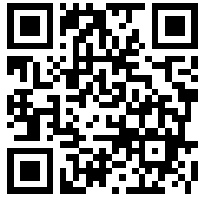

Thomas M. Spaulding.

A TREATISE

ON THE

MILITARY LAW

OF THE

UNITED STATES.

TOGETHER WITH THE

PRACTICE AND PROCEDURE OF COURTS-MARTIAL AND OTHER MILITARY TRIBUNALS.

BY

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INTRODUCTION.

THE history of the constitutional military establishment of England, the country from which our own institutions are in great part derived, has hardly received the attention to which, by its interest and importance, it is fairly entitled. The gradual development of the common law and the study of that great body of maxims and fundamental principles which we call the English Constitution have been made the subject of minute and painstaking inquiry; the corresponding development of the military institutions of the kingdom, however, have been less carefully studied, and this notwithstanding the fact that the long controversy between the sovereign and Parliament, extending over more than three quarters of a century, which culminated in the Great Revolution of 1688, had to do not only with the discussion and settlement of disputed questions connected with the maintenance of the military establishment and the discipline of the military forces, but involved as well the relation of the military to the civil power, and the place of the former in the constitutional law of the kingdom.

It may be safely asserted that for the two centuries immediately succeeding the Norman Conquest the place assigned to military law was in no sense inferior to that occupied by the common law. Indeed it was not until the feudal system had begun to decline in England that the latter began to predominate, and gradually to absorb the civil jurisdiction formerly exercised by the courts of the constable and marshal; and this absorption of jurisdiction was due less, perhaps, to the superior excellence of the common law than to the fact that the kingdom was at peace with the continental states, and that there were but few occasions for the employment of military forces on foreign service or in foreign wars.

The Hundred Years' War for dominion in France, in so far as it affected the interests of the English people, was a foreign war, carried on upon foreign territory, and as such gave rise to no conflict of jurisdiction between the civil and military tribunals, but rather afforded to each form of jurisprudence an opportunity for normal and appropriate development. This was especially true of military law. Articles or Ordinances of War were

prepared and applied in the establishment and maintenance of discipline in the armies employed in France, especially during the reign of Henry V., whose war ordinances have been preserved, and enable us to gain an insight into the disciplinary requirements of this early period.

The epoch of civil wars, which occupied the greater part of the fourteenth and fifteenth centuries, gave occasion for the frequent exercise of martial law—a new and unwelcome form of government, as obnoxious to the civil institutions of the realm as it was detrimental to the development of military law, with which system it had nothing in common. In the extreme form in which it was exercised during the reign of the Stuarts and the period of the Protectorate it became so inextricably confused with military law proper, in the minds of Englishmen, as to contribute not a little to defer the recognition of the latter as a part of the constitutional system of England. Indeed, it was not until the close of the eighteenth century that public men came to understand the distinction between martial rule and military law, and to apply the terms correctly in the discussion of public affairs.

The Tudor period has generally been regarded by historians as in the nature of a truce between the sovereign and Parliament. It was an era of religious rather than civil agitation; foreign wars, involving important military operations on land, were infrequent, and the policy of the Government, especially during the long reign of Elizabeth, was one of internal and economic development, and of neutrality or non-interference in foreign affairs. The result was to defer the discussion of purely constitutional questions, and to delay the final distribution of sovereign powers between the legislative and executive departments of the government for more than a century.

During this epoch, however, Englishmen were not permitted to forget the existence of martial law; although the occasions for its exercise were less frequent than they had been during the disturbed reigns of the Houses of Lancaster and York, and were, perhaps, more nearly justified by the facts of existing emergencies than was the case during the first half of the period of Stuart rule.

The questions which came up for discussion and settlement during the first half of the seventeenth century were many and important, and had to do with the power to maintain a military establishment, to determine its strength and composition, to provide for its support, and to regulate its discipline. Of all of these questions the last is the one with which we are immediately concerned. The "Ordinances of War" of the early sovereigns had, in the lapse of time, given place to the modern Articles of War, based in great part upon the war ordinances of Gustavus Adolphus, the father of modern military discipline. The courts of the constable and the marshal, and the court of chivalry had been replaced by the council of war of the Stuart period; and this tribunal had, in the early part of the seventeenth

century, given place to the modern court-martial. The powers of the constable and marshal, which, as has been seen, had been derived from the sovereign, had reverted to their original source, and were now exercised directly by him, or by commanders-in-chief under authority regularly delegated by royal commission. Indeed the system of military jurisprudence had become so fully established that, upon the outbreak of the Parliamentary wars, the armies of the Commonwealth were governed by Articles of War similar in form and terms to those which were relied upon to regulate discipline in the royal armies.

Although the serious differences between the Crown and Parliament had been adjusted by the formal acceptance of the Declaration of Rights by William and Mary, an event of no less importance than a serious mutiny was necessary to remind Parliament that the legislative adoption of the Declaration of Rights was not in itself a complete settlement of the constitutional questions to which the reign of the Stuart sovereigns had given rise; but it was the manner in which the question was disposed of by Parliament that gives significance to its action as an epoch in the development of military law. The urgency of the occasion was great, for some regiments were in open mutiny, and others were known to be so seriously disaffected as to give cause for serious concern to the sovereign and his ministers. The emergency was met, most wisely as the event proved, by the enactment of the Mutiny Act. That instrument, after declaring that "the raising or keeping of a standing army within this kingdom in time of peace, unless it be with consent of Parliament, is against law," gives formal statutory recognition to the existing military establishment, as a force necessary "for the safety of the kingdom"; and then proceeds to adopt the system of military law then prevailing in the Army, including the agency of the court-martial, as a means of maintaining discipline in the forces so authorized. Such limitations as were deemed necessary to restrict the operation of the system to the existing establishment were clearly imposed; the two most serious military offenses —mutiny and desertion—were expressly recognized and made criminal, and the power to try and punish them was conferred upon courts-martial, appointed by the Crown or by the Lord General, subject, however, to the condition that the sentences imposed by those tribunals were to be carried into effect only when they had been approved by the authority which created them. With a view to retain legislative control over the military establishment thus placed within the protection of the Constitution, the Act was limited in its operation to a period the duration of which was especially set forth in the statute, at the expiration of which the grant of power, unless formally renewed, was to cease and determine. It will thus be seen that the Mutiny Act was by no means the least important of a series of enactments having for their purpose to bring the existing military system within the operation of the English Constitution. It will also be borne in mind

that this purpose was accomplished by the legislative recognition of an existing system of military jurisprudence, as ancient in its origin as the common law.

A little more than a century later, the Congress of the United States, acting deliberately and without the pressure of the emergency which furnished an occasion for the enactment of the Mutiny Act, gave precisely similar recognition to a system of military law derived from the long-established system of the mother country, and adapted to our military needs during the progress of a long and eventful war. The legislative enactment which brought within the operation of the newly-adopted Constitution a system of discipline which was already in successful operation, was made possible by the terms of the fifth amendment to that instrument, which formally excepted "cases arising in the land and naval forces" from the operation of the several clauses which embodied the guarantees respecting the trials of persons accused of crime against the United States.

The development of a constitutional military system in the United States is thus seen to have been beset by fewer difficulties than were encountered in the mother country, and this was due in part to the fact that the question was practically settled, from its constitutional side, by the adoption of the Bill of Rights and the enactment of the Mutiny Act, and in part also by the express recognition of the requirements of military law in the fifth of the amendments to the Federal Constitution. The experience of more than a century had demonstrated the wisdom of Parliament in its recognition of military law as a system of jurisprudence, not less necessary to the well-being of the state than the common law itself, and none the less so because it provided for standards of conduct among persons constituting the military establishment, differing materially from those regulating the rights and obligations of individual members of the body politic in their purely civil and criminal relations.

PREFATORY NOTE.

THE author takes pleasure in making this willing and grateful acknowledgment of the valuable assistance which has been afforded him in the preparation of this work by Brigadier-General G. Norman Lieber, Judge-Advocate General of the United States Army; so great indeed is the obligation that the writer does not hesitate to say that whatever of merit the book may be found to have is due, in great measure, to the constant support and suggestive encouragement which have been extended to him, at every stage of the undertaking, by that able and accomplished officer. The especial thanks of the author are also due to Major Enoch H. Crowder of the Judge-Advocate General's Department and to First Lieutenant Walter A. Bethel of the Third Artillery, for the efficient and helpful services rendered by them in the revision and criticism of the manuscript and the preparation and publication of the volume.

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MILITARY LAW.

CHAPTER I.

MILITARY LAW: ITS AUTHORITY AND SOURCES.

Military Law.—The term Military Law applies to and includes such rules of action and conduct as are imposed by a State upon persons in its military service, with a view to the establishment and maintenance of military discipline.[1] It is largely, but not exclusively, statutory in character, and prescribes the rights of, and imposes duties and obligations upon, the several classes of persons composing its military establishment; it creates military tribunals, endows them with appropriate jurisdiction and regulates their procedure; it also defines military offenses and, by the imposition of adequate penalties, endeavors to prevent their occurrence.[2]

Origin and History.—As the system of Military Law which has received constitutional recognition in the United States is in great part derived from

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[1] O'Brien, 25, 26; De Hart, 2; Harwood, 7; Benét, 7; Ives, 9; Winthrop, 1; Samuels, xi; Clode, Mil. Law, 25–75; Story, Summary of Mil. Law, 2–5; Adye, 35–42; Tytler, 9; Simmons, §§ 80–109; Man. Mil. Law, 7. "If a national army be established, it is indispensably requisite that order and discipline should be established and maintained in that army. To effect this, it is necessary that the duties of the military be defined and their performance enforced, under appropriate penalties, by tribunals appointed for that purpose. For this reason, rules and articles of war are ever found to accompany an army. There is yet a stronger motive for their establishment, which relates to the tranquillity and security of the State; for nothing could be more dangerous to the public peace and safety than a licentious and undisciplined military. Such a force would be merely an armed mob; and our own experience, as well as that of other nations, has given us sad but useful lessons in the mischief to be apprehended from such an assemblage. The aim of all military legislation should, therefore, be twofold: first, to render the army as efficient as possible against the public enemy; and secondly, to deprive it of all power of injuring the country which supports it." (O'Brien, Mil. Law, 25.)

[2] The term as here used relates, not to a mere body of statutes, but to a system of jurisprudence, some of the provisions of which are common to the military policy of all civilized States, both ancient and modern. It differs from the Common Law in respect to its subject-matter, and as to the persons whose conduct it regulates. In the United States it forms a part of a more extensive body of laws, enacted by Congress under the authority conferred by several clauses of the Constitution, having for its object the creation, support, and administration of the constitutional military establishment.

the rules of discipline which prevailed in the British Army at the outbreak of the American Revolution, its origin and development can best be understood by a brief reference to the history of the military institutions of the country from which our own disciplinary system is the direct inheritance.

From the Norman Conquest to the Accession of James I.—During the period intervening between the Norman Conquest and the establishment of representative institutions in England, the sovereign was regarded not only as the fountain of justice, but as the ultimate source of legal authority, and his edicts and ordinances had the obligatory force now assigned to the formal enactments of Parliament. During this period the king, by suitable decrees or proclamations, established such rules for the government of the military forces as seemed to him proper or necessary;[1] and these rules were enforced by tribunals, presently to be described, called the Constables' and Marshals' Courts and the Court of Chivalry.[2] The Court of Chivalry, in the course of time, began to intrude upon the jurisdiction of the common-law courts, and acts were passed from time to time restricting its authority until, during the reign of Henry VIII., it finally ceased to exist; its functions in respect to questions of honor and pedigree having become practically obsolete, and its jurisdiction over military offenses having been transferred to the council of war, the predecessor of the modern court-martial.

Although the control of the military establishment gave rise to occasional differences of opinion between the crown and Parliament during the reigns of the Tudor sovereigns, the questions in controversy were adjusted without serious difficulty, usually by the enactment of statutes calculated to apply an appropriate remedy to the particular wrong complained of;[3] and it was not until the accession of the Stuart sovereigns that the controversy attained the importance of a constitutional question of serious national concern.

Military Law subsequent to the Revolution of 1688; the Mutiny Act.—In conformity to the agreement in accordance with which William and

[1] The system of governing troops on active service by Articles of War issued under the prerogative power of the crown, whether issued by the king himself or by the commanders-in-chief, or other officers holding commissions from the crown, continued from the time of the Conquest till long after the passing of annual Mutiny Acts, and did not actually cease till the prerogative power of issuing such articles was superseded, in 1803, by a corresponding statutory power (Man. Mil. Law, 7). In the Black Book of the Admiralty will be found examples of military laws composed by the King (Richard II.), with the advice and assistance of the Duke of Lancaster and others. Adye in his Treatise on Courts-Martial (page 5, note) mentions the publication of a pamphlet containing the Code of Military Laws for the government of the English Army, under Henry V., then engaged in war with France.*

[2] For an account of the jurisdiction of these courts see the chapter entitled MILITARY TRIBUNALS. See also, for a history of the Court of Chivalry, the English Manual of Military Law, p. 7.

[3] Such was the attempt to define the jurisdiction of this court in 13 Rich. II., Ch. 2, and 1 Henry IV., Ch. 4; see, also, Salkeld's Reports, 533, and Blackstone's Commentaries, Book III., pp. 104, 105.

* Grose in the first edition of his Military Antiquities (1788) mentions the Ordinances of King John; the Charter of Richard I. for the government of those going by sea to the Holy Land; the Ordinances of Richard II., Henry V., and Henry VIII.

Mary ascended the throne in 1688, which, as embodied in the Bill of Rights, has since been regarded as an important part of the British Constitution, the right of command and the power to enforce and maintain discipline were vested in the sovereign, as the constitutional commander-in-chief; but these powers were to be regulated in their exercise by the terms of an important statute called the Mutiny Act,[1] the scope and purpose of which will presently be explained. It is sufficient to observe at this point that the Mutiny Act recognized mutiny and desertion as two of the most serious military offenses and authorized their trial and punishment by court-martial. All matters affecting discipline, however, which were not expressly provided for in the Mutiny Act were left to be regulated by the royal prerogative, and in conformity to such disciplinary rules as the sovereign might see fit to impose. Indeed, such a body of rules already existed in a code of regulations, known as the Articles of War, which had been issued by James II. in 1686.[2] These Articles, therefore, though frequently added to and amended, or modified, by the issue of subsequent articles, continued in force, side by side with the Mutiny Act, and in subordination to that instrument, until 1879, when the Mutiny Act and Articles of War were merged in an enactment known as the Army Discipline Act, which, as re-enacted in the Army Act of 1881, is still in force throughout the British Empire. In strictness, however, the Army Act of 1881 "has, of itself, no force, but requires to be brought into operation annually by another Act of Parliament, thus securing the constitutional principle of the control of Parliament over the discipline requisite for the government of the Army."[3]

The Mutiny Act and the Articles of War.—It will thus be seen that from 1689, the date of the first Mutiny Act, until 1881, the date of the permanent Army Discipline Act, military discipline was regulated in England by two authoritative instruments: (1) the Mutiny Act,[4] which was statutory in character and contained the more important disciplinary

[1] 1 William and Mary, Chap. 5.

[2] Clode, Mil. Law, 38.

[3] Man. Mil. Law, 18, 19. It is proper to observe in this connection that the Articles of 1686, which were in force at the date of the passage of the Mutiny Act, were not annulled or even replaced by that enactment, but were rather recognized, by implication, as a supplementary body of rules for the government of the military forces, which were applicable to all disciplinary questions not covered by the express terms of that statute. They therefore continued to exist side by side with that instrument, and were added to and amended by the crown from time to time, as the necessities of the service demanded, until 1803, when the prerogative power of issuing such articles was replaced by a corresponding statutory power.*

[4] For military offenses, created by statute, prior to the enactment of the Mutiny Act, see 18 Henry VI., by which desertion was made a felony; 7 Henry VII., Chap. 1, and 3 Henry VIII., Chap. 5, by which that offense was excluded from benefit of clergy. By 2 and 3 Edward VI., Chap. 2, desertion was again made a felony, without benefit of clergy, and a number of other military offenses were defined and made punishable.

* 53 Geo. III., Ch. 17, Sec. 146.

provisions, together with the power to appoint the several military tribunals; and (2) the Articles of War, issued by the sovereign, and so non-statutory in character, containing the great body of rules for the government and discipline of the military forces of the crown.

The Articles of War were added to and amended from time to time, as occasion demanded, and were in force throughout the realm at the outbreak of the American Revolution in 1775. As a consequence, the Mutiny Act and Articles of War were well known to the colonists in America, and when the royal troops served in conjunction with the colonial forces during the wars with the French and Indians, prior to the Revolution, both species of military force were governed by their provisions. At the outbreak of hostilities in 1775, the Revolutionary Congress found itself confronted with the necessity of raising and disciplining armies, and, for the reason above stated, turned to the British military code as a body of disciplinary rules with the scope and operation of which the troops of the several colonies were already familiar. With some modifications, therefore, the Mutiny Act and the Articles of War then in force in the British Army were adopted by the Congress for the government of the Armies of the United States.[1]

Classification of Military Law.—The rules regulating the conduct of military persons in the performance of their duties, like those which control the conduct of the general body of citizens, are in part statutory and in part embodied in orders and regulations in conformity thereto; a considerable part, however, of the military law now in force in the United States Army is derived from usages, long adhered to in the military establishment, called *customs of service*, the nature of which will presently be explained. These laws are therefore susceptible of classification, according to their form, into *written* and *unwritten laws*. The *written military law* consists of:

1. *The Enactments of Congress respecting the Military Establishment.*[2]—Of the several enactments falling under this head the most important are to be found in the body of statutory rules, enacted under authority conferred by several clauses of the Constitution, which are technically known as the Rules and Articles of War.[3] Although the Articles of War as revised or amended, from time to time, by the authority of Congress contain the greater part of the Military Law proper of the United States, many important statutory provisions respecting the discipline and administration

[1] The first set of Articles of War was adopted by Congress by resolution of June 30, 1775 (1 Journal of Cong., 90); these Articles were repealed and replaced by those authorized by the resolution of September 20, 1776 (1 *ibid.*, 435–482). See the chapter entitled THE ARTICLES OF WAR.

[2] These enactments derive their authority from the several clauses of Section 8, Article I of the Constitution which vest in Congress the power (1) to declare war, grant letters of marque and reprisal, and make rules concerning captures on land or water; (2) to raise and support armies; and (3) to make rules for the government and regulation of the land and naval forces.

[3] For a history of the Articles of War see the chapter so entitled.

of the Army are not embraced in the Articles, but are to be found in the Revised Statutes and in the biennial volumes of Statutes at Large; the former containing a codification of the laws of the United States which were in force at the date of its enactment,[1] and the latter containing the statutes subsequently enacted.[2]

Distinction between Military and Martial Law.—It is proper to observe, at this point, that the terms military law and martial law are by no means synonymous. Military Law, as has been seen, is in great part statutory in character and regulates the conduct of military persons at all times and in all places, without as well as within the territorial jurisdiction of the United States; that is, military law is applicable to certain persons, not only in time of peace, but in time of war as well, and its operation is not restricted to the territory of the United States, but follows its forces wherever they may go in the performance of lawful military duty or in the prosecution of a legitimate and duly authorized military undertaking. The Naval Articles of War, for example, do not cease to be binding upon the officers and men who constitute the crew of a vessel of war, when they pass from the territory of the United States into the high seas; indeed, by the comity of nations, those laws continue to be operative while such vessel is in the territorial waters of a foreign State. So, too, the Articles of War continue in force and have extra-territorial operation in a military command engaged in the pursuit of hostile Indians begun in the United States but continued in Mexican territory, under the authority conferred by a recent convention with that power. The military laws of the United States had the same binding force in the armies of Generals Scott and Taylor while operating in Mexico that they had in respect to those portions of the Army which remained within its territorial jurisdiction during that period. Military law has, also, chiefly to do with the acts and relations of military persons; it applies to the conduct of citizens in an exceedingly limited number of cases, in each of which there must be the express authority of an enactment of Congress.

Martial law, on the other hand, is not statutory in character, and arises, in every case, out of strict military necessity. Its proclamation, or establishment, is not expressly authorized by any of the provisions of the Constitution; it comes into being, as will hereafter be seen, only in the territory of an enemy in time of war, or in a part of the territory of the United States in which the proper civil authority is, for some controlling reason, unable for the time to exercise its proper functions. It disappears when such forcible resistance to the operation of the law has been overcome or

[1] Act of June 20, 1874 (18 Stat. at Large, 113).

[2] The 18th and all subsequent volumes of the Statutes at Large contain provisions in relation to the military establishment which are of date subsequent to the enactment of the Revised Statutes.

has ceased to exist, and the civil authorities have been enabled to resume the exercise of their appropriate functions.[1]

2. *The Decisions of Courts.*—It is the duty of the several Federal courts, under the Constitution, to apply the laws of the United States in the decision of cases arising under them. In the performance of this duty, these tribunals find it necessary, from time to time, to *interpret* the laws; that is, to place an authoritative construction upon the enactments of Congress which come before them for adjudication. The decisions rendered in such cases are of equal authority with the statutes upon which they are based and, until reversed or overruled, have similar obligatory force.[2] Many important questions respecting military affairs have come before these courts for decision—a number of such questions, indeed, have been decided by the Supreme Court of the United States, the highest judicial authority known to the Constitution. Others have been passed upon by the Circuit and District Courts and the Court of Claims. The decisions so rendered are of the highest authority upon the subjects to which they relate.

3. *Decisions of the President, Opinions of the Attorney-General, of the Secretary of War, the Judge-Advocate General, etc.*—Closely related to the decisions of courts in point of authority are the decisions of the President and of the heads of the several executive departments in matters coming within their respective jurisdictions. Under this head fall the opinions of the Attorney-General, the constitutional law adviser of the executive branch of the Government;[3] the decisions of the Secretary of War, as the military representative of the President, those of the Commanding General of the Army, and the opinions of the Judge-Advocate General in matters relating to military law and the practice and procedure of courts-martial. The rulings and decisions of the several authorities competent to convene general courts-martial are also obligatory within the spheres of their respective commands.

Army Regulations.—Next in point of authority to the formal enactments of Congress and the decisions of courts may be mentioned the General Regulations or Standing Orders of the Army. This term applies to a body of administrative rules relating to the management of military affairs and the performance of military duties, issued by the President as the head of the executive branch of the Government. While these executive utterances have the obligatory force of law,[4] they are, in this regard, inferior

[1] See the chapter entitled MARTIAL LAW: MILITARY GOVERNMENT.

[2] Cooley, Const Law, 146, 147.

[3] See Sections 354, 356-358 Rev. Stat.; 1 Opin. Att.-Gen., 211; 6 *ibid.*, 326; 7 *ibid.*, 692; 10 *ibid.*, 267; 11 *ibid.*, 189.

[4] The Supreme Court has repeatedly recognized the legality and force of Army Regulations: "The Army Regulations, when sanctioned by the President, have the force of law, because it is done by him by the authority of law." (U. S. *vs.* Freeman, 3 How., 567.) "As to the Army Regulations, this court has too repeatedly said that they have the force of law, to make it proper to discuss that point anew." (Gratiot *vs.* U. S.,

to statutes, and it is therefore essential to their validity, as will presently be seen, that they shall not be in conflict with the formal enactments of Congress.[1]

Conformity to Statutes.—Army regulations proper are merely executive or administrative rules and directions as distinguished from statutes. A regulation cannot legislate, nor can it contravene the statute law. A regulation in conflict with an existing Act of Congress can have no legal effect; if, subsequently to the issue of a regulation, an Act is passed with which it conflicts, it becomes at once inoperative.[2] Regulations, like statutes, are

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4 How., 118.) "The power of the Executive to establish rules and regulations for the government of the Army is undoubted." (U. S. *v.* Eliason, 16 Pet., 301.) "The Army Regulations derive their force from the power of the President as commander-in-chief, and are binding upon all within the sphere of his legal and constitutional authority." (Kurtz *vs.* Moffitt, 115 U. S., 503.) See also Swaim *vs.* U. S., 165 U. S., 553, decided by the Supreme Court, March 1, 1897.

The term "Regulations of an Executive Department" describes rules and regulations relating to subjects on which a Department acts, which are made by the head under an Act of Congress conferring that power, and thereby giving to such regulations the force of law. A mere order of the President or of a Secretary is not a regulation. Harvey *vs.* U. S., 3 C. Cls. R., 38, 42; Dig. Opin. J. A. Gen., 166, par. 1, and note 1. A "regulation" affects a class of officers; an "instruction" is a direction to govern the conduct of the particular officer to whom it is addressed. Landram *vs.* U. S., 16 C. Cls. R., 74. The Army Regulations when sanctioned by the President have the force of law, because it is done by him by the authority of law. U. S. *vs.* Freeman, 3 How., 556; Gratiot *vs.* U. S., 4 How., 80; *Ex parte* Reed, 100 U. S., 13; Smith *vs.* U. S., 23 C. Cls. R. 452.

When Congress permits regulations to be formulated and published and carried into effect from year to year, the legislative ratification must be implied. Maddox *vs.* U. S., 20 C. Cls. R., 193, 198.

The authority of the head of an Executive Department to issue orders, regulations, and instructions, with the approval of the President, is subject to the condition, necessarily implied, that they must be consistent with the statutes which have been enacted by Congress. U. S. *vs.* Symonds, 120 U. S., 46, 49; U. S. *vs.* Bishop, *idem*, 51; Dig. Opin. J. A. Gen., 166, par. 1, note 2; par. 6, p. 168. Regulations can have no retroactive effect. U. S. *vs.* Davis, 132 U. S., 334. Provision of statute exists by which the statute regulations of the Army may, within certain limits, be altered by the Secretary of War, but there is no such provision in regard to the statute regulations of the Navy. 6 Opin. Att.-Gen., 10; 8 *ibid.*, 337. The same discrepancy exists in the military law of Great Britain. *Ibid.*

Regulations prescribed and framed by the Secretary of War and which are intended for the direction and government of the officers of the Army and agents of the Department do not bind the commander-in-chief nor the head of the War Department. Burns *vs.* U. S., 12 Wall., 246; Smith *vs.* U. S., 24 C. Cls. R., 209, 215. But see Arthur *vs.* U. S., 16 C. Cls. R., 422, and U. S. *vs.* Burrows, 1 Abb., 351. Regulations made *pursuant* to law, certain regulations respecting the Civil Service for example, are binding even upon the Executive, and the heads of the several Executive Departments, until changed.

Regulations which heads of Departments are expressly authorized to make, in which the public is interested, become a part of that body of public records of which the courts take judicial notice. Caha *vs.* U. S., 152 U. S., 211.

[1] For an able and exhaustive discussion of this subject from all points of view, see the "Remarks on the Army Regulations" by Judge-Advocate General G. Norman Lieber, of the United States Army; Benét, 8, 9; Ives, 18–20; Winthrop, 17–37; Tytler, 17–31; Adye, 4, 5; Simmons, §§ 82–84; Clode, Mil. Law, 13–15; Man. Mil. Law, 7–18; Dig. J. A. Gen., 166–169.

[2] Dig. J. A. Gen. 166, par. 1; *ibid.*, 168, par. 6. Army regulations are not to be confounded with the "rules for the government and regulation of the land (and naval) forces" which Congress is empowered to make by Sec. 8, Art. I, of the Constitution; these being, of course, *statutory* rules. The use in this section of the word "regulation"; the fact that the published Army Regulations contain sundry statutory provisions not distinguished from the mass of regulations proper, and embrace also some subjects

intended to operate in the future, and are not to be given retroactive effect unless their language clearly requires it.[1]

Classification.—Regulations are susceptible of classification under the following heads:

(1) Those which have received the sanction of Congress. These cannot be altered, nor can exceptions to them be made, by the executive authority, unless the regulations themselves provide for it. In reality, the approval of Congress makes them legislative regulations, and they might therefore be more strictly classified with other statutory regulations with reference to subjects of military administration. They are, however, included under the general head of Army Regulations, as approved codes of executive regulations.[2]

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which seem scarcely within the scope of executive direction or military orders, but to pertain rather to the province of the statute law; and the further fact that the Army Regulations as a body received a special recognition in the Act of July 28, 1866—these circumstances have contributed to confuse regulations with statutes much to the embarrassment of the student of military law. Regulations proper (unlike Articles of War, which are statutes) are simply orders and directions made and published to the Army by the President, either as commander-in-chief, for the purposes of the exercise of command over the Army, or as Executive, for the purposes of the execution of powers vested in him by law. By Congress, indeed, the President or Secretary of War is sometimes expressly required to make special regulations for special objects. Such regulations, however, are not of the class of general army regulations proper. *These* may be made by the President at any time, at his discretion, and of his own authority.

That regulations promulgated through the Secretary of War are to be "received as the acts of the Executive," see U. S. *vs.* Eliason, 16 Peters, 301; U. S. *vs.* Webster, Daveis, 59; U. S. *vs.* Freeman, 1 Wood. & Minot, 50, 51; Lockington's Case, Brightly, 288; McCall's Case, 5 Philad., 289; In Matter of Spangler, 11 Mich., 322.

An authority which can legally be vested by legislation only, cannot of course be conferred by an executive regulation. Thus *held* that the expenditure of the proceeds of the sale of articles manufactured by the prisoners at the Military Prison, such proceeds being public funds, could not properly be the subject of an army regulation. Dig. J. A. Gen., 167, par. 2.

As illustrating the distinction between statutes and regulations, and the principle that regulations can have force only so far as they are not inconsistent with the statute law, see U. S. *vs.* Webster, Daveis, 56–59, and 2 Ware, 54–60; Boody *vs.* U. S., 1 Wood. & Minot, 164; McCall's Case, 5 Philad., 259; *In re* Griner, 16 Wisc., 434; Magruder *vs.* U. S., Devereux, 148; 1 Opins. Att.-Gen., 469; 4 *id.*, 56–63, 225–7; 6 *id.*, 10, 215, 365; 8 *id.*, 343; 11 *id.*, 254; O'Brien, 31.

As to the inferior force and obligation of the British Army Regulations as compared with the Mutiny Act (and Articles of War thereby authorized), see Samuel, 193–197. Clode (Mil. & Mar. Law, p. 55) illustrates the nature of these Regulations in noting that originally "each colonel had his own Standing Orders—no General Regulations being in existence—for the discipline and exercise of his regiment."

[1] Dig. J. A. Gen., 168, par. 7.

[2] Lieber, Remarks on the Army Regulations. An impression seems to have existed that a peculiar "force of law" is given to regulations by their approval by Congress, but it seems to be an erroneous one. If, as above said, the making of regulations is within the jurisdiction both of Congress and the President, but the authority of Congress is superior to that of the President, it follows that when regulations are approved by Congress they cannot be altered by him until the approval is removed. To this extent regulations approved by Congress may be said to have a superior force of law to those not thus approved, but this is not the erroneous impression referred to. Precisely what this is is not clear, but it seems to have been believed that the approval of regulations by Congress makes them of higher obligation. This, however, is not true. Whether approved by Congress or not, they have, so long and so far as they are in force, the force of law, and this cannot be divided into degrees. The distinction, in this

(2) Those that are made pursuant to and in aid of a statute. These (if it be not prohibited by the statute) may be modified by the executive authority, but until this is done they are binding as well on the authority that made them as on others. Examples of regulations of this class are those relating to the examination and promotion of enlisted men, made pursuant to the Act of Congress of July 30, 1892, and the executive order of March 20, 1895, prescribing limits of punishment.[1]

(3) Those emanating from, and depending upon, the constitutional authority of the President as commander-in-chief of the Army. These constitute by far the greater part of the Army Regulations. They are not only modified at will by the President, but exemptions from particular regulations are given in exceptional cases; the exercise of this power with reference to them being found necessary. "The authority which makes them [regulations] can modify or suspend them as to any case, or class of cases, or generally."[2] Under this head fall the regulations respecting military command, those in relation to salutes, ceremonies, and military honors, as well as those which control the routine of military duty, wherever performed, in garrison or in the field, together with those relating to the conduct of military operations and those affecting orders and official correspondence.

(4) Departmental regulations, made by virtue of the authority conferred by section 161, Revised Statutes, on the head of each Department, "to prescribe regulations not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property appertaining thereto."[3]

Mere repetitions of legislative enactments are not included under any of these heads.[4]

Military Orders.—Orders are authoritative directions, respecting the

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respect, that has sometimes been made between regulations approved by Congress and those not thus approved is misleading. *Ibid.*, p. 7.

[1] Thus it was held in U. S. *vs.* Barrows (1 Abbott, 351; 24 Fed. Cases, 1018) that a regulation of the Treasury Department, made in pursuance of an Act of Congress, becomes a part of the law, and is of the same force as if incorporated in the body of the Act itself. *Ibid.*, p. 4.

[2] Lieber, Remarks on Army Regs., p. 4; 5 Dec. First Comptroller, 29; and see art. 1 of Circular No. 4, 1897, A. G. O., and U. S. *vs.* Eliason, 16 Pet., 302; also Davis's Military Laws, p. 146.

[3] Lieber, Remarks on Army Regs., p. 4.

[4] 23 Ct. Cls., 460; 3 *id.*, 38. The executive regulations of the British military administration consist principally of the Rules of Procedure, the Queen's Regulations, and Royal Warrants. The Rules of Procedure are authorized by the Army Act and prescribe the regulations for the formation of military courts, the trial of offenders, and the execution of sentences; the Queen's Regulations relate to the interior economy of corps, the maintenance of discipline, and the powers and duties of commanding officers, and supplement the Army Act as to offenses against enlistment and the disposal of prisoners; and Royal Warrants prescribe the permanent regulations as to the government, discipline, pay, promotion, and conditions of service. (Pratt's Military Law, London, 1892.)

military service, issued by the President, as the constitutional commander-in-chief, or by his subordinate commanders, with a view to regulate the conduct of military persons, or control the movements or operations of individuals or organizations under their several commands.[1] The orders of the President are assimilated to regulations in all matters respecting their sanction and operation; indeed, the General Regulations are sometimes called the Standing Orders of the Army. Orders issued by subordinate commanders operate only within the sphere of their military authority, and bear, in some respects, the same relation to the Army Regulations and the orders of superior commanders that the latter bear to the enactments of Congress. As disobedience to the lawful orders of a superior officer is given the character of a military offense by the 21st Article of War, such utterances are given an additional sanction by the terms of that article which makes such disobedience punishable at the discretion of a court-martial.

