Military Law—Court-Martial—Double Jeopardy—[Federal].—In 1918 the petitioner was convicted of rape by a court-martial and sentenced to death. On the grounds that the trial had been hasty and that the petitioner had been inadequately represented by counsel, the President refused to confirm the sentence and ordered a new trial. The second court-martial, denying the prisoner’s plea of double jeopardy, imposed a sentence of life imprisonment. Twenty years later the petitioner sought a writ of habeas corpus, alleging that he had been twice placed in jeopardy. The district court granted the petition. On appeal to the Circuit Court of Appeals for the Fifth Circuit, held, that the second court-martial properly denied the plea of double jeopardy. Judgment reversed. Sanford v. Robbins.

Absence of authorization in the Articles of War for a particular action of a court-martial has been held to constitute such lack of jurisdiction as to require the granting of a writ of habeas corpus. The court in the instant case, in limiting its inquiry to the question of whether the second court-martial proceeding constituted a violation of the constitutional prohibition of “double jeopardy,” appears to have overlooked the preliminary question of whether the President had authority to order a new trial under the Articles of War.

At the time of the court-martial proceedings, the President was without specific statutory authority to order a new trial; nor had the then existing statutes been interpreted as authorizing such a procedure. The reviewing authority had power to send the case back to the court of first instance for corrections of a nature not requiring a new trial, such as changing the sentence to conform with the findings, or revising the

1 It is a characteristic feature of military law that sentences of courts-martial cannot be executed until they are approved by the officer appointing the court or by the officer commanding certain higher tactical units. Article of War 46, 39 Stat. 657 (1916). Death sentences and certain other decisions, in addition to “approval,” need also “confirmation by the President,” with certain exceptions, none of which was applicable to the instant case, being provided for time of war. Article of War 48, 39 Stat. 658 (1916). See Winthrop, Military Law and Precedents 448, 459 (2d ed. 1920). As a result of criticisms following the last war (see Ansell, Military Justice, 5 Corn. L. Q. 1 (1919); Bogert, Courts-Martial: Criticisms and Reforms, 5 Corn. L. Q. 18 (1919)), the rules concerning approval and confirmation of court-martial decisions have been amended in important respects by acts of 1920. 41 Stat. 795, 797, 10 U.S.C.A. §§ 1512, 1522 (1926). See Morgan, The Existing Court-Martial System and the Ansell Army Articles, 29 Yale L. J. 52, 60-62 (1919). Manual for Courts-Martial 73, 79 (U.S. Army 1928).

2 The court-martial stated: “But, notwithstanding this finding, the Court deems it to be its duty to state its belief that in thus ordering the retrial of an accused without his request or consent, [it] establishes . . . a departure so at variance with military law and custom, as to be dangerous, and which possibly is not in strict accord with the 40th Article of War and the Vth Amendment to the Constitution of the United States.”

3 Decision unreported.

4 115 F. (2d) 435 (C.C.A. 5th 1940). As an alternative holding the court also stated that since the question was not one concerning the jurisdiction of the court-martial, the civil courts should not consider the matter; but the court continued to discuss the issue at great length. See note 15 infra.

5 McCloughry v. Deming, 186 U.S. 49 (1902) (writ granted because court-martial composed of officers of the regular army tried an officer of the volunteer army in violation of Article of War 78); Ex parte Milligan, 4 Wall. (U.S.) 2 (1866) (writ granted because military authorities had tried civilian citizen not under their statutory jurisdiction, and in violation of his constitutional right of trial by jury).
findings to conform with the evidence. But the reviewing authority was said to have no power to disapprove of the court-martial's sentence or findings and to order a new trial without the express consent of the accused. Complete disapproval of a sentence was said to be tantamount to an acquittal. In the present case the court sought to avoid this difficulty by assuming that a prisoner who has been sentenced to death could be presumed to consent to a new trial where such new trial appeared as a condition of the disapproval of the sentence.

An amendment to the Articles of War, passed subsequent to the court-martial trials in the instant litigation, gives express statutory authority for ordering a new trial. There appears to be no great doubt as to the constitutionality of the amendment under the provision against double jeopardy. The amendment expressly provides that there may be no second trial after an acquittal and that there may be no heavier sentence imposed in a later trial than was imposed in the first one; there is, therefore, no danger of abusing the power by ordering new trials until a result satisfactory to the reviewing authority has been obtained. Since revision upward of a sentence by the original court or the reviewing court has never been held unconstitutional, it may be argued that a new trial, with a safeguard against imposition of a higher sentence, is likewise constitutional. Moreover, the procedure set up in the statute provides safeguards against double jeopardy which are closely analogous to those afforded by the federal civil court rule that "jeopardy attaches upon the arraignment of the defendant and the impanelling of the jury." The decision of a court-martial cannot be executed without approval or confirmation of the reviewing authority; refusal to approve an acquittal and a new trial removes the objection of double jeopardy.

