the letter of the law to follow out its intention; but, must take the law "as it is written." (See Judge Holt's Opinion.)

If, then, the strict letter of the law denounces no punishment against Joseph Will, it matters not what Congress may have *intended* to do, still less what they ought to have done, the court will arrest this judgement, and discharge the prisoner.

Were it at all necessary to the purpose of this motion, we should contend, from the terms of the conscription act itself, that Congress never *intended* a penalty for the offence here charged. We believe this, because—

1. The section that provides the penalty against resisting the draft, uses the word "enrolled" in the past tense, showing that that the subject of the enrollment was before the eyes of Congress; and hence their prescribing no punishment for obstructing the enrollment, evidences the legislative intention to create no penalty for that offence.

2. But we believe, from the whole tenor of the act, that Congress *intended* no penalty for "obstructing the enrollment." The general theory of the act is that all the male cititizens are part of the National Forces; and the *purpose* of the enrollment seems to be, to give those over or under age, or those who are plainly exempt from its provisions, an opportunity of escaping it. If every male in the district were enrolled, an exempt could only be relieved on his application at the proper place, in pursuance of the 13th section of the act. Hence it is the interest of those who come within the provisions of any of the exemptions in the act, to be enrolled.

All the officer has do is to enroll the names and ages. It is no difference how he procures them. And the very fact of any citizen refusing to give his name or age, would of course be taken most strongly against him. And if a person seventy years of age should refuse to give his age, he would be compelled to travel some 60 miles, (the distance to the place of draft, in the present case,) to procure his exemption, or stand, under the very terms of the act, as a deserter, and liable to military punishment as such.

There is nothing in the law requiring an officer to call upon each person for his name and age—nor even to visit each house. Nor has any such practice obtained under the law. In the very case now before the court, the prosecutor swears that he did not pretend to do so; and yet he enrolled Joseph Will, and every other person liable to military duty in his district.

We repeat, then, that portion of the act relating to enrollments, is for the purpose of making the draft less cumbersome, in relieving from its operation such as were plainly not subject to its provisions; and, at the same time, enabling those who were palpably exempt, from the trouble and inconvenience of appearing before the board of enrollment, on notice, to undergo an examination; and hence no penalty was required.

Besides the enrollment did not necessarily require that the subject of it should ever be drafted. He *might*, some day, be subject to a draft, and he might not. Every thing depended upon future contingencies, that might not arise. In short every body was to be enrolled—a specified number *might* be drafted. The enrollment left every many where he was, minding his own business; the draft took the citizen, his parents, his wife, or his children. Hence, Congress might well consider the enrollment able to take care of itself; while the draft should be regarded with severe penalties.

The practical working of the law vindicates this intention in the enactment. In all the State not in rebellion, the enrollment has been already made and perfected; and there has been no serious difficulty anywhere in carrying out the provisions of the enrollment; and, hence it is that court is called upon, for the first time, to construe the act. The New York riots were not the result of the enrollment, but to *prevent the draft*. And the only case on the subject that we are acquainted with, is that decided by Commissioner Osburn of New York, who takes the same view of the case we have done, and decides that the penalty prescribed in 25th section, refers to draft, and not to enrollment. Even in the case of the HESSES before this court, at its late session, the defendents seemed to expect something else than an enrollment, because the case showed that they had no person connected with them subject to the provisions of the draft.

Were it otherwise, however, it is a subject of congratulation that the decision of this court can do no harm, as the enrollment has long since been completed; and before another enrollment can be required, which is not till 1865, Congress will have ample time to impose a penalty for "obstructing the enrollment," if they deem it necessity.

We assert, then, that no properly appointed and prudent officer can have any difficulty in enrolling his whole district. In Cambria County, there are about a dozen districts, with a corresponding number of enrolling officers, and the only difficulty that has occurred, is this of Chest Springs Borough. There is an obnoxious provision in the law, (at least our people, who are nearly all poor, think so,) but until it is removed from the statute book, by repeal, or declared unconstitutional by the proper tribunal, it will be religiously observed by our people.

An unpopular officer frequently renders a law odious. With us the districts were mostly supplied with returned soldiers for enrolling officers. In Chest Springs, and the adjoining districts, the officer was not fresh from the battle field, but fresh from the State of Maine. He was not a citizen of the district, county or State; and being evidently subject to military duty himself, it was supposed he had left home to avoid enrollment or draft there.

He testified, as your Honor's notes will show, that he had no trouble in making the enrollment, and that he had only called upon a portion of the people, making up his list from the former enrollment. He swears, too, that he had the name and age of Joseph Will on that list, and from that he entered it on *his* list. But the very manner of his calling upon the defendant, showed more of a desire to taunt, or show his own importance, when he asks, "Joe Will, what is your name?" &c

In short, if a citizen of the district had been appointed enrolling officer, or one whose desire was faithfully to perform his duties, instead of showing his importance, we should not be here now, invoking a fair construction of the law in favor of an obscure and harmless citizen of our county.

But we are treading on forbidden ground, and conclude by asking that the same construction which has always heretofore been applied to the statute laws of our country, shall prevail; and that Joseph Will, the defendant, shall be discharged.

M. D. MAGEHAN,
PHIL. S. NOON,
R. L. JOHNSTON,
*Counsel for Defendant.*

## DECISION

**In the District Court of the United States.**

**FOR THE WESTERN DISTRICT OF PENNSYLVANIA.**

UNITED STATES vs. JOSEPH WILL.