The Unwritten Military Law; the Custom of War; Customs of Service.—The oath taken by each member of a court-martial requires him, in a certain case, to administer justice in accordance with "the custom of war in like cases." The unwritten military law, made up of customs of service, or of "the custom of war" as it is called in the 84th Article of War, is, in substance, a form of customary law developed from usages of the military service so constantly repeated and so long adhered to as to confer upon it the character of an authoritative rule of action. It is followed in cases in respect to which the written law is silent, or to which its provisions do not apply. The 92d Article of War, for example, does not prescribe by whom the oath shall be administered to witnesses before a court-martial. By the custom of service it is administered by the judge-advocate.[2] So, too, in a case where its sentence is discretionary, a court-martial may impose any punishment that is sanctioned by the custom of service, although (in the cases of enlisted men) the same may not be included in the list of the more usual punishments contained in the Manual for Courts-martial.[3]

Conditions Essential to the Validity of a Custom of Service.—Customs of service resemble in their origin and development those portions of the Common Law of England which were of similar derivation, and to be valid must conform to the same conditions. The terms *custom* and *usage*, as used at Common Law, are not synonymous; the latter applying to an act or practice which, by constant, regular, and invariable repetition, has gradually acquired the force of law; the former applies to the legal sanction acquired by such constant repetition and invariable observance, that is, to the *custom*,

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[1] U. S. *vs.* McDaniell, 7 Pet., 2, 15; O'Brien, 37; De Hart, 165; Ives, 26, 21; Winthrop, 37; Tytler, 6; Simmons, §§ 595, 596; Clode, Mil. Law, 13–15; Man. Mil. Law, 22; Man. for Courts-martial, 4; Dig. J. A. Gen., 27, 30.

[2] Dig. J. A Gen., 108, par. 2; *ibid.*, 140, par. 2; *ibid.*, 697, par. 8.

[3] *Ibid.*, 697, par. 6.

or *customary law*, developed by long-continued adherence to a particular practice or usage. The following are the principal conditions to be fulfilled in order to constitute a valid custom of service:

1. *It must be long continued.* This is the first essential of a custom; habits are not quickly acquired, even by individuals; for a particular usage to become habitual in a community, therefore, a long period of time is required. "If a particular usage can be shown to have commenced, it is void as a custom. Of course it must have had a beginning; but if its beginning can be discovered, then the individual who originated the custom can be ascertained, and one man will be the maker of the law, which is impossible. But if there is no evidence of a beginning, it will be presumed to have existed during the whole period of legal record."[1]

2. *It must be generally known and invariably observed by those who are alleged to be subject to its operation.* This follows from the definition of the term; for that is not a custom which is casually or repeatedly excepted from, and a practice which is not habitual, or generally observed in a community, lacks the most essential characteristic of a custom.

3. *It must be compulsory.* In other words, it must be an invariable rule of action; that is, it must have the obligatory form of a *customary* law.

4. *It must not be in opposition to the terms of a statute.* Statutes, as has been seen, have the highest sanction of all forms of the written law; and anything contrary to their tenor is void and without obligatory force: a custom opposed to a statute has therefore no obligatory effect.

Extinguishment of Custom by Non-user.—As usage constantly observed for a long period of time constitutes custom, it follows, by parity of reasoning, that formal abandonment or long-continued non-usage will operate to destroy a particular custom, that is, to deprive it of its obligatory character.[2]

Field of Operation.—The field of operation of the unwritten military law is very extensive, and its provisions are so fully established and so generally understood in the military service that it is extremely unlikely that it will be replaced, at any time in the future, by statutes or regulations; such a course, indeed, would hardly seem to be necessary, since its existence and obligatory force are expressly recognized and sanctioned by the clause above cited from the 84th Article of War. The body of unwritten military law in

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[1] 3 Blackstone, pp. 74–77.

[2] The punishment of ball and chain, though sanctioned by the usage of the service, should, in the opinion of the Judge-Advocate General, be imposed only in extreme cases. Its remission has in general been recommended by him except in cases of old offenders or aggravated crime, where deemed serviceable as a means of obviating violence or preventing escape. This penalty has (as have also those of shaving the head and drumming out of the service) become rare in our army, since the further corporal punishment of branding or marking has been expressly prohibited by statute. (Dig. J. A. Gen., 697, par. 8.) This example furnishes an illustration of the abandonment of a custom of service partly from disuse, or non-user, and partly because of its inconsistency with the terms of a statute.

force at the time of the adoption of the Federal Constitution also received statutory sanction in the Act of September 29, 1789,[1] which provided that the troops composing the then existing military establishment should be governed by the Rules and Articles of War enacted, prior to the adoption of the present Constitution, by the Congress under the Articles of Confederation.

It is applied by courts-martial in the definition of certain military offenses, in determining whether certain acts or omissions are punishable, as such, especially in cases arising under the 61st and 62d Articles of War, and in fixing upon the form of certain military punishments. The procedure of courts-martial is also regulated, to a certain extent, by the custom of service, and it is appealed to, at times, as a rule of interpretation of terms technical to the military service.[2]

Usages.—It has been seen that mere practices, or usages of service, although persisted in for considerable periods of time, are not customs and have none of the obligatory force which attaches to customary law, properly so called. The fact that such usages exist, therefore, can never be pleaded in justification of conduct otherwise criminal or reprehensible, nor relied upon, as a complete defense, in a trial by court-martial. They may, however, with the permission of the court, be established in evidence, with a view to constitute a partial defense, to mitigate the severity of the punishment, or to diminish, somewhat, the degree of criminality of the offense set forth in the charges and specifications.[3]

TABULAR STATEMENT OF MILITARY LAW.[4]

Law applicable to military persons.	Military Law applicable at all times.	Written...	1. Statutes: Articles of war and enactments of similar character. 2. Decisions of courts. Opinions of Attorneys-General, etc. 3. Army regulations. 4. Military orders.	Administered by courts-martial.
		Unwritten.	1. Customs of service = the custom of war in like cases. (84 A. W.)	
	Martial Law. Military rule, or the law of hostile occupation.	In general unwritten. A part of International Law, supplemented by the orders and instructions of belligerent government to its military commanders in the field; together with a few statutory provisions applicable to a state of war.		Administered by military commissions.

[1] Act of September 29, 1789 (1 Stat. at Large, 95).

[2] The definition of the term "desertion" as used in the 47th Article and of the term "mutiny" as used in the 22d Article is based upon customs of service.

[3] 1 Winthrop, 45; Ives, 21; U. S. *vs.* McDaniell, 7 Pet., 2, 15.

[4] Prepared by Captain Geo. H. Boughton, 3d Cavalry, Assistant Professor of Law, U. S. Military Academy.

CHAPTER II.

MILITARY TRIBUNALS.

COURTS-MARTIAL: THEIR ORIGIN AND FUNCTION.

Origin and History.—The Court-martial, as a military tribunal, antedates the standing army in English history. As an agency for the maintenance of discipline in armies, its history can be traced back to a period considerably earlier than the Christian era; especially among the Romans, the most important and powerful of the military nations of antiquity,[1] from whose system of jurisprudence it was borrowed by the Teutonic leaders during the Middle Ages, and adapted to the peculiar conditions of the feudal system. It had become fully established on the continent of Europe at the time of the Norman Conquest, and was introduced into England, as an incident of that system, by William the Conqueror and his immediate successors, in the latter part of the eleventh century.

The Constable and Marshal; the Constable's or Marshal's Court; the Court of Chivalry.—Of the high officers of William's court, there were two, the Constable and Marshal, whose duties and functions were peculiarly military. The constable, under the direction of the king, was the commander of the royal armies.[2] When an occasion arose for the employment of the military forces, this officer, in addition to his duties as commander-in-chief, sat as a superior judge for the trial of all matters in litigation between soldiers and followers of the army. In addition to this duty, the Constable's Court had power to try and punish certain criminal acts, subversive of discipline, which would now be termed military offenses, and over which the common-law courts, as such, were at first without jurisdiction. This court was composed of the constable, assisted by the marshal, by three doctors of the civil law (indicating its Roman origin), and by a clerk,

[1] See Bruce, Institutions of Military Law (1717).

[2] The office of constable is said to have been conferred upon the Bohuns, Earls of Hereford and Essex. From this family it passed to the Dukes of Buckingham, as heirs general, and on the attainder of Edward, Duke of Buckingham, for high treason,* the office reverted to the crown and, save upon ceremonial occasions, has not since been conferred upon a subject. Grose, Mil. Antiq., 216. For an account of the rights and privileges claimed by the Constable of Bourbon, see Grose, Mil. Ant., vol. ii. p. 218. The office of constable in France was suppressed by Louis XIII. in 1627. *Ibid.*, ii. p. 224.

* 13 Henry VIII.

whose duties resembled those of the present judge-advocate, in that he was required to prosecute all delinquents brought before the Constable's Court for trial.[1]

The Earl Marshal.—The Earl Marshal was the officer next in rank to the constable.[2] As the duties of the constable related to the command of the Army, those of the marshal, as the name implies, resembled those now performed by the adjutant-general. When the office of constable ceased to exist his duties descended to and were performed by the earl marshal, and the court of the constable came to be known as the Marshal's Court or, in its modern form, as the Court-martial. Aside from its strictly criminal jurisdiction, it had much to do with the decision of questions relating to fiefs and military tenures, and to the performance of military duties under them; and this jurisdiction continued to exist, and to be exercised, after the common-law courts had begun to exercise jurisdiction over questions relating to the holding of land in feudal tenures. Matters respecting *estates* in land, regarded merely as a question of property, going to the common-law courts for decision, but controversies respecting rights, dignities, and successions, in which no question of property was involved, being decided by the Marshal's Court.[3]

[1] Grose, Mil. Ant., vol. ii. p. 216. For other accounts of the origin and jurisdiction of this court see Tytler, 22; Adye, 7; Manual Mil. Law, 7–12; Winthrop, 46. See, also, a paper on the Articles of War, by Judge-Advocate General G. Norman Lieber, U. S. A., in the first volume of the Journal of the U. S. Mil. Service Institution.

[2] The office of earl marshal was conferred by William the Conqueror upon Roger de Montgomery and William Fitzosborne. It was held, later, for several generations, by the family of de Clare, Earls of Pembroke, after which, upon a reversion to the crown, it was conferred upon the family of Thomas Howard, Duke of Norfolk, where it has since remained. (Grose, Mil. Antiq., ii. 224.) The earl marshal is now head of the Heralds' College, and exercises a small part of his original jurisdiction in respect to crests and armorial bearings.

[3] The jurisdiction of this court, according to Sir Matthew Hale, was declared and limited by common law as follows: "First, negatively; its officers were not to meddle with anything determinable by the common law, and therefore, insomuch as matter of damages, and the quantity and determination thereof, is of that cognizance, the court of the constable and earl marshal could not, even in such suits as were proper for their authority, give damages against the party convicted before them, and, at most, could only order reparation in point of honor. Neither could they, as to the point of reparation in honor, hold plea of any such words or things wherein the party was relievable by the courts of common law. Second, affirmatively; their jurisdiction extended to matters of arms and matters of war, viz., as to matters of arms (or heraldry) the constable and marshal had cognizance, viz., touching the right of coats of armour, bearings, crests, supporters, pennants, etc., and also touching the right of place and precedence, in cases where either Acts of Parliament or the king's patent (he being the fountain of honor) had not already determined it; for, in such cases, they had no power to alter it. These things were anciently allowed to the jurisdiction of the constable and marshal, as having some relation to military affairs; but so restrained that they were only to determine the right, and give reparation to the party injured, in point of honor, but not to repair him in damages." (Hale, History of the Common Law, pp. 36–38.)

"As to matters of arms, however, the constable and marshal had a double power: (1) a ministerial power, as they were anciently two great ordinary officers in the king's army; the constable being, in effect, the king's general, and the marshal being employed in marshaling the king's army, and keeping the list of the officers and soldiers therein; and his certificate being the trial of those whose attendance was requisite;* (2) a

* Littleton, § 102.

Before the office of marshal began to decline in importance, the institution of the Court-martial, as a tribunal for the trial and punishment of military offenses, had become firmly established. The place of the marshal and his assistants had been taken by military officers detailed for the purpose, or performing the duty by title of office, and the court had come to be convened, or appointed, by the crown, either directly by the sovereign in person, or in pursuance of a commission, issued by him for that purpose, to a proper military commander.[1]

Courts-martial: their Authority and Function.—Military Law is enforced by means of certain tribunals, created for the purpose, called Courts-martial, the origin and history of which have already been described. These tribunals are created by the order of a proper convening authority, and are empowered, by statute, to determine challenges, to try accusations against military persons, to reach findings of guilt or innocence respecting the same, and to impose appropriate sentences. Their sentences, however, have in themselves no legal validity, being in the nature of recommendations merely, until they have received the approval of a military commander, designated by law for this purpose, called the *reviewing authority*. With such approval or confirmation, however, their sentences become operative and acquire the same sanction as the sentences of civil courts having criminal jurisdiction, and are entitled to the same legal consideration.

Courts-martial Executive Agencies.—Courts-martial are no part of the judiciary of the United States, but simply instrumentalities of the executive power. They are creatures of *orders;* the power to convene them, as well as the power to act upon their proceedings, being an attribute of *command*. But, though transient and summary, their judgments, when rendered upon subjects within their limited jurisdiction, are as legal and valid as those of any other tribunals, nor are the same subject to be appealed from, set aside, or reviewed by the courts of the United States or of any State.[2]

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judicial power, as, first, appeals of death or murder committed beyond the sea, according to the course of the civil law; second, the rights of prisoners taken in war; third, the offenses and miscarriages of soldiers, contrary to the laws and rules of the army." (Adye, Treatise on Courts-martial, 2–6.)

[1] Littleton, § 102.

[2] Dig. J. A. Gen., 313, par. 1; Swaim *vs.* U. S., 165 U. S., 553. See Dynes *vs.* Hoover, 20 Howard, 79; *Ex parte* Vallandigham, 1 Wallace, 243; Wales *vs.* Whitney, 114 U. S., 564; Fugitive Slave Law Cases, 1 Blatch., 635; *In re* Bogart, 2 Sawyer, 402, 409; Moore *vs.* Houston, 3 S. & R., 197; *Ex parte* Dunbar, 14 Mass., 392; Brown *vs.* Wadsworth, 15 Verm., 170; People *vs.* Van Allen, 55 N. Y., 31; Perault *vs.* Rand, 10 Hun, 222; *Ex parte* Bright, 1 Utah, 148, 154; Moore *vs.* Bastard, 4 Taunt., 67; 6 Opins. Att.-Gen., 415, 425. "No acts of military officers or tribunals, within the scope of their jurisdiction, can be revised, set aside, or punished, civilly or criminally, by a court of common law." Tyler *vs.* Pomeroy, 8 Allen, 484. Where a court-martial has jurisdiction, "its proceedings cannot be collaterally impeached for any mere error or irregularity committed within the sphere of its authority. Its judgments, when approved as required, rest on the same basis and are surrounded by the same considerations which give conclusiveness to the judgments of other legal tribunals, including as well the lowest as the highest, under like circumstances." *Ex parte* Reed, 10 Otto, 13.

Military Tribunals Courts of Honor.—Although, as will presently be seen, the jurisdiction conferred upon courts-martial by the Articles of War is criminal in character, it should also be borne in mind that they are in a special sense courts of honor, whose object is the maintenance of a high standard of discipline and honor in the Army, and which, in the exercise of this jurisdiction, try many accusations based upon acts entirely unknown to the civil courts as criminal offenses. Only courts composed of military officers can have that knowledge of the standard of discipline and honor in the Army which would enable them to weigh correctly acts impairing it, and courts-martial, in maintaining this standard, may properly be said to be courts of honor.[1]

Classification.—Courts-martial are classified, in accordance with their jurisdiction, into *General* and *Inferior Courts-martial;* the latter term including the Regimental Court, the Garrison Court-martial, and the Summary Court. The General Court-martial is the highest tribunal known to military law, and has the most comprehensive jurisdiction in respect to both persons and cases. It may try any person subject to military law for any offense over which such tribunals are given statutory jurisdiction. The jurisdiction of the minor courts is restricted as to the persons and cases triable by them, and as to the punishments which they may impose upon conviction.

How Created and Terminated.—Courts-martial differ from civil tribunals having criminal jurisdiction, not only in the nature and extent of their jurisdiction, as will presently be seen, but in the manner of their creation. Civil courts, whether of general or special jurisdiction, are created by statutes, which define their composition, endow them with appropriate jurisdiction, and determine the times when, and the place or places where their sessions shall be held. Courts-martial, on the other hand, though authorized by statute, are created, in every case, by proper military orders, issued by commanding officers having authority, under the Articles of War, to call them into being. When the cases referred to them for trial have been completed, or, in certain contingencies, at the discretion of the appointing power, they are dissolved by the authority that created them and simply cease to exist as military tribunals.[2]

MILITARY TRIBUNALS: TABULAR STATEMENT.

Courts-martial. Power to try and sentence.	1. General courts-martial; complete jurisdiction (72, 73, 74 A. W. Sec. 1326, R. S.) 2. The Summary Court. (81 A. W.) 3. The Regimental Court. (81 A. W.) 4. The Garrison Court. (82 A. W.)
Courts of Inquiry. Power to investigate merely.	1. Courts of Inquiry. (115 A. W.) 2. The Regimental Court for doing justice. (30 A. W.)

[1] Judge-Advocate General.
[2] Dig. J. A. Gen., 317, par. 13, 14; 320, par. 30; 88, par. 5.

CHAPTER III.

THE CONSTITUTION OF COURTS-MARTIAL.

THE GENERAL COURT-MARTIAL.

Power to Convene.—Authority to convene general courts-martial is conferred by the 72d Article of War upon "any general officer commanding an army, a territorial division or department, or colonel commanding a separate department." Under the authority thus conferred general courts-martial may be convened "whenever necessary" by the following persons:

1. *By the President of the United States, as the constitutional commander-in-chief.* This he may do not only in the case expressly stated in the Article "when any such commander is the accuser or prosecutor of any officer under his command," but at his discretion and as an incident of his authority as commander-in-chief.[1]

2. *Where the convening officer is accuser or prosecutor.* The President, in addition to the power above described, is expressly authorized by this Article to convene general courts-martial when the usual and proper convening authority "is the accuser or prosecutor of any officer under his command." The reason for this exception is obvious. An officer standing

[1] "A military officer cannot be invested with greater authority by Congress than the commander-in-chief, and a power of command devolved, by statute, on an officer of the Army or Navy is necessarily shared by the President. The power to command depends upon discipline, and discipline depends upon the power to punish; and the power to punish can only be exercised, in time of peace, through the medium of a military tribunal. Since the earliest legislation of our Government it has undoubtedly been understood and intended that whatever powers were granted to general officers were, at the same time, granted and intended to be shared by the President," "whose name is understood as written in every statute which confers upon a military officer military authority." Swaim *vs.* U. S., 165 U. S., 553; *ibid.*, 28 Ct. of Cls., 173, 221, 224; Runkle *vs.* U. S., 19 *ibid.*, 396; Dig. J. A. Gen., 81, par. 1. A convening of a general court-martial nominally by the Secretary of War is in law a convening by the President, and therefore as legal as if the President himself had signed the order. (*Ibid.*, 606, par. 2.)

The authority of the President as commander-in-chief to institute general courts-martial has been in fact exercised from time to time, from an early period, in a series of cases commencing with those of Brigadier-General Hull, Major-General Wilkinson, and Major-General Gaines, tried in 1813–1816, and including that of Brevet Major-General Twiggs, tried in 1858. His authority in this particular has been in substance affirmed by the Judiciary Committee of the Senate, in Report No. 868, dated March 3, 1879, Forty-fifth Congress, third session. (A single member of the committee apparently dissented, in a subsequent report of April 7, 1879, Mis. Doc. No. 21, Forty-sixth Congress, first session.) *Ibid.*, 606, par. 1, note 1.

toward the accused in the relation of an accuser or prosecutor is thereby disabled from acting with the impartiality which it is the purpose of the law to secure in all matters respecting the procedure of courts-martial.

The question whether a particular convening officer is to be regarded as having been the "accuser or prosecutor" of the accused in the sense of this Article is mainly to be determined by his *animus* in the matter. If, when the facts of the alleged offense are communicated to him, he determines that the same constitute a sufficient and proper ground for a trial, and thereupon directs a suitable officer, as an officer of his staff, or the commanding officer of the regiment or company of the accused, to prepare or prefer the charges, he acts simply in the due performance of an *official* duty and not as "accuser or prosecutor."[1] Nor is his action any the less official if, in the desire to have the proceedings regular and effectual, he himself directs as to the form of the charges, or, after the same are prepared, revises them so that they shall sufficiently set forth the alleged offenses. Much less is he to be deemed an "accuser or prosecutor" where he causes the charges to be preferred, and proceeds to convene the court, by the direction of the Secretary of War or a competent military superior.

On the other hand, where he himself *initiates* the charge out of a hostile *animus* toward the accused or a personal interest adverse to him, or from a similar motive adopts and makes his own a charge initiated by another, he is to be deemed an "accuser or prosecutor" within the Article. Nor is he the less so where, though he has no personal feeling or interest in the case, he has become possessed with the conviction that the accused is guilty and deserves punishment and, in this conviction, initiates, or assumes as his own, the charge or the prosecution. For in this case, equally as in the former, he is unfit to be a *judge* upon the merits of the case: in the one instance he is too much prejudiced to be qualified to do justice; in the other he has condemned the accused beforehand.[2]

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[1] Compare late opinion, to a somewhat similar effect, of the Attorney-General of August 1, 1878 (16 Opins., 106), in which it is also held that where the record of the trial fails to indicate that the convening officer was the "accuser or prosecutor" of the accused, the latter, in applying to the Secretary of War to have the proceedings pronounced invalid on this ground, may establish the fact by the production of *affidavits* setting forth the circumstances of the case and the action of the commander. Dig. J. A. Gen., 83, par. 7, note 1.

[2] Dig. J. A. Gen., 82, par. 7. The objection that the convening commander was the "accuser" or "prosecutor" of the accused, being one going to the legal constitution of the court, may be raised before the court at any stage of its proceedings. Or it may be taken to the reviewing officer with a view to his disapproving the proceedings, or may be made to the President, after the approval and execution of the sentence, with a view to having the same declared invalid or to the obtaining of other appropriate relief. Regularly, however, the objection, if known or believed to exist, should be taken at or before the arraignment. If the objection is not admitted by the prosecution to exist, the accused is entitled to prove it like any other issue. Dig. J. A. Gen., 84, par. 8.

The provision of this Article (and of Art. 73), that, when the convening commander is "accuser or prosecutor," the court shall be convened by the President or "next higher commander," being expressly restricted to *general* courts, has of course no application to regimental or garrison courts. The same *principle*, however, will properly be applied to

The 72d Article, in empowering the commanders above named to constitute the superior courts-martial, makes them the judges, in general, of the expediency of ordering such courts in particular instances. Except where specially authorized to do so by law or regulation, an officer or soldier cannot demand a court-martial in his own case.[1] Where a commander, empowered by this Article to convene a general court-martial, declines, in the exercise of his discretion, to approve charges submitted to him by an inferior and to order a court thereon, his decision should, in general, be regarded as final.[2]

Nature of the Authority.—The authority to order a court under this Article is an attribute of *command.* Thus a department commander detached and absent from his command for any considerable period, by reason of having received a leave of absence (whether of a formal or an informal character) or having been placed upon a distinct and separate duty (as that of a member of a court or board convened outside his department, for example), is held to be incompetent, during such absence, to order a general court-martial, as department commander, even though no other officer has been assigned or has succeeded to the command of the department.[3]

Nor can a department commander thus absent exercise such authority *through* a staff officer or other subordinate, or *delegate* the same *to* a subordinate to be exercised by him: the authority must be exercised in person, by the proper commander, and is not, nor can it properly be made, the subject of delegation.[4]

3. *By certain military commanders.* The 72d Article of War also confers the power to convene general courts-martial upon "any general officer commanding an army, a territorial division or a department, or colonel commanding a separate department." The term "general commanding an army" relates not only to the commander of an army, properly so called,—that is, of the field organization composed of troops of all arms of the service, arranged in divisions and brigades,—but includes as well the major-general, or other officer, assigned by the President to command of the Army of the United States.[5] The other officers named in the Article are those entrusted

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proceedings before these courts, if it can be done without serious embarrassment to the service. *Ibid.*, par. 9.

[1] Dig. J. A. Gen., 81, par. 2.

[2] *Ibid.*, par. 3.

[3] *Ibid.*, 82, par. 5.

[4] *Ibid.* Nor, where a general court-martial duly convened by a department commander has, at a time when the commander is thus absent from his command, been reduced, by an incident of the service, below five members, can another member legally be detailed upon the court by the assistant adjutant-general, or other subordinate officer remaining in charge of the headquarters; since such a detail would be an exercise of a portion of the authority vested, by the Article, in the commander, and which can in no part be delegated. *Ibid.*, 82, par 5.

[5] The command exercised by the commanding general of the Army, not having been made the subject of statutory regulation, is determined by the order of assignment. It has been habitually composed of the aggregate of the several territorial commands that have been or may be created by the President.

The Act of August 5, 1882, (22 Stat. at Large, 238,) also authorizes the President to

with the command of the departmental organizations into which the territory of the United States is habitually divided in time of peace,[1] though their power to convene general courts-martial is not restricted by that fact, but may be exercised "whenever necessary," in time of peace as well as in time of war.

Power to Convene Courts-martial in Time of War.—It will be observed that the 72d Article of War is not restricted in its operation to a time of peace, but is equally applicable to a state of peace or war. Nor is it restricted to the territory of the United States, but may have extra-territorial operation, and confers power upon the officers named to convene courts-martial wherever the forces of the United States may lawfully happen to be; and courts so convened are legal tribunals even if convened in the enemy's country and beyond the territorial jurisdiction of the United States.[2]

In time of war, however, two classes of persons are given authority by the 73d Article of War to convene general courts-martial—commanders of

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direct the commanding general of the Army, or the chief of any military bureau of the War Department, to perform the duties of Secretary of War in the case contemplated by Section 179 of the Revised Statutes.

The general commanding the Army, in the exercise of his command, which is created by executive order and is composed of the aggregate of the geographical or territorial commands into which the territory of the United States is divided, has power under the 72d Article to convene general courts-martial and, by his approval or confirmation, to make their sentences effective. In practice courts-martial for the trial of military persons who do not form part of the departmental commands above described are convened and their sentences are carried into effect by this officer.

The Army Regulations of 1895 contain the following provisions respecting the duties of this officer:

The military establishment is under the orders of the commanding general of the Army in that which pertains to its discipline and military control. The fiscal affairs of the Army are conducted by the Secretary of War, through the several staff departments. (Par. 187, A. R., 1895.)

All orders and instructions from the President or Secretary of War relating to military operations or affecting the military control and discipline of the Army will be promulgated through the commanding general. (Par. 188, A R., 1895.)

Paragraph 189 of the Army Regulations of 1895 contains the provision that in time of peace army corps, divisions, and brigades will not be formed except for purposes of instruction. Section 9 of the Act of July 17, 1862, (12 Stat. L., 594,) authorized the President to establish and organize army corps according to his discretion. Section 10 of the same Act provided for the staff of an army corps. Such legislation was not necessary, however, the organization of separate armies, army corps, grand divisions, wings, reserves, and the like, in time of war being a matter within the discretion of the President as the commander-in-chief. For regulations respecting the organization of armies in the field in time of war, see the volume entitled "Troops in Campaign."

[1] In time of peace our Army has been habitually distributed into geographical commands, styled, respectively, military divisions, departments, and districts - the districts, as organized prior to 1815, corresponding to the commands now designated as departments. These divisions and departments can be established only by the President; but, within their respective departments, commanding generals have from time to time grouped adjacent posts into temporary commands, which are now known as districts.

Military divisions, each embracing two or more departments, have obtained from May 17, 1815, to June 1, 1821; from May 19, 1837, to July 12, 1842; from April 20 1844, to October 31, 1853; from July 25 to August 17, 1861; and from October 13, 1863, to July 2, 1891. Department organizations have been continuous since 1815. (Scott Dig., p. 244.)

[2] U. S. *vs.* Anderson, 9 Wall., 56; The Protector, 12 Wall., 700; Georgia *vs.* Stanton, 6 Wall., 50; Luther *vs.* Borden, 7 How., 1; Kennett *vs.* Chambers, 14 How., 38.

divisions and commanders of separate brigades. This provision applies to the tactical organization of armies in the field,[1] as distinguished from the geographical organization of military divisions and departments into which the territory of the United States is habitually divided in time of peace. The commander of an army in the field in time of war derives his authority to convene courts-martial from the 72d Article; the commander of the principal unit of command in an army in the field—the division—and the commander of the exceptional field organization—the separate brigade—derive their power to constitute general courts-martial from the 73d Article, which is restricted in its operation to a state of war. This Article makes provision for the contingency of the convening officer being the accuser or prosecutor by the requirement that, in such case, "the court shall be appointed by the next higher commander."

Separate Brigades.—To constitute a particular command a *separate brigade* within the meaning of this Article, the organization must not exist as a component part of a division; to authorize its commander to convene a general court-martial it must be detached from, or not connected with, any division, but must be operating as a distinct command.[2]

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[1] Section 1114 of the Revised Statutes contains the requirement that "in the ordinary arrangement of the Army two regiments of infantry or of cavalry shall constitute a brigade and shall be the command of a brigadier-general and two brigades shall constitute a division and shall be the command of a major-general; but it shall be in the discretion of the commanding general to vary this disposition whenever he may deem it proper to do so." Paragraph 189 of the Army Regulations of 1895 provides that "in time of peace army corps, divisions, or brigades will not be formed except for purposes of instruction."

[2] Dig. J. A. Gen., 85, par. 1. In accordance with the terms of Section 1114 of the Revised Statutes a division is an organized command consisting of at least two brigades, and a brigade is a similarly organized command consisting of at least two regiments of infantry or cavalry. (*Ibid.*) General Orders 251 A. G. O. of 1864 contained the requirement that "where a post or district command is composed of mixed troops, equivalent to a brigade, the commanding officer of the department or Army will designate it in orders as a separate brigade, and a copy of such order will accompany the proceedings of any general court-martial convened by such brigade commander. Without such authority, commanders of posts and districts having no brigade organization will not convene general courts-martial." Under this order, which was applied mainly to the commands designated in the late war as "districts," it was held by the Judge-Advocate General as follows: That the fact that a district command was composed not of regiments but of detachments merely (which, however, in the number of the troops, were equal to or exceeded two regiments) did not preclude its being designated as a "separate brigade" and that when so designated its commander had the same authority to convene general courts-martial as he would have if the command had the regular statutory brigade organization; that though a district command embraced a force considerably greater than that of a brigade as commonly constituted, yet if not designated by the proper authority as a "separate brigade" its commander would be without authority to convene general courts-martial, unless indeed his command constituted a separate "army" in the sense of the 72d Article; that it was not absolutely necessary, to give validity to the proceedings or sentence of a general court-martial convened by the commander of a separate brigade, that the command should be described as a separate brigade in the caption or superscription of the order convening the court and prefixed to the record, or even that a copy of the order designating the command as a separate brigade should accompany the proceedings. As to the latter feature, General Orders No. 251 of 1864 is viewed as directory merely. And though not to accompany the record with a copy of the order thus constituting the command would be a serious irregularity, as would be also—though

"Time of War," How Determined.—The dates when a state of war begins and terminates are questions of fact, to be determined by Congress and the Executive, the political departments of the Government charged, in the Constitution, with the power to declare war and to conduct military operations. The dates so determined are binding upon the judiciary, and serve to fix the period within which, under the 73d Article of War, the commanders of divisions and separate brigades may constitute general courts-martial.[1]

The Superintendent of the Military Academy.—Section 1326 of the Revised Statutes confers power upon the Superintendent of the Military Academy to convene general courts-martial for the trial of cadets. This officer is also empowered to execute the sentences of such courts, except the sentences of suspension and dismission, subject to the same limitations and conditions now existing as to other general courts-martial.[2]

THE INFERIOR COURTS-MARTIAL.

The Regimental Court-martial.—The 81st Article of War provides that "every officer commanding a regiment or corps shall, subject to the provisions of Article 80, be competent to appoint, for his own regiment or corps, courts martial, consisting of three officers, to try offenses not capital." In

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a less serious one—the omission of the proper formal description of the command from the convening order, yet if the command had actually been duly designated, and *in fact* was, a separate brigade, and this fact existed of record and could be verified from the official records of the department or Army, the omission of either of these particulars, though a culpable and embarrassing neglect on the part of the court or judge advocate, would not, *per se*, invalidate the proceedings or sentence. *Ibid.*, par. 3.

[1] Dig. J. A. Gen., par. 4; *ibid.*, 748.

[2] As the cadets at the Military Academy are not commissioned officers, they are, under the 82d Article, subject to trial by garrison courts-martial. (7 Opin. Att.-Gen., 328.) The Academic Regulations also confer upon the Superintendent a limited power to punish, summarily, certain offenses committed by cadets in violation thereof The offenses so made punishable are defined in the regulations and orders of the Academy, and the punishments which may be imposed are there specified. The undergraduate cadets are not commissioned officers, and are, therefore, not competent to sit on a court-martial, and are triable by a regimental or garrison court-martial. (7 Opin. Att.-Gen.. 328.) In their internal academic organization as officers, non-commissioned officers, and privates, they are not subject to the Articles of War as respects their relation to one another, but only as respects their relation to commissioned officers of the Army, on duty as such at the Academy. (*Ibid.*)

Cadets are amenable to trial by court-martial for violations of the regulations of the Academy, as "conduct to the prejudice of good order and military discipline." * (Dig. J. A. Gen., 210, par. 8)

The Superintendent of the M litary Academy can have no power, by virtue of a regulation of the Academy, to try and punish a cadet for a military offense for which, under the Articles of War, he is amenable to trial by court-martial. A regulation assuming to confer upon him such power would be in contravention of law and inoperative. Otherwise of a regulation which merely authorized a measure of discipline. So where a cadet, on arraignment for a military offense, pleaded in bar that he had already, for the same offense, been punished by reduction from cadet officer to cadet private, under par. 107, Academy Regulations, *held* that, regarding such reduction as a form of school discipline only, the plea was properly overruled by the court. *Ibid.*, par. 11.

