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Military Law - Jurisdiction and Procedure of Courts Martial - Amenability of Discharged Serviceman to Jurisdiction of Court Martial for Crime Committed during Military Service

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MILITARY LAW — JURISDICTION AND PROCEDURE OF COURTS MARTIAL — AMENABILITY OF DISCHARGED SERVICEMAN TO JURISDICTION OF COURT MARTIAL FOR CRIME COMMITTED DURING MILITARY SERVICE.—Petitioner, an honorably discharged serviceman, was arrested on May 13, 1953 at Pittsburgh, Pennsylvania by Military Police and transported to Korea on a charge of having committed murder there while a member of the Armed Forces. He sought release from confinement and return to this country through a petition for habeas corpus addressed to the United States District Court in Washington, D. C., naming the Secretary of the Army as defendant. *Held,* petition for habeas corpus granted. The procedure followed in arresting petitioner was not authorized by the Uniform Code of Military Justice.[1] While the Code specifies that a military court may exercise jurisdiction over a discharged serviceman who has committed crimes punishable by imprisonment for five years or more and cannot be tried in the regular federal courts, it does not establish any procedure for transferring the serviceman back to a military status. Since the method used in petitioner's case deprived him of such rights as arraignment before a United States Commissioner, his confinement and arrest were illegal. *Toth v. Talbott,* 113 F. Supp. 330 (D.C. 1953).

It is the general rule that a person is amenable to military jurisdiction only during the period of his service as a soldier or officer, and that when discharged in any recognized legal mode of separation from the service, he ceases to possess a military status and becomes a civilian; thus such jurisdiction can constitutionally no more be exercised over him than it could before he entered the armed forces.[2] Although a punishable crime has been committed, even the most patently guilty person may be so adjudged only in a proceeding where he is accorded all rights, privileges, and immunities guaranteed him by the Constitution.[3] To insure this guarantee, only the court, either military or civil, that has jurisdiction over the offender can legally try him[4] because the Fifth Amendment clearly distinguishes the military from the civilian class as separate communities and recognizes no third class consisting of one half army and one half civilian.[5]

Since the military court did have jurisdiction at one time but did not exercise it, does military jurisdiction extend to the person after he becomes a civilian? It has been suggested that an affirmative answer to this question is inconsistent with the supremacy of civil over military law, and hence unconstitutional.[6] The instant case raised this question but it was not decided because of the lack of any procedure for subjecting civilians to military courts in the Uniform Code of Military Justice. Thus the question is still unanswered.

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1. Uniform Code of Military Justice, art. 3(a) (1951).
2. *E.g.,* United States v. MacDonald, 265 Fed. 695 (E.D.N.Y. 1920); *Ex Parte* Drainer, 65 F. Supp. 410 (N.D. Cal. 1946); *Cf.* Hironimus v. Durant, 168 F.2d 288 (5th Cir. 1949); *Ex Parte* Goldstein, 268 Fed. 695 (E.D.N.Y. 1920).
3. Lisenba v. California, 314 U.S. 219 (1941); Brown v. Mississippi, 297 U.S. 278 (1936).
4. Winthrop, Military Law and Precedents 85 (2d ed. 1920) (military jurisdiction extends from the time of entering the service by acceptance of appointment or commission, or by enlistment or muster in, and the time of leaving it by resignation, dismissal, discharge or death).
5. Winthrop, Military Law and Precedents 106 (2d ed. 1920).
6. *See Ex Parte* McRoberts, 16 With. 600 (Iowa 1864) ". . . under our Federal Constitution, rightful supremacy of civil over military authority is well outlined."

A leading case [7] held, regarding military offenders in general, that if military jurisdiction has attached prior to legal termination of service, the offender may be tried by court martial after that date, discharge being withheld. And where military jurisdiction has once attached by arrest or charges before discharge, termination of a person's military status does not deprive the military of jurisdiction already acquired over the person.[8]

Since court martial jurisdiction includes not only the power to hear and determine a case, but also the power to execute and enforce the sentence,[9] the offender can be retained by or returned to military jurisdiction from civilian, for all purposes of trial, judgment and execution provided action was started against him before his discharge.[10] However, in the past it has been held that this is not so if court martial proceedings are begun after discharge,[11] nor is the rule applicable to inactive reservists since they cannot be called into active duty merely to be tried for an offence committed during their previous active duty time.[12]

Court Martial Boards are lawful tribunals with authority to finally determine any case over which they have jurisdiction. Their proceedings, when confirmed as provided, are not open to review by civil tribunals except for purposes of ascertaining whether the military court had jurisdiction of the person and subject matter, and whether though having such jurisdiction, it exceeded its powers in the sentence pronounced.[13] The military must meet the test of jurisdiction over the accused before they can try a civilian.[14] In view of the foregoing the accused does have a means of guaranteeing his right in that he can petition for a writ of habeas corpus to determine whether there was a deprivation of a constitutional right.[15]

The Federal Constitution provides for supremacy of the civilian authority over the military powers at all times.[16] The Uniform Code of Military Justice, nevertheless, gives the military the power to arrest a civilian, formerly a military offender, and court martial him. Although the constitutionality of Article 3 (a) of the Code has not been tested, is this not a violation of our Federal Constitution and our democratic government? It is contended that

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7. Carter v. McClaughry, 183 U.S. 365, 383 (1902) "The accused was proceeded against as an officer of the Army, and jurisdiction attached in respect of him as such, which included not only the power to hear and determine the case, but the power to execute, and enforce the sentence of the law . . . He was a military prisoner though he had ceased to be a soldier; and for offences committed during his confinement he was liable to trial and punishment by court martial under the rules and articles of war."

