DePaul Law Review

Volume 5
Issue 1 *Fall-Winter 1955*

Article 10

Discharged Servicemen Not Constitutionally Amenable to Courts-Martial Jurisdiction

DePaul College of Law

ficers. The problem immediately brought to mind is whether the technical physical trespass to the home made in the process of secreting the devices or whether the eavesdropping by means of the device constituted a violation of the Fourth Amendment. More fundamentally, the question is whether the Fourth Amendment is truly a guarantee of a right to privacy in every sense of the word or is it merely a guarantee of a right to be free from trespass by meddling officials? The *Boyd* case understood the scope of the Fourth Amendment to include a constructive search and seizure by force of a statute, while later in *Goldman v. U.S.*[28] where a detectograph (amplifier) had been used to eavesdrop on private conversations, the court seemed to turn its decision on whether or not there had been a technical trespass. Certainly, the use of an amplifier to overhear conversations on the other side of a wall is just as much an invasion of privacy as the use of a dictaphone secreted by breaking and entering, yet the former is not within the prohibition of the Fourth Amendment, while the latter, because of the trespass is. The same principles are illustrated in the famous case of *Olmstead v. U.S.*[29] where wire tapping was held not to violate the Fourth Amendment. Thus, the law today seems to hinge on the fact of whether or not a technical trespass has been committed in the process of delving into a person's privacy. One wonders if the California Supreme Court in the *Cahan* case has made a sweeping condemnation of the principle of unreasonably invading a person's privacy whether it is by means of a dictograph, detectograph or battering ram, or whether it has merely condemned the trespass committed incidentally in such invasion. As the methods of scientific investigation progress, the question will have to be answered.

[28] 316 U.S. 129 (1942).

[29] 277 U.S. 438 (1928).

DISCHARGED SERVICEMEN NOT CONSTITUTIONALLY AMENABLE TO COURTS-MARTIAL JURISDICTION

The amenability of an ex-serviceman to trial by court-martial for crimes allegedly committed while in the military service came before the United States Supreme Court this term in *Toth v. Quarles*.[1] The Court determined that a military tribunal had no jurisdiction over the discharged veteran and declared unconstitutional Article 3 (a) of the Uniform Code of Military Justice[2] which purported to give the military

[1] 76 S. Ct. 1 (1955).

[2] 64 Stat. 109 (1950), 50 U.S.C.A. § 553 (a) (1951) which provides: "Subject to the provisions of section 618 of this title, any person charged with having committed, while in a status in which he was subject to this chapter, an offense against this chap-

establishment the authority to try ex-servicemen and women by courts-martial even after their return to civilian life.

The case arose out of an arrest and detention carried out in an extremely high-handed manner by military police. On May 13, 1953, Robert W. Toth, who had been discharged from the Air Force five months previously, was arrested by military police at his place of employment in Pittsburgh, Pennsylvania. Toth was charged with murder and conspiracy to commit murder of a Korean citizen while an airman in Korea.[3] Under military authority Toth was flown immediately to Korea to stand trial by court-martial. He was permitted to telephone his family only after he had been transported *incommunicado* as far as San Francisco. His sister petitioned the District Court for the District of Columbia for a writ of habeas corpus, and that court ordered Toth released on the ground that he should not have been removed to Korea without a hearing.[4] The court viewed Toth as a cilivian, and indicated that the military police in making this arrest acted simply as civilians making a civilian arrest. In these circumstances they should have immediately brought Toth before the nearest available United States Commissioner or any other duly empowered officer as required by Rule 5 of the Federal Rules of Criminal Procedure.

The Secretary of the Air Force appealed the district court ruling. The Court of Appeals reversed and remanded the case with instructions to discharge the writ and return Toth to military custody, stating:

> . . . The statute which makes a civilian amenable to trial by court-martial necessarily connotes authority to apprehend him for that purpose and to remove him for trial to the place where the alleged offense was committed.[5]

Toth thereupon petitioned the United States Supreme Court for a writ of certiorari,[6] and upon granting of certiorari Mr. Justice Black said: "We granted certiorari to pass upon this important constitutional question."[7]

The problem of the propriety of trying civilians by military commissions or courts-martial is not a particularly new one, despite the current interest in the *Toth* decision.