* In this connection may be noted the opinion of the Solicitor-General (15 Opins., 634) that except for the offense of hazing, specially made punishable by the Act of June 23, 1874, cadets of the *Naval* Academy are *not subject to trial by court-martial.*

addition to the commanders of regiments, properly so called, the chiefs of such of the Staff Corps as include enlisted men in their personnel may convene these courts at posts or places occupied by troops under their direct military control and command.[1]

The strictly criminal jurisdiction of this tribunal having been transferred to the Summary Court by a recent enactment of Congress, its functions are now largely restricted to cases, arising under the 30th Article of War, which involve the redress of grievances alleged by enlisted men to have arisen in the administration of the commands to which they belong. It can now be lawfully convened for the trial of a soldier only in a case, properly referable to a Summary Court, in which the party defendant, being a non-commissioned officer, formally requests that the charges against him be passed upon by a regimental court-martial, or when such trial has been authorized by the officer competent to the trial of the accused by a general court-martial.[2]

The Garrison Court-martial.—While the Garrison Court-martial has the same jurisdiction in respect to offenses as the other inferior courts recognized by the Articles of War, its jurisdiction as to persons is considerably more extensive, and it may try enlisted men of any corps or arm of the service who are attached to, or form a part of, the command of the officer who has power to convene it. The Regimental Court already described relates strictly to organizations. It is thus seen to be independent of place or locality, and may be convened at a military post or in the field, on the march, or in bivouac—wherever, indeed, the organization to which it pertains may happen to be. The Garrison Court, on the other hand, is fixed

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[1] *Held* that the Chief of Engineers was authorized to order a court under this Article for the trial of soldiers of the engineer battalion; the same, in connection with the engineer officers of the Army, being deemed, in view of Secs. 1094, 1151, 1154, etc., of the Revised Statutes, to constitute a "corps" in the sense of the Article. So *held* that the Chief of Ordnance was authorized to convene such a court for the trial of the enlisted men authorized by Sec. 1162, Rev. Sts., to be enlisted by him; the same being deemed to constitute with the ordnance officers such a separate and distinct branch of the military establishment as to come within the general designation of "corps" employed in the Article. So *held* that the Chief Signal Officer, under the provisions of the Acts of July 24, 1876, June 20, 1878, etc., relating to his branch of the service, was authorized to order courts-martial, as commanding a "corps" in the sense of this Article. Dig. J. A. Gen., 92, par. 1.

[2] The Regimental Court is the oldest, in respect to its creation, of the several inferior courts known to our military practice. It originally consisted of all the commissioned officers of the regiment, and had in early times a more comprehensive jurisdiction than is now assigned to it by law. In the British service its membership was reduced to five about the middle of the last century, and in our own service was fixed at three by the resolution of Congress of May 31, 1786. The Regimental Court was replaced in 1862 by the Field-officer's Court, a tribunal composed, as its name implies, of a single officer, and clothed with summary jurisdiction for the trial of enlisted men of the regiment to which it pertained. The Field-officer's Court, which was thus given exclusive jurisdiction for the trial of all cases properly justiciable by inferior courts in time of war, was itself replaced by the Summary Court created by the Act of June 18, 1898.* See, also, the 82d Article in the chapter entitled THE ARTICLES OF WAR.

* 30 Stat. at Large, 483.

in respect to place, and may be convened by "the officer commanding[1] a garrison, fort, or other place,[2] subject to the qualification, however, that the troops constituting the garrison shall consist of different corps." Like the Regimental Court, it is superseded by the Summary Court in all cases in which that tribunal may properly be convened for the trial of enlisted men.

Constitution and Composition.—The rank of the convening officer is immaterial so long as he is the lawful commanding officer of the post or garrison at which the court-martial is convened. The presence of a single representative, commissioned or enlisted, of a corps, arm, or branch of the service other than that of which the bulk of the command is composed will be deemed sufficient to fix upon the command the character of one in which "the troops consist of different corps" within the meaning of the Article, and will empower the commanding officer thereof to order a court-martial under the same.[3]

THE SUMMARY COURT.

History of the Tribunal.—As the cases referable to the inferior courts are, as a rule, very much less serious in importance than those which are referred to general courts-martial for trial, and as a prompt disposition of such cases is, in general, more beneficial to discipline than a protracted investigation into their merits, the tendency in our service has been to replace the older inferior courts by tribunals having a more summary juris-

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[1] It is not essential that the "officer commanding" should be of the rank of field-officer. A commanding officer, though a captain or lieutenant, may convene a court-martial under this Article, provided he has the required command. Dig. J. A. Gen., 93, par. 1.

A commanding officer is not authorized to detail *himself* with two other officers as a court under this (or the preceding) Article. An "acting assistant surgeon," not being an officer of the Army, cannot be detailed on such court. *Ibid.*, par. 2.

[2] The general term "other place" is deemed to be intended to cover and include any situation or locality whatever—post, station, camp, halting-place, etc.—at which there may remain or be, however temporarily, a separate command or detachment in which different corps of the Army are represented, as indicated above. If such command, so situated, contains three officers other than the commander available for service on court-martial, the commander will be competent to exercise the authority conferred by this Article. *Ibid.*, par. 3.

[3] *Held*, in view of the early orders relating to the subject and of the practice thereunder, that the presence on duty with a garrison, detachment, or other separate command, at a fort, arsenal, or other post or place, and as a part of such command, of a single representative, officer or soldier, of a corps, arm, or branch of the service other than that of which the bulk of the command is composed—as an officer of the quartermaster, subsistence, or medical department, a chaplain, an ordnance sergeant or hospital steward, an officer or soldier of artillery where the command consists of infantry or cavalry, or *vice versa*, etc.—might be deemed sufficient to fix upon the command the character of one "where the troops consist of different corps," in the sense of this Article, and to empower the commanding officer to order a court-martial under the same. The presence, however, with the command, of a civil employé of the Army (as an "acting assistant surgeon") could have no such effect. Dig. J. A. Gen., 94, par. 4.

diction and a somewhat less elaborate procedure; thus enabling the minor infractions of discipline, in camp or garrison, to be more expeditiously disposed of.

The Field-officer's Court.—The first tribunal thus created was the Field-officer's Court, which was established by Act of Congress in 1862.[1] This court, as its name implies, was composed of a single officer and was given exclusive jurisdiction over the cases formerly tried by the regimental and garrison courts; its proceedings were reviewed and carried into effect by the "brigade commander, or by the commander of the post or camp" to which the regiment was for the time attached. Although the jurisdiction of the Field-officer's Court was not expressly restricted to a time of war in the enactment creating it, such a limitation was, in fact, imposed in the revision of the Articles of War in 1874,[2] by the insertion of a clause in the 80th Article restricting its operation to "time of war." The result of this enactment was to restore to the Regimental and Garrison Courts the authority to try enlisted men for minor offenses committed by them in time of peace. The Field-officer's Court ceased to exist on August 17, 1898, in conformity to the repeal provisions of the Act of June 18, 1898.[3]

The Summary Court of 1890.—With a view to secure greater expedition in the disposal of cases in which enlisted men were charged with the commission of minor military offenses, a Summary Court was established by Act of Congress in 1890,[4] and clothed with jurisdiction over offenses properly triable by inferior courts, to the exclusion of the garrison and regimental courts. The enactment creating the court contained the requirement, however, that if the accused "objected to a hearing and determination of his case by such court," his request for a trial before a garrison or regimental court "should be granted as a matter of right." As the jurisdiction of this tribunal was expressly restricted to time of peace, the Field-officer's Court was called into being on April 22, 1898, at the outbreak of the war with Spain. On June 18, 1898,[5] Congress, by an appropriate enactment, replaced this tribunal by the present Summary Court, the constitution and composition of which will now be explained.

The Summary Court.—*Constitution and Composition.*—The law creating the Summary Court provides that "the commanding officer of each garrison, fort, or other place, regiment or corps, detached battalion, or company,

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[1] Section 7, Act of July 17, 1862. (12 Stat. at Large, 598.)
[2] Act of June 22, 1874. (18 Stat. at Large, 113.)
[3] Act of June 18, 1898. (30 *ibid.*, 483.)
[4] Act of October 1, 1890. (26 Stat. at Large, 648.) The Act establishing the Summary Court of 1890 constituted the second line officer in rank the court for the trial of cases properly cognizable by it; where only officers of the staff were on duty at a post, the second staff officer in rank was to constitute the court.
[5] Act of June 18, 1898. (30 Stat. at Large, 483.)

or other detachment in the Army, shall have power to appoint for such place or command, or in his discretion for each battalion thereof, a Summary Court to consist of one officer to be designated by him, before whom enlisted men who are to be tried for offenses" which, prior to the passage of the Act, were "cognizable by field-officers detailed to try offenders under the provisions of the 80th and 110th Articles of War shall be brought to trial within twenty-four hours of the time of the arrest, or as soon thereafter as practicable."[1] It is provided, however, in the statute establishing it that the Summary Court "may be appointed and the officer designated by superior authority when by him deemed desirable." The statute also contains the proviso that "when but one commissioned officer is present with a command, he shall hear and finally determine such cases."[2]

Exception.—The Act establishing the Summary Court excepts from its jurisdiction all enlisted men holding certificates of eligibility to promotion; it also provides that "non-commissioned officers shall not, if they object thereto, be brought to trial before summary courts without the authority of the officer competent to order their trial by general court-martial, but shall in such cases be brought to trial before garrison, regimental, or general courts-martial, as the case may be."[3]

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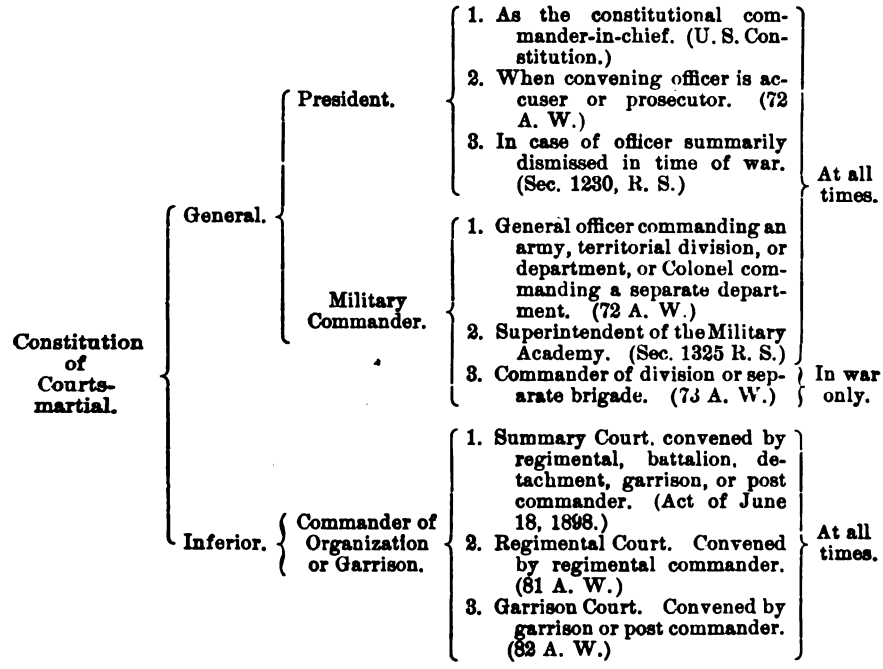
[1] Act of June 18, 1898. (30 Stat. at Large, 483.) [2] *Ibid.* [3] *Ibid.*

CONSTITUTION OF COURTS-MARTIAL: TABULAR STATEMENT.[1]



[1] Prepared by Captain Geo. H. Boughton, 3d Cavalry, Assistant Professor of Law, U. S. Military Academy.

CHAPTER IV.

THE COMPOSITION OF COURTS-MARTIAL.

Composition in General.—The statutes authorizing the several military tribunals known as courts-martial—contain the requirement that they shall be composed of *commissioned officers*—a term applied to persons in the military service, of and above the rank of additional second lieutenant, who have been appointed by the President, with the advice and consent of the Senate, and whose appointments are evidenced by commissions under seal, signed by the President and countersigned by the Secretary of War.[1] While none but commissioned officers may sit as members of courts-martial and courts of inquiry, certain persons holding commissions from the President, and, as such, entitled to the denomination of commissioned officers, are not subject to detail as members of courts-martial. To this class belong professors at the Military Academy, who are without military rank,[2] and officers of the retired list, who, in view of the provisions of Sections 1259 and 1260 of the Revised Statutes, cannot legally be assigned to court-martial duty.[3]

The Marine Corps.—The 77th Article of War provides that "officers of the regular army shall not be competent to sit on courts-martial to try the officers or soldiers of other forces except as provided in Article 78." The statute creating the Marine Corps, normally a part of the Navy, provides

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[1] Under this head fall, also, what are called "recess appointments" made by the President during an adjournment of the Senate, under the authority conferred by Article II, Section 2, of the Constitution.

[2] Sections 1333 and 1336, Revised Statutes; Dig. J. A. Gen., 615, par. 2.

[3] Dig. J. A. Gen., 87, par. 1. Until the officers of the several staff corps had military rank conferred upon them by Congress, it was not customary to place them on duty as members of courts-martial, although there are instances in which they were employed as judge-advocates; this for the reason that without either actual or relative rank it was impossible to assign them seats, or to determine the order of voting in accordance with the requirement in that regard which is contained in the 95th Article of War. So soon, however, as rank was conferred upon them by enactments of Congress, they became eligible for court-martial duty. For the reason above assigned the professors at the Military Academy, and the chaplain authorized at that institution by the Act of February 18, 1896, (29 Stat. at Large, 8,) are still ineligible for that duty. A medical officer of a post or station is legally eligible for service on courts-martial, either as a member or a judge-advocate, and in small commands surgeons and assistant surgeons are not unfrequently detailed upon such service. In view, however, of the fact that a medical officer of a post, with a hospital or sick men under his charge, is practically continuously "on duty," besides requiring a considerable time for study, it is deemed to be in general prejudicial to the interests of the service to detail such officers upon court-martials where it can well be avoided. Dig. J. A. Gen., 493, par. 2.

that the corps so established "shall be liable to do duty in the forts and garrisons of the United States, on the seacoast, or any other duty on shore, as the President, at his discretion, may direct."[1] When so detached by order of the President, the law provides that the Marine Corps "shall be subject to the rules and Articles of War prescribed for the government of the Army."[2] The 78th Article of War permits officers of that arm, when so detached for service with the Army, to "be associated with officers of the regular army on courts-martial for the trial of offenders belonging to the regular army or to forces of the Marine Corps so detached."[3]

Courts-martial for the Trial of the Militia.—Section 1658 of the Revised Statutes contains the requirement that "courts-martial for the trial of militia shall be composed of militia officers only"; the 77th Article of War contains the more comprehensive provision that "officers of the regular army shall not be competent to sit on courts for the trial of officers or soldiers of other forces except as provided in Article 78." The converse of this proposition, however, is not true, and officers of militia or other forces may sit on courts-martial for the trial of officers or enlisted men of the regular army.[3]

Volunteers.—Though assimilated to the militia in some respects, as, for example, in the mode of original appointment of regimental and company officers, the volunteer forces are as distinct *in law* from the militia as are the troops constituting the regular military establishment.[4] Under existing

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[1] Section 1619, Rev. Stat.

[2] Section 1621, *ibid.*

[3] In one class of cases—that in which a member of the militia neglects or refuses to serve when called into actual service in pursuance of a requisition or order of the President of the United States—it has been decided that courts-martial convened by the authority of the State and of the United States had concurrent jurisdiction. Military offenses not being cognizable by the civil courts of the United States, the militia laws have provided that offenses of disobedience to the President's order calling the militia into actual service shall be cognizable by courts-martial of the United States; a statute of Pennsylvania made such offenses triable by courts-martial convened by the authority of the State, and it was held by the Supreme Court, in the case of Houston *vs.* Moore (5 Wheaton, 1), that the statute of the State of Pennsylvania in such case was not in conflict with the similar enactment of Congress, and that a case of concurrent jurisdiction properly existed. In the case of Martin *vs.* Mott (12 Wheaton, 19) the judgment in the case of Houston *vs.* Moore was affirmed, and it was held that the decision of the President was conclusive as to the existence of the emergency justifying the calling forth of the militia. It was also held that courts for the trial of such delinquents must be composed of officers of the militia, but that such provisions of the Articles of War as regulated the procedure of courts-martial for the trial of persons belonging to the regular establishment and to the militia actually in service, did not apply to the trials of members of the militia who had refused or neglected to appear in response to a call issued in pursuance to the order or requisition of the President.

[4] Prior to the passage of the Act of April 22, 1898 (30 Stat. at Large, 483,) it was held that, although officers and soldiers of volunteers, not being militia, were as much a part of the Army of the United States as are regular officers, yet, in view of the terms of this Article, an officer of the regular army, so called, would not be eligible for detail as a member of a court-martial convened for the trial of volunteer officers or soldiers, nor, when duly detailed as a member of a court-martial, would he be competent to take part in the trial of a volunteer by such court. Dig. J. A. Gen., 89. As the Act "to provide for temporarily increasing the military establishment of the United States in

law officers and enlisted men of the volunteer forces, once mustered into the military service of the United States, occupy, so long as they continue in such service, precisely the same status in respect to the operation of military law as officers and enlisted men of the regular army.[1] Their term of service is indeed briefer, but this does not constitute a material distinction, since the term of regular officers has also, in some cases, been limited by statute to a definite period, as the duration of an existing war.[2]

Number of Members.—The 75th Article provides that "general courts-martial may consist of any number of officers, from five to thirteen inclusive; but they shall not consist of less than thirteen when that number can be convened without manifest injury to the service."[3] Such judicial powers, therefore, as are vested by statute in a general court-martial become operative and may be fully exercised by a properly constituted tribunal composed

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time of war," approved April 22, 1898, declares that the Army of the United States in time of war shall consist of both the regular army and the volunteer army, it was held that the volunteer army was not other "forces" within the meaning of the 77th Article of War. Circular 21, A. G. O., 1898. But this ruling has been reversed by the Supreme Court in the case of McClaughry *vs.* Deming, 186 U. S., 49.

[1] Act of June 18, 1898. (30 Stat. at Large, 483.) The term "volunteers" as applied to a part of the military forces of the United States, as distinguished from the militia, does not appear in the early legislation of Congress and seems to have come into use during the war of 1812* and to have had its origin in Article I, Section 8, of the Constitution, which restricts the use of the militia to the cases therein set forth—"to execute the laws of the Union, to repress insurrections and repel invasions." As it was contemplated to use the troops raised for that war for purposes of invasion, and as some of the requisitions for militia had not been honored by the governors of States, the attempt was made to raise troops by the direct authority of the United States, under the power "to raise and support armies" conferred upon Congress by the Constitution. These troops were called "volunteers" to distinguish them from those constituting the regular military establishment. The troops raised for the period of the Mexican War were also of this class. As illustrating the distinction made in Article I, Section 8, of the Constitution, between the Army and the militia, and indicating the status of the volunteers, during the late war, as a part of the former, see Kerr *vs.* Jones, 19 Ind., 351; Wantlan *vs.* White, *id.*, 471; In the Matter of Kimball, 9 Law Rep., 503; Burroughs *vs.* Peyton, 16 Grat., 483. 485.

The first Mutiny Act (1 Wm. & M., ch. 5, 1689) recognized thirteen as the normal number of officers necessary to compose a general court-martial in the clause respecting the death-sentence, which contained the requirement that "no sentence of death shall be given against any offender in such case by court-martial, unless nine of thirteen officers present concur therein." The same enactment, however, contained the requirement that "if there be a greater number of officers present, then the judgment shall pass by the concurrence of the greater part of them so sworn, and not otherwise." This would indicate that courts composed of more than thirteen members were known to court-martial practice at the date of the adoption of the Mutiny Act. Walton, History of the British Standing Army, pp. 539, 540.

[2] Dig. J. A. Gen., p. 745, par. 1.

[3] Seventy-fifth Article of War. In the Duke of Albemarle's Articles (1606) the number is fixed at thirteen. Article 140 of the Code of Gustavus Adolphus fixes the membership at the same number.

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* Act of February 6, 1812. (Stat. at Large, 676.) The Act of May 28, 1798, (1 *ibid.*, 558,) conferred a similar authority to accept the services of "volunteers," but was never carried into operation.

of at least five members. A less number, as will presently be seen, is without power to enter upon the trial of a case, to proceed with a trial already begun, or to perform any act of a judicial nature if, for any reason, its membership should be reduced below that number. The number of officers who shall compose a particular court is determined, in conformity to the terms of the statute, by the proper convening authority. In the leading case of Martin *vs.* Mott it was held by the Supreme Court of the United

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COMPOSITION OF COURTS-MARTIAL: TABULAR STATEMENT.[1]

Composition of Courts-martial.

1. Commissioned officers, having military rank. (75, 77, 78 A. W.)
2. On active list of the Army. Retired officers not eligible. (Sec. 1259, R. S.)
3. Rank to be positive or relative and, if practicable, superior to that of accused. (79 A. W.)
4. Number, five to thirteen inclusive; of thirteen when that number can be assembled without manifest injury to the service. (75, 76, A. W.)
5. Forces: regular army, marine corps, volunteers, and militia when in active service. Regular officers not eligible to try officers or enlisted men of militia or other forces. (77 A. W., Sec. 1658, R. S.) Except members of marine corps when detached for service with the Army. (78 A. W.)

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[1] Prepared by Captain Geo. H. Boughton, 3d Cavalry, Assistant Professor of Law, U. S. Military Academy.

States that the clause above cited in relation to the number of members was "merely directory to the officer appointing the court, and his decision as to the number that can be convened 'without manifest injury to the service,' being in a manner submitted to his discretion, must be conclusive." [1]

Where at a particular post or detachment the statutory number of members cannot be assembled, the 76th Article provides that the commanding officer shall in such case "report to the commanding officer of the department, who shall thereupon order a court to be assembled at the nearest post or department at which there may be such a requisite number of officers, and shall order the party accused, with necessary witnesses, to be transported to the place where the said court shall be assembled." [2]

Trial by Inferiors in Rank.—The 79th Article of War, which confers exclusive jurisdiction upon general courts-martial for the trial of commissioned officers, contains the added requirement that "no officer shall, when it can be avoided, be tried by officers inferior to him in rank." Whether the trial of an officer by officers of an inferior rank can be avoided or not is

[1] Martin *vs.* Mott, 12 Wheaton, 19, 35; U. S. *vs.* Mullan, 140 U. S., 240; Dynes *vs.* Hoover, 20 How., 81. The limitation with reference both to the numbers and rank of the members of a general court-martial is discretionary with the appointing power. Mullan *vs.* U. S., 23 Ct. Cls., 34. It is not essential to the validity of the proceedings that the order convening a general court-martial of less than thirteen members should state that "no other officers" (or "no greater number") "than those named can be assembled without manifest injury to the service." Attorney-General Wirt* did not hold such a statement to be essential, but simply expressed the opinion that the President, before confirming a certain death-sentence adjudged by a court of less than thirteen members, would properly satisfy himself that a court of the full number could not have been convened without prejudice to the service. It was held at an early period by the U. S. Supreme Court that it was for the convening authority to determine as to what number of officers could be detailed without manifest injury to the service, and that his decision on the subject would be conclusive.† Dig. J. A. Gen., 88, par. 8.

[2] Prior to the passage of the first Mutiny Act in England there does not seem to have been any fixed rule as to the number of officers necessary to constitute a general court-martial. In the reign of James II. seven officers were requisite to constitute such a tribunal. Courts held under the first Mutiny Act‡ were composed of thirteen officers "whereof none under the degree of captain." The peculiar circumstances attending the enactment of the Mutiny Act in the reign of William and Mary suggest, as a reason for fixing the number at thirteen, the analogy of the judge and jury of twelve before whom criminal cases at common law were tried. Such an analogy, indeed, is suggested by Clode, in his Military and Martial Law, in the reason which he assigns for the selection of the number thirteen as composing the general court-martial, first authorized, by statute, during the reign of William and Mary: "When provision was first made, under the military code, for the trial of an offender by a court composed of the president and twelve officers, it may reasonably be presumed that the controlling analogy which suggested the tribunal was the civil administration of justice by a presiding judge appointed by the crown, and twelve jurymen summoned by the sheriff, to deal with all the questions of law and fact that might be brought before them."§ In the English service the president is appointed, as such, by the convening authority, and has certain functions assigned to him by statute and regulation.‖ This is not the case in the United States.

* 1 Opins. Att.-Gen., 296.
† Martin *vs.* Mott, 12 Wheat., 19, 35.
‡ 1 William and Mary, Ch. 1, S 4.
§ Clode, Military and Martial Law, 104.
‖ Army Act of 1881.

a question not for the accused or the court, but for the officer convening the court; and his decision upon this point (as indicated by the detail itself as set forth in the convening order), as upon that of the number of members to be detailed, is conclusive. An officer, therefore, cannot successfully challenge a member simply because he is of a rank inferior to his own.[1]

Minimum Membership.—While the normally constituted general court-martial should, and usually does, contain thirteen members, it has been seen that it is not necessary to the legality of its procedure that it should be composed of that number; the corresponding requirement respecting the common-law jury, that it shall maintain its numbers unimpaired throughout a particular trial, being obviously out of place, and at times impossible of attainment, in the practice of courts-martial, especially in time of war or during the pendency of active military operations. The minimum below which a general court-martial ceases to have power to try cases is fixed, in the 75th Article of War, at five members. When, therefore, for any cause, a general court-martial has been reduced below that number, it loses its character as a military tribunal, and can no longer exercise jurisdiction as such until, by the return of absentees or the detail of new members, the legal quorum has been restored.[2]

In the procedure of the inferior courts-martial having multiple membership the three members composing the tribunal must be constantly present

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[1] Dig. J. A. Gen., 89, par. 1. The statement sometimes added in orders convening courts-martial to the effect that "no officers other than those named can be detailed without injury to the service" is as superfluous and unnecessary for the purpose of excusing the detailing of officers junior to the accused as it is for accounting for the fact that less than the maximum number have been selected for the court. (See 75th Article.) *Ibid.*, par. 2.

At the opening of a trial by court-martial it was objected by the accused that nine of the thirteen members as detailed were his inferiors in rank, and that the detailing of such inferiors could have been "avoided" without prejudice to the service. *Held* that the objection was properly overruled by the court. Whether such a detail "can be avoided" is a question to be determined by the convening authority alone, and one upon which his determination is conclusive.* *Ibid.*, par. 3.

[2] Where, in the course of a trial, the number of the members of a general court-martial is reduced by reason of absence, challenge, or the relieving of members, the court may legally proceed with its business so long as five members, the minimum quorum, remain; otherwise where the number is thus reduced below five. *Ibid.*, 87, par. 3.

While a number of members less than five cannot be organized as a court or proceed with a trial, they may perform such acts as are preliminary to the organization and action of the court. Less than five members may adjourn from day to day, and where five are present and one of them is challenged the remaining four may determine upon the sufficiency of the objection. *Ibid.*, par. 4.

A court reduced to four members and thereupon adjourning for an indefinite period does not dissolve itself. In adjourning it should report the facts to the convening authority and await his orders. He may at any time complete it, by the addition of a new member or members, and order it to reassemble for business. *Ibid.*, 88, par. 5.

Where a court, though reduced by the absence of members, operation of challenges, etc., to below five members, yet proceeds with and concludes the trial, its further proceedings, including its finding and sentence (if any), are unauthorized and inoperative. *Ibid.*, par. 6.

* See Mullan *vs.* U. S., 140 U. S., 240.

throughout the trial, and no jurisdiction can be exercised unless that number of members participates in the proceedings.

Composition of the Inferior Courts-martial.—The membership of the several inferior courts, like that of the general court, is restricted to commissioned officers.[1] The Regimental Court is composed of three officers of the regiment or corps to which the accused belongs;[2] the Garrison Court of three officers detailed from the post or command of the officer by whose order the court convened.[3] Each is provided with a judge-advocate. The composition of the Summary Court has already been explained.

THE OFFICERS OF COURTS-MARTIAL.

The President.—No special rank or qualifications are required for the position of president of a military court. In our practice the president is not appointed as such; he is simply the senior in rank of the members present, and he presides by virtue of his seniority alone. If the senior of the officers detailed in the convening order is not present with the court at the original organization, the next senior present becomes president; so if the officer who presided at the beginning of a trial is at a subsequent stage of the proceedings relieved, or compelled to be absent by sickness, etc., the next ranking officer present presides as a matter of course; and the senior officer present with the court at the termination of the trial authenticates the proceedings as president.[4]

The president of a court-martial is in no sense its commanding officer; he can exercise no military command over its members, and is without power, as such, either to conduct or to direct or control its proceedings.[5] In a leading case on this subject it was decided by the President of the United States that "the presiding officer of a court-martial (besides the duties and privileges of a member) is only its organ. He speaks and acts for it in each case when the particular rule has been prescribed by law, regulation, or its own resolution. He announces the adjournment when the prescribed hour has arrived. He cannot adopt an hour different from that which has been prescribed without the approbation of a majority of the court when in session. The right of regulating its own sessions is important and necessary, and the limitation placed on it by the 95th Article of War was obviously intended to secure full and fair deliberation. In this and all deliberations

[1] Section 1342, Revised Statutes. See, also, page 26, *ante*.
[2] 81st Article of War.
[3] 82d Article of War.
[4] Dig. J. A. Gen., 608, par. 1; see, also, Manual for Courts-martial, 22.
[5] The president of a military court has no *command* as such. As president he cannot give an *order* to any other member. As the organ of the court he gives of course the directions necessary to the regular and proper conduct of the proceedings; but a failure to comply with a direction given by him, while it may constitute "conduct to the prejudice of good order and military discipline," cannot properly be charged as a "disobedience of a lawful command of a superior officer" in violation of Article 21. *Ibid.*, 609, par. 4.

of the court the equality of the several members was intended to be preserved." [1]

The presiding officer is the agency through which the court, as such, communicates with the convening authority or with others; he is responsible for the preservation of order in the immediate presence of the court, he presides at its deliberations, and may exercise, in that capacity, the authority vested in the chairman of a deliberative body by the rules of parliamentary procedure, and when a decision has been reached as a result of such deliberation, he announces the same in open court. "In deliberations on questions raised upon a trial, however, as well as in the finding and the adjudging of the sentence, the presiding member is on a perfect equality with the other members. He has no casting vote, nor, if the vote is even, does *his* vote have any greater or other weight or effect than that of any other member." [2]

Members. — The qualifications for membership have already been described. It is proper to observe, however, that such membership is composed not only of commissioned officers, but of commissioned officers having military rank. This to enable members to cast their votes in accordance with the requirement of the 95th Article that "members of a court-martial in giving their votes shall begin with the youngest in commission. In all other respects it is the purpose of the statutes creating the several military tribunals to secure an absolute equality of rights in respect to the membership." [3]

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[1] The case of Brevet Lieutenant-Colonel Backenstos, published in General Orders No. 14, War Department, of 1850. For the president of a court-martial to assume to adjourn the court against the vote of the majority of the members would be an unauthorized act and a grave irregularity, properly subjecting him to a charge under the 62d Article. Dig. J. A. Gen., 609, par. 5.

[2] Dig. J. A. Gen., 609, par. 3. While a special authority—that of swearing the judge-advocate—is devolved upon the president of a military court by statute (the 85th Article of War), such officer has in other respects—as in performing the usual duties of a presiding officer, in authenticating the proceedings with his signature, and in communicating with the convening officer or other commander—no original authority, but acts simply as the representative and "organ" of the court. *Ibid.*, 608, par. 2.

The further function devolved upon him by Article 52 is not known to have ever been exercised in our service; the Article itself is a dead letter, as is also Article 53 *in pari materia*. *Ibid.*, 608, par. 2. Note, 2.

In the British service there is a marked difference of practice in this respect. The president is named in the order appointing the court. He must be a field-officer, unless the convening officer is below that rank, or unless such convening authority is of opinion that a field-officer is not available for detail; in either of these cases an officer not below the rank of captain may be appointed, if such an officer be available; otherwise, unless a warrant officer is to be tried, the president may be detailed from the grade of lieutenant.* Whenever a general or colonel is available for detail, an officer of inferior rank is not to be appointed. Queen's Reg., Sec VI, par. 95.

The president is responsible for the proper conduct of the trial; he is to see that justice is administered, that the prisoner has a fair trial, and that he does not suffer any disadvantage in consequence of his position as a prisoner, or of his ignorance, or of his capacity to examine or cross-examine witnesses, or otherwise.† English Army Act of 1881, Sec. 58.

[3] See paragraph entitled "The President," *supra*.

* Manual of Military Law, 590, 591.
† *Ibid.*, 622, 623.

When a court-martial has been called into being by a competent convening authority, and has entered upon the hearing of a case properly referred to it for trial, it is independent of such authority pending the hearing and determination of the case. As he created it, he may terminate its existence at his discretion or, by a proper order, may cause a particular case to be discontinued at any stage of the trial;[1] but unless such power be exercised, the convening officer is without power to regulate its conduct, or to control or influence its deliberations.[2]

New Members; Relieving Members.—Unlike the common-law jury, it is not essential to the legality of a trial by court-martial that the composition of the tribunal should remain unchanged during the progress of the trial; new members may be added,[3] and, upon the occurrence of a sufficient emergency, members who have participated in a portion of the trial may be relieved and assigned to other posts of duty. The mere promotion of an officer during the trial of a particular case, or his appointment to a higher grade, would in no way affect his competency to participate in the trial.[4] It is highly desirable, however, that the composition of a court-martial should remain unchanged, especially during the pendency of a particular trial, and in practice members are rarely relieved from or added to a court during the trial of a particular case.[5]

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[1] Dig. J. A. Gen., 536; *ibid.*, 458, par. 10; *id.*, 315, par. 7. See, *post*, the article entitled "Nolle Prosequi."

