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COURTS-MARTIAL--JURISDICTION OVER PERSON DISCHARGED AND RE-ENLISTED FOR OFFENSE COMMITTED DURING PRIOR ENLISTMENT

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COURTS-MARTIAL—JURISDICTION OVER PERSON DISCHARGED AND RE-ENLISTED FOR OFFENSE COMMITTED DURING PRIOR ENLISTMENT—Petitioner, a chief petty officer in the Navy was honorably discharged on March 26, 1946, and re-enlisted on the following day. In 1947, he was tried by court-martial and convicted of cruelty, during his prior period of service, to persons subject to his orders.[1] The District Court sustained his writ of habeas corpus on the ground that the court-martial had no jurisdiction;[2] the Circuit Court of Appeals reversed.[3] On certiorari to the Supreme Court of the United States, *held,* the court-martial had no jurisdiction to try petitioner for an offense committed prior to his discharge and re-enlistment. *United States ex rel. Hirshberg v. Cooke,* 336 U.S. 210, 69 S.Ct. 530 (1949).

Courts-martial possess a special and limited statutory jurisdiction[4] which is subject to collateral attack.[5] A statutory foundation for the claimed jurisdiction must be demonstrated.[6] The statutory language, "in the Navy," which was relied

[1] Art. 8 (Second), A.G.N., 12 Stat. L. 600 (1862), 34 U.S.C. (1946) §1200. "Such punishment as a court-martial may adjudge may be inflicted on any person in the Navy . . . [who is] guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders."

[2] United States ex rel. Hirshberg v. Malanaphy, (D.C. N.Y. 1947) 73 F. Supp. 990.

[3] United States ex rel. Hirshberg v. Malanaphy, (C.C.A. 2d, 1948) 168 F. (2d) 503.

[4] Congressional power to legislate in this field is based on U.S. Const., Art. I, §8. The guarantees of the Fifth Amendment do not apply to "cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger."

[5] Rosborough v. Rossell, (C.C.A. 1st, 1945) 150 F. (2d) 809; Collins v. McDonald, 258 U.S. 416, 42 S.Ct. 326 (1922); Givens v. Zerbst, 255 U.S. 11, 41 S.Ct. 227 (1921).

[6] McCune v. Kilpatrick, (D.C. Va. 1943) 53 F. Supp. 80; 22 Op. Atty. Gen. 137 (1900) (consent of accused does not confer jurisdiction); Ver Mehren v. Sirmyer, (C.C.A. 8th, 1929) 36 F. (2d) 876.

on to confer jurisdiction here, is ambiguous. Both the Army[7] and the Navy[8] had for many years interpreted similar language not to give jurisdiction to a court-martial after discharge, even though the person had re-enlisted. The Supreme Court in the principal case refused to accept a more recent interpretation by the Navy[9] to the contrary. Moreover, the similar statute regulating the Army had been re-enacted after these interpretations had been adopted.[10] Sound principles of statutory interpretation, then, support the result here.[11] Related decisions also point to the conclusion reached by the Court. It is well settled that persons no longer in the service, by reason of discharge or other form of release,[12] are not subject to court-martial.[13] Formal severance from the service has been held a final judgment on the person's military record:[14] a discharge can be set aside only by judicial action.[15] These decisions clearly point to the conception that release from the service terminates the relationship from which court-martial jurisdiction arises.[16] Where the personal rights of the accused are in issue, the jurisdiction given by the statute should be strictly construed, especially when failure to assert the authority contended for indicates that it is not necessary to a proper ordering of the Naval establishment. The decision reached in the principal case follows sound principles of statutory construction and is also consistent with closely analogous decisions.

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[7] MANUAL FOR COURTS-MARTIAL, UNITED STATES ARMY, ¶10 (1928).

[8] C.M.O. No. 1, p. 9 (1926); C.M.O. No. 6, p. 11 (1926); C.M.O. No. 12, p. 11 (1921); C.M.O. No. 12, p. 7 (1929). This position is supported by WINTHROP, MILITARY LAW AND PRECEDENTS, 2d ed., 93 (1920).

[9] C.M.O. No. 7, p. 42 (1938); NAVAL COURTS AND BOARDS, 1937 ed., §334 (a). The Navy also contended that this new interpretation was given the force of law under authority of 34 U.S.C. §591. This issue is not treated in this note.

[10] 41 Stat. L. 787 (1920), 10 U.S.C. (1946) §§1471-1593.

[11] Fed. Trade Comm. v. Bunte Bros., Inc., 312 U.S. 349, 61 S.Ct. 580 (1941); N.Y., N.H. & H. R. Co. v. I.C.C., 200 U.S. 361, 26 S.Ct. 272 (1906); Copper Queen Mining Co. v. Arizona Board, 206 U.S. 474, 27 S.Ct. 695 (1907).

[12] Durant v. Hironimus, (D.C. W.Va. 1947) 73 F. Supp. 79 (release from active duty on terminal leave); United States ex rel. Viscardi v. MacDonald, (D.C. N.Y. 1920) 265 F. 695 (release to inactive duty of naval reservist).

[13] 24 OP. ATTY. GEN. 570 (1903); 31 OP. ATTY. GEN. 521 (1919); Ex Parte Wilson, (D.C. Va. 1929) 33 F. (2d) 214. See Snedeker, "Jurisdiction of Naval Courts Martial over Civilians," 24 NOTRE DAME LAWYER 490 (1949).

[14] United States v. Kelly, 15 Wall. (82 U.S.) 34 (1872); United States v. Landers, 92 U.S. 77 (1875); Ex Parte Drainer, (D.C. Cal. 1946) 65 F. Supp. 410.

[15] United States ex rel. Flannery v. Commanding General, (D.C. N.Y. 1946) 69 F. Supp. 661. Contra, 28 OP. ATTY. GEN. 170 (1910).

[16] See note,46 COL. L. REV. 977 (1946).