---

ter, punishable by confinement of five years or more and for which the person cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia, shall not be relieved from amenability to trial by courts-martial by reason of the termination of said status."

[3] The charges were violations of Articles 118 and 81 of UCMJ, 64 Stat. 140 and 134 (1950), 50 U.S.C.A. §§ 712 and 675 (1951).

[4] Toth v. Talbott, 113 F. Supp. 330 (D.C. D.C., 1953).

[5] Talbott v. U.S., 215 F. 2d 22, 30 (App. D.C., 1954).

[6] 348 U.S. 809 (1954).

[7] 76 S. Ct. 1, 3 (1955).

Congress, by the Judiciary Act of 1789, gave to the Circuit Courts of the United States:

> . . . power to issue writs of . . . habeas corpus. . . . And that either of the justices of the supreme court, as well as the judges of the district courts, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment.[8]

The writ of habeas corpus is a treasured right of Americans, a most effective weapon against unjustified detention. This right was greatly threatened during the Civil War when Congress sought to give the President the power to suspend the writ of habeas corpus at his discretion. On March 3rd, 1863, Congress passed an act which authorized: ". . . the suspension, during the Rebellion, of the writ of habeas corpus, throughout the United States by the President."[9] The Act further provided that a list of all United States citizens being held for civilian offenses in a particular area should be given to the local federal court. If the grand jury in attendance terminated before it acted on a prisoner whose name appeared on the list, the court should, at its discretion, either discharge the prisoner or detain him to be further dealt with according to law.

Under this law, on September 15, 1863, President Lincoln by proclamation[10] suspended the writ of habeas corpus where military, naval and civil officers of the United States held prisoners of war, spies, or aiders and abettors of the enemy.

With the Judiciary Act of 1789, the Act of Congress of March 3, 1863, and the Presidential proclamation in effect, the case of *Ex parte Milligan*[11] arose. On October 5, 1864, Milligan was arrested at his home by order of the military commandant for Indiana, and imprisoned. He was charged, *inter alia* with aiding the enemy and conspiracy against the Government of the United States. After being found guilty by a mititary commission, he was sentenced to death.

Milligan sent his petition for a writ of habeas corpus to the Circuit Court for the district of Indiana and claimed:

1. While imprisoned, the grand jury was sitting and adjourned "without having found any bill of indictment, or made any presentment whatsoever."[12]
2. Never having been in the Army of either the South or North, he could not come under the military commission's jurisdiction.

The United States Supreme Court held:

1. A writ of habeas corpus should be issued.
2. Milligan ought to be discharged from custody according to the act of Congress passed March 3, 1863.

[8] 1 Stat. 81 (1789).

[9] 12 Stat. 755 (1863).

[10] 13 Stat. 734 (1863).

[11] 71 U.S. 2 (1866).

[12] Ibid., at 7.

3. The military commission had no jurisdiction legally to try and sentence said Milligan.

The holding in No. 3 is of the utmost importance. The civil courts of Indiana were functioning when Milligan was tried by the military; they (the civil courts) were quite capable of seeing that justice would be done, and they also would afford to Milligan the safeguards guaranteed to him by the United States Constitution which are not respected by military commissions, or courts-martials, i.e., indictment, jury, preliminary hearing. As Mr. Justice Davis wrote:

> . . . It is the birthright of every American citizen when charged with crime, to be tried and punished according to law. . . . By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of the wicked rulers, or the clamor of an excited people.[13]

To provide for punishment of embezzlement which might not be discovered until after an unfaithful serviceman had departed from the service, Congress passed an act on March 2, 1863,[14] which provided: "That any person in the . . . naval forces of the United States, . . . who shall embezzle . . . money . . . of the United States . . . may be arrested and held for trial by court-martial."[15]

In 1873, in *In re Bogart*,[16] a former Navy paymaster's clerk was accused of embezzling $10,000 of funds in his custody during his enlistment. The petitioner claimed he was no longer a member of the Navy, and therefore he did not come under naval jurisdiction. The court stated that he was clearly a member of the Navy when the crime was committed and was thus properly tried and sentenced by court-martial. The court added that Congress had the right to convey such powers to the military, and the act was not contrary to the Fifth Amendment, for clearly this is a ". . . case arising in the naval forces."[17] As big a step as this Act was in subjecting civilians to military court-martial, Congress specifically limited the power to embezzlement cases only.