[2] Macomb, § 16. A court-martial should in general be left to determine its own course of procedure, except where the same is defined by law or usage. It would be unwarranted by usage to require in orders that a court-martial shall adopt a certain procedure in any case or class of cases as to a matter properly within its discretion. Thus a commander could not properly order that courts-martial convened by him should take testimony in cases in which the accused pleaded guilty, though he might properly recommend their doing so. Dig. J. A. Gen., 313, par. 2.

[3] To add a new member to a military court after any material part of the trial has been gone through with must always be a most undesirable measure, and one not to be resorted to except in an exceptional case and to prevent a failure of justice. Adding a member after all the testimony has been introduced, and nothing remains except the finding and sentence, is believed to be without precedent. Dig. J. A. Gen., 495, par. 3.

[4] The receipt by a member, during the proceedings of the court, of an appointment to a higher rank, or of other official notice of his promotion, can affect in no manner his competency to act upon the court. The fact of the promotion should indeed be noted in the record and the officer be thereafter designated by his new rank. *Ibid.*, par. 4.

[5] Where, in the course of a trial by court-martial, a member of a court is served with a legal order in due form dismissing or discharging him from the military service, or an official communication notifying him of the acceptance of his resignation, he becomes thereupon separated from the Army and can no longer act upon the court; he should therefore at once withdraw therefrom, and the fact of his withdrawal, explained by a copy of the order, be entered upon the record. And the proceeding should be similar where a member is served with an order of the President placing him upon the retired list; retired officers not being legally competent to sit upon courts martial *Ibid.*

Where an officer detailed as a member of a general court-martial was duly relieved by order therefrom, but continued notwithstanding to sit upon the court during a trial, taking part in the findings and sentence, *held* that the proceedings and sentence should properly be disapproved.* *Ibid.*, 496, par. 6.

Where the term of service of a member as an officer of volunteers expired pending a trial by the court, *held* that the member was not thereupon disqualified, but could legally

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* See General Court-martial Orders No. 20, Department of California, 1880.

Performance of Other Duties.—The liability of members of courts-martial to perform duty with their commands is regulated by Paragraph 918, Army Regulations of 1895, which provides that "a member stationed at the place where it sits is liable to duty with his command during adjournment from day to day."[1]

The Judge-Advocate. — All courts-martial having general as distinguished from summary jurisdiction are provided with officers, detailed for the purpose by the proper convening authority, whose duty it is to prosecute cases coming before them in the name of the United States. The appointment of these officers is, by the terms of the 74th Article, vested in the several convening officers, who, as a consequence of their power to appoint courts-martial, are, by that Article, authorized to appoint judge-advocates for the same.[2] "While a civilian may legally be appointed, or rather employed, as judge-advocate of a court-martial, such an employment has for the past fifty years been of the rarest occurrence in the military service,"[3] and the duty is now invariably performed by a commissioned officer of the Army, selected, as above described, by the proper convening authority.[4] All commissioned officers, whether belonging to the line or

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continue to act upon the court till actually discharged or mustered out of the service.* Dig. J. A. Gen., par. 4.

[1] See, also, "Manual for Courts-martial," p. 22. In an emergency indeed arising out of a state of war or other public exigency, additional service may be imposed upon such officers; in a case of this kind, however, their service on the court would preferably be temporarily suspended. *Ibid.*, 493, par. 1.

[2] See notes to the Seventy-fourth Article in the chapter entitled THE ARTICLES OF WAR.

[3] The last occasions of such employment are believed to have been those of the trial of the persons charged with complicity in the assassination of President Lincoln, and the trial of Major Haddock, Prov. Mar. Dept., (see G. C. M. O. 356 and 565, War. Dept., 1865,) upon which Hon. J. A. Bingham and Hon. Roscoe Conkling were respectively employed as judge-advocates. In an early case the Hon. Martin Van Buren, who was afterwards a President of the United States, was employed as judge-advocate.

In view of the provisions of Sec. 17 of the Act of June 22, 1870, (Sec. 189, Rev. Sts.,) transferring to the Department of Justice the authority to employ counsel for the executive departments, neither the Secretary of War nor the Secretary of the Navy is now authorized to retain a civilian lawyer to act as judge-advocate of a court-martial. 13 Opins. Att.-Gen., 514; 14 *ibid.*, 13.

[4] Any commissioned officer may legally be appointed judge-advocate of a court-martial. Thus a surgeon, assistant surgeon, or even a chaplain is legally eligible to be so detailed. Dig. J. A. Gen., 456, par. 2. A medical officer of a post or station is legally eligible for service on courts-martial, either as a member or a judge-advocate, and in small commands surgeons and assistant surgeons are not unfrequently detailed upon such service. In view, however, of the fact that a medical officer of a post, with a hospital or sick men under his charge, is practically continuously "on duty," besides requiring a considerable time for study, it is deemed to be in general prejudicial to the interests of the service to detail such officers upon courts-martial where it can well be avoided. *Ibid.*, 493, par. 2.

An officer serving as judge-advocate on the *staff* of a department or army commander has, as such, no authority to act as judge-advocate of a court-martial convened by such commander. If it is desired that he should act as judge-advocate of such a court, he should be specially detailed for the purpose. *Ibid.*, 456, par. 6. A *court-martial* has of

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* In a case in G. C. M. O. 104, Dept. of Kentucky, 1865, the proceedings were properly disapproved because a member had remained and acted upon the trial after receiving official notice of his muster-out.

staff of the Army, are eligible for detail; the selection in a particular instance being determined by the character and importance of the case to be tried and the capacity of the officer for the performance of the duty.

A separate judge-advocate should be appointed for each general court-martial convened by a department or other competent commander. The same officer may indeed be selected to perform the duties of judge-advocate as often as may be deemed desirable by the commander, but he should be detailed anew for every court-martial on which he acts. To appoint in a general order a particular officer to act as judge-advocate for all the courts to be held in the same command would be quite irregular and without the sanction of precedent.[1]

Relief of Judge-Advocate.—As the judge-advocate derives his authority to act from the appointment of a particular convening authority, "it is competent for the commander who has convened a court-martial to relieve the officer originally detailed in that capacity and substitute another in his place, and the second may in the same manner be relieved by a third, etc. The relieving, however, of a judge-advocate, pending a trial, must in general embarrass the prosecution of a case, and should not be resorted to if it can well be avoided."[2]

Source of Authority.—Although the judge-advocate is an officer of the court, his power to act as such is derived, not from the court, but from the convening authority. For this reason the court is without authority to appoint a judge-advocate or, in the event of a vacancy occurring in the office, to authorize one of its members to act in his stead; such power being vested, by the statute, in the officer convening the court.[3]

General Duties of the Judge-Advocate.—It has been seen that the office of judge-advocate is a temporary employment created by statute; the general duties of the office are defined in the 90th Article of War, which empowers the judge-advocate to prosecute in the name of the United States. Other

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course no authority to direct or empower its junior member or any other officer to act as its judge-advocate. *Ibid.*, par. 5.

[1] Dig. J. A. Gen., 456, par. 3.

[2] *Ibid.*, par. 4.

[3] *Ibid.*, 456, par. 5. A direction, in an order convening a general court-martial, that if the judge-advocate be prevented from attending the junior member of the court will act in his stead *held* irregular and improper; the function of a judge-advocate as prosecuting officer* not being properly compatible with that of a member of a court-martial. And—the member having acted as judge-advocate in this case—*advised* that the proceedings (though the court had still retained five members) be disapproved by the reviewing authority. *Ibid*

Where a court-martial excused its judge-advocate, and required its junior member to act as judge-advocate in his stead, *held* that its action was wholly unauthorized and that its proceedings were properly disapproved.† It is only the convening authority (or his successor in command) who can relieve or detail a member or a judge-advocate. *Ibid.*, 317, par. 16.

* See the 90th Article of War.

† See G. C. M. O. 62, War Dept., 1874.

statutes and regulations confer upon him the power to summon witnesses and in certain cases to compel their attendance by the issue of compulsory process. The law, regulations, and the custom of service thus vest in the judge-advocate the duty of preparing the case for trial and charge him with the responsibility of conducting the prosecution.

A court-martial, being a judicial body, has power to hear and determine cases which have been properly brought before it, but, except in case of certain contempts committed in its presence, is without authority to institute trials or to conduct prosecutions. It looks to the judge-advocate, its regularly constituted prosecuting officer, to originate business, that is, to bring cases before it for trial. In his capacity as prosecuting officer, therefore, the judge-advocate is not subject to its control, and "will properly be left by the court to introduce the testimony in the form and order deemed by him to be the most advantageous and, generally, to bring on cases for trial and conduct their prosecution according to his own judgment."[1]

Duties of the Judge-Advocate Previous to the Trial.—The principal duty of the judge-advocate prior to the meeting of the court is to prepare his case or cases for trial. This includes the summoning of the witnesses[2] for the prosecution and defense, and the preliminary examination of the former with a view to a regular and orderly presentation of the case in behalf of the United States. If other witnesses than those named in the charges and specifications are material and necessary, they are summoned by the judge-advocate; the names of the witnesses desired by the accused are also obtained and formal summons are issued for their appearance.[3] The regulations restrict the power of the judge-advocate in this respect to the extent of forbidding him to summon witnesses, at the expense of the Government, without the order of the court, unless satisfied that their testimony is material and necessary.[4]

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[1] Dig. J. A. Gen., 458, par. 11. Strictly, communications from the convening authority to the court *as such*, (and *vice versa*,) should be made to (and by) the president as its organ; communications relating to the conduct of the prosecution to (and by) the judge advocate. *Ibid.*, 318, par. 17.

[2] The attendance of witnesses is obtained as to military persons by military orders issued by competent authority; as to civilians by the issue of a writ of subpœna. (For forms of this writ, see Manual for Courts-martial, pp. 138, 139.) The latter form of process, being inapplicable to the case, is never issued to a military person.

A judge-advocate is authorized to subpœna witnesses only for testifying in court; he cannot summon a witness to appear before himself for preliminary examination. For this purpose he must procure an order to be issued by the proper commander. Dig. J. A. Gen., p. 462, par. 31.

A judge-advocate has no authority to employ a civil official or private civilian to serve subpœnas if by so doing the United States will be subjected to a claim for compensation. *Ibid.*, p. 463, par. 32.

[3] For a discussion of this subject, see the chapter entitled EVIDENCE.

[4] Paragraph 922, Army Regulations of 1895.

Except where their testimony will be merely cumulative,* and will clearly add nothing whatever to the strength of the defense (see Ninety-third Article), the accused is in

* For a definition of the term "cumulative testimony," see the chapter entitled EVIDENCE.

Amendment and Modification of Charges.—The case which it is the duty of the judge-advocate to prepare for trial is that referred to him by the convening authority.[1] Where, therefore, charges, already formally preferred, are transmitted to him for prosecution, he should not assume to modify them in material particulars in the absence of authority from the convening officer. While he may ordinarily correct obvious mistakes of form, or patent or slight errors in names, dates, amounts, etc., he cannot without such authority make *substantial* amendments in the allegations, or—least of all—reject or withdraw a charge or specification, or enter a *nolle prosequi* as to the same, or substitute a new and distinct charge for one transmitted to him for trial by the proper superior.[2]

Counsel for the Accused.—In addition to his duty as prosecuting officer in behalf of the United States, the 90th Article of War provides that the judge-advocate "shall so far consider himself counsel for the prisoner as to object to any leading question to any of the witnesses, and to any question

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general entitled to have any and all material witnesses summoned to testify in his behalf.* A prompt obedience to a summons is incumbent upon all witnesses; nor is a commanding or superior officer in general authorized to place any obstacles in the way of the prompt attendance, as a witness, of an inferior duly summoned or ordered to attend as such.† Where the judge-advocate has declined to summon a witness for the accused, for the reason that he is not "satisfied" (in the words of paragraph 922 of the Army Regulations of 1895) that his testimony is "material and necessary to the ends of justice," the court may, in its discretion, direct him to be summoned. The court, however, will not in general properly sanction the summoning of a witness where it is not probable that his attendance can be secured within a reasonable time and his deposition legally be taken pursuant to the Ninety-first Article of War. Dig. J. A. Gen., 751, par. 9.

In military law an accused party cannot be deemed to be entitled to have a witness summoned from a distance whose military or administrative duties are of such a character that they cannot be left without serious prejudice to the public interests. Article VI of the amendments to the Constitution, declaring that the accused shall be entitled "to be confronted with the witnesses against him," applies only to cases before the United States courts. Thus where the offense charged is not capital, and a deposition may therefore legally be taken under the Ninety-first Article of War, the Secretary of War will not in general authorize the personal attendance at the place of trial of a witness whose office or duty makes it necessary or most important that he should remain elsewhere. *Ibid.*, 752, par. 10.

An accused party at a military trial can rarely be entitled to demand the attendance, as a witness, of a chief of a staff corps, much less that of the President or the Secretary of War, especially as some minor official can almost invariably furnish the desired facts. If, however, the testimony of one of these officials be found to be necessary or most desirable, and the same cannot legally be taken by deposition, the court, if convened at a distance, may properly be adjourned to Washington or other convenient point, in order that the witness may be enabled to attend without detriment to the public interests. *Ibid.*, par. 11.

[1] Dig. J. A. Gen., 457, par. 9. See, also, the title "Counsel for the Accused," *post*.

[2] *Ibid.*, 458, par. 10.‡ The judge-advocate is not infrequently directed to prepare or reframe charges;§ when such a duty is imposed upon him the judge-advocate, acting as the agent of the convening authority and not in his capacity as an officer of the court, is to be guided by such instructions as have been given him by that officer.

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* See G. C. M. O 21, 24. War Department, 1872; G. C. M. O. 128, Headquarters of Army, 1876.

† See G. C. M. O. 18, Department of the Platte, 1877.

‡ See G. O. 64, Dept. of the Cumberland, 1867; do. 18, *id.*, 1868; do. 85, Dept of the South, 1874; G. C. M. O. 36, 42, Dept. of the Platte, 1877; do. 13, *id.*, 1878; do. 48, Mil. Div. of Pacific & Dept. of Cal., 1880.

§ Dig. J. A. Gen., 458, par. 10.

to the prisoner, the answer to which might tend to criminate himself."[1] The duty of the judge-advocate toward the accused should not be regarded as confined to the limited province of "counsel for the prisoner" as the same is defined in the 90th Article of War. Where the accused is ignorant and inexperienced and without counsel—especially where he is an enlisted man—the judge-advocate should take care that he does not suffer upon the trial from any ignorance or misconception of his legal rights, and has full opportunity to interpose such plea and make such defense as may best bring out the facts, the merits, or the extenuating circumstances of his case.[2]

This duty is more especially incumbent on the judge-advocate in cases where the prisoner has not the aid of professional counsel to direct him, which generally happens in the trials of private soldiers, who, wanting all advantages of education or opportunities of mental improvement, must stand greatly in need of advice in such trying circumstances as are sufficient to overwhelm the acutest intellect, and embarrass or suspend the powers of the most cultivated understanding. It is certainly not to be understood that in discharging this office, which is prescribed solely by justice and humanity, the judge-advocate should in the strictest sense consider himself as bound to the duty of a counsel, in exerting his ingenuity to defend the prisoner at all hazards against those charges which, in his capacity as prosecutor, he is, on the other hand, bound to urge and sustain by proof; for, understood to this extent, the one duty is utterly inconsistent with the other.[3]

All that is required is that, in the same manner as in the civil courts of criminal jurisdiction the judges are understood to be counsel for the person accused, the judge-advocate in courts-martial shall do justice to the cause of the prisoner, by giving full weight to every circumstance or argument in his favor; shall bring the same fairly and completely into the view of the court; shall suggest the supplying of all omissions in the leading of exculpatory evidence; shall engross in the written proceedings all matters which, either directly or by presumption, tend to the prisoner's defense; and, finally, shall not avail himself of any advantage which superior knowledge or ability or his influence with the court may give him in enforcing the conviction, rather than the acquittal, of the person accused.[4]

Opinions in Matters of Law.—The Articles of War are silent on the subject of the duty of the judge-advocate to assist the court with his opinion or advice as to matters of law arising during the course of the trial. It is

[1] Ninetieth Article of War.
[2] Dig. J. A. Gen., 458, par. 12. See, also, note 4 *post*.
[3] Macomb, § 176.
[4] *Ibid.* The judge-advocate should also advise the accused, especially when ignorant and unassisted by counsel, of his rights in defense—particularly of his right, if it exists in the case, to plead the statute of limitations, and of his right to testify in his own behalf. A failure to do so, however, will not affect the legal validity of the proceedings; though if it appear that the accused was actually ignorant of these rights, the omission may be ground for a mitigation of sentence. Dig. J. A. Gen., 462, par. 28.

strictly the proper practice for a judge-advocate not to give his opinion upon a point of law arising upon a military trial unless the same may be required by the court. This practice, however, is often departed from, and the opinions of judge-advocates, suitably tendered, are in general received and entertained by the court without objection, whether or not formally called for. But where the court *does* object to the giving of an opinion by the judge-advocate, he is not authorized to attempt to give it, and of course not authorized to enter it upon the record.[1]

Counsel to Assist Judge-Advocate.—In cases of exceptional difficulty and public importance civil counsel were formerly not unfrequently retained to assist the judge-advocate. Since the creation, however, of the office of Judge-advocate General of the Army, and of the corps of judge-advocates, by the Act of July 17, 1862, such instances have been of the rarest occurrence.[2]

Counsel for the Accused.—An officer or soldier put upon trial before a court-martial is not entitled as of right to have counsel present with him to assist him in his defense, but the privilege is one which is almost invariably conceded;[3] and where it is unreasonably refused, such refusal may constitute ground for the disapproval of the proceedings. A court-martial, however, is not required to delay an unreasonable time to enable an accused to provide himself with counsel.[4]

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[1] Dig. J. A. Gen., 459, par. 15. Whether the fact that the opinion was offered and objected to by the court shall be entered upon the record, is a matter for the court alone to decide. It is, however, certainly the better practice that all the proceedings, even those that are irregular, which transpire in connection with the trial, should be set out in the record for the inspection of the reviewing authority. *Ibid.*

It "is understood to be his duty to explain any doubts which may arise in the course of their deliberations, and to prevent any irregularities or deviations from the regular form of proceeding. For it is to be observed that, in all matters touching the trials of crimes by courts-martial, wherever the military law is silent the rules of the common law, as generally recognized and enforced throughout the Union, must of necessity be resorted to." Macomb, § 174. See, also, Ives, 232; Benét 70; 1 Winthrop, 262; Kennedy, Duties of Judge-Advocates, 123; De Hart, 324–6; Tytler, 354, 5.

[2] Dig. J. A. Gen., 311. Under the existing law, indeed, which is contained in Section 361 of the Revised Statutes, counsel could be employed (at the public expense) for this purpose only through the Department of Justice upon the request or recommendation of the Secretary of War. *Ibid.* The detail of a commissioned officer for this purpose, though infrequent, is warranted by precedent, and is within the authority of the convening officer in cases in which, in his opinion, such a course is either necessary or desirable.

[3] Compare, on this subject, People *vs.* Daniell, 6 Lansing, 44; People *vs.* Van Allen, 55 N. York, 31. The restriction upon the admission of counsel for the accused in court-martial trials is said by Clode to have had its origin in the circumstance that military tribunals, as such, were without power to award the payment of legal expenses. It may also be traced to the inherent power of courts of limited jurisdiction to prescribe rules for their own procedure. Clode, Military Forces, 169; *ibid.*, Military Law, 120; see, also, Collier *vs.* Hicks, B. & Adol., 668; Tytler, 250 In the British service the appearance of counsel, in behalf of both prosecution and defense, is regulated by Section 129 of the Army Act of 1881, subject, however, to the provisions of the Rules of Procedure in respect to the rights and duties of counsel.*

[4] Dig. J. A. Gen., 311, par. 1. While reasonable facilities for procuring such counsel

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* See Rules 85–92, Rules of Procedure; Man. of Mil. Law., 639–642. See, also, pp. 56, 472, and 638–642, *ibid.*

Counsel for Enlisted Men.—It is required by the Army Regulations that the commanding officer of a post at which a general court-martial is convened shall, "at the request of any prisoner who is to be arraigned, detail as counsel for his defense a suitable officer, one not directly responsible for the discipline of an organization serving thereat, nor acting as a summary court. If there be no such officer available, the fact will be reported to the appointing authority for action. An officer so detailed should perform such duties as usually devolve upon counsel for defendant before civil courts in criminal cases. As such counsel he should guard the interests of the prisoner by all honorable and legitimate means known to the law.[1]

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as he may desire should be afforded an accused, his claim must be regarded as subordinate to the interests of the service. Thus where an accused officer applied to the department commander, who had convened the court, to authorize a particular officer whom he desired as counsel to act in that capacity, and this officer could not at the time be spared from his regular duties without material prejudice to the public interests, *held* that the commander was justified in denying the application, and further that the validity of the subsequent proceedings and sentence in the case was not affected by such denial. *Ibid.*, 312, par. 2.

An application by an accused officer to be furnished, at the expense of the United States, with civil counsel to defend him on his trial by court-martial *remarked upon* as unprecedented and not to be entertained. Par. 968, A. R., 1895, relates to no such a case. No authority exists for the payment by the United States of civil counsel employed by an officer to defend him on his trial by court-martial. *Ibid.*, 312, par. 6.

[1] Paragraph 926, Army Regulations of 1895. *Held* that G. O. 29 of 1890, providing for the detail, by the commander of a post at which a general court-martial is ordered to sit, of a suitable officer of his command to act as counsel for prisoners to be arraigned, if requested by them, was not to be construed as sanctioning the detail or voluntary appearance of a post commander himself in such capacity at his own post. *Ibid.*, 312, par. 5. The phrase "one not directly responsible for the discipline of an organization serving thereat" has been given an authoritative interpretation in Circular No. 8, A. G. O. of 1894: "No officer directly responsible for the discipline of an organization or organizations under his command—as the commanding officer of a post, band, company, battalion, squadron, or regiment—nor the trial officer of a summary court, will be regarded as a 'suitable' officer under the provisions of General Orders No. 29, 1890, A. G. O., for this duty at the post where he is stationed" Par. III, Circular No. 8, A. G. O., 1894. See, also, Circular No. 5, A. G. O., 1894, and Manual for Courts-martial, p. 25.

The Manual for Courts-martial, which is the authoritative guide for the Army in court-martial practice, prescribes that an officer detailed as counsel for a soldier before a court-martial should guard the interests of the accused by all honorable and legitimate means known to the law. Unless this is understood to be subject to an important modification it will be misleading. The modification is that he must not do anything inconsistent with military relations.

It is necessary that discipline should be maintained. Discipline is founded on respect for authority. The position of counsel for the accused does not give an officer the right to disregard the obligations arising out of this relation. The tendency to go too far in assimilating the court-martial trial to the ordinary criminal trial is noticeable and should not be encouraged. It would be decidedly harmful, and unless the Manual is understood as indicated it would be a step in the wrong direction. It is therefore the duty of an officer assigned as counsel for an accused person to conduct the defense not only with a due regard for authority, but within the well-understood limits prescribed, in the interest of discipline, by the established procedure of courts-martial. It can never be necessary, and it certainly will never be justifiable, for the counsel for the accused to lay aside his obligation to respect authority, and his position will not give him immunity if he does it.* (Judge-Advocate General.)

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* See, also, for a definition of the duties of an officer assigned as counsel, the paragraph on page 38, *ante*, relating to the duty of the judge-advocate as counsel for the accused.

The privilege of being represented by counsel does not apply in cases tried by inferior courts.[1]

An accused, prior to arraignment, even if in close arrest, should be allowed to have interviews with such counsel, military or civil, as he may have selected. So, his counsel should be permitted to have interviews with any accessible military person whom it may be proposed to use as a material witness, or whose knowledge of facts may be useful to the accused in preparing for trial.[2]

A military court has no authority (analogous to that sometimes exercised by civil courts in criminal cases) to *assign* counsel to an accused unprovided with counsel. Nor can such a court excuse one of its members to enable him to act as counsel for an accused.[3]

REPORTERS, INTERPRETERS, AND CLERKS.

Reporter, How Appointed.—Section 1203 of the Revised Statutes provides that "the judge-advocate of a military court shall have power to appoint a reporter, who shall record the proceedings of, and testimony taken before, such court, and may set down the same, in the first instance, in shorthand. The reporter shall, before entering upon his duty, be sworn or affirmed faithfully to perform the same."[4]

The power conferred by this statute is vested exclusively in the "judge-advocate," and cannot be exercised by the court; it should be resorted to, however, only in an important case.[5]

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[1] Manual for Courts-martial, 25, par. 1, note.

[2] Dig. J. A. Gen., 312, par. 3.

[3] *Ibid.*, par. 4.

[4] The statute does not indicate by whom the reporter shall be sworn. In practice he is sworn by the judge-advocate; a form of oath being prescribed in the Manual for Courts-martial. If the same party is employed as a reporter for more than one case, he should properly be sworn anew in each case.

When a reporter is employed under Section 1203, Revised Statutes, he shall be paid, upon the certificate of the judge-advocate, not to exceed $1 an hour for the time occupied in court by himself or a competent assistant necessarily employed for him by the judge-advocate, and 15 cents per 100 words for the first and 5 cents per 100 words for each additional copy of the transcript of notes and of exhibits copied; and in case the court is held more than ten miles from the place of employment of himself and assistants they shall each be allowed mileage over the shortest usually traveled route at the rate of 8 cents per mile going to the place of holding the court, and $3 a day for expenses while necessarily kept by the judge-advocate away from the place of employment. Reporters are employed by the judge-advocate and are paid by the Pay Department, at the rates herein named, upon the certificate of the judge-advocate that the services charged for have been rendered. (Par. 1063, A. R. 1901.)

The only authority for the employment of reporters for courts-martial is that contained in Section 1203, Revised Statutes, which authorizes the judge-advocate of a military court to appoint a reporter for such court. In view of this statute, *held* that the appointment, by a judge-advocate on the staff of a department commander, of a person to act as reporter for all the courts to be convened in the department, was in contravention of law and of no effect. Dig. J. A. Gen., 461, par. 23.

No person in the military or civil service of the Government can lawfully receive extra compensation for clerical duties performed for a military court. (Par. 960, A. R. 1895.) See, also, Manual for Courts-martial, pp. 25, 26.

[5] Par. 958, Army Regulations, 1895. The employment of a stenographic reporter, under Section 1203, Revised Statutes, is authorized for general courts only, and in cases

Interpreters.—Interpreters to courts-martial are paid by the Pay Department upon the certificate of the judge-advocate that they were employed by order of the court. They will be allowed the pay and allowances of civilian witnesses.[1]

Interpreters and reporters are officers or, strictly speaking, employees of the court, and should be sworn before entering upon the performance of their duties.[2]

Clerks.—There is no authority for the employment of a civilian clerk for a court-martial other than the "reporter" authorized by Sec. 1203, Rev. Sts., and referred to in par. 958 of the Army Regulations of 1895. An enlisted man may be detailed as such clerk under par. 958. A court-martial, member of court, or judge-advocate cannot of course lawfully communicate to a reporter or clerk the finding or sentence of the court by allowing him to record the same. Before proceeding to deliberate upon its finding, the court should require the reporter or clerk, if it has one, to withdraw. But the fact that the finding or sentence or both may have been made known to the reporter or clerk of a court-martial cannot affect the legal validity of its proceedings or sentence.[3]

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where the convening authority considers it necessary. The convening authority may also, when necessary, authorize the detail of an enlisted man to assist the judge-advocate of a general court in preparing the record.

[1] Par. 961, A. R. 1895. That a member of the court acted as interpreter on a trial *held* an irregularity, but one which did not affect the legal validity of the proceedings. Dig. J. A. Gen., 454, par. 1.

Where the charges against a private soldier were preferred by the captain of his company, who also acted not only as a prosecuting witness but as interpreter on the trial, *held* a grave irregularity which might well induce a disapproval of the proceedings and sentence unless it quite clearly appeared that no injustice had been done the accused.* *Ibid.*, par. 2.

[2] For forms of oaths, see Manual for Courts-martial, p. 29.

[3] Dig. J. A. Gen., 264, par. 1. In view of the interpretation, by successive Attorneys-General,† of the term "other constant labor," employed in the Act of March 2, 1819, (the original of the provision of July 13, 1866,) as including clerical service, and of the continued practice of the government in accord with such interpretation, *held* that enlisted men detailed as clerks of courts-martial might properly be regarded as entitled, for constant labor as such "of not less than ten days' duration," to the extra-duty pay of twenty cents *per diem*. But *held*, in view of the positive prohibition of Sec. 1765, Rev. Sts., that a soldier could not legally be allowed any additional compensation for such service further or other than such laborer's pay; and this although at the time of acting as clerk he was on leave of absence. *Ibid.*, 404, par. 4

Held that a claim by an *officer* to be allowed extra compensation for services rendered by him as clerk to a general court-martial of which he was the junior member was wholly without sanction in usage, and moreover could not be allowed without a violation of Sec. 1765, Rev. Sts. *Ibid.*, 264, par. 2.

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* That an important witness on a trial should not properly be permitted to interpret the testimony of another such witness is remarked in G. C. M. O. 24, Dept. of Texas, 1875.

† 2 Opin. Att.-Gen., 706; 3 *ibid.*, 116; 4 *ibid.*, 425; 10 *ibid.*, 472.

CHAPTER V.

THE JURISDICTION OF COURTS-MARTIAL.

Sources.—The jurisdiction of a court is it power to try a case.[1] Jurisdiction is conferred, as to the State courts, by the common law, or by statutes of the State by whose authority they are created and in whose behalf they act;[2] that of the several Federal courts is conferred by the Constitution, or by laws made in pursuance thereof. The peculiar jurisdiction exercised by courts-martial is conferred by the Articles of War, and by other enactments of Congress of similar character had in pursuance of the authority conferred upon that body by the Constitution to "make rules and regulations for the government of the land and naval forces."[3]

Military Jurisdiction.—Courts-martial, as has been seen, are courts of limited jurisdiction, and as such their records must show affirmatively that they have authority to hear and determine cases coming before them for trial. The jurisdiction of courts-martial is not only statutory, but is also *exclusively criminal* in character, and such tribunals are entirely without power to entertain civil causes, or to take jurisdiction over property or property interests of any kind, or to make or enforce decrees respecting its possession or ownership. Their jurisdiction is *exclusive* as to what are known as military offenses, that is, offenses created by the Articles of War, and by other enactments of Congress of similar character.[4]

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[1] Rhode Island *vs.* Mass., 12 Pet., 657; Mo. *vs.* Lewis, 101 U. S., 22.

[2] *Ex parte* Dollman, etc., 4 Cr., 75; Sheldon *vs.* Sill, 8 How., 441; Boswell *vs.* Otis, 9 How., 336; Rose *vs.* Himely, 4 Cr. 241.

[3] The court-martial having jurisdiction of the person of the accused and of the offense charged, and having acted within the scope of its lawful power, its decision and sentence cannot be reviewed or set aside by the civil courts by writ of habeas corpus or otherwise. Johnson *vs.* Sayre, 158 U. S., 109, 118; Dynes *vs.* Hoover, 20 How., 65, 82; *Ex parte* Reed, 100 U. S., 13; *Ex parte* Mason, 105 U. S., 696; Smith *vs.* Whitney, 116 U. S., 167, 177–179.

[4] Courts-martial (though, within their scope and province, authoritative and independent tribunals) are bodies of exceptional and restricted powers and jurisdiction; their cognizance being confined to the distinctive classes of offenses recognized by the military code. Their jurisdiction is *criminal*, their function being to assign, in proper cases, *punishment;* they have no authority to adjudge damages for personal injuries or private wrongs.* Dig. J. A. Gen., 321, par. 1; *Ex parte* Wilkins, 3 Peters, 209; Barrett *vs.* Crane, 16 Verm., 246; Brooks *vs.* Adams, 11 Pick., 441; Brooks *vs.* Davis, 17 *id.*, 148; Brooks *vs.* Daniels, 22 *id.*, 498; Washburn *vs.* Phillips, 2 Met., 296; Smith *vs.* Shaw, 12 Johns., 257; Mills *vs.* Martin, 19 *id.*, 7; In Matter of Wright, 34 How. Pr., 221; Duffield

* See 2 Greenl. Ev., secs. 471, 476; United States *v.* Clark, 6 Otto, 40; Warden *vs.* Bailey, 4 Taunt., 78.

Concurrent Jurisdiction.—From the nature and source of their respective jurisdictions, civil and military courts can never have concurrent jurisdiction in the strict sense of the term. The same act or omission, however, may give rise to both a military and a civil trial, but the offense in each case is distinct and separate, one being created by the Articles of War and the other by the common law, or by statute in the State or district within whose territorial limits it was committed.[1]

Classification. — The question of jurisdiction as respecting military tribunals may be regarded from several points of view, accordingly as it relates (1) *to place*, (2) *to time*, (3) *to persons*, or (4) *to offenses*. These aspects of the subject will be discussed in the order named.

1. **Jurisdiction as to Place.**—The jurisdiction of courts-martial, not being restricted in point of territorial operation, extends to every part of the territory of the United States and, as to military persons, covers all military offenses committed by them, whether within or beyond such territorial limits. In so far, therefore, as mere jurisdiction is concerned, it

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vs. Smith, 3 Sergt. & Rawle, 590; Bell *vs.* Tooley, 12 Iredell, 605; State *vs.* Stevens, 2 McCord, 32; Miller *vs.* Seare, 2 W. Black., 1141; 6 Opins. Att.-Gen., 425.

"A court-martial is a court of limited and special jurisdiction. It is called into existence, by force of express statute law, for a special purpose and to perform a particular duty; and when the object of its creation is accomplished it ceases to exist. . . . If, in its proceedings or sentence, it transcends the limit of its jurisdiction, the members of the court and the officer who executes its sentence are trespassers, and as such are answerable to the party injured, in damages, in the courts." 3 Greenl. Ev., sec. 470.

Courts-martial are no part of the judiciary of the United States, but simply instrumentalities of the executive power. They are creatures of *orders;* the power to convene them, as well as the power to act upon their proceedings, being an attribute of *command*. But, though transient and summary, their judgments, when rendered upon subjects within their limited jurisdiction, are as legal and valid as those of any other tribunals, nor are the same subject to be appealed from, set aside, or reviewed by the courts of the United States or of any State. *Ibid.*, 813, par. 1.