8. Barrett v. Hopkins, 7 Fed. 312 (D. Kan. 1881) (term of enlistment expired after arrest but before trial and conviction).

9. O'Malley v. Hiatt, 74 F. Supp. 44 (M.D. Pa. 1947).

10. Carter v. McClaughry, 183 U.S. 365 (1902); Barrett v. Hopkins, 7 Fed. 312 (D. Kan. 1881).

11. *Ex Parte* Drainer, 65 F. Supp. 410 (N.D. Cal. 1946); *Cf.* Hironimus v. Durant, 168 F.2d 288 (4th Cir. 1948) (service personnel on terminal leave considered on active duty with jurisdiction over them being retained by the military).

12. United States v. Warden, 265 Fed. 787 (E.D.N.Y. 1919); United States v. MacDonald, 265 Fed. 695 (E.D.N.Y. 1920); *Ex Parte* Drainer, 65 F. Supp. 410 (9th Cir. 1946).

13. Grafton v. United States, 206 U.S. 333 (1907); Carter v. McClaughry, 183 U.S. 365 (1902); Carter v. Roberts, 177 U.S. 496 (1900).

14. Carter v. Woodring, 67 App. D.C. 393, 92 F.2d 544 (1937).

15. *Accord,* Gusik v. Schilder, 340 U.S. 128 (1950) (military court judgment is subject to habeas corpus only after all available remedies under the court-martial system are exhausted).

16. See note 6 *Supra.*

this section would be unconstitutional on the grounds that it permits the military direct control over a civilian. A possible solution, however, might be in the establishing of a commissioner's office, whose duty it would be to regulate the passing of prior military offenders from civilian control back into military channels, thereby creating harmony between the Uniform Code of Military Justice and our Federal Constitution.

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SALES—REMEDIES OF BUYER—LIABILITY OF MANUFACTURER TO REIMBURSE RETAILER FOR DAMAGES PAID TO CONSUMER FOR BREACH OF EXPRESS WARRANTY.—The defendant manufactured a stepladder and sold it to a retailer with an express warranty of fitness. The retailer resold it to a customer with a similar warranty. The customer, injured when the stepladder collapsed, sued the retailer and recovered a sizeable verdict. Although the retailer notified the defendant of the commencement of the purchaser's suit and demanded that it take over the defense, the defendant refused. The plaintiff, an insurance company which reimbursed the retailer for the damages he was compelled to pay, brought suit against the defendant to recover the sum thus paid. *Held,* judgment for plaintiff as a matter of law. Defendant manufacturer, having been given notice of the pendency of the suit by the customer against the retailer, was bound by the result in the prior action on the principle of res judicata. *Liberty Mutual Insurance Co. v. J. R. Clark Co.,* 59 N.W.2d 899 (Minn. 1953).

The underlying rule applied in this case is one which is apparently "well settled, that where a person is responsible over to another, either by operation of law or express contract and he is duly notified by the pendency of the suit against the person to whom he is liable over and full opportunity is afforded him to defend the action, the judgment, if obtained without fraud or collusion, will be conclusive against him whether he appears or not." [1] The same principle has often been applied in cases of warranty of title,[2] as well as in negligence cases.[3] Most of the authorities cited in the instance case involved either cases of recovery on implied warranties or for negligent manufacture.[4] The holding is thus not confined to cases involving express warranties.[5]

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1. London Guarantee & Accident Co. v. Strait Scales Co., 322 Mo. 502, 15 S.W.2d 766 (1929).
2. Goldberg v. Sisseton Loan & Title Co., 24 S.D. 49, 123 N.W. 266 (1909); 3 Williston, Sales §615a (Rev. ed. 1948).
3. Washington Gaslight Co. v. District of Columbia, 161 U.S. 316 (1896); Consolidated Hand-Method Lasting-Mach. Co. v. Bradley, 171 Mass. 127, 50 N.E. 464 (1898).
4. Dushane v. Benedict, 120 U.S. 630 (1886) (implied warranty); Dayton Power & Light Co. v. Westinghouse Elec. & Mfg. Co., 187 Fed. 439 (6th Cir. 1923); Boston Woven Hose & Rubber Co. v. Kendall, 178 Mass. 232, 59 N.E. 657 (1901) (implied warranty); *see* Pfarr v. Standard Oil Co., 165 Iowa 657, 146 N.W. 851, 855 (1914).
5. Reichard, Inc. v. Dunwoody Co., 45 F.Supp. 153 (E.D.Pa. 1942); Aldridge Motors v. Alexander, 217 N.C. 750, 9 S.E.2d 469 (1940); Gerst v. Jones & Co., 32 Gratt. 518 (Va. 1879) (A manufacturer sold a grower some tobacco boxes for the grower to pack his tobacco in. The boxes were green and molded the tobacco, causing the grower to sell defective goods to his customers. The grower recovered on an implied warranty of fitness.).