The statute of 1863 was expanded, as represented by Article 94 of the Articles of War:[18]

> . . . And if any person, being guilty of any of the offenses aforesaid [frauds against the Government] while in the military service of the United States, receives his discharge or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial in the same manner and to the same extent as if he had not received such discharge nor been dismissed.[19]

[13] Ibid., at 119.

[14] 12 Stat. 696 (1863).

[15] Ibid., § 1.

[16] 3 Fed. Cas. 796, No. 1,596 (C.C. Calif., 1873).

[17] U.S. Const. Amend. 5.

[18] 41 Stat. 787 (1920).

[19] Ibid., at 805.

Whereas the Act of 1863 limited the jurisdiction to embezzlement cases, the Articles of War expanded the military jurisdiction to those countless cases which come under the broad title of "fraud."

Perhaps the first civilian to be tried as a result of Article 94 of the Articles of War was one Joly. In *Ex parte Joly*,[20] the petitioner had been convicted by court-martial for fraud offenses which occurred during Joly's term of service. The charges were brought, and the court-martial proceedings were held one year and one month after Joly's honorable discharge. The court stated:

> The ninety-fourth Article was originally the Act of March 2, 1863. For nearly 60 years, therefore, the Congress has deemed it necessary, for the protection of the military and the nation itself, that a discharge shall not release a *person* in the military service from liability to arrest and trial by a military tribunal for offenses committed prior to discharge. In such circumstances, a court of first instance, under familiar rules, will not declare such a statute unconstitutional unless its infirmity is clearly beyond doubt. . . . In the face, therefore, of more than half a century of practical construction and of the reported cases, this court will not hold the act unconstitutional.[21]

The court felt that since Congress, by legislation, conferred upon the military this power, and since the statutes had a similar construction for sixty years, this statute was constitutional. The court did not concern itself with the greater latitude this statute confered upon courts-martial, nor the distinctions that existed between a court-martial and a civil trial, or the fact that these civilians were being denied the guarantees of a speedy and public trial, by jury, by indictment, as spelled out in the Fifth and Sixth Amendments of the United States Constitution.

In a very similar case, the court dismissed the grave question of civilians being tried by courts-martial rather briefly:

> . . . Unless there is some reason why the Army authorities cannot invoke this statute [Articles of War] against Morino their jurisdiction is complete.[22]

It is also important to note that Morino had been honorably discharged four months before the military police arrested him.

A most important decision was handed down by the Supreme Court in 1947, a decision which perhaps started the "amenability of ex-servicemen to court-martial" type of statutes on the road to being declared unconstitutional. In *Hirshberg v. Cooke*,[23] the petitioner was convicted by a naval court-martial for an offense committed during a prior enlistment. The fact that he re-enlisted did not mean his prior enlistment had not termi-

[20] 290 Fed. 858 (S.D.N.Y., 1922).

[21] Ibid., at 860.

[22] Morino v. Hildreth, 61 F. Supp. 667, 668 (E.D.N.Y., 1945).

[23] 336 U.S. 210 (1949).

nated—it had. The prior enlistment had ended by an honorable discharge. A year later the petitioner was served with charges directing his court-martial. Speaking for the Supreme Court, Mr. Justice Black held that Article 8 (Second) of the Articles for the Government of the Navy,[24] which provided that the Navy should have courts-martial jurisdiction over *any person in the Navy* was not applicable because Hirshberg was not *in the Navy* at the time he was charged, for the reason that his enlistment had terminated in an honorable discharge. It is true that Mr. Justice Black did not rule on the constitutionality of the Act, but what he very clearly stated was that when the defendant was honorably discharged, the Navy lost jurisdiction of all crimes committed during that enlistment. Re-enlistment did not revive that jurisdiction.