See, also, Dynes *vs.* Hoover, 20 Howard, 79; *Ex parte* Vallandigham, 1 Wallace, 243; Wales *vs.* Whitney, 114 U. S., 564; Fugitive Slave Law Cases, 1 Blatch., 635; *In re* Bogart, 2 Sawyer, 402, 409; Moore *vs.* Houston, 3 S. & R., 197; *Ex parte* Dunbar, 14 Mass., 392; Brown *vs.* Wadsworth, 15 Verm., 170; People *vs.* Van Allen, 55 N. Y., 31; Perault *vs* Rand, 10 Hun, 232; *Ex parte* Bright, 1 Utah, 148, 154; Moore *vs.* Bastard, 4 Taunt., 67; 6 Opins. Att.-Gen., 415, 425. "No acts of military officers or tribunals, within the scope of their jurisdiction, can be revised, set aside, or punished, civilly or criminally, by a court of common law." Tyler *vs.* Pomeroy, 8 Allen, 484. Where a court-martial has jurisdiction, "its proceedings cannot be collaterally impeached for any mere error or irregularity committed within the sphere of its authority. Its judgments, when approved as required, rest on the same basis and are surrounded by the same considerations which give conclusiveness to the judgments of other legal tribunals, including as well the lowest as the highest, under like circumstances." *Ex parte* Reed, 10 Otto, 13.

[1] A soldier, for example, assaults his superior officer, the latter being, in the execution of his office, at a military post. The offense committed in this case constitutes a violation of the 21st Article of War, over which a court-martial has exclusive jurisdiction. Were an enlisted man, however, to meet a military superior, under similar circumstances of duty, in a city or other place without or beyond the limits of a military post, and to make a similar assault upon him, two separate offenses would result: one the civil offense of assault and battery, triable by a civil court having appropriate criminal jurisdiction, the other the military offense of striking a superior officer, under the 21st Article of War, which would be exclusively triable by court-martial. In neither case could an acquittal or conviction by one tribunal be pleaded in bar of a trial before the other, since the offenses are distinct in each case, though growing out of precisely the same act.

matters not where an offense has been committed, so long as it is one over which some form of military tribunal has jurisdiction and is committed by a person amenable to military law.[1]

Restriction upon the Convening Authority.—While, as has been seen, there is no limitation upon the territorial jurisdiction of military tribunals in so far as the place of commission of the offense is concerned, there are certain limitations in respect to the places at which courts-martial shall be convened by each of the several classes of persons empowered by law to constitute them. It may be said, in general, that a convening officer may convene a court-martial only at a place within the territorial limits of his command. Thus the President of the United States, the Secretary of War, and the Major-General commanding the Army may convene general courts-martial at any place within the territorial jurisdiction of the United States; a department commander may similarly convene such courts at any place within his department, a division commander within his division, and so on. A garrison or summary court may only be convened at the post or garrison commanded by its convening officer. When the power to convene a court-martial appertains to a command, as distinguished from a place,—as to a regiment or an army in the field, for example,—it may be exercised wherever such command may lawfully be operating when the necessity for the trial arises.

2. Jurisdiction in Point of Time.—As courts-martial do not depend upon a state of war for their jurisdiction, save in respect to the crimes mentioned in the 58th Article and to a limited number of offenses which pertain solely to a state of war, which do not exist in time of peace, and which cease to exist with the termination of hostilities or with the treaty of peace, the jurisdiction of military courts is only restricted in point of time by the operation of statutes of limitation.

Statutes of Limitation.—Statutes of limitation, in criminal practice, are enactments which, if pleaded by an accused, operate to deprive the courts of power to try certain offenses when a period of time, expressly stated in the statute, has elapsed since their commission. These statutes are not prohibitory as to jurisdiction, but constitute matter of defense which, to become effective, should be pleaded and proved.[2] "By pleading the general issue the accused is assumed to waive the right to plead the

This double jurisdiction, or liability, is not peculiar to the practice of courts-martial, since it may be created by the criminal laws of the United States and those of one of the States of the Union. A sale of liquor without a Federal license in a State in which the sale of liquor is prohibited by law may constitute a penal offense under the prohibitory law of the State and, at the same time, an offense against the revenue laws of the United States.

[1] Dig. J. A. Gen., 322, par. 2.

[2] Manual for Courts-martial, p. 32; Dig. J. A. Gen., 124, par. 12; *In re* Bogart, 2 Sawyer, 397; *In re* White, 17 Fed. Rep., 723; *In re* Davison, 21 *ibid.*, 618; *In re* Zimmerman, 30 Fed. Rep., 176; G. O. 22 of 1893. And compare U. S. *vs.* Cooke, 17 Wallace, 168.

limitation by a special plea in bar; but, under a plea of not guilty, the limitation may be taken advantage of by evidence showing that it has taken effect."[1]

Limitations at Military Law.—Two statutes of limitation form part of the military law of the United States. One of these, which is embodied in the 103d Article of War and applies to military offenses generally, provides that "no person shall be liable to be tried and punished by a general court-martial for any offense which appears to have been committed more than two years before the issuing of the order for such trial unless, by reason of having absented himself, or of some other manifest impediment, he shall not have been amenable to justice within that period."[2]

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[1] Dig. J. A. Gen., 124, par. 12. See, also, the article "Pleas in Bar of Trial" in the chapter entitled THE INCIDENTS OF THE TRIAL.

[2] 103d Article of War. In view of this Article it is the duty of the Government to prosecute an offender within a reasonable time after the commission of an offense. *Ibid.*, par. 11.

By the absence referred to in the original Article, in the term "unless by reason of having absented himself," is believed to be intended not necessarily an absence from the United States, but an absence by reason of a "fleeing from justice," analogous to that specified in Section 1045, Revised Statutes, which has been held to mean leaving one's home, residence, or known abode within the district, or concealing one's self therein, with intent to avoid detection or punishment for the offense against the United States.* Thus *held* that, in a case other than desertion, it was not essential for the prosecution to be prepared to prove that the accused had been beyond the territorial jurisdiction of the United States in order to save the case from the operation of the limitation. *Ibid.*, p. 125, par. 14.

A court-martial, in a case of an offense other than desertion, sustained a plea of the statute of limitations in bar of trial for the reason that the judge-advocate could produce no evidence to show that the accused was not within the territorial jurisdiction of the United States during his absence. *Held* that such showing was not necessary, and that it was sufficient that the absence should be any unauthorized absence from the military service whereby the absentee evades and for the time escapes trial. This construction of the term "absented himself" in the Article corresponds to that placed on the words "fleeing from justice" as used in the statutes of the United States to designate those whom the statutes of limitation for the prosecution of crimes do not protect. *Ibid.*, 125, par. 15.

It is quite clear that any person who takes himself out of the jurisdiction, with the intention of avoiding being brought to justice for a particular offense, can have no benefit of the limitation, at least when prosecuted for that offense in a court of the United States. . . . A person fleeing from the justice of his country is not supposed to have in mind the object of avoiding the process of a particular court, or the question whether he is amenable to the justice of the nation or of the State, or of both. Proof of a specific intent to avoid either could seldom be had, and to make it an essential requisite would defeat the whole object of the provision in question. Streep *vs.* United States, 160 U. S., 128; United States *vs.* Smith, 4 Day, 121, 125; Roberts *vs.* Reilly, 116 U. S., 80, 97.

The mere fact that the offense was concealed by the accused and remained unknown to the military authorities for more than two years constitutes no "impediment" in the sense of the Article. Dig. Opin. J. A. Gen., 123, par. 5.

A mere allegation in a specification to the effect that the whereabouts of the offender was unknown to the military authorities during the interval of more than two years which had elapsed since the offense is not a good averment of a "manifest impediment" in the sense of the Article. *Ibid.*, par. 6.

The prohibition of the Article relates only to prosecutions before general courts-martial; it does not apply to trials by inferior courts So, courts of inquiry may be convened without regard to the period which has elapsed since the date or dates of the act or acts

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* U. S. *vs.* O'Brien, 2 Dillon, 381; U. S. *vs.* White, 5 Cranch C. C., 38, 73; Gould & Tucker, Notes on Revised Statutes, 349.

Statute of Limitations in Desertion.—The other, subsequently enacted, applies to the offense of desertion in time of peace only, and provides that "no person shall be tried or punished by a court-martial for desertion in time of peace and not in the face of an enemy, committed more than two years before the arraignment of such person for such offense, unless he shall meanwhile have absented himself from the United States, in which case the time of his absence shall be excluded in computing the period of the limitation: *provided* that said limitation shall not begin until the end of the term for which said person was mustered into the service."[1]

3. Jurisdiction as to Persons.—*Amenability in General.*—As the amenability of an individual to military law involves the temporary surrender of a part of his civil rights, which are placed in abeyance during the period of his military service, and, in addition, the voluntary acceptance of certain obligations to which citizens, as such, are not subject, it follows that no person can be subjected to military jurisdiction without his consent as evidenced by his voluntary entrance to the military service, nor, save in a limited number of cases presently to be explained, can he be made amenable to such jurisdiction without the express authority of law. For the reasons thus stated, military laws are always strictly construed as to those clauses which are calculated to subject to their operation individuals who are in no way connected with the military establishment.

To What Persons Applicable.—Military law is, in general, applicable to military persons alone. The following classes of persons become subject to military jurisdiction by their voluntary entry into the military service either by enlistment or appointment: (*a*) the officers and enlisted men of the regular and volunteer forces;[2] (*b*) the militia when called into active service by the President to execute the laws of the Union, to suppress insurrections, or to repel invasions.[3] In addition to the classes above named, which constitute the military establishment of the United States, Congress has, by several statutes, subjected other classes of persons to military jurisdiction, but under conditions, as will presently be seen, which operate to create a doubt as to the validity of the enactments in question.[4] Under this head fall: (*c*) certain civilians in time of war;[5] (*d*) the inmates of the Soldiers' Home[6] and (*e*) of the several branches of the National Home for Disabled Volunteer Soldiers.[7] These will be discussed in the order named.

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to be investigated.* Nor does the rule of limitation apply to the hearing of complaints by regimental courts under Article 30. *Ibid.*, 124, par. 10.

[1] Act of April 11, 1890 (26 Stat. at Large, 54).

[2] Sections 1094 and 1342, Revised Statutes of the United States; 64th Article of War.

[3] Sec. 1644, *ibid.*; 64th Article of War.

[4] See note 6, *post.*

[5] 45th, 46th, and 63d Articles of War; Sec. 1343, Rev. Stat. U. S.

[6] Sec. 4824, Rev. Stat.

[7] Sec. 4835, *ibid.*; but see note 2, page 54, *post.* Sections 4824 and 4835 have never been given effect, presumably because they have been regarded as unconstitutional.

* See 6 Opin. Att.-Gen., 239.

Substitute for pages 47-51 to include "Conscription," in Davis' Military Law.

b. **The Militia.**—The militia of the United States is recognized by the Constitution, which gives to Congress the power to "provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions," and also for organizing, arming and disciplining the militia, and governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress (Constitution, Art. I, sec. 8). The Act of Congress, approved January 21st, 1903, provides, "that the militia shall consist of every able-bodied male citizen of the respective States, Territories, and the District of Columbia, and every able-bodied male of foreign birth who has declared his intention to become a citizen, who is more than eighteen and less than forty-five years of age, and shall be divided into two classes—the organized militia, to be known as the National Guard of the State, Territory, or District of Columbia, or by such other designations as may be given them by the laws of the respective States or Territories, and the remainder to be known as the reserve militia."

Exemption.—The Vice-President of the United States, the judicial and executive officers of the government, members and officers of each House of Congress, persons in the military and naval service of the United States, and certain persons who are in the performance of designated public functions, or employed in or upon works of public utility, or in sea service, members of religious sects whose creed forbids them to participate in war, and those who may be exempted by the laws of the respective States or Territories, are exempted from duty without regard to age.

Organization.—The organization, armament and discipline of the militia shall be the same as that which is now or may hereafter be prescribed for the Regular and Volunteer Armies of the United States. Such organization is to be made within five years from the date of this Act. (January 21, 1903.) In time of peace, the President of the United States may by order fix the minimum number of enlisted men fn each company, troop, battery, corps, engineer corps, and hospital corps.

How called into Service.—Whenever the United States is invaded, or in danger of invasion, or of rebellion against the authority of the government of the United States, or he is unable, with other forces at his command, to execute the laws of the Union in any part thereof, the President may call forth, for a period, which he may specify in his call, not exceeding nine months, such number of the militia as he may deem necessary to repel such invasion, suppress such rebellion, or to enable him to execute such laws, and to issue his orders for that purpose to such officers of the militia as he may think proper. The militia when so called shall continue to serve during the term specified, unless sooner discharged by order of the President. When the militia of more than one State is called into actual service of the United States, the President may apportion them among such States or Territories or to the District of Columbia according to representative population.

portions of the enrolled militia as have been organized by the several States into companies, battalions, regiments, and other tactical bodies for purposes of instruction and discipline.

It was not the intention of the framers of the Constitution to vest the entire control of the militia in the Federal Government, but to reserve to the several States an efficient participation in its management and, by the appointment of its officers, to maintain such control over its organization and discipline as would be calculated, in time of peace, to give it the character of a *State* as distinguished from a *National* militia. These objects were accomplished by clauses in the Constitution conferring upon Congress the power to provide for its armament, to prescribe its tactical organization, and to secure uniformity in drill and military instruction;[1] reserving to the several States the power to appoint its officers and to control its organization, discipline,[2] and training in accordance with the methods prescribed by Congress.[3]

Active Service of the Militia.—It is thus seen that the militia of the several States, considered as a military force, may be regarded from two points of view: (1) as a military force belonging to the State of which its members are citizens; (2) as a portion of the constitutional military force of the United States. It may therefore, in a proper contingency, be called into active service by either State or Federal authority. The power to call the militia into the service of the State is vested in some department of its government, usually in the governor, who is *ex officio* the commander-in-chief of its military forces. The corresponding power to call a portion of the militia into the military service of the United States is vested, by Congressional enactment, in the President, the constitutional commander-in-chief of its military forces.[4]

The Constitution itself prescribes the purposes[5] for which the militia may be called out and, by an express mention of those purposes, restricts its

which the United States may make provision for the form of the organization of, and for which it may prescribe a uniform system of drill or discipline and a uniform armament and equipment; but they are not primarily military forces of the United States in the sense that the regular and volunteer forces are a part of such military forces. They are a State militia, any part of which may become a part of the military forces of the United States when called by the President into its military service. J. A. G.

[1] By the Constitution of the United States, the power to determine who shall compose the militia is vested in Congress; and as it has been exercised by Congress, a State legislature cannot constitutionally provide for the enrollment of any other persons in the militia. Opin. of Justices, 14 Gray (Mass.), 193.

[2] The term "discipline" as used in Art. I, Sec. 8, of the Constitution, relates to drill merely, and not to military discipline, in the sense in which that term is now used; the control of the discipline, properly speaking, of the militia in time of peace being vested in the several States. See, also, Dig. J. A. Gen., 520, par. 9.

[3] Com. *vs.* Thaxter, 11 Mass., 386; Com. *vs.* Allen, 16 Mass., 523.

[4] The President has no original authority over the militia by right of his office. He can only call them out when Congress provides for his doing so as the agent of the United States for such purpose. When the call is complied with, the militia becomes national militia, and he becomes their commander-in-chief. Dig. Opin. J. A. Gen., 519, par. 2. See also Sections 1642–1656, 5297–5299, Revised Statutes.

[5] Article I, Section 8, Cl. 15.

employment to the specific uses named; i.e., to "execute the laws of the Union, suppress insurrections, and repel invasions." The period of service of the militia thus called into active service is restricted by statute to a term not exceeding nine months in duration.[1]

Emergency, by Whom Determined.—The question of determining whether an emergency exists justifying the calling forth of the militia or any portion of the same,[2] the authority to whom the call shall be addressed—whether to the governor of a State or to the commanding officers of the militia itself,—and all questions as to the strength and composition of the several quotas or contingents to be furnished, and the State or States which are to furnish them, are matters within the exclusive discretion of the President, as the commander-in-chief of the Army and Navy of the United States.[3]

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[1] Section 1648, Revised Statutes. There is no corresponding limitation upon the power of the States in respect to the length of time during which their militia may be employed in active service. See, also, note 2, p. 51, *post.*

[2] The Act of February 28, 1895, (1 Stat. L., 424,) authorizing the President under certain circumstances to call out the militia, is constitutional, and the President is the final judge of the emergency justifying such call. This construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the Act of Congress. The power itself is to be exercised upon sudden emergencies, upon great occasions of State, and under circumstances which may be vital to the existence of the Union. A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object. The service is a military service, and the command of a military nature; and in such case every delay and every obstacle to an efficient and immediate compliance necessarily tend to jeopard the public interests. Martin *vs.* Mott, 12 Wheat., 19, 30.

Where a power is confided to the President by law, the presumption is that in the exercise of that power he has pursued the law. The existence of an exigency justifying the calling out of the militia is not traversable and need not be averred. It is not necessary to set forth the orders of the President; it is sufficient to state that the call of the governor for the militia was in obedience to them. For disobedience to a call made by a governor for the militia in pursuance of the orders of the President, a citizen is liable to be tried by a court-martial organized under the laws of the United States. *Ibid.*, 33. Sanderheyden *vs.* Young, 11 Johns. (N. Y.), 150.

[3] The manner of calling out of the militia by the President under the Act of 1795 (Sec. 1642, R. S.) is indicated by the Supreme Court in the leading case of Houston *vs.* Moore,* where it is observed that "the President's orders may be given to the chief executive magistrate of the State, or to any militia officer he may think proper." The call would ordinarily be addressed to the governor, who, in most of the States, is made commander-in-chief of the active militia of the State. A further form, indeed, of calling out the militia, viz., by a conscription, was authorized during the late war by the Act of July 17, 1862. Dig. J. A. Gen., 519, par. 1.

The calling forth of the militia into the United States service is an administrative function, a ministerial act, in which the Secretary of War may issue the necessary orders as the organ of the Executive, and his act is the act of the President. *Ibid.*, par. 3.

In the exercise of its constitutional power "to provide for calling forth the militia" and "to provide for organizing" the same, etc., Congress has made no distinction between any different portions of this force, or recognized any such portion as the "national guard." The law relating to the subject, Revised Statutes, title 16, Sections 1625, 1642, etc., contemplates but a single integral body as constituting the militia and as liable to be called out. Under the existing law, the "national guard" of a State cannot legally be called out as such. Upon a call, the governor may indeed order them out, as being organized and available, so far as they will go to make up the number of the militia required. *Ibid.*, p. 520, par. 7.

The United States statutes take no notice of "national guard" as such. If called

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* 5 Wheaton, 1 (1820).

How Called into Service.—It has been seen that the order of the President calling forth any part of the militia[1] under the several Acts of Congress[2] authorizing its embodiment may be addressed to the governor of the State or to the commanding officers of particular organizations of the militia, as he may think proper.[1] To make this power effective it must be coupled with authority to compel obedience to the President's command. To this end, therefore, the statutes above referred to make a failure to appear at the appointed rendezvous, on the part of an individual member of the militia, a military offense, to which an appropriate penalty is attached, and over which a court-martial convened by the authority of the United States, or that of the State to which the militia force of the offender belongs, is given concurrent jurisdiction.[3]

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out, it is not as "national guard," but as militia; and when so called forth or included in a call, it must be governed by the existing laws providing for the organization, discipline, etc., of the militia. Dig. J. A. Gen., 520, par. 8.

The "national guard," so called, being merely militia, cannot (where not called forth) be "supported" or "maintained" by Congress, which is authorized by the Constitution to "support" and "maintain" the Army and Navy only. So officers of the national guard cannot be commissioned by the President without a violation of the Constitution, which "reserves the appointment of militia officers to the States respectively." *Ibid.*, par. 10.

[1] Houston *vs.* Moore, 5 Wheaton, 1; see, also, note 3, p 49, *ante*.

[2] Acts of Feb. 28, 1795. (1 Stat. at Large, 424,) April 8, 1814, (3 *ibid.*, 134,) and July 17, 1862, (12 *ibid.*, 594.) The manner of the calling out of the militia by the President under the Act of 1795 (Sec. 1642, Rev. Sts.) is indicated by the Supreme Court in the leading case of Houston *vs.* Moore,* where it is observed that "the President's orders may be given to the chief executive magistrate of the State or to any militia officer he may think proper." The call would ordinarily be addressed to the governor, who in most of the States is made commander-in-chief of the active militia of the State. A further form indeed of calling out the militia, viz., by a conscription, was authorized during the late war by the Act of July 17, 1862. Dig. J. A. Gen., 519, par. 1.

The President has no original authority over the militia by right of his office. He can only call them out when Congress provides for his doing so as the agent of the United States for such purpose. When the call is complied with, the militia becomes national militia, and he becomes their commander-in-chief. The law governing his exercise of power in calling out is found in Secs. 1642, 5297, 5298, and 5299, Rev. Sts. *Ibid.*, par. 2.

The calling forth of the militia into the U. S. service is an administrative function, a ministerial act, in which the Secretary of War may issue the necessary orders as the organ of the Executive, and his act is the act of the President. *Ibid.*, par. 3.

It is not essential for a militia organization that there should be a formal muster-in to bring it into the actual service of the United States. The provision of the Act of 1862 relating to the muster-in of militia is directory only. *Ibid.*, par. 4.

The President, in calling out a force of militia, authorized the governor of a State to designate the particular militia of that State to be included in the call, and the governor thereupon designated a certain regiment, and formally accepted its service. *Held* that in so doing he acted as the agent of the President, and that his acceptance was in law an acceptance by the President, and was equivalent to a muster-in of the regiment. *Ibid.*, par 5.

[3] Houston *vs.* Moore, 5 Wheaton, 1. Section 1658, Revised Statutes, prescribes that "courts-martial for the trial of militia shall be composed of militia officers only." The 77th Article of War contains a recognition of the same principle in the form of a prohibition to the effect that "officers of the regular army shall not be competent to sit on courts-martial to try the officers or soldiers of other forces, except as provided in Article 78." "*Held* that the enactment applied also in principle to *courts of inquiry* convened in the militia, and that officers of the army could not, for purposes of instruction

* 5 Wheaton, 1.

When Subject to Military Law.—The militia when called into active service by the President become subject to military law in the same manner and to the same extent as other troops of the United States.[1] The officers of the militia while "employed in conjunction with the regular or volunteer forces of the United States take rank next after all officers of like grade in said regular and volunteer forces, notwithstanding the commissions of such militia officers may be older than the commissions of the said officers of regular and volunteer forces of the United States."[2]

Conscription.—In addition to the methods above described, the United States may obtain the service of a portion of its militia by an exercise of the right of conscription. Resort was had to this method of obtaining a military force by the Acts of July 17, 1862, March 3, 1863, and February 10, 1864. These statutes provided for a national enrollment under the authority of the United States, for an apportionment of quotas in accordance therewith, and authorized such quotas to be obtained by conscription in the several districts into which each of the States was divided. Certain classes of persons were exempted from the operation of the conscription law, and drafted men were released from service upon the presentation of acceptable substitutes or by the payment of a sum specified in the statute.[3]

c. Retainers to the Camp; Camp-followers; Civilian Employes.—The 63d Article of War makes two classes of persons amenable to military law who, unlike the classes already described, form no part of the military forces of the United States. By their voluntary presence, however, with an army in the field, in time of war, they may be regarded as having submitted themselves, of their own free will, to the status in which they are placed by the operation of the statute. The Article arranges such persons into two classes: (1) Retainers to the camp, or camp-followers. Under this head fall

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or assistance, legally be detailed to be associated with militia officers as members of such courts." Dig. J. A. Gen., 521, par. 11.

[1] Section 1644, Revised Statutes of the United States; 64 Article of War.

[2] One hundred and twenty-fourth Article of War. The Act of February 28, 1795, (1 Stat. at Large, 424,) fixed the period of service of the militia serving under a call of the President at three months; this period was extended to six months by the Act of April 8, 1814, (3 *ibid.*, 134,) and to nine months by the Act of July 17, 1862, (12 *ibid.*, 594; Sec. 1648. Rev. Stat.) The period of service begins, in any case, on the date of the arrival of the militia at the place of rendezvous, on which date the obligations of the United States in respect to pay, rations, clothing, and the like become operative. The Acts of Feb. 28. 1795, (1 Stat. at Large, 524,) and March 19, 1836, (5 *ibid.*, 7,) authorize certain travel allowances, in behalf of members of the militia, during the period of assembly, prior to its entry into the service, and during a corresponding period covering its dispersion after discharge.

Where militia are called out and mustered into actual service, the staff-officers of their commanding general cannot be considered as in any sense appointed by the Secretary of War or commissioned by the President. Nor are they given the corresponding rank of staff officers of the regular army, but their rank remains the same as it was before in the militia under the State laws. Dig. J. A. Gen., 522, par. 18.

[3] See Acts of July 17, 1862, (12 Stat. at Large, 597), March 3, 1863, (12 *ibid.*, 731,) and February 24, 1864, (13 *ibid.*, 8.) See, also, U. S. *vs.* Scott, 3 Wallace, 642; U. S. *vs.* Murphy, *ibid.*, 649.

sutlers, traders, correspondents, restaurant-keepers, officers' servants, and the like, whose employment, if any there be, is private, not public, in character. (2) Civilian employees of the United States, such as clerks, teamsters, guides, interpreters, telegraph-operators, and the like, whose services are necessary to the administration of the several staff departments.[1] It will be observed that the statute is restricted in its operation to persons accompanying armies in the field in time of war, and in the actual theatre of military operations.[2] It has been held to apply, however, to employees and others accompanying troops engaged in extensive operations against hostile Indians;[3] but it has never been construed to apply, even in time of war, to any portions of the territory of the United States in which military operations were not being carried on against the public enemy. It is proper to observe that individuals of the class termed "retainers to the camp," such as officers' servants and the like, as well as camp-followers generally, have rarely been subjected to trial in our service. For breaches of discipline committed by them the punishment has generally been expulsion from the limits of the camp and dismissal from employment.[4]

[1] Dig. J. A. Gen., 75, par. 2.

[2] The discipline authorized by the Article has mainly been applied to the description of "persons serving with the armies of the United States in the field," that is to say, civilians serving in a *quasi*-military capacity in connection with troops in time of war and on its theatre. Thus during the late war civilians of the following classes were, in repeated cases, held amenable, under this Article, to the military jurisdiction, and subjected to trial and punishment by courts-martial: teamsters employed with wagon-trains, watchmen, laborers, and other employees of the quartermaster, subsistence, engineer, ordnance, provost-marshal, etc., departments; ambulance-drivers; telegraph-operators; interpreters; guides; paymasters' clerks; veterinary surgeons; "contract" surgeons, nurses and hospital attendants; conductors and engineers of railroad-trains operated upon the theatre of war for military purposes; officers and men employed on government transports, etc. But the mere fact of employment by the government pending a general war does not render the civil employee so amenable. The employment must be in connection with the army in the field and on the theatre of hostilities. Dig. J. A. Gen., 75, par. 2.

Held (June, 1863) that the force employed in the "Ram Fleet" on western waters was properly a contingent of the army rather than of the navy, and accordingly that civilian commanders, pilots, and engineers employed upon such fleet during the war and before the enemy were persons serving with the armies in the field in the sense of this Article, and, therefore, amenable to trial by court-martial. *Ibid.*, par. 3. See, also, *ibid.*, par. 6.

[3] Dig. J. A. Gen., 76, par. 4.

[4] *Ibid.*, 75, par. 1. By the sixth amendment of the Constitution civilians are guaranteed the right of trial by jury "in all criminal prosecutions." Thus in time of peace a court-martial cannot assume jurisdiction of an offense committed by a civilian without a violation of the Constitution. It is only under the exceptional circumstances of a time of war that civilians may, in certain situations, become amenable to trial by court-martial.* Dig. J. A. Gen., 325, par. 7.

A civilian brought to trial before a court-martial cannot, by a plea of guilty or other form of legal assent, confer jurisdiction upon the court where no jurisdiction exists in law.† *Ibid.*

* See in support of this view, *Ex parte* Milligan, 4 Wallace, 121–123; Jones *vs.* Seward, 40 Barb., 563; In Matter of Martin, 45 *ibid.*, 145; Smith *vs.* Shaw, 12 Johns., 257, 265; In Matter of Stacy, 10 *ibid.*, 332; Mills *vs.* Martin, 19 *ibid.*, 22; Johnson *vs.* Jones, 44 Ill., 142, 155; Griffin *vs.* Wilcox, 21 Ind., 386; *In re* Kemp, 16 Wis., 359; *Ex parte* McRoberts, 16 Iowa, 605; Antrim's Case, 5 Philad., 288; 3 Opin. Att.-Gen., 690; 13 *ibid.*, 63.

† Compare People *vs.* Campbell, 4 Parker, 386; Shoemaker *vs.* Nesbit, 2 Rawle, 201; Moore *vs.* Houston, 3 Sergt. & Rawle, 190; Duffield *vs.* Smith, *ibid.*, 599; also One Hundred and Third Article.

d. Relieving, or Giving Intelligence to, the Enemy.—In addition to the classes already described, certain persons become subject to military jurisdiction, and so to trial by court-martial, as a consequence of the commission of specific statutory offenses in time of war. Such are: (1) those who relieve the enemy with money, victuals, or ammunition, or knowingly harbor or protect him;[1] (2) whosoever holds correspondence with or gives intelligence to the enemy, either directly or indirectly;[2] (3) spies.[3] Spies are persons who, in disguise or under false pretenses, enter the lines of an army for the purpose of obtaining information for the use of the enemy. Acting as a spy, therefore, is an offense against the laws of war, and, as such, comes into existence only during the pendency of active military operations.

It has already been seen that military laws are always strictly construed; that is, that no persons are made subject to them or brought within their operation save with the express authority of law. The word "whosoever" in Articles 45 and 46 and the words "all persons"[4] as used in Section 1343,

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Any statute by which any class of civilians is attempted to be made amenable to trial by court-martial for offenses committed while civilians and in time of peace is necessarily unconstitutional. Dig. J. A. Gen., par. 8.

[1] 45th Article of War.

[2] 46th Article of War.

[3] Section 1343, Revised Statutes.

While the 45th and 46th Articles appear to confer jurisdiction upon courts-martial to try and punish civilians for the offenses therein named, it may perhaps be doubted whether, since the adoption of the Constitution, the conviction of a civilian under either Article would be sustained. For the offenses thus set forth, however, civilians would, in time of war, properly be triable by military commissions.

[4] In view of the general term of description in this and the succeeding Article, "whosoever," it was *held*, during the late war, by the Judge-Advocate General and by the Secretary of War,* and has been held later by the Attorney-General,† that *civilians* equally with military persons were amenable to trial and punishment by court-martial under either Article.‡ Dig. J. A. Gen., 40, par. 1.

During the late war all inhabitants of insurrectionary States were *prima facie* enemies in the sense of this and the succeeding Article.§ A citizen of an insurgent State who entered the U. S. military service became of course no longer an enemy. So *held* of a lieutenant of the 1st E. Tenn. Cavalry. *Ibid.*, 41, par. 2.

It is no less a *relieving* an enemy under this Article that the money, etc., furnished is *exchanged* for some commodity, as cotton, valuable to the other party. *Ibid.*, par. 3.

The act of "relieving the enemy" contemplated by this Article is distinguished from that of trading with the enemy in violation of the laws of war; the former being restricted to certain particular forms of relief, while the latter includes every kind of commercial intercourse not expressly authorized by the government. *Ibid.*, par. 4.

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* See G. O. 67, War Dept., 1861; also the following Orders of that Department publishing and approving sentences of civilians tried and convicted under these Articles: G. O. 76, 175, 250, 371, of 1863; do. 51 of 1864; G. C. M. O. 106, 157, of 1864; do. 260, 671, of 1865.

† 13 Opins. Att.-Gen., 472.

‡ Admitting this construction to be warranted so far as relates to acts committed on the theatre of war or within a district under martial law, it is to be noted that it is the effect of the leading adjudged cases to preclude the exercise of the military jurisdiction over this class of offenses when committed by civilians in places not under military government or martial law. See, especially, *Ex parte* Milligan, 4 Wallace, 121-123; Jones *vs.* Seward, 40 Barb., 563; also other cases cited in note to par. 7, p. 325, Dig. J. A. Gen.

§ See the opinion of the U. S. Supreme Court (frequently since reiterated in substance) as given by Grier, J., in the "Prize Cases," 2 Black, 666 (1862); and by Chase, C. J., in the cases of Mrs. Alexander's Cotton, and The Venice, 2 Wallace, 274, 418 (1864). In the latter case the Chief Justice observes: "The rule which declares that war makes all the citizens or subjects of one belligerent enemies of the government and of all the citizens or subjects of the other applies equally to civil and to international wars." That an insurrectionary State was no less "enemy's country," though in the military occupation of the United States, with a military governor appointed by the President, see opinion by Field, J., in Coleman *vs.* Tennessee, 7 Otto, 516, 517.

Revised Statutes, have been held to include civilians as well as military persons, and to render them liable to the penalties therein imposed.[1]

e. Inmates of the Soldiers' Home and of the National Home for Disabled Volunteer Soldiers.—The inmates of the Soldiers' Home at Washington, D. C., are declared in Section 4824 of the Revised Statutes "to be subject to the Rules and Articles of War in the same manner as soldiers of the Army";[2] Section 4853, Revised Statutes, declares that "all inmates of the National Home for Disabled Volunteer Soldiers shall be subject to the Rules and Articles of War, and in the same manner as if they were in the Army."[3]

Beginning of Period of Amenability.—Members of the military establishment become amenable to the jurisdiction of courts-martial by their voluntary entry into the military service. In the case of a commissioned officer of the regular or volunteer forces such amenability dates from the acceptance of his appointment or commission,[4] or, in certain cases, from the date

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[1] *Held* that the offense of *holding correspondence* with the enemy was completed by writing and putting in progress a letter to an inhabitant of an insurrectionary State during the late war; it not being deemed essential to this offense that the letter should reach its destination.* Dig. J. A. Gen., 42, par. 1.

It is essential, however, to the offense of *giving intelligence* to the enemy that material information should actually be communicated to him; the communication may be verbal, in writing, or by signals. *Ibid.*, par. 2.

