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Double Jeopardy and Courts-Martial

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CONGRESS is empowered under the constitution:[1] "To make rules for the government and regulation of the land and naval forces." Under this authority, Congress has established a system of criminal law for the regulation of members of the army and a system of military courts for its administration. The substantive law is to be found in the Articles of War,[2] other congressional statutes, Army Regulations and Orders, and the customs of the service. The courts wherein this law is administered and the procedure therein are provided for by the Articles of War and the Manual for Courts-Martial, which is issued by authority of the Secretary of War and has the effect of army regulations.

The principal military courts, the courts-martial, have jurisdiction over all persons subject to military law, including not only officers and soldiers of the army, but officers and soldiers of the marine corps, detached for service with the army, and, in time of war, retainers and persons accompanying or serving with the army in the field or abroad.[3] This jurisdiction is personal rather than territorial; that is, the court-martial convened by the proper authority and duly constituted may try a person subject to military law for an offense made punishable by the Articles of War, no matter where the offense is committed. A person subject to this military jurisdiction, however, is not immune from the territorial jurisdiction of the civil courts of the states.[4] This is recognized expressly in the Articles of War, No. 74, which makes it obligatory upon the military authorities to deliver over to the civil authorities offenders against the civil law.

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[1] Art. I Sec. 8, cl. 14.

[2] 4 U. S. Compiled Stat. 1916 Chap. 5 Sec. 2308a (Rev. Stat. 1878 Sec. 1342 as amended by Act of August 29th, 1916, Chap. 418 Sec. 3).

[3] Article of War 2.

[4] Franklin v. United States, (1910) 216 U. S. 559, 54 L. Ed. 615, 30 S. C. R. 434; Grafton v. United States, (1907) 206 U. S. 333, 51 L. Ed. 1084, 27 S. C. R. 749, 11 Ann. Cas. 640; Coleman v. Tennessee, (1878) 97 U. S. 509, 24 L. Ed. 1118.

The Articles of War make punishable by courts-martial both offenses of a strictly military nature and non-military offenses,[5] though the capital offenses of murder and rape, committed within the territory of the states of the Union and the District of Columbia, are excluded from jurisdiction of courts-martial in time of peace.[6] This concurrent jurisdiction of the civil courts and courts-martial extends to all crimes punishable under the criminal laws of the states where committed, with the exception noted above.

In time of peace, as has been stated, provision is made for turning over by the military authorities to the civil authorities all offenders against the criminal law of the states.[7] In time of war, such delivery by the military authorities obviously might interfere with the efficiency of the army and is not universally required, but it appears to be the policy of the War Department to make such delivery where the offense is of a serious character and military exigencies do not make it inexpedient.[8] In time of peace the usual rule would probably prevail, that the court first taking jurisdiction would be permitted to proceed without interference by the other court having concurrent jurisdiction, and this is implied in Article of War No. 74; but in time of war, military exigencies require that the military authorities should be able to demand that an offender who is subject to military law be handed over by the civil authorities for punishment, and that the military jurisdiction have priority, and this has been recently so decided.[9] There is, however, no reason why a state court should not exercise jurisdiction over a discharged soldier for an offense against the criminal law of the state, committed by him in time of war while a member of the army. In such case, if the matter has already been dealt with by a court-martial, a question of double jeopardy might arise; and, conversely, a person who has been tried and acquitted, or convicted, in a civil court, might afterwards be tried by a court-martial for the same offense and in such proceeding raise the question of double jeopardy.

[5] Articles of War 93 and 96.
[6] Article of War 92.
[7] Article of War 74.
[8] See Judge Advocate General's Opinions: "Delivery of Accused Soldier to Civil Authorities," Oct. 30, 1917, and "Jurisdiction of Offenses by Selective en Route to Camp," March 6, 1918.
[9] (1917) Ex parte King, 246 Fed. 868.