On September 30, 1946, Captain Kathleen Durant of the Women's Army Corps was convicted by general court-martial for the theft of jewels while she was on *terminal leave*. The district judge sustained the petitioner's contention that the court-martial was without jurisdiction to hear the case because she was on *terminal leave;* and that her active status came to an end when her *terminal leave* began, which was five or six months before the charges were brought. The Circuit Court of Appeals reversed, and held that one on *terminal leave* is still in the Army, for he receives all the benefits of an officer on active duty.[25] Here, the petitioner did not receive her discharge before the charges were filed, and therefore she had not quite gained her full civilian status. This is a borderline case compared to those already discussed, but it is important to notice that a district court was willing to take the case from the jurisdiction of the military court-martial even though the petitioner had not received her discharge. Here was an implication that in those cases where the charges come after the discharge, the case should be heard by the civil courts.

The cases discussed above dealt *primarily* with the amenability of ex-servicemen to court-martial jurisdiction for crimes committed in the Army or Navy. Now, some important cases which set forth that the military should not hear these cases because they do not afford the persons charged the rights guaranteed by the Constitution, i.e., indictment, jury, preliminary hearings, will be discussed.

In 1933, in *Terry v. United States*,[26] the defendant had been charged with the commission of crimes while in the Army, court-martialed and sentenced after he was honorably discharged. He claimed he was denied the rights due him as a citizen under the Fifth and Sixth Amendments of the United States Constitution. The district judge held, in effect, that since the case *arose in the Army* it was an exception to the Fifth Amendment.

[24] 12 Stat. 600 (1862).

[25] Durant v. Malanaphy, 168 F. 2d 503 (C.A. 2d, 1948).

[26] 2 F. Supp. 962 (W.D.S.D., 1933).

True, the case *arose in the Army*, but the Fifth Amendment says nothing about giving the military the right to hear cases that arise out of the Army or Navy *without limitations*—particularly after the person has gained the status of a civilian. It would seem that because the Fifth Amendment does *not* expressly state that court-martial jurisdiction is limited to the period of service this should not mean that they have such power by implication.

A court-martial differs considerably from civilian trial in procedural due process. The first step is a charge by the commanding officer of the accused; second, there is an investigation[27] of the validity of the charges and a statement as to whether the prosecution of the case will forward the interest of justice and discipline is made. If it is suggested that the charges are valid, they are heard by the court, comprised of military officers and, on occasion, enlisted personnel. This differs drastically from the procedural due process given each citizen by the Fifth and Sixth Amendments which guarantee:

> No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a Grand Jury. . . .[28]

And the Sixth reads:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.[29]

There is no justifiable reason that ex-servicemen should be denied these basic rights (for crimes in service) under the guise that the military establishment must be able to maintain discipline.

In *Kronberg v. Hale*[30] it was held that the Fifth Amendment is not violated by court-martial of ex-servicemen. Therein, it was stated:

> Cases arising in the land or naval forces meant proceedings issuing or springing from acts in violation of the laws regulating the Army or Navy, committed by a person while a member of the service.[31]

Thus, this case falls within the exception provided for in the Fifth Amendment.

On November 7, 1955, due to the Supreme Court's decision in the *Toth* case, millions of ex-servicemen and women regained their rights under the Fifth and Sixth Amendments. The military courts were restrained from encroaching upon the jurisdiction of Article III courts. The military was duly relegated to a subordinate position to the superior civil power.

Mr. Justice Black's majority opinion denied that Congress had any express or implied power under Article I to pass a law subjecting civilians who have committed offenses while on active duty to trial by courts-mar-

[27] 64 Stat. 118 (1950), 50 U.S.C.A. § 603 (1951).

[28] U.S. Const. Amend. 5.

[29] U.S. Const. Amend. 6.

[30] 180 F. 2d 128 (C.A. 9th, 1950).

[31] Ibid., at 130.

tial even in view of the "necessary and proper" clause. The power granted Congress in Article I restricts courts-martial jurisdiction to persons who are actually members or part of the armed forces.