6 Article of War 50, 39 Stat. 658 (1916). Winthrop, Military Law and Precedents 454 (2d ed. 1920); Manual for Courts-Martial 75 (U.S. Army 1928). See Morgan, The Existing Court-Martial System and the Ansell Army Articles, 29 Yale L. J. 52, 61, 62 (1919), where the distinction is made between the legitimate procedure of changing the findings or sentence without a new trial and the apparently unauthorized revision upon a retrial. See Swaim v. United States, 165 U.S. 553 (1897); Ex parte Reed, 100 U.S. 13 (1879).

7 Winthrop, Military Law and Precedents 451 (2d ed. 1920); In re Liesendahl, 26 Ops. Att'y Gen'l 239 (1907). But cf. Digest of the Opinions of the Judge Advocate Gen'l 347 (1914).

Consent of the accused to disapproval and a new trial removes the objection of double jeopardy. 1 Ops. Att'y Gen'l 233 (1818); Ex parte Costello, 8 F. (2d) 386 (D.C. Va. 1925); Winthrop, Military Law and Precedents 453 (2d ed. 1920).


9 This fear has been expressed in Winthrop, Military Law and Precedents 260 n. 65 (2d ed. 1920); Bruce, Double Jeopardy and Courts-Martial, 3 Minn. L. Rev. 484 (1919), where it is pointed out that in 1918 alone there were fourteen cases in which the court-martial's original findings of acquittal were disapproved by the reviewing authority, and the action was sent back to the same court and revised, resulting in a conviction. But these apparently were all cases in which the reviewing authority exercised his statutory power to send the sentence and findings back to the same court for revision, a procedure which Bruce probably confused with the non-existent procedure of ordering a new trial.

10 See Swaim v. United States, 165 U.S. 553 (1897); Ex parte Reed, 100 U.S. 13 (1879). Revision upward is no longer permitted since the amendment in 1920 of Article of War 40, 41 Stat. 795, 10 U.S.C.A. § 1511 (1926).


prove or confirm therefore presents a situation analogous to that of a "hung jury" in an ordinary criminal case, in which situation it is held that jeopardy has not attached. The new provisions against imposition of a higher sentence in a later trial make it possible to presume that the defendant consents to a new trial, in much the same manner as does a defendant in an ordinary criminal trial who appeals his case. The safeguards afforded by the amended Articles of War were not, of course, operative at the time of the courts-martial in the instant litigation, but the fact that the procedure followed was in accordance with that later provided for by the amendment gives some justification for the court's holding that there was no double jeopardy.

A more significant aspect of the present case is found in the fact that the court, although denying that it had the power to inquire into the constitutional issue of double jeopardy, devoted the major part of its opinion to discussing the merits of the case. This deviation from the general rule that denial of the constitutional safeguards is not such a jurisdictional defect as can be raised on petition for habeas corpus, is, it would seem, a salutary tendency. So long as the army is made up of professional soldiers, it may be permissible to allow the court-martial system conclusively to determine the meaning of constitutional provisions. Where, however, the personnel of the army is largely conscript, it is arguable that the constitutional safeguards should mean the same thing to the citizen soldier as to the citizen civilian. At the very least, the same reviewing courts should have an opportunity to consider the effect to be given to the diverse considerations affecting the civil and the military organizations. The fact that the writ of habeas corpus is a jurisdictional writ would not appear to be a serious bar to the exercise of review by the federal courts; it has elsewhere been held that, where habeas corpus is the only practicable method of obtaining enforcement of constitutional provisions, it will be so used.

United States v. Perez, 9 Wheat. (U.S.) 579 (1824); Logan v. United States, 144 U.S. 263 (1892); cf. Simmons v. United States, 142 U.S. 148 (1891). But see Morgan, The Existing Court-Martial System and the Ansell Army Articles, 29 Yale L. J. 52, 62 (1919), stating, in defense of the practice of sending sentences and findings back to the same court for revision: "The relation of court to jury does not now, and did not, at the time of the adoption of our constitution or at any other time, exist, between the appointing authority and the court-martial; and no sound argument can be based upon so false an analogy."


"Notwithstanding the hesitation of the court about the plea, it was a court and decided it. There was no lack of judicial atmosphere or of the aid and advice of counsel. The plea having been regularly urged and overruled, the district court probably ought not to have attempted to retry its merits. "Nevertheless, in view of the high nature of the constitutional right said to have been invaded, a violation of which by the sentence of any courts, it is urged, will render imprisonment under it illegal, we too will re-examine it." Sanford v. Robbins, 115 F. (2d) 435, 437 (C.C.A. 5th 1940).


Johnson v. Zerbst, 304 U.S. 458 (1937) (habeas granted after conviction in federal criminal court on ground that, petitioner not having had such legal aid as to enable him to effect an appeal, habeas corpus is the only means by which his constitutional rights can be safeguarded); Hans Nielsen, Petitioner, 131 U.S. 176 (1889); Moore v. Dempsey, 261 U.S. 86 (1923).