That no one shall twice be put in jeopardy for the same offense is a familiar common-law doctrine. As to the federal courts, it has the sanction of the United States constitution.[10] Many states have similar constitutional provisions and, even without such provision, the rule against double jeopardy has been applied by state courts as a common-law rule.[11]

A crime is a violation of a rule of conduct imposed by a sovereign having the right to prescribe the conduct of an individual by reason of territorial or personal jurisdiction. If a person is subject with respect to certain conduct, at the same time, to the jurisdiction of two sovereigns, he may, by the same act, violate the rules of both and so commit two crimes. If the offender is tried and convicted, or acquitted, by one sovereign, and subsequently tried by the other, it is not a case of double jeopardy, for he is being tried by the second sovereign for a different crime. This principle has been applied in several instances, as, for example, where the same act is a violation of the law of two states, and has been held to be subject to prosecution by both, without involving double jeopardy.[12] The same is true where the act is an offense against the laws of a state and of the United States.[13] It has also been held that no double jeopardy is involved in a prosecution for violation of a criminal statute of a state, after the accused has been convicted for violation of a city ordinance framed in substantially similar terms, making punishable the same act as did the state statute.[14] The soundness of this latter rule seems to be questionable, inasmuch as the city is merely a municipal corporation established by the state, exercising delegated powers, and is not itself a sovereign, but rather the agent of the state. This rule appears to be inconsistent with the cases to the effect that where an act violates the laws of the United States and of a governmental agency thereof, such as the Hawaiian

[10] U. S. Constitution, Fifth Amendment.

[11] State v. Lee, (1894) 65 Conn. 265, 30 Atl. 1110, 27 L. R. A. 498, 48 Am. St. Rep. 202.

[12] Strobhar v. State, (1908) 55 Fla. 167, 47 So. 4; Marshall v. State (1877) 6 Neb. 120, 27 Am. Rep. 363.

[13] State v. Moore, (1909) 143 Iowa 240, 121 N. W. 1052, 21 Ann. Cas. 63; United States v. Cruikshank, (1875) 92 U. S. 542, 23 L. Ed. 588; Moore v. Illinois, (1852) 14 How. (U.S.) 13, 14 L. Ed. 306.

[14] State v. Lee, (1882) 29 Minn. 445, 13 N. W. 913; and for other cases see 16 Corpus Juris 282.

Islands,[15] or the Philippine Islands,[16] there would be double jeopardy if prosecution were had by both governments, because only one sovereign is involved, namely the United States.

In the case of an act committed by a person subject to military law, which offends against the Articles of War or other military law and against the criminal law of the state, would there be double jeopardy if the offender were tried both by the courts-martial and by the civil court of the state? There is very little direct authority. The most important case is *Grafton v. United States.*[17] In that case a soldier was tried and acquitted by a court-martial for violation of the then 62nd Article of War, for killing a person in the Philippine Islands. He was later tried in a civil court and pleaded in bar the acquittal by the court-martial. The plea was overruled and he was convicted. He carried an appeal to the Supreme Court of the United States, claiming double jeopardy under the Fifth Amendment. The court stated the issue as follows:

"We are next to inquire whether, having been acquitted by a court-martial of the crime of homicide as defined by the penal code of the Philippines, could Grafton be subjected thereafter to trial for the same offense in a civil tribunal deriving its authority, as did the court-martial, from the same government, namely, that of the United States? That he will be punished for the identical offense of which he has been acquitted, if the judgment of the civil court, now before us, be affirmed, is beyond question, because, as appears from the record, the civil court adjudged him guilty and sentenced him to imprisonment specifically for 'an infraction of Article 404 of said Penal Code and of the crime of homicide'."

The court decided that the plea of double jeopardy was valid, but its opinion carefully distinguishes the principal case from one in which the offense was an offense against the laws of a state, using the following language:

"The same act, as held in *Moore's* case,[18] may constitute two offenses, one against the United States and the other against a state. But these things cannot be predicated of the relations between the United States and the Philippines. The government

[15] United States v. Perez, 3 Hawaii Fed. 295; but see, contra, United States v. Lee Sa Kee, 3 Hawaii Fed. 262; State v. Norman, (1898) 16 Utah 457, 52 Pac. 986.

[16] Grafton v. United States, (1907) 206 U. S. 333, 51 L. Ed. 1084, 27 S. C. R. 749, 11 Ann. Cas. 640.

[17] Supra.

[18] Moore v. Illinois, (1852) 14 How. (U.S.) 13, 14 L. Ed. 306.

of a state does not derive its powers from the United States, while the government of the Philippines owes its existence wholly to the United States, and its judicial tribunals exert all their powers by authority of the United States...So that the cases holding that the same acts committed in a state of the Union may constitute an offense against the United States and also a distinct offense against the state do not apply here, where the two tribunals that tried the accused exert all their powers under and by authority of the same government—that of the United States."

As far as this case goes, it is not an authority to the effect that there would be double jeopardy in a case where the laws of a state were violated and a trial had in a state court; but in its manner of reaching its decision and distinguishing such a case, it is rather a strong authority that no double jeopardy would exist.