In the case of *Dynes v. Hoover*,[32] it was held that persons actually in the armed forces are subject to trial by courts-martial for military and naval offenses, strongly implying that those persons who were discharged came under civil jurisdiction. However, courts-martial jurisdiction can and does attach to a serviceman who receives a dishonorable discharge by a military court or board and is committed as a military prisoner to serve a sentence imposed upon him by courts-martial.[33]

In *Ex parte Milligan*,[34] the Court, in speaking of Congressional suspension of the writ of habeas corpus under the war power in conjunction with the "necessary and proper" clause, stated:

> For this, and equally weighted reasons, they secured the inheritance they fought to maintain, by incorporating in a written constitution the safeguards which time had proved were essential to its preservation. Not one of these safeguards can the President, or Congress, or the Judiciary disturb, except the one concerning the writ of habeas corpus.[35]

That these safeguards so close to the hearts of the people of our country at that time are still to be upheld and with the same vigor is evidenced by Mr. Justice Black's concern over the encroachment on the jurisdiction of federal courts by military tribunals, the preservation of the right to have grievances or criminal charges heard before a competent judge appointed for life (to be removed only for incompetency by impeachment), the right to the presentment or indictment by a grand jury in the case of capital or infamous crimes, and the right to a trial by jury.[36]

The Court does not say that one is deprived of due process when tried before a military tribunal, for in the recent case of *Burns v. Wilson*[37] where several servicemen were found guilty of rape and sentenced to death by a court-martial, they petitioned for a writ of habeas corpus and on appeal to the Supreme Court no abuse of due process was found. In deciding that a soldier has as much right to due process as anyone else the court stated:

> For the Constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers—as well as civilians—from the crude injustices of a trial . . . bent on fixing guilt, dispensing with rudimentary fairness rather than finding truth. . . .[38]

In the *Toth* case the Court seems particularly concerned with the trial of a serious offense without a jury as provided in the Constitution or a

[32] 61 U.S. 65 (1857).
[33] Kahn v. Anderson, 255 U.S. 1 (1920).
[34] 71 U.S. 2 (1866).
[35] Ibid., at 125.
[36] U.S. Const. Art. III.
[37] 346 U.S. 137 (1953).
[38] Ibid., at 142.

qualified court. The means of military justice are understood and recognized by the Court, but Mr. Justice Black points out that there is a great difference between trial by jury and trial by courts-martial.

> We find nothing in the history or constitutional treatment of military tribunals which entitles them to rank along with Article III courts as adjudicators of the guilt or innocence of people charged with offenses for which they can be deprived of their life, liberty, or property.[39]

Any holding contrary to the *Toth* case would give the military a jurisdiction never contemplated by the founding fathers of our Constitution, who gave Congress the power to regulate the land and naval forces, nor by the supporters of the Fifth Amendment which specifically excludes the necessity of presentment or indictment by grand jury for capital or infamous crimes regarding cases arising in the land or naval forces (even if it could be conceivable that the draftsman of this Amendment intended discharged veterans to be excluded).

In citing that there are over three million persons on active duty with the armed forces and equally as many who have become veterans since the Uniform Code of Military Justice of 1950, the Court points out:

> . . . The enormous scope of a holding that Congress could subject every ex-serviceman and woman in the land to trial by court-martial for an alleged offense committed while he or she had been a member of the armed forces.[40]

The dissent in the *Toth* case was of the opinion that nothing in Article I of the Constitution justifies limiting trial and punishment by the military for crimes committed by members of the armed services to the period of service. By the same token there is nothing in the Constitution, either expressly or by interpretation, which provides for the congressional power to give the military such extended jurisdiction beyond period of service. Therefore, the converse of the dissenting argument can be as readily applied as a reason for declaring the statute unconstitutional.

The next argument presented by the dissent is to the effect that the holding of the majority "turns loose, without trial or possibility of trial, a man accused of murder."[41] This type of reasoning is hardly sufficient to show cause why millions of ex-servicemen should be denied procedural due process of law for *their* crimes committed in the service. The price is not too dear to allow one person escape without trial, so that justice can be restored to a mass of civilians and a proper balance be achieved between the military and civil government.

Another argument brought forward by the dissent was that if military courts-martial were not permitted, the services would lose one of their greatest weapons of maintaining discipline. No one can seriously feel that

[39] Toth v. Quarles, 76 S. Ct. 1, 5 (1955).

[40] Ibid., at 7.

[41] Ibid., at 9.

discipline will crumble because the military offender is aware that if caught *after* his discharge he will face an *easy* civil trial. There is no need to discuss the comparative effectiveness of military and civil trials in seeking the truth and justice and simultaneously protecting the prisoner's rights. The framers of the Constitution never sought to establish military courts-martial on an even position with civil courts; they certainly appreciated the difference and sought to give the armed forces a very limited power of judicial authority.