[2] This section, however, is unconstitutional and a dead letter. These inmates are no part of the army, nor are they supported by the United States. They are civilians occupying dwellings and sustained by funds held in trust for them. The territory of the Home being within the District of Columbia, and not having been exempted by Congress from the operation of the criminal laws of the District, the inmates are subject to those laws like any other residents. Dig. J. A. Gen., 705, par. 2. See, also, 744 *ibid.*, par. 4, and 20 Opin. Att.-Gen., 514.

[3] See note 2, *supra*. In March, 1870, the president of the National Home for Disabled Volunteer Soldiers, a civilian, convened at the Home a court-martial composed of eight inmates of the same (all civilians, but designated by their former rank in the volunteer service, as "surgeon," "captain," "sergeant," and "private") for the trial, on charges of desertion and other offenses, of another (civilian) inmate. The court tried the accused, convicted him, and sentenced him to a term of imprisonment. The proceedings and sentence were approved by the convening authority, who thereupon applied to the Secretary of War for an order designating a military prison for the confinement of the party in execution of his sentence. *Held* (upon a reference of the case for opinion, by the Secretary of War) that the proceedings were unprecedented, unauthorized *ab initio*, and void as a whole and in detail; that the provision in the Act establishing the Home that the inmates should be "subject to the rules and articles of war in the same manner as if they were in the army," even if it could be regarded as constitutional, conveyed no authority for such a court as that constituted and composed in this case; and that the sentence adjudged by the same could not legally be executed in the manner proposed or otherwise.† See, also, U. S. *vs.* Murphy, 9 Fed. Rep. 26, in which it was held that inmates of this Home were not in the military service of the United States. Dig. J. A. Gen., 329, par. 15.

[4] An appointment (or commission) in order to take effect at all must be *accepted;* but, when accepted, it takes effect as of and from its date, *i.e.*, the date on which it is completed by the signature of the appointing power, or that as and from which it purports in terms to be operative.‡ Dig. J. A. Gen., 149, par. 1.

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* Compare Hensey's Case, 1 Burrow, 642; Stone's Case, 6 Term, 527; Samuel, 580.

† It is inaccurately stated in the report of the case of Renner *vs.* Bennett, 21 Ohio St., 434, (December, 1871,) that no inmate of the National Home had ever been subjected to a trial by court-martial. The instance referred to in the text, however, is the only one known of such a trial.

‡ See Marbury *vs.* Madison, 1 Cranch, 137; United States *vs.* Bradley, 10 Peters, 304; United States *vs.* Le Baron, 19 How., 78; Montgomery *vs.* United States, 5 Ct. Cl., 97.

of muster-in[1] of the organization to which he belongs; in the case of an enlisted man the date of entry into service, and so of amenability to military law, is determined by his enlistment.[2] If any portion of the militia be called into the service by the President, the amenability of its members to military law begins at the date of assembly named in the orders calling them forth.[3] In respect to persons conscribed, such amenability relates to and becomes operative from the date fixed in the statute authorizing the conscription.[4]

Enlistment.—The enlistment of a person in the military service of the United States is always a voluntary act, and consists, in substance, of the execution of a contract of enlistment, to which the United States and the enlisted man are parties.[5] The transaction which, as will presently be seen, operates to effect an important change of status, in so far as the enlisted

[1] Dig J. A. Gen., 746, par. 4.

[2] Our law not defining enlistment, nor designating what proceeding or proceedings shall or may constitute an enlisting, it may be said in general that any act or acts which indicate an undertaking, on the part of a person legally competent to do so, to render military service to the United States for the term required by the existing law, and an acceptance of such service on the part of the government, may ordinarily be regarded as legal evidence of a contract of enlistment between the parties, and as equivalent to a formal written agreement where no such agreement has been had.* The 47th Article practically makes the receipt of pay by a party as a soldier evidence of an enlistment on his part, estopping him from denying his military capacity when sought to be made amenable as a deserter. So *held* that the fact that a party, after having been armed and clothed as a soldier, had voluntarily rendered material service as such, although he had received no pay, constituted *prima facie* evidence that a legal contract of enlistment had been entered into between him and the United States. But enlistments in our army are *now* almost invariably evidenced by a *formal* writing and engagement under oath. *Ibid.*, 384, par. 1. (See, also, as illustrating what constitutes a formal enlistment, Article 2 in the chapter entitled THE ARTICLES OF WAR. See, also, *Ex parte* Grimley, 137 U. S., 137.)

[3] Houston *vs.* Moore, 1 Wheaton, 1; Martin *vs.* Mott, 12 *ibid.*, 19, 30. Dig. J. A. Gen., 519, par. 1, 2, 3, 5; Military Laws of the United States, par. 1256, notes; Sec. 1649, Revised Statutes.

[4] Section 13, Act of March 3, 1863 (12 Stat. at Large 733).

[5] See note 2, *supra*. A mere non-compliance with an army regulation, in making an enlistment, does not *per se* affect the validity of the contract. Thus the fact that the recruiting officer has knowingly enlisted a married man in derogation of par. 825 of the Regulations, or that a married man has procured himself to be enlisted under a representation that he was unmarried, does not affect the validity of the enlistment. In such a case the President or the Secretary of War may, in his discretion, forthwith discharge the soldier under the 4th Article of War, or may hold him regularly to service for the term for which he has enlisted.† Dig. J. A. Gen., 385, par. 2.

Sections 1116–1118, Rev. Sts., providing that deserters, convicted felons, insane or intoxicated persons, and certain minors shall not be enlisted, etc., are regarded as directory only, and not as necessarily making void such enlistments, but as rendering them voidable merely at the option of the government.‡ In cases of such enlistments, except of course where the party, by reason of mental derangement or drunkenness, was without the legal capacity to contract, the government may elect to hold the soldier to ser-

* "On a charge of desertion, or other offense against military discipline it will be sufficient to prove that the accused received the pay or did the duties of a soldier, without other proof of his enlistment or oath." 3 Greenl. Ev., § 488. And see Lebanon *vs.* Heath, 47 N. Hamp., 359; *Ex parte* Anderson, 16 Iowa, 599.

† In *Ex parte* Schmeid, 1 Dillon, 587, an application for a discharge from his enlistment made by a soldier who had enlisted as an unmarried man, and based upon the ground that he had in fact a wife and child at the time and that his enlistment was therefore a nullity, was refused by the court on *habeas corpus*. See, also, *In re* Grimley, 137 U. S., 147, and the similar ruling in Ferren's Case, 3 Benedict, 442.

‡ See United States *vs.* Wyngall, 5 Hill, 16; United States *vs.* Cottingham, 1 Rob., 631; Commonwealth *vs.* Baker, 5 Binney, 427; In Matter of Graham, 8 Jones' Law, 416; Cox *vs.* Gee, Winst. L. & E., 131.

man is concerned, is supported and reinforced by the solemn sanction of an oath of enlistment. The act of enlistment is thus seen to be contractual in character; a violation of the contract, however, involves certain penal consequences which will elsewhere be described. "The effect of the act of enlistment is to create a status, and the taking of the oath of enlistment is the pivotal fact which operates to change the status from that of citizen to that of soldier. By enlistment the citizen becomes a soldier. His relations to the State and the public are changed. He acquires a new status with correlative rights and duties; and although he may violate his contract obligations, his status as a soldier is unchanged. He cannot of his own volition throw off the garment he has once put on, nor can he, the State not objecting, renounce his relations, and destroy the status, on the plea that, if he had disclosed truthfully the facts, the other party, the State, would not have entered the new relations with him, or permitted him to change his status."[1]

Termination of Liability.—The enlistment contract, thus entered into, may be terminated prior to the completion of the stipulated period by purchase[2] of discharge, or by a discharge due to disability caused by wounds, injury, or disease contracted or incurred prior to, or during, the term of enlistment;[3] it may also be terminated at any time by a discharge issued at the discretion of the Secretary of War, under the authority conferred by the 4th Article of War. It may be voided, by the same authority, at the instance of the parent or guardian, if entered into by a minor without his consent;[4] it is not voidable, however, at the instance of the enlisted man on the ground of minority, fraud, misrepresentation, or concealment, even though in point of age he was without legal capacity to contract.[5] An

vice, subject to any application for discharge which may be addressed by himself or his parent, etc., either to the Secretary of War or to a United States court..*

[1] *Ex parte* Grimley, 137 U. S., 137.

[2] Section 4, Act of June, 16, 1890 (26 Stat. at Large, 157).

[3] Fourth Article of War, paragraphs 154–157, Army Regulations of 1895.

[4] See note 5, page 55, *ante;* Dig. J. A. Gen., 387, par. 5, 6.

[5] It is well established that a soldier cannot himself avoid his contract of enlistment on the ground of minority, and abandon at pleasure the military service. His release on this ground can be obtained only on application of a parent or guardian entitled to his services, and without whose consent he enlisted.† The application of the parent, whether made to the Secretary of War or, on *habeas corpus*, to a U. S. court, must be made before the soldier attains his majority and ratifies his contract.‡ Dig. J. A. Gen., 389, par. 12.

The enlistment of a minor without consent is not void, but is voidable merely, and only by the United States, which, on the fact of minority, etc., becoming known, may waive the objection and adopt and continue the enlistment or terminate it at pleasure. If the minor *deserts*, he cannot take advantage of his own wrong and plead in defense, on trial, that the enlistment was void.§ Nor can he do so if on enlistment he purposely

* Under the existing law the authority to discharge soldiers on account of minority, etc., is not reserved to the Secretary of War alone, but the United States courts are empowered to inquire into the validity of enlistments on *habeas corpus*, and thereupon to discharge enlisted persons in proper cases. *Ex parte* Grimley, 137 U. S., 137; *Ex parte* Schmeld, 1 Dillon, 587; *In re* McDonald, Lowell, 106; McConologue's Case, 107 Mass., 154. This power cannot legally be exercised by a State court. Tarble's Case, 13 Wallace, 397.

† *In re* Hearn, 32 Fed., 141; U. S. *vs.* Gibbon, 24 Fed., 135; *In re* Morrissey, 137 U. S., 157.

‡ *In re* Dohrendorf, 40 Fed., 148; *In re* Spencer, *id.*, 149.

§ *In re* Morrissey, 137 U. S., 157.

enlistment is normally terminated at the expiration of the period of enlistment by a formal discharge, in writing, issuing from the proper military authority.[1] The discharge certificate, the issue of which operates to put an end to the status of enlistment, is evidence not only of the fact of discharge, but of the character of service rendered by the soldier during the period of his engagement.

Volunteers or militia may be discharged individually, as above described, or they may be mustered out in organized bodies, at the expiration of their term of service;[2] in either case a formal certificate of discharge is issued.

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concealed his age and the enlistment was therefore fraudulent. That a soldier was a minor at enlistment does not affect his capacity to commit a military offense or the jurisdiction over him of a court-martial. Where a minor deserts he must abide, like any other soldier, the consequence of his criminal act, viz., arrest, trial, and sentence if convicted. And till the charge of desertion has been disposed of, or till the sentence has been undergone, not even his parent can procure his discharge. The right of the United States to hold him to the penalty of the infraction of his contract and of military discipline is paramount to the right of the parent to his services, and the parent cannot procure his release on *habeas corpus* while held in military custody awaiting trial, or under sentence on conviction of desertion or other military offense. The law requiring consent of parent or guardian applies to an Indian minor enlisting in the army. *Ibid.*, par. 13.

[1] See 4th Article of War, *post*. Except in cases to which the last paragraph of the 60th Article of War may be applicable, a soldier cannot be made amenable for an offense committed under an enlistment prior to that in which he is serving. Reenlistment does not revive such a liability. Dig. J. A. Gen., 654, par. 1.

[2] Dig. J. A. Gen., 355, par. 1. A soldier honorably discharged in the usual form at the end of his term is no longer subject to military discipline or control.* Having become a civilian, he is entitled to be restored at once, or as soon as the exigencies of the service will permit, to the rights and status of a citizen. *Ibid.*, 356, par. 6.

The formal *certificate of discharge* furnished in blank by the Adjutant-General is, when duly made out and signed (see Art. of War 4), legal evidence of the fact of discharge, and of the circumstances therein stated, under which it was given.† The certificate is not a record, and its statements are not conclusive upon the Government when contradicted by record or other better evidence. *Ibid.*, 358, par. 13.

The discharge furnished to the soldier, or for him, takes effect, like a deed, upon delivery. The delivery should be personal, unless, at its date, the soldier is in confinement awaiting trial or under sentence; in such case the delivery may be constructive, the certificate being committed to the commander of the company, post, etc., to be retained by him for the soldier until released from arrest or imprisonment, and then rendered to him personally. This is the recognized practice; the delivery to the commander being deemed tantamount to actual delivery. *Ibid.*, par. 14.

Any form of discharge other than such as is prescribed in the 4th Article of War is irregular and inoperative (unless indeed otherwise authorized by subsequent statute). Mere desertion does not operate as a discharge of a soldier; he may then be dropped from the rolls of his command, but he is in no sense discharged from the army. Nor can an official publication, in orders, of a sentence of dishonorable discharge have the effect of discharging a soldier; there must still be a notice, actual, as by the delivery of the formal discharge certificate, or constructive. A soldier cannot discharge himself by simply leaving the service at the expiration of his term. The final statements required by par. 141, A. R. 1895, to be furnished with the discharge, constitute no part of the discharge: the discharge is complete without them. *Ibid.*, 359, par. 17.

The statement of "character" appended to the certificate is no part of the discharge. This description is devolved by par. 148, A. R. 1895, upon the commanding officer

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* Much less is he subject to be *punished*. In the late case of White *vs.* McDonough, 3 Sawyer, 311, where a soldier whose term of enlistment expired while he was on a transport with a detachment was formally discharged, and subsequently, on account of an alleged breach of discipline, was ordered by his commanding officer to work in the coal-hole, the court say: "The conduct of the officer in command was arbitrary and unjustifiable either by law or military necessity."

† Hanson *vs.* S. Scituate, 115 Mass., 336; Bd. of Comrs. *vs.* Mertz, 27 Ind., 336; U. S. *vs.* Wright, 5 Philad., 296.

The service of a commissioned officer may be terminated in time of peace by resignation, by dismissal in pursuance of the sentence of a general court-martial, or, under the authority conferred by Section 1229 of the Revised Statutes, he may, for absence without leave extending over a period of three months, be dropped from the rolls by order of the President.[1] In addition to these methods, the service of a commissioned officer in time of war may be terminated by a formal discharge at the expiration of his term of service; and he may also be discharged at the discretion of the President, but with the right, as will presently be seen, to have the question of his dismissal inquired into by a general court-martial.[2]

Jurisdiction after Expiration of Service.—As has been seen, an officer or soldier (except as otherwise expressly provided by statute) ceases to be amenable to the military jurisdiction for offenses committed while in the military service after he has been separated therefrom by resignation, dismissal, being dropped for desertion, muster-out, discharge, etc., and has thus become a civilian.[3]

The discharge of a soldier, therefore, when subject to trial and punishment for a military offense is a formal waiver and abandonment by the United States of jurisdiction over him. Nor does a soldier after having once been discharged (as where he has been dishonorably discharged by sentence for desertion or any other military offense) remain liable to military jurisdiction, or become subject thereto, as to past offenses, by again entering the military service, whether by enlistment or by conscription or appointment. Nor can a person who, by reason of acceptance of resignation, dismissal, discharge, etc., has become wholly detached from the military service be made liable to trial by court-martial for offenses committed while in the service, on the ground that such offenses were not discovered till after he had left the Army.

Exceptions: 60th Article of War; Military Convicts.—The 60th Article of War confers jurisdiction upon courts-martial for the trial of officers or enlisted men for offenses therein enumerated, subject, however, to the operation of the statute of limitations contained in the 103d Article. The Act of June 18, 1898,[4] confers jurisdiction for the trial of enlisted men only who have been sentenced to dishonorable discharge and to confinement in addi-

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whose duty it may be to make out the discharge. The Army Regulations do not give to his superior any authority over the subject. (See G. O. 74 of 1881.) Dig. J. A. Gen., par 18.

[1] Section 1229. Revised Statutes. See Newton *vs.* U. S., 18 Ct. Cls., 435; Dig. J. A. Gen., 370, par. 5; *Ibid*, par. 7. See, also, Section 1230, Rev. Statutes.

[2] Sections 1229 and 1230, Rev. Stat.

[3] Dig. J. A. Gen., 323, par. 5.

[4] Section 5, Act of June 18, 1898. (30 Stat. at Large, 483.)

tion thereto, such jurisdiction attaching during the period of imprisonment imposed by the sentence of a general court-martial.

But a soldier, if he has not been in fact discharged, may be brought to trial by court-martial after the term of service for which he enlisted has expired, provided before such expiration proceedings with a view to trial have been duly commenced against him by arrest or service of formal charges.[1] By such arrest or service of charges the military jurisdiction attaches, and, once attached, trial by court-martial, and punishment upon conviction, may legally ensue though the soldier's term of enlistment may in fact expire before the trial be entered upon.[2]

4. Jurisdiction as to Offenses.—As the Federal Government, as such, has no common-law jurisdiction, it follows that there can be no criminal offenses against the United States unless they are made such by statute.[3] This principle applies with equal force to military offenses which, to become triable and punishable by military tribunals, must be expressly created by statute. The several military offenses known to the law are to be found in the Articles of War and in subsequent enactments of Congress. Other offenses, while not defined in those Articles, are adopted by them and courts-martial are given jurisdiction over them. In some cases this grant is general, applying to all times and places; in others it is limited to time of war only. Still other offenses—those of being a spy, and forcing a safeguard, for example—become such only when a state of war exists to which the United States is a belligerent party.

Courts-martial have exclusive jurisdiction to try offenders for acts con-

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[1] Dig. J. A. Gen., 324, par. 6. See, also, G. C. M. O. 16, A. G. O., 1871.

[2] In the leading case on this point, of a seaman in the navy (*In re* Walker, 3 American Jurist, 281*), the Supreme Court of Massachusetts held (Jan. 25, 1830) as follows: "In this case the petitioner was arrested, or put in confinement, and charges were preferred against him to the Secretary of the Navy before the expiration of the time of his enlistment; and this was clearly a sufficient commencement of the prosecution to authorize a court-martial to proceed to trial and sentence, notwithstanding the time of service had expired before the court-martial had been convened." And, to illustrate the injurious consequences of an opposite ruling, the court goes on to remark that "if any of the class of offenses not punishable at common law," and "of which no other courts excepting courts-martial can take cognizance, should be committed by any seaman immediately before the expiration of his term of service, he would escape with impunity. He might be guilty of the grossest insult to his officers; of disobedience of orders in the most critical moment to the ship; and in the hour of battle he might refuse to fight, and there would be no power to punish him." So *held* by the Judge-Advocate General in a case of a soldier of the regular army arrested on the day before the expiration of his term of enlistment, with a view to a trial for a military offense by court-martial, that the jurisdiction of the court had duly attached, and that his trial might legally be proceeded with. And similarly *held* in repeated cases of soldiers and officers of regular and volunteer regiments. Dig. J. A. Gen., 324, par. 6.

[3] U. S. *vs.* Worrall, 2 Dallas, 384; *Ex parte* Bollman, 4 Cranch, 75; U. S. *vs.* Hudson, 7 Cranch, 32; U. S. *vs.* Coolidge, 1 Wheat., 415; U. S. *vs.* Beraus, 3 Wheat., 326.

[*] And see Judge Story's charge to the jury in United States *vs.* Travers, 2 Wheeler Cr. C., 509; In the Matter of Dew, 25 L. R., 540; *In re* Bird, 2 Sawyer, 33.

stituting military offenses only; they also have jurisdiction to try offenders for certain acts which, besides constituting military offenses, are also civil crimes. In the latter case the military ordinarily gives precedence to the civil court, but when an officer or a soldier has been arraigned before a duly constituted court-martial for an offense triable by it, the jurisdiction thus attached cannot be set aside by the process of a State court.[1]

As regards offenses, the jurisdiction therefore embraces the offenses specifically defined in the Articles of War, or included under the general terms of the 61st and 62d Articles;[2] the offense of military persons trading with the enemy,[3] and that of fraudulently enlisting in the service of the United States.[4]

The 61st and 62d Articles of War.—The 61st Article of War gives to certain acts or omissions on the part of an officer the character of a military offense under the name of conduct unbecoming an officer and gentleman; the particular acts or behavior that shall constitute such conduct being determined by custom of the service, as indicated by the approved decisions of courts-martial in cases referred to them for trial. Especial weight is attached to the decisions of the President in cases arising under the Article in which he appears as the reviewing authority.[5] Certain crimes, disorders, and neglects, when committed by military persons under circumstances calculated to make them prejudicial to good order and military discipline, have the quality of military offenses conferred upon them by the terms of the 62d Article.[6]

Offenses Exclusively Triable by General Courts-martial.—These courts have, as regards persons and with reference to other courts-martial, exclusive jurisdiction over officers,[7] cadets,[8] and "candidates for promotion."[9] Over enlisted men, other than candidates for promotion, they have con-

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[1] "Manual for Courts-martial" (edition of July, 1898), p. 14, par. 6. See, also, Dig. J. A. Gen., p. 328, par. 12.

[2] Section 1343, Revised Statutes.

[3] Sections 5306 and 5313, *ibid.*

[4] Act of July 27, 1892. (27 Stat. at Large, 278.) See G. O. 57, A. G. O., 1892. For definition of fraudulent enlistment, see "Manual for Courts-martial" (ed. of July 11, 1898), page 13, note 4. A court having once duly assumed jurisdiction of an offense and person cannot, by any wrongful act of the accused, be ousted of its authority or discharged from its duty to proceed fully to try and determine, according to law and its oath. Thus the fact that, pending the trial, the accused has escaped from military custody furnishes no ground for not proceeding to a finding, and, in the event of conviction, to a sentence, in the case; and the court may and should find and sentence as in any other case.

[5] See the 61st Article in the chapter entitled THE ARTICLES OF WAR.

[6] See the 62d Article in the chapter entitled THE ARTICLES OF WAR.

[7] 83d Article of War.

[8] Section 1326, Revised Statutes.

[9] Section 4, Act of July 30, 1892. (27 Stat. at Large, 336.) Act of June 18, 1898, (30 Stat. at Large, 483.)

current jurisdiction with the inferior courts in cases cognizable by the latter.

As regards offenses,[1] they have exclusive jurisdiction over all offenses punishable capitally,[2] and over those set forth in the 58th Article, when committed in time of war. Over other offenses they have concurrent jurisdiction with the inferior courts; subject to the qualification that all offenses for which the prescribed limit of punishment is in excess of the limits of the punishing power of an inferior court, as well as all serious non-capital offenses for which limits of punishment have not been prescribed, are, when practicable, to be tried by general court-martial.

Appellate Jurisdiction.—It has been seen that the jurisdiction of courts-martial, in respect to military offenses, is both *original* and *exclusive*. Save in the case contemplated in the 30th Article of War, which will be explained hereafter, their jurisdiction is also *final*, and cannot be made the subject of appeal to a military tribunal of higher authority or more extensive jurisdiction. Nor can a case properly triable by a court-martial be carried, by way of appeal, to any form of civil tribunal; all of which, without exception, are without jurisdiction to try cases properly arising under the Articles of War.[4]

Rules of Interpretation.—Whenever a common-law offense is, by a suitable enactment of Congress, given the character of an offense against the United States, the rules regulating the interpretation of criminal statutes at common law will prevail in all questions respecting its interpretation.

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[1] Paragraph 931, Army Regulations of 1895. See, also, Act of June 18, 1898. (30 Stat. at Large, 483.)

[2] See "Manual for Courts-martial" (ed. of July 11, 1898), par. 2, p. 15, and par. 13, p. 3.

[3] 83d Article of War.

[4] Though transient and summary their judgments, when rendered upon subjects within their limited jurisdiction, are as legal and valid as those of any other tribunals; nor are the same subject to be appealed from, set aside, or reviewed by the courts of the United States or those of any of the States. Dig. J. A. Gen., 818, par. 1; see, also, note 1, page 15 *ante*, Swaim *vs.* U. S., 165 U. S., 553, 554.

TABULAR STATEMENT OF THE JURISDICTION OF COURTS-MARTIAL.[1]

Jurisdiction.

Place.
- The United States.
- The territory of the enemy in time of war.
- Friendly foreign territory in time of peace (exterritoriality).

Time.
- During period of service.
- After expiration of service.
  1. Desertion. (48 A. W.)
  2. Where proceeding has been instituted before expiration of service, by arrest or confinement, etc.
  3. Offenses under Article 60.
- Trial to be had within statute of limitation.
- All offenses except desertion in time of peace; order for trial to be issued within two years after commission of offense. (103 A. W.)
- Desertion in time of peace; offender to be brought to trial between date of desertion and two years after expiration of term of enlistment. (Act of April 11, 1890.)
- (Statutes of limitation are properly matter of defense. See chapter on Incidents of the Trial.)

Persons.
1. Army of the United States
   - Regular Army.
   - Volunteer Army.
   - Drafted men.
2. Militia in service of the United States.
3. Marines detached for service with the army.
4. Military convicts while undergoing sentence of imprisonment after dishonorable discharge. (Act of June 18, 1898.)
5. Civilians.
   1. Retainers to the camp. (63 A. W.)
      1. Officer's servants.
      2. Camp-followers.
   2. Persons serving with an army in the field (63 A. W.). Civilian employés, contractors, etc.
   3. All persons relieving, corresponding with, or giving intelligence to the enemy. (45, 46 A. W.)
   4. Spies. (See 1343, R. S.)
   5. Persons trading with the enemy, etc. (Secs. 5306, 5313, R. S.)

Offenses.
- Under Articles of War.
  1. Specific (named). — All articles, except 61 and 62. — Military. All except 58 and 60 A. W.
  2. General (described). — Articles 61 and 62. — Military and Civil. 58 and 60 A. W.
- Under other statutes. — Sections 1359, 1360, 5306, 5313, R. S.; Act of July 27, 1892; etc., etc.

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CHAPTER VI.

ARREST AND CONFINEMENT.

THE ARREST OF OFFICERS.

Arrest in General.—To enable the proper military authority to put an instant end to criminal or unmilitary conduct, and to impose such restraint as may be necessary upon the person of a military offender, with a view to his trial by court-martial, the Articles of War empower commanding officers to arrest officers serving under their immediate command; they also confer upon all commissioned officers a similar power to confine enlisted men. As both of these acts constitute restraints upon freedom of movement, they require and have received express statutory sanction.

Arrest of Commissioned Officers.—The 65th Article of War provides that "officers charged with crime shall be arrested and confined in their barracks, quarters, or tents, and deprived of their swords by the commanding officer." The arrest of a commissioned officer is usually executed by a staff-officer of the proper commander, by means of an oral or written order or communication advising him that he is placed in arrest, or will consider himself in arrest, or in terms to that effect. The reason for the arrest need not be, but usually is, specified, and the arrest may also be accomplished by the commanding officer in person.[1]

Except in the case contemplated in the 24th Article of War, or in the event of an extraordinary emergency, none but commanding officers can place commissioned officers in arrest; the commanding officer so authorized being the commander of the tactical or territorial command to which the arrested officer belongs, that is, of the department, post, or staff corps, or of the army, division, brigade, regiment, battalion, battery, or other separate

[1] Dig. J. A. Gen., 169, par. 1; Macomb, § 19. The term "crime" is here employed in a general sense, referring to offenses of a military character, as well as to those of a civil character which are cognizable by court-martial. Dig. J. A Gen., 78, par. 1. Compare Wolton *vs.* Gavin, 16 Ad. & El., 66, 68; Simmons, § 360. An arrest, though an almost invariable, is not an essential preliminary to a military trial; to give the court jurisdiction it is not necessary that the accused should have been arrested; it is sufficient if he voluntarily, or in obedience to an order directing him to do so, appears and submits himself to trial. So, neither the fact that an accused has not been formally arrested, or arrested at all, nor the fact that, having been once arrested and released from arrest, he has not been re-arrested before trial, can be pleaded in bar of trial, or constitute any ground of exception to the validity of the proceedings or sentence. Dig. J. A. Gen., 169, par. 1; *ibid.*, 328, par. 11.

or independent organization or detachment in the field. Where a regiment, battalion, or company is included in a post command, the commander of the post, rather than the commander of the inferior organization, is the one by whom the arrest of a subordinate officer should be effected.[1]

A court-martial has no control over the nature of the arrest or other status of restraint of a prisoner except as regards his personal freedom in its presence. Neither the court nor the president can place an accused person in arrest if he be not already in that status; nor can the court, even with a view to facilitate his defense, interfere to cause a close arrest to be enlarged. The officer in command is alone responsible for the prisoners in his charge.[2]

Status of Arrest.—On being placed in arrest, an officer resigns his sword to the person executing it; if this form be omitted it is nevertheless considered to have taken place, and hence originates the custom, which is invariably observed, that an officer in arrest appears without his sword.[3] The status of being in arrest is inconsistent with the performance of any military duty, and an officer in that situation is therefore without power, during the pendency of his arrest, to exercise military command, or even to perform any of the duties incident to his rank or station. The imposition of arrest, however, affects in no manner the right of an officer or soldier to receive the pay, allowances, or emoluments of his rank in the military service.[4]

An officer in arrest has no right to demand a court-martial either on himself or others; the commanding general, or other officer competent to order a general court-martial, being the judge of its necessity or propriety. Nor has an officer who may have been placed in arrest any right to demand a trial, or to persist in considering himself in arrest, after he shall have been released by proper authority.[5] An officer is in no case entitled to demand to be arrested.[6]

An officer under arrest will not make a visit of etiquette to his commanding officer, or call on him, unless sent for; and in case of business he will make known his object in writing. It is considered indecorous in an officer in arrest to appear at public places.[7]

Limits of Arrest.—Unless other limits are specially assigned him, an officer in arrest must confine himself to his quarters. It is generally under-

[1] Dig. J. A. Gen., 170, par. 2; par. 897, A. R., 1895.
[2] Dig. J. A. Gen., 314, par. 5; *ibid.*, 328, par. 11.
[3] Macomb, § 19. An officer in arrest will not wear a sword nor visit officially his commanding or other superior officer unless directed to do so. His applications and requests of every nature will be made in writing. Par. 901, A. R., 1895.
On the march, field-officers and non-commissioned staff-officers in arrest will follow in the rear of their respective regiments, and company officers and non-commissioned officers in arrest, in rear of their respective companies unless otherwise specially directed. Par. 902, A. R., 1895.
[4] *Ibid.*, 171, par. 8.
[5] Macomb, §§ 28, 29. See, also, § 27, *ibid.*
[6] Dig. J. A. Gen., 169, par. 1.
[7] *Ibid.*, § 30. See, also, paragraphs 900-902, Army Regulations of 1895.

stood, indeed, that he can go to the mess-house or other place of necessary resort. It is not unusual, however, for the commander to state in the order of arrest certain limits within which the officer is to be restricted, and, except in aggravated cases, these are ordinarily the limits of the post where he is stationed or held. An officer or soldier, though retained in close arrest, should be permitted to receive such visits from his counsel, witnesses, etc., as may be necessary to enable him to prepare his defense.[1]

Although the Articles of War make no mention of any difference in the nature of the arrest in order to trial, still a difference is established by the custom of the Army, according to the degree or measure of the crime; an officer accused of a capital crime, or of any offense to which the penalty attached is so severe as to excite a natural temptation to escape from justice, should be detained in a state of confinement as secure as the closest civil imprisonment.[2] If the offense be of a lighter nature, the presumption is that the officer whose character is thus impeached must be solicitous to obtain a judicial investigation of his conduct, and he is therefore generally allowed to be in arrest at large; that is, without his sword, but on his word of honor to await the issue of a trial or his enlargement by proper authority. The degree and measure of the arrest must, however, be entirely at the discretion of the commanding officer, who will in all cases regulate his conduct by the particular circumstances of the case and by the dictates of propriety and humanity.[3]

Breach of Arrest.—The 65th Article of War contains the requirement that "an officer who leaves his confinement before he is set at liberty by his commanding officer shall be dismissed the service." An offense in violation of this Article is only committed when an officer confined in "close arrest" to his quarters leaves the same without authority. This clause of the Article, being highly penal in character, is strictly construed, and for this reason a breach of a mere formal arrest, or of any arrest not accompanied by confinement to quarters, would be an offense not within this Article but under Article 62.[4] The mere doing of an act prohibited by the status of arrest, but without intent to violate the terms of the Article, such as the wearing of a sword through inadvertence, or the like, constitutes a constructive breach of arrest, which, though reprehensible or even punishable, does not constitute the offense described in the Article.[5]

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[1] Dig. J. A. Gen., 170, par 3.

[2] No court-martial, military commander, or other military authority is empowered to accept bail for the appearance of an arrested party or to release a prisoner on bail. Bail is wholly unknown to the military law and practice; nor can a court of the United States grant bail in a military case. *Ibid.*, 177.

[3] Macomb, § 20.

[4] Dig J. A. Gen., 78, par. 1. See, also, par. 2 and par. 4, *ibid.*

[5] Where an officer in close arrest was permitted by his commanding officer to leave temporarily his confinement, *held* that his delaying his return for a brief period beyond the time fixed therefor did not properly constitute an offense under this Article. *Ibid.*, par. 3.

Termination of Arrest.—An arrest lawfully imposed, can only be terminated by the commanding officer who imposed it, or by his superior or successor in office. If the arrest be imposed with a view to trial, the arrest is terminated by the proper reviewing authority in his action upon the proceedings of the court-martial; the arrest ceasing when the sentence becomes operative, unless sooner terminated—as in a case of acquittal, for example—by the officer ordering the court.