Opinion of the Court by McCandless, United States District Judge, delivered at Williamsport, September 21,

This case was argued at Pittsburg, with marked ability, and this opinion written there, but as it involved a principle of National importance, I have delayed the announcement of my decision, until I could have a conference with my brother, Mr. Justice Grier. I am pleased to say that we concur in opinion.

The defendant was convicted at the late term of this Court upon an indictment charging him with "obstructing, hindering, and delaying" an enrolling officer in the performance of his duties. The indictment is framed under the 25th Section of the Act of the 3d of March last, commonly called the "Conscription Act.' It is moved in arrest of judgment:

1. That the Act of Congress, under which the indictment is drawn, does not provide any punishment for the offence for which the defendant is indicted.

An Act of Congress passed during the commotion of a civil war, is, sometimes, difficult of construction. Its peace and warlike provisions must be separated, and the penal sanctions applicable to the one, should not be applied to the other. I have been impressed with this distinction in examining the provisions of the Act in question. Its title indicates that it has two objects:—*First*, "enrolling," and *Second*, "calling out" or drafting the "National forces."—The first is a peaceful measure, the other peremptory in its character and requring *force* to support it.

Since the world began, all civilized nations at given periods in their history have ascertained not only their material wealth but their physical force. In ancient times it was an authentic declaration, before the Censors, by the citizens, of their names and places of abode. In the United States, this enumeration has been once in ten years and its primary object is to fix the rate of representation in Congress, but to this is now added a vast compendium of the National resources. When a great public emergency arises, Congress may direct another, and an intermediate enumeration for the purpose of ascertaining the power they possess to suppress insurrection or repel invasion, and this they have done in the present instance, the census of 1860 affording but an imperfect guide to the National strength in 1863. Congress had a right to suppose, and did suppose, that the enrollment would be a peaceful measure, in which there would be a general acquiescence, and which required neither penalties nor military authority to accomplish it. The National force was to be found by the same mild means that an assessor would fix the the value of real estate, or other property subject to taxation. From the past history of the American people, Congress did not presume that there would be any resistance to a measure merely preliminary in its character. The Act is not for the time being only, for this register of the people is to occur every two years, and without limitation. Congress designed that the Government should at all times be ready, whether for a foreign war, or any new complication of domestic difficulties. Wise statesmen always anticipate such emergencies and provide for them. They have done so here, in trying to reduce to precision the force or power upon which they could rely to restore the rightful authorify of the Government.

The first eleven sections of this act are wholly taken up with provisions relative to the enrollment, and there is no penalty interposed for resisting the enrolling officer, or omitting to respond to his enquiries if he should choose to make them. Thus far the Act treats the enrollment as a thing complete in itself. A draft may or may not be made. That is to happen when in the judgment of the President the public safety may require it. By the twelfth section, he is then authorized to assign "to each district the number of men to be furnished by each district," and "*thereupon*" the enrolling Board shall, under the direction of the President, *make a draft*. This is the first exhibition of the warlike power. Then spring into activity the Provost Marshals, other officers and their subordinates, who are to draw or 'call out' the people in given classes, who have been previously enrolled. They are to answer the President's demand, or upon failure, they become, for the first time, subject to the Rules and Articles of War, except where the Act directs that they shall be turned over to the Civil authorities for trial. As was well said upon the argument, the enrollment left every man where he was, minding his own business; the draft took the citizen from his home, his parent, his wife, or his children. Hence, Congress might well consider the enrollment able to take care of itself; while the draft should be guarded by severe penalties.

Full directions are given in the following sections, as to the mode of conducting the draft, until we arrive at the 24th and 25th, which may be termed the penal clauses of the Bill. As this Indictment derives its validity from the latter, this brings us to the consideration of the other reason assigned for arresting this Judgement, which is,

2. That the Indictment sets forth no crime for which the Defendant can be convicted.

The point is well taken. The section declares "That if any person shall resist any *draft* of men *enrolled* under this act into the service of the United States, or shall counsel or aid any person to resist any such *draft*; or shall assault or obstruct any officer *in making such draft*, or in the performance of any service in relation thereto; or shall counsel any drafted man not to appear at the place of rendezvous, or willfully dissuade them from the performance of military duty as required by law, such person shall be subject to summary arrest by the Provost Marshal, and shall be forthwith delivered to the civil authorities, and upon conviction thereof, be punished by fine not exceeding five hundred dollars, or by imprisonment not exceeding two years, or by both of said punishments."

It will be borne in mind that the Indictment charges that the Defendant did "assault" the "enrolling officer" and did "hinder, delay and obstruct" him, in the performance of his official duties. But the section has no reference to the enrollment except in the past tense, as a fact accomplished, an act consumated. The draft is the subject matter treated of, and the draft alone. It is the draft of men already "enrolled" under the provisions of the Act. The clause "or in performance of any service in relation *thereto*" can have for its antecedent the draft and nothing else. The sentence can bear no other grammatical construction, and that is its fair legal interpretation.

Congress having provided no penalty for obstrucing the enrolment, we must take the law as we find it, and not create an offence by intendment. If experience has shown that the officers charged with this public function are not sufficiently protected, the omission can be supplied at the next session, and before by the terms of the Act, the next session, and before by the terms of the Act, the next biennial enrollment is to take place. As the law now stands, the opinion of the Court is with the Defendant on both the points submitted, and the JUDGMENT IS ARRESTED.

The case was argued by Mr. Carnahan, United States District Attorney, for the Government, and by Mr. Noon, Mr. Magehan, and Mr. Johnston, of Cambria County, for the Defense.