Mr. Justice Minton, joining in the dissent, stated:

> A civilian not under the jurisdiction of the Military Code has a right to be tried in a civil court for an alleged crime as a civilian. My trouble is that I don't think Toth was a full-fledged civilian. . . . He had a conditional discharge only.[42]

This is to say that one never would regain all his rights as a civilian, so long as he might be charged with offenses under the Uniform Code of Military Justice. Thus, a person *could*, after discharge, be relegated to the status of a serviceman merely by having a formal charge brought against him before a court-martial. If this reasoning were valid, one who became a naturalized citizen of the United States by fraudulent statements in his application should automatically be denied the use of the courts the moment a charge was made as to the verity of his application upon an attack on the validity of his citizenship. This is not so. This person retains the rights and protections afforded him by the Constitution and can fight deportation proceedings in the federal courts, not before a commission.

The question at this point may well be asked, "Where do we go from here?" This is not easily answered. As to those cases which deal with a crime committed outside the boundaries and territories of the United States, as in the *Toth* case, there is no court in America which at present has jurisdiction to hear this particular type of case. Extradition is not a likely solution, for the United States Government does not like to have its citizens subject to foreign law when not necessary. Also, where no treaty exists extradition can not be used.

The solution is noted in the opinion of Mr. Justice Black, where he suggests that Congress should, by its powers in Article III, legislate to give the district courts jurisdiction over offenses committed by ex-servicemen in foreign lands beyond the United States boundaries and territories. That such special legislation is within Congress' power is well settled. For example, in *Jones v. United States*,[43] petitioner committed murder on Navassa Island in the Caribbean Sea, which appertained to the United States.

[42] Ibid., at 20.

[43] 137 U.S. 202 (1890); also see Ex parte Quirin, 317 U.S. 1 (1942); Skiriotes v. Florida, 313 U.S. 69 (1941); U.S. v. Bowman, 260 U.S. 94 (1922).

The Island was out of the jurisdiction of either a state or district court of the United States. The indictment alleged that the District of Maryland was the District of the United States into which defendant was brought from Navassa Island. The jury found Jones guilty of murder. Jones moved in arrest of judgment, "because the act of August 18, 1856, c. 164, . . . is unconstitutional and void. . . ."[44] This Act of August 18, 1856, was designed to protect citizens who may discover deposits of guano and read in part that when any citizen of the United States shall:

> discover a deposit of guano on any island . . . not within the lawful jurisdiction of any other government . . . said island . . . at the discretion of the President of the United States be considered as appertaining to the United States.[45]

The Act also provides that offenses will be tried as if they were done on the high seas, and offenses that are committed on the high seas (out of jurisdiction of a state or district), "shall be in the district where the offender is found or where he is brought."[46]

This clearly shows that the *Toth* type case could be readily heard in the federal courts with a civilian jury. It is no argument to say that a military offense requires a special knowledge to adjudicate; i.e. a military tribunal would be more qualified. This is a fallacious argument, for the jury system is itself a wonderful instrument of justice and jurymen have heard extremely complex suits and have deliberated competently and arrived at reasonable verdicts. That jurymen might not have special military knowledge is no reason why they should be precluded from hearing the cases which occurred in the armed forces.

The first case which was a direct result of the *Toth* decision on November 7, 1955, was handed down in the Northern District of California. District Court Judge Louis E. Goodman granted a writ of habeas corpus to three "turncoat" ex-soldiers, Louis Griggs, William Cowart and Otho Bell, who had been dishonorably discharged after they had refused to come back from Chinese captivity. Judge Goodman did not write an opinion, but stated orally, "In view of the *Toth* decision decided yesterday, I have no alternative but to release the prisoners."[47]

The Goodman decision leaves only one alternative for the Attorney-General of the United States. He may bring action against the three "turncoats" in the federal courts on the grounds of treason. In this instance, the special legislation hitherto discussed is not needed, because the federal courts already have jurisdiction.

[44] Jones v. U.S., 137 U.S. 202, 209 (1890).

[45] 11 Stat. 119 (1856).

[46] Rev. Stat. § 730 (1875).

[47] As recorded per phone conversation November 10, 1955 with Judge Goodman,