Restrictions upon the Duration of Arrests.—With a view to place a limitation upon the power to continue an officer in the status of arrest, and to prevent abuses in its exercise, the 70th Article of War provides that "no officer or soldier put in arrest shall be continued in confinement more than eight days, or until such time as a court-martial can be assembled." The 71st Article, however, contains a more elaborate restriction upon the authority to arrest in its requirement that "when an officer is put in arrest for the purpose of trial, except at remote military posts or stations, the officer by whose order he is arrested shall see that a copy of the charges on which he is to be tried is served upon him within eight days after his arrest, and that he is brought to trial within ten days thereafter, unless the necessities of the service prevent such trial; and then he shall be brought to trial within thirty days after the expiration of said ten days. If a copy of the charges be not served, or the arrested officer be not brought to trial, as herein required, the arrest shall cease. But officers released from arrest under the provisions of this Article may be tried, whenever the exigencies of the service shall permit, within twelve months after such release from arrest."[1]

Detaining officers or soldiers in arrest for long and unreasonable periods when it is practicable to bring them to trial is arbitrary and oppressive, and in contravention both of the letter and spirit of this Article. Whether the delay in any case is to be regarded as so far unreasonable as properly to subject the commander responsible therefor to military charges, or a civil action, must depend upon the circumstances of the situation and the

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Though any unauthorized leaving of his confinement by an officer in close arrest is, strictly, a violation of the Article, it would seem, in view of the severe mandatory punishment prescribed, that an officer should not in general be brought to trial under the same unless his act was of a reckless or deliberately insubordinate character. Dig. J. A. Gen., 78, par. 4.

It is no defense to a charge of breach of arrest in violation of this Article that the accused is innocent of the offense for which he was arrested.* It *is* a defense, however, that subsequently to the original confinement the accused has been put on duty or allowed to go on duty, provided that he has not been duly re-arrested and re-confined before the breach assigned.† *Ibid.*, par. 5.

The requirement of this Article that an offender "shall be dismissed" is held to be exclusive of any other punishment. A sentence of dismissal, with forfeiture of pay, is unauthorized and inoperative as to the forfeiture, and as to this should be disapproved. *Ibid*, 79, par. 6.

[1] For a history of this Article, see Article 71 in the chapter entitled THE ARTICLES OF WAR.

* Hough (Prac.), 494. † Hough (Prac.), 19.

exigencies of the service at the time.[1] Under no circumstances, however, can an officer or enlisted man release himself from arrest, or terminate a lawfully imposed status of arrest at his own volition.[2]

Arrests under the 24th Article of War.—An exceptional power to impose arrests upon commissioned officers and to order enlisted men into confinement is contained in the requirement of the 24th Article of War that "all officers, of what condition soever, have power to part and quell all quarrels, frays, and disorders, whether among persons belonging to his own or to another corps, regiment, troop, battery, or company, and to order officers into arrest, and non-commissioned officers and soldiers into confinement, who take part in the same, until their proper superior officer is acquainted therewith. And whosoever, being so ordered, refuses to obey such officer or non-commissioned officer, or draws a weapon upon him, shall be punished as a court-martial may direct."

This Article, framed to meet the grave emergency of serious frays or disorders in a military command, is in substance an application of a well-known rule of the common law to the needs of the military service.[3] The term officer is here given a peculiar statutory interpretation, not recognized elsewhere in the Articles of War, in that it is applied to all military persons above the grade of private soldier. The duty of determining the existence of an emergency of sufficient importance to bring the Article into operation

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[1] Dig. J. A. Gen., 80. Compare Blake's Case, 2 Maule & Sel., 428; Bailey *vs.* Warden, 4 *id.*, 400.

[2] Though an officer in whose case the provisions of this Article in regard to service of charges and trial have not been complied with is entitled to be released from arrest, he is not authorized to release himself therefrom. If he be not released in accordance with the Article, he should apply for his discharge from arrest, through the proper channels, to the authority by whose order the arrest was imposed, or other proper superior. Dig. J. A. Gen., 80, par. 1.

The term "within ten days thereafter" held to mean after his arrest. *Ibid.*, par. 2.

Held a sufficient compliance with the requirement as to the service of charges to have served a true copy of the existing charges and specifications, though the list of witnesses appended to the original charges was omitted, and though the charges themselves were not in sufficient legal form, and were intended to be amended and redrawn. *Ibid.*, p. 81, par. 3.

The fact that cases of officers put in arrest "at remote military posts or stations" are excepted from the application of the Article does not authorize an abuse of the power of arrest in these cases. And where, in such a case, an arrest, considering the facilities of communication with the department headquarters and other circumstances, was in fact unreasonably protracted without trial, *held* that the officer was entitled to be released from arrest upon a proper application submitted for the purpose. *Ibid.*, par. 4.

[3] It is a principle of the common law that any bystander may and should arrest an affrayer. 1 Hawkins, P. C., c. 63, s. 11; Timothy *vs.* Simpson, 1 C. M. & R., 762, 765; Phillips *vs.* Trull, 11 Johns. 487. And that an officer or soldier by entering the military service does not cease to be a citizen, and as a citizen is authorized and bound to put a stop to a breach of the peace committed in his presence, has been specifically held by the authorities. Burdett *vs.* Abbott, 4 Taunt., 449; Bowyer, Com. on Const. L. of Eng., 499; Simmons, §§ 1096–1100. This article is thus an application of an established common-law doctrine to the relations of the military service. See its application illustrated in the following General Orders: G. O. 4, War Dept., 1843; do. 63, Dept. of the Tennessee, 1863; do. 104, Dept. of the Missouri, 1863; do. 52, Dept. of the South, 1871; do. 92, *id.*, 1872.

rests primarily upon the senior officer present at the time of its occurrence; in the event of his failure to act, the duty, but not the responsibility, passes to the next in rank, and so on, in succession. To insure its effectual operation, the Article imposes the duty of implicit obedience upon all military persons present in respect to such orders as may be given them in furtherance of the purpose of quelling the disorder.

Arrests under the 25th Article of War.—The 25th Article of War contains the requirement that "no officer or soldier shall use any reproachful or provoking speeches or gestures to another," and authorizes the arrest of any officer who makes use of such speeches or gestures.[1]

This Article confers no jurisdiction or power to punish on courts-martial, but merely authorizes the taking of certain measures of prevention and restraint by commanding officers; *i.e.*, measures preventive of serious disorders such as are indicated in the two following Articles relating to duels.[2]

CONFINEMENT OF ENLISTED MEN.

How Executed.—The arrest of an enlisted man is executed, or his confinement ordered, by his immediate commander, or by the officer who has observed the commission of a military offense; in which case the fact of confinement will be immediately reported to the commander of the company or detachment to which the offender belongs.[3] The confinement of an enlisted man, though required, by regulation and by custom of service, to be *ordered* by a commissioned officer, may be *executed* by a subordinate or by any duly authorized military person, as by a non-commissioned officer or by a sentinel. Except as provided in the 24th Article of War, or when restraint is necessary, no soldier will be confined without the order of an officer, who shall previously inquire into the offense.[4] By custom of the service, non-commissioned officers are frequently placed in close arrest in the same manner and subject to the same restrictions as commissioned officers.[5]

An enlisted man while in confinement awaiting trial or awaiting the result of trial should not be fettered or ironed except where such extreme

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[1] "No officer or soldier shall use any reproachful or provoking speeches or gestures to another. Any officer who so offends shall be put in arrest. Any soldier who so offends shall be confined, and required to ask pardon of the party offended, in the presence of his commanding officer." 25th Article of War.

[2] Dig. J. A. Gen., 33. Compare Samuels, 372.

[3] 66th Article of War. The word "crimes," as used in this Article, is construed to mean serious military offenses. So that a soldier will not properly be "confined" where not charged with one of the more serious of the military offenses; in other words, where charged only with an offense of a minor character. Dig. J. A. Gen., 79, par. 2; paragraphs 903–906, Army Regulations of 1895.

[4] Paragraph 905, A. R. 1895.

[5] Macomb, § 21. Should a non-commissioned officer break an arrest so imposed, the charge of breach of arrest would, of course, be laid under the 62d Article, the provisions of Article 65 applying exclusively to commissioned officers.

means are necessary to restrain him from violence, or there is good reason to believe that he will attempt an escape and he cannot otherwise be securely held.[1]

Under existing regulations "soldiers in confinement awaiting action on the proceedings of their trials are assimilated to those awaiting trial, and both classes may, at the discretion of the commanding officer, be employed, separately from prisoners undergoing sentence, upon such labor as is habitually required of soldiers. More severe or other labor would not be legal, nor would labor with a police party consisting in whole or in part of men under sentence however slight their sentence might be.[2] A soldier in arrest in quarters may be required to do fatigue or police work about his quarters which otherwise other soldiers would have to do for him."[3]

Miscellaneous Provisions respecting Confinement.—The 67th and 69th Articles of War prescribe a method of procedure in respect to the confinement of enlisted men and fix the conditions which, if performed by the committing officer, not only justify the commander of the guard in receiving, but, under an appropriate penalty, require him to receive and safely hold, a prisoner tendered to him for confinement. The conditions referred to are fully set forth in the Articles in question, which provide that "no provost-marshal or officer commanding a guard shall refuse to receive or keep any prisoner committed to his charge by an officer belonging to the forces of the United States, provided the officer committing shall, at the same time, deliver an account in writing, signed by himself, of the crime charged against the prisoner";[4] and "any officer who presumes without proper authority to release any prisoner committed to his charge, or suffers any prisoner so committed to escape, shall be punished as a court-martial may direct."[5]

Release of Enlisted Men from Confinement.—This subject, in its relation to commissioned officers, has already been discussed, and it is only necessary to say at this point that the restriction upon the power to arrest which is contained in the 70th Article of War applies equally to the cases of officers and enlisted men. "The latter part of this clause evidently allows a latitude which is capable of being abused; but, as in a free country there is no

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[1] Dig. J. A. Gen., 171, par. 10; par. 909, A. R. 1895. See G. O. 55, A. G. O. 1895.
[2] G. O. 44, Div. Atlantic, 1889.
[3] Dig. J. A. Gen., 171, par. 11; par. 907, A. R. 1895.
Soldiers held in military arrest, while they may be subjected to such restraint as may be necessary to prevent their escaping or committing violence, cannot legally be subjected to any *punishment*. The imposition of punishment upon soldiers while thus detained has been on several occasions emphatically denounced by department commanders. See for example, the remarks of such commanders in G. O. 23, Dept. of the East, 1863; do. 26, Dept. of California, 1866; do. 23, Dept. of the Lakes, 1870; do. 106, Dept. of Dakota, 1871. And compare remarks of Justice Story in Steere *vs.* Field, 2 Mason, 516. Dig. J. A. Gen., 79, par. 1.
[4] 67th Article of War.
[5] 69th Article of War.

wrong without a remedy, the military law points out a mode of redress for all officers and soldiers who conceive themselves injured by their commanding officer which must always be sufficient for restraining every act of injustice or oppression."[1]

In addition to the provisions already discussed, the 68th Article of War, with a view to prevent arbitrary imprisonment, contains the requirement that "every officer to whose charge a prisoner is committed shall within twenty-four hours after such commitment, or as soon as he is relieved from his guard, report in writing, to the commanding officer, the name of such prisoner, the crime charged against him, and the name of the officer committing him; and if he fails to make such report, he shall be punished as a court-martial may direct."[2] To the same end the Army Regulations provide that "all persons under guard without written charges will be released by the old officer of the day at guard-mounting unless specific orders to the contrary have been given in each case by the commanding officer."[3]

[1] Macomb, § 22.
[2] 68th Article of War.
[3] Paragraph 908, Army Regulations of 1895.

CHAPTER VII.

CHARGES AND SPECIFICATIONS.

The Charge.—The instrument in which the military offense against an accused person is set forth (corresponding to the *indictment* in criminal procedure) is called the *charge.*[1] Unlike the indictment, however, a military charge is composed of two parts, the *charge proper*, in which the particular offense is alleged in general terms, and the *specification*, in which, as its name implies, the facts constituting the offense charged are fully and sufficiently stated. An accusation against an officer or soldier not thus separated in form would be irregular and exceptional in our practice, and till amended would not be accepted as a proper basis for proceedings under the code.[1]

Forms of Charges.—While the same particularity is not called for in military charges which is required in criminal indictments, there are certain essential conditions which must be complied with in their preparation. These are: (1) that the charge shall be laid under the proper Article of War, or other statute; (2) that such charge shall set forth in the specification facts sufficient to constitute the particular offense. This is best accomplished, as to the charge, by a brief description of the offense, wherever practicable in the words of the Article under which it is charged, adding the phrase "in violation of the —— Article of War," or other statute describing the offense. "Desertion, in violation of the 47th Article of War," "Sleeping on post, in violation of the 39th Article of War," "Being a spy, in violation of Section 1343 of the Revised Statutes of the United States," are examples of the proper forms of words appropriate to be used in such allegations.[2]

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[1] Dig. J. A. Gen., 224, par. 1. See, also, Manual for Courts-martial, pp. 15–20.

In our practice, unlike that of the English courts-martial, a military charge properly consists of two parts, the technical "charge" and the "specification." The former designates by its name, particular or general, the alleged offense; the latter sets forth the facts supposed to constitute such offense. Dig. J. A. Gen. 224, par. 1.

[2] Dig. J. A. Gen., 225, par. 2. In regard to the proper form for a military charge, Atty.-Gen. Cushing (7 Opins., 603) says: "There is no one of exclusive rigor and necessity in which to state military accusations." He adds further: "Trials by court-martial are governed by the nature of the service, which demands intelligible precision of language, but regards the substance of things rather than their forms. . . . The most bald statement of the facts alleged as constituting the offense, provided the legal offense itself be distinctively and accurately described in such terms of precision as the rules of military jurisprudence require, will be tenable in court-martial proceedings, and

Specifications.—The requirement above stated in respect to the specification is fulfilled by a compliance with the following conditions: (1) the offender should be identified and described as a member of the military establishment or, if a civilian, as a person amenable to military jurisdiction; (2) the facts constituting the essential elements or ingredients of the offense should be sufficiently set forth; and, (3) where intent is an essential ingredient of the offense, there must be an allegation of such criminal intent in the specification: this is accomplished by the use of the words "willfully," "knowingly," "feloniously," "corruptly," or other terms of like import,[1] according to the circumstances of the particular case.

These precautions are necessary not only to apprise the accused of the offense charged against him, but for the purpose of showing, affirmatively, that the person mentioned in the charges, as well as the offense charged or alleged, is within the jurisdiction of the court convened for the trial of the case. "These essentials being observed, however, the simpler and less encumbered with verbiage and technical terms the charge is the better, provided it be expressed in clear and intelligible English. However inartificial a pleading may be, it will properly be held sufficient as a legal basis for a trial and sentence, provided that the charge and specification, taken together, amount to a statement of a military offense, either under a specific Article or under the general Article, No. 62."[2]

The specification should also be appropriate to the charge. A charge of "conduct to the prejudice of good order and military discipline," with a specification setting forth a violation of a specific article, is an irregular and defective pleading, and so, of course, is a charge of a specific offense with a

will be adequate groundwork of conviction and sentence." So it is observed by Atty.-Gen. Wirt (1 Opins., 286) that "all that is necessary" in a military charge is that it be "sufficiently clear to inform the accused of the military offense for which he is to be tried, and to enable him to prepare his defense." And see Tytler, 209; Kennedy, 69. It is ably remarked by Gould (Pleading, p. 4) that "all pleading is essentially a logical process"; and that, in analyzing a correct pleading, "if we take into view with what is expressed what is necessarily supposed or implied, we shall find in it the elements of a good syllogism." But it can hardly be expected that military charges in general will stand this test.

[1] Some military offenses, as defined in the Articles of War or the statutes creating them, contain no reference to an intent; under this head fall sleeping on post, signing a false certificate, under the 18th Article, and disrespect to a commanding officer, under Article 20; in such cases it is not necessary to allege a particular intent, or indeed any intent whatever, or to establish any intent in evidence at the trial. In other cases a specific intent is described in the Article defining the offense; of this the offenses defined in the 5th, 8th, 14th, and 45th Articles are examples, all of which offenses must be "knowingly" committed in order to warrant a conviction; so, too, the offenses defined in the 15th and 16th Articles must be "willfully" committed. Crimes at common law, however, of which some are enumerated in the 58th Article, must be charged and proved with the particular intent which is attributed to them at common law, as modified by statute in the State in which they were committed. The word "feloniously" is properly used, as descriptive of the intent, when the act constitutes an offense punishable by imprisonment in a State prison or penitentiary under the ordinary criminal code, although, as a matter of military pleading, it is not essential if the offense is otherwise sufficiently set forth. Indeed it is only as a matter of precaution with respect to the 98th Article of War that the word is used.

[2] Dig. J. A. Gen., 224, par. 2.

specification describing not that but a different specific offense, or a simple disorder or neglect of duty.[1]

Exclusion of Evidence from Specifications.—It has been seen that the specification should contain a statement of the facts constituting the offense —not the evidence by which such facts are supported. Every offense, whether military or civil, is made up of certain elements of fact, that is, of certain acts or omissions which, combined with a particular intent, constitute such offense. It is these elements of fact and intent which should be alleged in the specification. "While, however, it is in general irregular to plead matter of evidence, there is no objection to noting in brief in the specification the immediate result or effect of the act charged, as a circumstance of description illustrating the character and extent of the offense committed."[2]

General Terms: Specific Articles.—A charge expressed in too general terms is faulty and imperfect; this for the reason that the accused is entitled to know for what particular act he is called to account.[3] So, too, a charge expressed in the *alternative*—either under Art. 17 or Art. 60—is irregular and defective, and, upon motion, may be stricken out or required to be amended.[4]

Where an offense is clearly defined in a specific Article, it is irregular and improper to charge it under another specific Article. So where the Article in which the offense is defined makes it punishable with a specific punishment to the exclusion of any other, it is error to charge it under an Article, such as the 62d, which leaves the punishment to the discretion of the court. On the other hand, it is equally erroneous to charge under a specific Article, making mandatory a particular punishment, an offense properly charged only under Article 62.[5]

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[1] Dig. J. A. Gen., p. 228, par. 12.

[2] Dig. J. A. Gen., 232, par. 21. Thus while a homicide, if amounting to murder, and capital under Sec. 5339, Rev. Statutes, or by the law of the State, etc., cannot as such be made the subject of a military charge in time of peace, yet a capital homicide, where it has been committed in connection with or as a consequence of a specific military offense charged against the accused,—as, for example, "mutiny," or "offering violence to a superior officer,"—may properly be stated in the conclusion of the specification, as matter of aggravation and as indicating the *animus* of the accused or the amount of force employed. *Ibid.*

[3] Dig. J. A. Gen., 236, par. 34. Thus a specification under Art. 62, in a case of an officer, which set forth, not a specific act of offense, but an habitual course of conduct as incapacitating the accused for service or for the performance of his proper duty, *held* seriously defective and subject to be stricken out on motion. For such conduct indeed the remedy is not by charge and trial, but by retirement under Sec. 1252, Rev. Sts. *Ibid.*

[4] *Ibid.*, par. 35.

[5] *Ibid.*, 225, par. 4. Such loose and indefinite forms of charge as "fraud," "worthlessness," "inefficiency," "habitual drunkenness," and the like, will be avoided by good pleaders. Such charges indeed, in connection with specifications setting forth actual military neglects or disorders (not properly chargeable under specific Articles), may be sustained as equivalent to charges of "conduct to the prejudice of good order and military discipline." But a charge of "worthlessness," with specifications setting forth repeated instances of arrests, confinements in the guard-house, or

Number of Charges, etc.—An accused person may be brought to trial upon any number of separate charges and specifications; such number, indeed, being limited only by the number of separate offenses which may have been committed. Where, however, there are two sets of charges against an accused, they should if practicable be consolidated, and one trial be had upon the whole, instead of two trials, one upon each set.[1]

Charges under Several Forms.—The prosecution is at liberty to charge an act under two or more forms, where it is doubtful under which it will more properly be brought by the testimony.[2] In the military practice the accused is not entitled to call upon the prosecution to elect under which charge it will proceed in such or indeed any case.[3]

Allegations as to Persons.—The accused should be described in the charges and specifications by his true name, and should be further designated by his correct rank and station, or title of office, in the military service. It is not essential to state in a specification the full Christian name of the

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trials and convictions for slight offenses, of the accused, *held* an insufficient pleading; such instances not constituting military offenses, but merely the punishments or penal consequences of such offenses. (What is really called for in such a case is a discharge of the soldier under the 4th Article of War.) A specification averring a general incapacity induced by habitual intoxication does not set forth a military offense. The accused in such a case should be charged with the acts of drunkenness committed, as separate and distinct instances of offense. *Ibid.*, 227, par. 10. Where a specific offense is charged (*i.e.*, an offense made punishable by an Article other than the general —62d—Article), and the specification does not state facts constituting such specific offense, the pleading will be insufficient as a pleading of that offense. Legal effect may, however, be given to a pleading if the charge and specification taken together amount to an allegation of an offense cognizable by a court-martial under Art. 62. And in all cases,—whatever be the form of the charge or specification.—if the two are not inconsistent, and, taken together, make out an averment of a neglect or disorder punishable under this general Article, the pleading will be sufficient in law and will constitute a legal basis for conviction and sentence. *Ibid.*, 226, par. 6.

[1] *Ibid.*, 227, par. 9. But after the accused has been arraigned upon certain charges, and has pleaded thereto, and the trial on the same has been entered upon, new and additional charges, which the accused has had no notice to defend, cannot be introduced or the accused required to plead thereto. Such charges should be made the subject of a separate trial, upon which the accused may be enabled properly to exercise the right of challenge to the court and effectively to plead and defend. As to the further objection to such charges that the court would not be qualified to try them under its oath, see *The Arraignment* in the chapter entitled THE TRIAL.

[2] See General Orders No. 71, A. G. O., 1879.

[3] Dig. J. A. Gen., 227, par. 8. So, too, where a particular act or omission constitutes a violation of more than one Article of War, as of the 60th and 61st, or the 61st and 62d, the offense may be charged under both;* undue multiplication, however, of charges, or forms of charge, is to be avoided: thus charges should not in general be added for minor offenses which were simply acts included in and going to make up graver offenses duly charged. It may, indeed, sometimes be expedient where the offenses are slight in themselves, and it is deemed desirable to exhibit a continued course of conduct, to wait, before preferring charges, till a series of similar acts have been committed, provided the period be not unreasonably prolonged; but in general charges should be preferred and brought to trial immediately or presently upon the commission of the offenses. Anything like an *accumulation*, or saving up, of charges, through a hostile *animus* on the part of the accuser, is discountenanced by the sentiment of the service.† Dig. J. A. Gen., 226, par. 7.

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* "For the purpose of meeting the evidence as it may transpire." State *vs.* Bell, 27 Md., 675.
† See G. C. M. O. 71, Hdqrs. of the Army, 1879.

accused, or other party required to be indicated. Only such name or initial need be given as will be sufficient to unmistakably identify the party.[1]

Allegations as to Time and Place.—The time and place of the commission of the offense charged should properly be averred in the specification, in order that it may appear that the offense was committed within the period of limitation fixed by the 103d Article, and enable the accused to understand what particular act or omission he is called upon to defend.[2] A reasonably exact allegation of the time is also important in some cases—especially those of desertion and absence without leave—in order that the accused, if subsequently brought to trial for the same offense or, what is the same thing in law, for an offense included in the original offense, may be enabled (by a production and exhibition of the record) properly to plead a former acquittal or conviction of that offense.[3]

Where the exact time or place of the commission of the offense is not known it is frequently preferable to allege it as having occurred "no or about" a certain date or time, or "at or near" a certain locality, rather than to aver it as committed on a particular day or between two specified days, or at a particular place. There is no definite construction to be placed upon the words "on or about" as used in the allegation of time in a specification. The phrase cannot be said to cover any precise number of days or latitude in time. It is ordinarily used in military pleading for the purpose of indicating, in cases where the exact day cannot well be named, some period, as nearly as can be ascertained and set forth, at or during which the offenses charged are believed to have been committed. And the same is to be said as to the use of the words "at or near" in connection with the averment of place. These terms "on or about" and "at or near" are, how-

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[1] Dig. J. A. Gen., 229, par. 13. A misnaming or misdescription of the rank of the accused in the specification should be taken advantage of by exception in the nature of a plea in abatement. Where not objected to, the error is immaterial after sentence, provided the accused is sufficiently identified by the testimony, etc. *

Where a specification to a charge preferred by a superior against an inferior officer, instead of referring to the former in the third person, alleged that the accused addressed abusive language to "me," and committed an assault upon "me," without naming or otherwise indicating the subject of the abuse or assault, *held* that such a form, though supported by some of the English precedents, was not sanctioned by our practice, and that, on objection being made to the same by the accused, the court would properly either require that the specification be amended, or that, in incorporating the charge in the record, the name of the preferring officer be added. *Ibid.*, 229, par. 14.

[2] As to the latitude allowable in the allegation of time in military pleadings, compare 1 Opins. Att.-Gen., 295, 6.

In the civil practice "nothing is better settled than that proof of guilt is not confined to the day mentioned in the indictment. It may extend back to any period previous to the finding of the bill and within the statutory limit for prosecuting the offense." McBryde *vs.* State, 34 Ga., 203.

[3] Dig. J. A. Gen., 230, par. 17.

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* See the article entitled *Pleading* in the chapter relating to the Trial.

ever, not unfrequently (though unnecessarily) employed in practice where the exact time or place is known and can readily be alleged.[1]

Where the offense charged is one of *omission* the same exactness in the averment of time is in general scarcely required as where it is one of the *commission* of a specific act. It is sufficient in the former case to allege that the offense occurred between certain named dates not unreasonably separated.[2]

Where time or place is omitted to be averred, or is averred without sufficient definiteness, and the defect is excepted to by the accused on being called upon to plead, the court will properly direct that an amendment be made. But where no such objection is interposed by the accused, the proceedings will be sufficient in law, provided the time and place of the offense can be ascertained with reasonable certainty from the testimony taken in connection with the specifications. If otherwise, the proceedings will, where practicable, be returned to the court for correction, or, where this cannot be done, they will in general properly be disapproved. And where the offense is alleged to have been committed on a particular day and the evidence shows that it was committed on quite a different day, in such case, provided time is not of the *essence* of the offense, and the specific act charged is sufficiently identified by the other testimony, the variance between the allegation and the proof will not constitute a fatal defect, and need not induce a disapproval of the sentence where there has been a conviction. A return, however, of the record to the court for correction, if practicable, would properly be resorted to, by the reviewing officer, before taking final action.[3]

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[1] Dig. J. A. Gen., 230, par. 18. Where a specification alleged that the accused was absent without leave at various times between two dates twenty days apart, *held* that the same was defective and subject to exception as being *double*, each such absence being a substantive and distinct offense.* But where the specification to a charge of violation of the 60th Article alleged the presentation by the accused of a fraudulent claim for rations furnished for recruits and also for lodgings furnished for the same recruits at the same time, *held* that the specification related to one transaction and was not, therefore, to be necessarily regarded as *double* or defective. In view of the liberal rules of pleading applicable to military charges. *Ibid.*, 229, par 15.

[2] *Ibid.*, 231, par. 19. So an offense of commission which probably was not completed, or may not have been completed, on any particular day may be similarly charged. Thus *held* that the allegations of time and place were sufficient in a specification in which it was set forth that the offense charged (which consisted in an improper disposition of public property) was committed by the accused "while *en route* between Austin, Texas, and Waco, Texas, between the 5th and 25th days of May, 1867." *Ibid.*

But where it was alleged in a specification that the accused was drunk on duty at some time or times during a period of seventy days, *held* that the specification did not give sufficient notice to the accused of the specific offense which he was required to defend, and was therefore uncertain and insufficient.† *Ibid.*

[3] Dig. J. A. Gen., 231, par. 20.

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* In the military as in the civil practice *double* pleading—*i.e.*, specifications setting forth two (or more) distinct offenses (especially when chargeable under different Articles of War)—is properly condemned, and in sundry cases the conviction and sentence have been disapproved on account of the *duplicity* in law of the pleadings. See G. C. M. O. 80, War Department, 1875; G. O. 3, 83, Department of the Missouri, 1863; *id.*, 49, Department of the Ohio, 1864.

† Compare cases in General Orders 193, Army of the Potomac, 1862; do. 98, Department of New Mexico, 1862.

Documents, Oral Statements, etc.—A specification in alleging the violation of an order which has been given in writing, or of any written obligation —as an oath of allegiance, parole, etc.,—should preferably set forth the writing *verbatim*, or at least state fully its substance, and then clearly detail the act or acts which constituted its supposed violation.[1] Oral statements should, wherever practicable, be set forth precisely as made or uttered; if alleged in substance, they should be so fully set forth as to leave no doubt as to their character or purport.

Amendments of Charges.—A material amendment of a charge should properly be made before the actual trial. Where a court-martial, after the trial was concluded, directed a specification to be amended so as to render it more definite as to time and place, and then caused the accused to be arraigned and to plead over again, its action was held to be without sanction of law or precedent.[2]

Withdrawal of Charges.—A withdrawal of charges constitutes no legal bar to their being subsequently revived and re-preferred. Charges, however, once formally withdrawn will not in general properly be revived except upon new material evidence being obtained. Charges once accepted as a sufficient basis for action, by the commander competent to convene a court for their trial, cannot properly be withdrawn except by his authority.[3]

List of Witnesses.—The Regulations require that charges formally preferred against officers, enlisted men, or other persons amenable to military jurisdiction shall be accompanied by lists of the witnesses relied upon to substantiate the charges so preferred. Such a list of the proposed witnesses, however, is no part of the military charge. In serving upon the accused a copy of the charges, it is not essential, though the better practice, to add a copy of the list of witnesses where one is appended to the original charges. Appending such a list, however, does not preclude the prosecution from calling witnesses not named therein.[4]

Joint Charges.—Properly to warrant the *joining* of several persons in the same charge and the bringing them to trial together thereon, the offense must be such as requires for its commission a combination of action, and must have been committed by the accused in concert, or in pursuance of a

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[1] Dig. J. A. Gen., 230, par. 16.

[2] *Ibid.*, 236, par. 38. How far charges may be amended by the judge-advocate before the organization of the court depends mainly upon his authority, general or special, to make amendments. After the arraignment amendments of form may always be made, with the assent of the accused or by the direction of the court; and so may slight amendments of substance not so modifying the pleading as to make it a charge of a new and distinct offense. An amendment so substantial as materially to modify the "matter" before the court will not in general be authorized, and any amendment whatever of substance should be allowed by the court with caution and subject to the right of the accused to apply for a continuance. *Ibid.*, 234, par. 28.

[3] *Ibid.*, 234, par. 27.

[4] *Ibid.*, 235, par. 29.

common intent. The mere fact of their committing the same offense together and at the same time, although material as going to show concert, does not necessarily establish it. Thus the fact that several soldiers have absented themselves together without leave will not, in the absence of evidence indicating a conspiracy or concert of action, justify their being arraigned together on a common charge, for they may have been availing themselves merely of the same convenient opportunity for leaving their station.[1]

Character of Offense, Military or Civil.—As to whether an act which is a civil crime is also a military offense, no rule can be laid down which will cover all cases, for the reason that what may be a military offense under certain circumstances may lose that character under others. For instance, larceny by a soldier from a civilian is not always a military crime, but it may become such in consequence of the particular features, surroundings, or locality of the act. What these may be cannot be anticipated with a sweeping rule comprehensive enough to provide for every possible combination of circumstances. Each case must be considered on its own facts. But if the act be committed on a military reservation, or other ground occupied by the army, or in its neighborhood, so as to be in the constructive presence of the army; or if committed while on duty, particularly if the injury be to a member of the community whom it is the offender's duty to protect; or if committed in the presence of other soldiers, or while in uniform; or if the offender use his military position, or that of another, for the purpose of intimidation or other unlawful influence or object,—such facts would be sufficient to make it prejudicial to military discipline within the meaning of the 62d Article of War.[2]

By Whom Preferred.—Any officer may prefer charges; an officer is not disqualified from preferring charges by the fact that he is himself under charges or in arrest. Charges should be preferred to the authority empowered to convene the court for their trial and signed by the officer submitting them. The signing of charges, like orders, with the name of an officer, adding "by the order of" his commander, is unusual and objectionable. Where charges are not signed voluntarily by the officer by

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[1] Dig. J. A. Gen., 232, par. 22. Desertion, of which the gist is a certain personal intent, is not ordinarily chargeable as a joint offense.* Where two or more soldiers have deserted together as the result of a concerted plan, they may properly be jointly charged with "conspiracy to desert, to the prejudice of good order and military discipline" (or with desertion, in the execution of a conspiracy—G. O. 21, A. G. O. of 1891), or each offender, in addition to being charged with desertion, may also be severally charged with engaging in such conspiracy. In the absence of such additional charge, the fact of concert may of course be put in evidence under the charge of desertion as illustrating the *animus* of the act committed. *Ibid.*

[2] Manual for Courts-martial, 16, par. 7.

* See G. O. 78, War Dept., 1872, issued by the Secretary of War in accordance with opinions, previously given, of the Judge-Advocate General.

whom they are preferred, they are, in practice, usually subscribed by the judge-advocate of the court.[1]

Military charges, though commonly originating with military persons, may be initiated by civilians; indeed, it is but performing a public duty for a civilian who becomes cognizant of a serious offense committed by an officer or soldier to bring it to the attention of the proper commander. So a charge may originate with an enlisted man. But, by the usage of the service, all military charges should be formally preferred by, *i.e.*, authenticated by the signature of, a commissioned officer. Charges proceeding from a person outside the Army, and based upon testimony not in the possession or knowledge of the military authorities, should, in general, be required to be sustained by affidavits or other reliable evidence, as a condition to their being adopted.[2]

When Preferred.—Charges should be preferred so soon as the commission of the offense has been observed by or made known to the officer preferring them, or within a reasonable time thereafter. Charges so preferred carry with them a presumption of good faith and the assurance that they have been brought in the interest of discipline, and with a view to their being brought to trial while the facts are fresh in the minds of the witnesses. Charges unreasonably delayed carry no such presumption, and the delay, unless explained, gives ground for the belief that some other consideration than the good of the service has been instrumental in their preparation.[3]

Previous Convictions.—With a view to enable the convening authority to determine the form of tribunal to which a particular set of charges should be referred for trial, and to enable the court to determine the proper measure of punishment to be awarded upon conviction, the Regulations require that charges against enlisted men shall be accompanied by evidence of such pre-

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[1] *Ibid.*, 233, par. 24. An objection that a charge is not signed should be taken at the arraignment, when the omission may be supplied by the judge-advocate's affixing his signature. By pleading the general issue the accused waives the objection. *Ibid.*, 235, par. 32.