Another authority to the same effect is *In re Fair*.[19] In that case a soldier who killed an escaping prisoner was tried and acquitted by a court-martial and afterwards arrested for this act on a charge of murder by a civil court of Nebraska. A proceeding in habeas corpus was instituted by the accused in the federal circuit court and the petition was granted because the court found that the act was done in the performance of military duty by the accused, and therefore the release of the accused from the jurisdiction of the state court could be obtained through this proceeding in the federal court. The court said, however, that trial and acquittal by the court-martial was not a bar to the inquiry and prosecution by the proper civil authorities. A similar dictum was expressed in the opinion in *United States v. Clark*.[20]

In *State v. Rankin*,[21] the accused was indicted for murder committed during the Civil War, while he was a soldier in the Union Army. In the state court he pleaded acquittal by a general court-martial for the same offense. The supreme court of Tennessee held that this was not a valid plea and the case was remanded to the trial court for trial on its merits. The opinion, it is submitted, stated the correct doctrine—that the same act was two distinct crimes, one against the United States and the other against the state to whose territorial jurisdiction the offender was subject. The authoritative value of this decision is perhaps lessened by the fact that the prisoner could have avoided the

[19] (1900) 100 Fed. 149.
[20] (1887) 31 Fed. 710.
[21] (1867) 4 Coldw. (Tenn.) 145.

proceedings in the state courts at any time by habeas corpus in the federal courts, according to *Coleman v. Tennessee*.[22] In the latter case it was held that the courts of Tennessee had no jurisdiction over offenses by soldiers in the Union Army during the Civil War, since Tennessee was at that time not a state but an insurgent community in military occupation, having no jurisdiction over members of the Union Army. The opinion in the *Coleman* case, however, endorsed the doctrine that acquittal by a court-martial would be no defense in a trial by a *state* for the same offense.

It is provided by Article of War 40 that "No person shall be tried a second time for the same offense." Is trial in a court-martial, for an offense on which there have been previous proceedings in a civil court, a second trial? It seems to be the opinion of the military authorities that it is not. "Although the same act when committed in a state might constitute two distinct offenses, one against the United States and the other against the state, for both of which the accused might be tried, that rule does not apply to acts committed in the Philippine Islands."[23]

In the case of *In re Stubbs*,[24] (a habeas corpus proceeding in the federal court) the petitioner had been acquitted in a civil court on a charge of murder and was arrested and charged by the military authorities and was about to be tried by a general court-martial for "conduct to the prejudice of good order and military discipline." He claimed that the surrender of his person to the civil authorities by the military authorities for the purpose of being tried for murder was a complete relinquishment of military jurisdiction over the offense, so that "no other court or special tribunal can lawfully assume jurisdiction to try the prisoner again upon a criminal charge based upon the same facts." The court decided against the petitioner on the ground that the court-martial proceeding was for a distinctly military offense and for military aspects of the act, for which there had been no trial in the civil court, stating that "the elements constituting the offense charged are radically different." The opinion contains a dictum that "after having surrendered him to the civil author-

[22] (1878) 97 U. S. 509, 513.

[23] Manual for Courts-Martial, p. 69; see, also, to the same effect, Davis, Military Law of the United States 534; 6 Ops. Attys. Gen. 506, 513. But see Winthrop, Military Law 371.

[24] (1905) 133 Fed. 1012.

ities, his military superiors could not lawfully deal with the petitioner for murder, manslaughter or criminal assault, considered as a crime against society in general." It is uncertain whether the court means by this statement that habeas corpus would lie had the court-martial done what this court says it could not lawfully do. That the surrender to civil authorities is not a waiver or final surrender of jurisdiction seems to follow from *Ex parte King*.[25] Even assuming that in the opinion of the federal court the court-martial was submitting the accused to double jeopardy, in violation of Article of War 40, it does not seem that the prisoner would have any remedy in the civil court, since the court-martial duly constituted by the proper authorities has jurisdiction over the person of the accused and of the offense of which he was charged, and assumed error by the courts-martial in applying the law to the facts does not destroy their jurisdiction or justify appeal to civil courts.[26]

Our conclusion is that where an act is an offense against the laws of the state territorially applicable to the offender and to his act and also against the military law to which he is personally subject, two distinct offenses are committed and there is no double jeopardy in proceedings against him in both the civil and military tribunals.

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[25] (1917) 246 Fed. 868.
[26] Ex parte Tucker, (1913) 212 Fed. 569.