But to be taken cognizance of by the court it is not essential that a charge should be signed by any officer. If, though not so signed, it be duly officially transmitted by the convening commander, or other competent superior authority to the court, either directly or through the judge-advocate, "for trial," or "for the action of the court," or in terms to such effect, it is sufficiently authenticated for the purposes of trial, and trial upon it may be proceeded with by arraignment thereon of the accused. *Ibid*, par. 33.

Though charges are prepared in the Office of the Judge-Advocate General, they are not to be signed by him. If not signed by the officer actually preferring them, they will properly be authenticated by the signature of the Acting Judge-Advocate of the Department, or, preferably, by the judge advocate of the court. *Ibid.*, par. 31.

[2] Dig. J. A. Gen., 230, par. 23.

[3] It is a reprehensible practice to allow charges to lie long dormant before being preferred. Charges should not be delayed, but should be brought to trial as soon as practicable and while the evidence is fresh. A delay of five months *remarked upon* as prejudicial to the administration of justice and unfair to the accused. *Ibid.*, 235, par. 30.

All the offenses with which an officer or soldier may be at one time chargeable should, if practicable, (and if the same are sufficiently grave,) be charged and brought to trial together. *Ibid.*, 226, par. 7.

vious convictions as have been recorded against the accused during the period of twelve months next preceding the preparation and submission of the charges.[1]

By "previous conviction" is meant a conviction by a duly authorized military tribunal, the sentence of which has been approved by the proper reviewing authority.[2] Such previous convictions, however, are not limited to those for offenses similar to the one for which the accused is on trial, as the purpose in requiring them to be submitted is to see if the prisoner is an old offender, and therefore less entitled to leniency than if on trial for his first offense. This information might not be fully obtained if evidence of previous convictions of similar offenses only were laid before the court. It has no bearing upon the question of guilt of the particular charge on trial, but only upon the amount and kind of punishment to be awarded, and to this end it is proper that all previous convictions should be known. As the accused is not on trial for the offenses, evidence of previous convictions of which it is proposed to introduce, the 103d Article of War cannot be held to apply.[3]

How Prepared and Submitted.—To accomplish this purpose the evidence of previous convictions must be submitted in such form as to ensure its admission and consideration by the court to which it is referred; it should therefore be prepared in accordance with the rules, hereafter to be explained, regulating the admissibility of documentary evidence.

Previous convictions by courts-martial other than the summary court are proved by the records of the trials, or by duly authenticated orders promulgating them. The proper evidence of previous convictions by summary courts is the copy of the record furnished to company and other commanders, as required by paragraph 932, Army Regulations, or one furnished for the purpose, and certified to be a true copy by the post commander or adjutant.[4]

Convictions incurred during a prior enlistment are not admissible, except of desertion, and then only where the accused is undergoing trial for desertion.[5] Evidence of a previous conviction by a civil court is not admissible in this procedure;[6] nor is evidence of a previous conviction admissible where the findings were disapproved by the proper reviewing authority.[7]

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[1] Executive Order of March 30, 1898.

[2] Where the post commander acts as the summary court no formal approval of the sentence is necessary.

[3] Manual for Courts-martial, title "Previous Convictions."

[4] See Manual for Courts-martial, title "Previous Convictions"; see, also, par. 929, A. R. 1895.

[5] Dig. J. A. Gen., 610, par. 5.

[6] *Ibid.*, 611, par. 6.

[7] *Ibid.*, par. 7. The term "previous conviction" as employed in the Executive Orders respecting maximum punishments means a conviction to which effect has been

Statement of Service: Surgeon's Report.—Charges against an enlisted man forwarded to the authority competent to order a general court-martial for his trial will also be accompanied by a statement of service in the prescribed form, setting forth the dates of his present and former enlistments, the character upon each of the discharges given him, and the date of his confinement for the offenses alleged in the charges. This statement is intended simply for the information of the convening authority and will not be introduced in evidence, nor made part of the record of the trial, but will be returned to the convening authority with the record.[1]

In case of a deserter the surgeon's report as to his physical fitness for service, required by par. 121 of the Army Regulations, will also be forwarded.[2]

Submission of Charges.—Charges preferred by commissioned officers are submitted to the officer authorized by law to convene a court for their trial; if the officer preferring them is serving at a military post or with a command in the field, they are submitted through the proper commanding officer, who is required by regulations to investigate them and to certify that, in his opinion, the charges so submitted and investigated can be sustained.[3]

Action of Post Commander.—The post commander or the commanding officer of an organization in the field is required, upon the receipt of charges and specifications, to make such personal investigation as is sufficient to satisfy him (*a*) whether the case is one in which a trial is necessary to the interests of discipline; (*b*) if such trial is believed by him to be necessary, whether the evidence in support of the charges is such as to warrant a conviction. If the case is one triable by a general court-martial only (as where the charges are preferred against a commissioned officer), he will forward the charges to the proper convening authority accompanied by a certificate, in the form of an indorsement, to the effect that the charges have been formally investigated by him, and that, in his opinion, they can be sustained by the testimony of witnesses.[3]

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given by the approval of the sentence by competent authority, and applies to the records of all trials except those had by a summary court where the post commander acts as the court and no approval of the sentence is required by law. *Ibid.* See, also, Manual for Courts-martial, p. 19, note 1, and Dig. J. A. Gen., 611, par. 8.

[1] Par. 927, A. R. 1895. For form see Appendix.

[2] An enlisted man apprehended or surrendering as a deserter, and whose trial for desertion is not barred by the statute of limitations, will be examined by a medical officer at the post where he is received, and a report of this examination will be forwarded to department headquarters. If, on account of disease, age, or other permanent disability, the man is found unfit for service, the report, with the department commander's recommendation thereon, will be forwarded to the Adjutant-General of the Army. If the examination shows that the man is fit for service, the department commander will bring him to trial or restore him to duty without trial as the interests of the Government may dictate. Par. 121, A. R. 1895.

[3] Commanding officers will, before forwarding charges, personally investigate them, and by indorsement on the charges will certify that they have made such investigation, and whether, in their opinion, the charges can be sustained. Par. 928, A. R. 1895.

Charges preferred for offenses cognizable by inferior courts will also be laid before the post commander, who will examine them as to the rank of the accused and the nature of the offense. If he thinks that the accused should be brought to trial, he will cause him to be brought before the summary court, where he will be arraigned and tried in accordance with the prevailing court-martial practice. If the accused, being a non-commissioned officer, objects to being tried by a summary court, and requests a trial by a regimental or garrison court, his request should, in general, be granted, and the proper inferior court convened for his trial. Against such objection a summary court would, under the statute, be without jurisdiction to try the case of a non-commissioned officer, save with the authority of the officer competent to order his trial by general court-martial. Such authority, if granted, should be entered upon the record in order to show that the court acted with jurisdiction in the particular case.

Action of Convening Authority.—It has been seen that the question whether a particular set of charges shall or shall not be brought to trial is to be determined in every case by the proper convening authority, who is responsible for the maintenance of discipline, and whose decision as to the necessity or propriety of a trial is final and conclusive.[1] "Commanding officers are not required to bring every dereliction of duty before a court for trial, but will endeavor to prevent their recurrence by admonitions, withholding of privileges, and taking such steps as may be necessary to enforce their orders."[4] If, therefore, in the opinion of the convening authority the case is one of sufficient importance to discipline to warrant its reference to a court-martial, a proper military tribunal is appointed, or the charges are referred to an existing court for trial.

Service of Charges upon the Accused.—The 71st Article of War, which regulates in part the arrest of commissioned officers, requires the officer by whose order an accused officer has been arrested to "see that a copy of the charges on which he is to be tried is served upon him within eight days of his arrest, and that he is brought to trial within ten days thereafter." By custom of service enlisted men are also entitled to be informed of the nature of the charges for which they have been confined. Custom of service also

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[1] See paragraph 931, A. R. 1895.

[2] See, in the Manual for Courts-martial, Section IV of the chapter relating to charges and specifications.

[3] In cases where charges preferred against an officer are apparently susceptible of a reasonable explanation it is not unusual, especially where the charges are preferred by an inferior against a superior, to afford the officer charged an opportunity to make explanation before it be determined whether to bring him to trial. Dig. J. A. Gen., 234, par. 25.

Charges proceeding from a person outside the army, and based upon testimony not in the possession or knowledge of the military authorities, should in general be required to be sustained by affidavits or other reliable evidence as a condition to their being adopted. *Ibid.*, 233, par. 23.

[4] Par. 930, A. R. 1895.

makes it the duty of the judge-advocate to furnish the accused with a copy of the charges upon which he is to be tried, within a reasonable time previous to the trial. It is thus seen that the same duty is imposed upon different officers, but for different reasons; and neither officer is responsible for a failure of the other to perform the duty thus imposed. Should such a failure of duty occur, however, the rights of an accused person cannot be prejudiced thereby, since he is entitled to receive a copy of the charges and specifications a sufficient time in advance of the trial to enable him to secure the necessary witnesses, to obtain counsel, and to make proper preparations for his defense.[1] Although the 71st Article requires such service of charges to be made previous to the trial, the statutes are otherwise silent in this regard, and it can only be said in general terms that such time must be reasonable in amount and sufficient, as above stated, to enable him to adequately prepare his defense. Should the time allowed be insufficient, however, that fact should be made the ground of an application to the court for postponement, under the 93d Article, or to the convening authority for a reasonable delay in bringing the case to trial.

[1] In the criminal practice of the United States courts an indictment for treason must be served upon the accused three entire days previous to the trial; indictments in capital cases must be similarly served at least two entire days before the commencement of the trial. In United *vs.* Curtis (4 Mason, 232) it was held that the requirement of two days meant two days before the trial of the case by the jury, and not two days before the arraignment.

CHAPTER VIII.

THE INCIDENTS OF THE TRIAL.

Meeting of the Court-martial.—The court assembles at the time and place mentioned in the convening order. The president takes his place at the head of the table, and the members take seats on either side of the president, in order of rank[1] as named in the order appointing the court. The judge-advocate and the reporter, if there be one, take their places at the foot of the table; where seats are also provided for the accused and his counsel, and for the particular witness who is undergoing examination.[2]

During the informal meeting of the court, prior to the introduction and arraignment of the accused, any preliminary matters that may seem to demand its attention are brought up and disposed of. The judge-advocate then verifies the presence of the officers composing the detail; absent members are noted, and such communications in writing as have been submitted in respect to such absence are read to the court and are noted in the record.[3]

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[1] The relative rank of the members, as determined by the convening authority in the order appointing them, is in general to be regarded as final. Dig. J. A. Gen., 88, par. 8; *ibid.*, 89, par. 2. In view of the repeal (by the Act of March 1, 1869) of the old 61st Article of War, an officer, except where specially assigned to duty according to his brevet rank by the President, is no longer entitled to precedence, on courts-martial or otherwise, by reason of his brevet rank. Dig. J. A. Gen., 198, par. 2.

[2] It is one of the most important duties of the judge-advocate to see that adequate preparations are made for the meeting of the court and the trial of the case or cases that are to come before it This includes the securing of suitable rooms and furniture, the provision, by timely requisitions, of the requisite stationery, and of such clerical and messenger service as will be needed for the service of the court, and, if need be, a waiting-room for the witnesses. He should also see to it that the witnesses for the day are present at the opening of the trial, or that they are in readiness whenever their testimony is required.

[3] A member of a court-martial, though strictly answerable only to the convening authority for a neglect to be present at a session of the court, will properly, when prevented from attending, communicate the cause of his absence to the president or judge-advocate, so that the same may be entered in the proceedings. Where a member, on reappearing after an absence from a session, fails to offer any explanation of such absence, it will be proper for the president of the court to ask of him such statement as to the cause of his absence as he may think proper to make. It need scarcely be added that the absence of a member does not affect the legality of the proceedings, provided a

If the statutory quorum is present, the court is now able to enter upon the trial of a case; if less than a quorum is present the court can transact no business, but may adjourn from day to day to await the arrival of absent members. Or it may communicate the fact to the convening authority in order that their places may be supplied, or that such orders may be issued as the necessities of the case may require.[1]

When the preliminary business has been disposed of, the judge-advocate announces that he is ready to proceed to the trial of the accused person named in the convening order or, in all cases after the first, with the case next in order for trial.

Introduction of the Accused.—The accused is then introduced by the judge-advocate. He appears in uniform, without arms, if an officer or enlisted man, and without irons or fetters in any case; that is, perfectly free from restraint as to his limbs and bodily movements; this in order that he may be absolutely free from embarrassment in making his defense.[2] Except, therefore, in an extreme case, as where, the accused being charged with an aggravated and heinous offense, there is reasonable ground to believe that he will attempt to escape or to commit acts of violence, the keeping or placing

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quorum of members remain. Dig. J. A. Gen., 494, par. 2. See, also, 7 Opin. Att.-Gen., 101.

It does not invalidate the proceedings of a court-martial that a member who has been present during a portion of the trial, and has then absented himself during a portion, has subsequently resumed his seat on the court and taken part in the trial and judgment. Nor is the legal validity of the proceedings affected by the adding of a new member to the court pending the trial. In either case, however, the testimony which has been introduced and the material proceedings which have been had, while the new or absent member was not present, should be communicated to him before he enters or re-enters upon his duties as a member. Dig. J. A. Gen., 494, par. 3.

Such was the ruling of the Secretary of War on Genl. Hull's trial,* and this precedent was followed in repeated, though not frequent, cases during the late war. For a member, however, who has been absent during a substantial part of a trial to return and take part in a conviction and sentence is certainly a marked irregularity, and one which may well induce a disapproval of the findings and sentence in a case where there is reason to believe that the accused may have suffered material disadvantage from the member's action. It is understood of course to be that a member cannot legally resume his seat where, by his absenting himself, the court has been reduced below five members. It was indeed held by Attorney-General Berrien† that a member of a court-martial who has absented himself during the taking of testimony is disqualified to take part in the sentence. Attorney-General Cushing, however, held, in a later opinion,‡ that whether the absent member should resume his seat and act upon his return "must depend upon his own views of propriety."

[1] Strictly, communications from the convening authority to the court as such (and *vice versa*) should be made to (and by) the president as its organ; communications relating to the conduct of the prosecution to (and by) the judge-advocate. Dig. J. A. Gen., 318, par. 17.

[2] Dig. J. A. Gen., 334, par. 1. In order that he may not be embarrassed in making his defense, the accused party on trial before a court-martial should be subjected to no restraint other than such as may be necessary to enforce his presence or prevent disorderly conduct on his part. *Ibid.* Where an accused person appears before a court-

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* See the reply dated March 7, 1814, of the Secretary of War, Hon. John Armstrong, to the communication of the "acting special judge-advocate," Hon. Martin Van Buren, submitting questions for the court. (Forbes' Trial of Hull, Appendix, pp. 28, 29.)

† 2 Opin. Att.-Gen., 414.

‡ 7 *ibid.*, 98.

of irons upon him while before the court will not be justified. Even in such a case it will be preferable to place an adequate guard over him.[1]

The fact that the accused is an officer of high rank should not be regarded as constituting a ground for allowing him any special right or privilege in his defense before a court-martial. The administration of justice by a military as by a civil court must be strictly impartial or it ceases to be pure. All persons on trial by the one species of tribunal, as by the other, are deemed to be equal before the law.[2]

Introduction of Counsel.—The counsel for the accused, if he desires such assistance, is then presented to the court by the judge-advocate. If there be objection to the introduction of counsel generally, or to the particular person offered by the accused in that capacity, or if the accused desires delay in order to enable him to secure the services of a particular person as counsel, such questions are disposed of at this time.[3]

Stenographer.—If the case is one of sufficient importance to warrant the employment of a stenographer, the person employed in that capacity is now introduced, and sworn to the proper performance of his duties.[4]

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martial in irons, or under any other form of visible constraint, the court, through its president, should address the post commander, inviting his attention to the fact, with a view to the removal of the restraint so imposed. It would then become the duty of the post commander to cause the irons, or other form of restraint, to be removed, or to show why a necessity exists for the unusual restraint employed. If the reasons seem sufficient to the court, the fact of restraint, with the reasons assigned therefor, should be entered at large upon the record. If the reasons so assigned are not, in the opinion of the court, sufficient to warrant the unusual course pursued, the further trial of the case should be desisted from, and the matter presented to the convening officer for his action. See G. O. 88, Dept. Colorado, 1897. "The fact, however, that an accused soldier was tried with hands or feet in shackles, or with ball and chain attached, these having been omitted to be removed during the hearing before the court, does not, however reprehensible, affect the legal validity of the proceedings or sentence." Dig. J. A. Gen., 741, par. 2.

[1] *Ibid.;* see, also, *ibid.*, 334, par. 1; G. C. M. O. 62, Dept. of the Missouri, 1877; do. 55, *id.*, 1879; and, as to the civil practice, Lee *vs.* State, 51 Miss., 566; People *vs.* Harrington, 42 Cal., 175.

[2] Dig. J. A. Gen., 335, par. 4.

[3] See the title "Counsel for the Accused," under the heading "Officers of the Court," in the chapter entitled THE COMPOSITION OF COURTS-MARTIAL.

[4] The employment of a stenographic reporter, under Section 1203, Revised Statutes, is authorized for general courts only, and in cases where the convening authority considers it necessary. The convening authority may also, when necessary, authorize the detail of an enlisted man to assist the judge-advocate of a general court in preparing the record. Par. 958, A. R. 1893.

When a reporter is employed under Section 1203, Revised Statutes, he will be paid not to exceed $10 a day during the whole period of absence from his residence, traveling or on duty, which shall be in full for taking and transcribing all notes, making such number of copies to be made at one writing as the judge-advocate may require, and, unless otherwise specially ordered by the Secretary of War, in full for all services rendered and expenses incurred by the reporter. In special cases, when authorized by the Secretary of War, stenographic reporters may be employed at rates not exceeding 25 cents per folio (one hundred words) for taking and transcribing the notes in shorthand, or 10 cents per folio for other notes, exhibits, and appendices. Reporters will be paid by the Pay Department on the certificate of the judge-advocate. Par. 959, *ibid.*

No person in the military or civil service of the Government can lawfully receive extra compensation for clerical duties performed for a military court. Par. 960, *ibid.*

Clerk to Assist the Judge-Advocate.—In cases in which the services of a stenographic reporter are not deemed necessary, the Regulations authorize the convening authority to detail an enlisted man to assist the judge-advocate of a general court-martial in the preparation of the record.[1]

Reading of the Convening Order.—The order convening the court, together with any orders subsequently issued in modification thereof, is then read to the accused by the judge-advocate, both standing; this with a view to apprise him of the composition of the court and to enable him to exercise intelligently the right of challenge.

CHALLENGES.

Procedure.—The composition of the court-martial having been made known to the accused by the reading of the convening order, together with any orders of subsequent date which have operated to modify the composition of the court as originally constituted, he is asked by the judge-advocate whether he objects to being tried by any member named in the order. If his reply be in the negative, the court proceeds at once to the arraignment; if, on the other hand, the accused has objection to a member, he is required to exercise his right in this respect by challenging but one member at a time.[2]

Nature of the Right.—The right of challenge in court-martial procedure is regulated by the 88th Article of War, which provides that "members of a court-martial may be challenged by a prisoner, but only for cause stated to the court. The court shall determine the relevancy and validity thereof, and shall not receive a challenge to more than one member at a time."[3]

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[1] Par. 958, A. R. 1895.

[2] 88th Article of War.

[3] This Article authorizes the exercise of the right of challenge before all courts except field-officers' courts and summary courts. These courts are not subject to be challenged, because, being composed of but one member, there is no authority provided which is competent to pass upon the validity of the challenge. Dig. Opin. J. A. Gen., 99, par. 1.

The Article imposes no limitation upon the exercise of the right of challenge other than that "more than one member shall not be challenged at a time." Thus while the panel, or the court as a whole, is not subject to challenge, yet all the members may be challenged provided they are challenged separately. The Article contains no authority for challenging the judge-advocate. *Ibid.*, 102, par. 15. An officer cannot in general fitly or becomingly act as judge-advocate in a case in which he is personally interested as accuser or prosecutor. Where the judge-advocate had prepared the charges and was the accuser in the case and, moreover, entertained a strong personal prejudice or hostility against the accused, *held* that he was ill-chosen to act as judge advocate especially in the capacities of prosecuting official and adviser to the court. A personal animus against the accused is particularly unbefitting a judge-advocate in a case where the accused is not represented by counsel. One who without personal prejudice against the accused, or interest in his conviction, has signed the charges as company commander may not improperly act as judge-advocate in the case. *Ibid.*, 462, par. 26.

The court of itself cannot excuse a member in the absence of a challenge. A member

The terms of this statute restrict the general right of challenge in two important particulars: (1) A member may be challenged only for cause stated; as a consequence, what are called "peremptory challenges" in civil procedure are forbidden in the practice of courts-martial; (2) He may challenge but one member at a time; from this rule it results that courts-martial are not permitted to entertain, as such, "challenges to the array," that is, objections to the entire membership.[1] If such objections exist, the end sought may be attained by a plea to the jurisdiction, to be explained hereafter.

How Exercised.—Every member of a court-martial enters upon the performance of his duty with the presumption of competency to try any case that may properly be brought before the tribunal of which he has been constituted a member. If he be objected to, therefore, the burden of proof rests upon the party making the challenge of establishing his incompetency. The result is to raise an issue in which both parties have a right to be heard, and which must be decided by the court by a preponderance of testimony; the judgment, after hearing, being that the challenge is sustained and that the challenged member is excused from sitting, or that the challenge is not sustained and the challenged member will resume his seat. Pending deliberation upon the question of sustaining a challenge, the challenged member withdraws from the session of the court.[2]

Classification of Challenges.—It has been seen that only what are known as "challenges for cause" may, under the 88th Article, be offered to the membership of a court-martial. The challenges "for cause stated" thus authorized may be arranged into two classes, *principal challenges* and *challenges to the favor*. A principal challenge is one in which, when the ground of challenge has been established, the challenged member is excused from sitting as a matter of course. A challenge to the favor is one alleging bias, prejudice, or interest to exist, and which may or may not be sustained; the question depending upon the nature and amount of the interest, or prejudice, as determined by the admission of the member or by the evidence submitted in its support.[3]

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not challenged but considering himself disqualified can be relieved only by application to the convening authority. Dig. Opin. J. A. Gen., 103, par. 16.

[1] An accused challenged the entire court on the ground that the convening officer was "accuser." *Held* properly overruled; the array cannot be challenged at military law. The Article declares that "the court . . . shall not receive a challenge to more than one member at a time." *Ibid.*, par. 17.

[2] It is not necessary (though usual and proper) for a member to withdraw from the court-room on being challenged and pending the deliberation on the objection. *Ibid.*, par. 11. See, also, in connection with the subject of challenges, Macomb, §§ 45–49; O'Brien, 236; DeHart, 114–127; Benét, 79; Ives, 89; Winthrop, 279; Tytler, 115; Simmons, § 495; Clode, Mil. Law, 111; Man. Mil. Law, 388; Man. for Courts-martial, 26, 27; Dig. J. A. Gen., 99–103.

[3] The distinction here noted is one that is now peculiar to military tribunals, and is

Waiver of Challenge.—An objection to the competency of a member must, as a general rule, be brought before the arraignment; and if the accused is aware of its existence at that time and fails to bring it forward, he will be deemed to have waived his right of challenge as to such member or cause of objection.[1] Should a challenge be regularly made but improperly overruled by the court, such waiver on the part of the accused is presumed not to have been made, and he is entitled to whatever benefit may accrue in consequence of the erroneous action of the court.[2] Should the fact that a member is liable to objection, however, be developed at a later stage of the proceedings, such ground of objection being unknown to the accused when the opportunity for challenge was afforded him, the court, in the exercise of a reasonable discretion, may permit the objection to be raised at any stage of the trial.[3]

Challenges by the Judge-Advocate.—After the right of challenge has been completely exercised by the accused, the judge-advocate may interpose objections to competency in behalf of the United States.

Incompetency, How Established.—The incompetency of a member may be established by the voluntary admission of the challenged member, by the testimony of witnesses, or by the examination of the member on his *voir dire*.[4] If, upon the statement of the ground of challenge, its sufficiency or propriety is admitted by the member, he is excused from further duty as a member. To warrant this course, however, the objection alleged must be sufficient in itself to warrant the court in sustaining it had it been established

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recognized to exist, in respect to challenges to petit-jurors, in but a few jurisdictions in the United States. In those States in which the distinction still exists principal challenges are tried by the court, and challenges to the favor by triers.

[1] Keyes *vs.* U. S., 15 Ct. Cls., 532; Brewer *vs.* Jacobs, 22 F. R., 217; Mina *vs.* Hepburn, 7 Cr., 290; Pittsfield *vs.* Burnstead, 40 N. H., 477; Clark *vs.* Van Vrancken, 20 Barber (N. Y.), 278; Ripley *vs.* Coolidge, Minor (Ala.), 11; Glover *vs.* Woolsey, Dudley (Ga.), 85; State *vs.* Bunger, 14 La. Ann., 461; Hallock *vs.* Franklin, 2 Met. (Mass.), 558; Wickersham *vs.* People, 2 Ill., 128. See, also, opinion of the Attorney-General of January 19, 1878, (15 Opins., 432,) in which the opinion expressed by the Judge-Advocate General in the most recent of the cases upon which this paragraph is based—that the fact that one of the charges upon which the accused was convicted was preferred by a member of the court, who also testified as a witness on the trial (but who, though clearly subject to objection, was not challenged by the accused) could not affect the validity of the sentence of dismissal after the same had been duly confirmed—is concurred in by the Attorney-General. Dig. J. A. Gen., 102, par. 14, note 1.

[2] The fact that a sufficient cause of challenge exists against a member, but, through ignorance of his rights, is not taken advantage of by the accused, or if asserted is improperly overruled by the court, can affect in no manner the validity in law of the proceedings or sentence, though it may sometimes properly furnish occasion for a disapproval of the proceedings, etc., or a remission in whole or in part of the sentence. *Ibid.*, par. 14.

Where, before arraignment, the accused (an officer), without having personal knowledge of the existence of ground of challenge to a member, had credible hearsay information of its existence, *held* that he should properly have raised the objection before the members were sworn, and that the court was not in error in refusing to allow him to take it at a subsequent stage of the trial. *Ibid.*, 102, par. 13.

[3] *Ibid.*, pars. 13, 14. [4] For form of *voir dire*, see p. 510, *post*.

by the testimony of witnesses.[1] If testimony be introduced in support of the objection, the court will decide, after a full hearing, upon a preponderance of testimony, and will sustain the objection or refuse to sustain it in accordance with the weight of evidence submitted. If testimony be introduced in support of an objection, and if such testimony is not deemed sufficient in amount to warrant the court in excusing the member, the challenged member may be sworn on his *voir dire*, and questioned as to his competency to sit in the trial of the case.[2]

Grounds of Objection. Principal Challenges.—The distinction between principal challenges and challenges to the favor has already been explained. Under the former it would constitute a valid ground of objection to a member that he had sat upon a previous trial of the same case, or was a member of a court of inquiry which had investigated the subject-matter, or had been required, as a matter of official duty, to investigate the circumstances and, as a result, to submit an opinion as to whether the case should be brought to trial. In the former cases the member has been compelled, by the sanction of an oath, to form an opinion upon evidence submitted in a legal investigation;[3] in the latter he has been required, by the operation of a lawful order, not only to form, but to give expression to, an opinion based upon personal inquiry into the facts of a particular case. For the reasons above stated, it is the duty of a court-martial, the ground of objection having been shown to exist, to excuse the member from further attendance upon the court during the trial of the case.

The Accuser; Material Witness, etc.—It is ordinarily a sufficient ground of challenge to a member that he is the author of the charges and is a material witness in the case. The mere fact that he is to be a witness is not in general to be held sufficient.[4] So, too, the fact that a member signed or formally preferred the charges is not, of itself, a sufficient ground of objection,

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[1] Courts should be liberal in passing upon challenges, but should not entertain an objection which is not specific, or allow one upon its mere assertion by the accused, without proof and in the absence of any admission on the part of the member. A positive declaration by the challenged member to the effect that he has no prejudice or interest in the case will in general, in the absence of material evidence in support of the objection, justify the court in overruling it. Dig. J. A. Gen., 101, par. 12.

[2] Bishop, Crim. Proc., 934; Maxwell, 577; Wharton, Crim. Proc., 676; Thompson on Trials, 102.

[3] *Held* that the members of a court-martial who had composed a previous court by which the same accused had been tried for the same act, though under a different charge, were all subject to be set aside on challenge. Dig. J. A. Gen., 101, par. 10.

Held sufficient ground of challenge to a member of a court-martial that he had previously taken part in an investigation of the same case before a court of inquiry, though such court did not express a formal opinion. *Ibid.*, par. 8.

Held good ground of challenge to a member of a court-martial in a case of alleged theft by a soldier that such member had been a member of a previous court of inquiry which had investigated the case and fixed the misappropriation of the property upon the accused. *Ibid.*, par. 9.

[4] Dig. J. A. Gen., 100, par. 2.

since he may have done so ministerially or by the order of a superior. But where a member, upon investigation or otherwise, has initiated or preferred the charges as accuser, or as prosecutor has caused them to be brought to trial, he is properly subject to challenge.[1]

Opinion.—For an opinion to disqualify, it must be positive and decided in character and must have been formed after deliberation upon the facts in the case.[2] In general it does not disqualify if it is based upon mere rumor, or upon statements in newspapers, if the member is able to say that he can give an impartial decision upon the evidence submitted.[3] If, however, such opinion has been based upon conversations with witnesses or formed by reading reports of testimony, it would operate as a cause of disqualification.[4]

Bias or Prejudice; Rank of Member.—The law contemplates that each member who sits in the trial of a case shall have a mind entirely free from bias or prejudice in respect to the accused; if a member has such bias or prejudice, or is interested in the result of the trial, he is not able to act impartially, and so should not be permitted to pass upon the guilt or innocence of a person toward whom such bias or prejudice is entertained.[5] It is not good

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[1] Dig. J. A. Gen., 100, par. 3. Thus, that a member had originated and preferred the charge for a disobedience of his own order was held good cause of challenge. So, in a case of a trial for an assault upon an officer, the fact that the officer upon whom the assault was committed, and who was the prosecuting witness, was a member of the court was held to constitute complete cause of challenge to him as member. *Ibid.*

That a member is the regimental or company commander of the accused does not *per se* constitute sufficient ground of challenge. But such ground may exist where the commander has preferred the charges or where the relations between him and the accused have been such as to give rise to a presumption of prejudice. *Ibid.*, 100, par. 4.

[2] Reynolds *vs.* U. S., 98 U. S., 145; Armistead's Case, 11 Leigh (Va.), 659; Wormley's Case, 10 Gratt. (Va.), 658; Neely *vs.* People, 13 Ill., 685; Staup *vs.* Commonwealth, 74 Pa., 1; Burr's Trial, 416; State *vs.* Rose, 32 Mo., 346; Thompson *vs.* Updegraff, 3 W. Va., 629.

[3] Hopt *vs.* People, 120 U. S., 430; Brown *vs.* State, 70 Ind., 576; 12 Eng. & Amer. Cyc. of Law, 355.

[4] 12 Eng. & Amer. Cyc. of Law, 355, 356.

[5] Where a member before the trial had expressed an opinion, based upon a knowledge of the facts, that the accused would be convicted whichever way he might plead, *held* that he had clearly prejudged the case, and that the court should have sustained an objection taken to him by the accused, although upon being challenged he declared that he was without prejudice. Dig. J. A. Gen., 100, par. 5. See G. C. M. O. 66, H. Q. A., 1879.

A mere general opinion in regard to the impropriety of acts such as those charged against the accused, unaccompanied by any opinion as to his guilt or innocence on the charges, is not a sufficient ground of objection under this Article. *Ibid.*, 103, par. 21.

A member, on being challenged for prejudice, declared that he did not consider the accused (an officer) a gentleman, and would not associate with him, and that he had stated so; but he added at the same time that he was not prejudiced for or against him. *Held*, especially as one of the charges was "conduct unbecoming an officer and a gentleman," that the challenge was improperly overruled by the court. *Ibid.*, 100, par. 6.

An accused objected to a member on the ground that some time before he had had a disagreement with the member and thought that he "might be prejudiced." The member declared that he was conscious of no prejudice whatever, but that, on the contrary, his feelings toward the accused were friendly. *Held* that the court erred in sustaining the challenge. *Ibid.*, 103, par. 19.

The accused were Indian scouts charged with mutiny. Some of the members of

ground of challenge to a member, for example, that he is junior in rank to the accused, nor is it sufficient ground that the member will gain a step or "file" in the line of promotion if the accused is dismissed. It is, however, a sufficient cause of challenge to a member that if the accused (an officer) be convicted and sentenced to be dismissed the member will thereby be entitled to immediate promotion.[1]

CONTINUANCES.

Procedure.—The organization of the court having been effected and the accused and his counsel having been introduced, a motion for a *continuance*, that is, for a delay in proceeding with the trial, will properly be in order. The subject of continuances is regulated by the provisions of the 93d Article of War, which directs that "a court-martial shall, for reasonable cause, grant a continuance to either party, for such time and as often as may appear to be just: *provided* that if the prisoner be in close confinement the trial shall not be delayed for a period longer than sixty days."

Such application to entitle it to consideration must be supported by evidence, usually in the form of a duly executed affidavit, setting forth the reason for the delay; if it be to obtain the attendance of an absent witness, for example, it should distinctly appear that the witness is material "and why, and that the accused has used due diligence to procure his attendance, and has reasonable ground to believe, and does believe, that he will be able to procure such attendance within a reasonable time stated."[2]

Causes for Delay or Postponement.—The sickness or enforced absence of a party, or of a material witness, is an example of a "reasonable cause" within the meaning of the Article. The fact that the charges and specifications upon which an accused is arraigned differ, in a material particular, from those contained in the copy served upon him before arraignment may also constitute a sufficient ground for granting him additional time for the preparation of his defense.[3] It is in general good ground for a reasonable continuance

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the court, though disclaiming any prejudice against the accused personally, were aware that they were present at the outbreak, and were fully apprised, from their own personal presence or knowledge of the circumstances, that the mutiny, which had involved homicide, constituted a most aggravated offense of the class. *Held* that, as these members could scarcely avoid applying their impressions to the accused when shown to be connected with the disorder they would fairly have been subject to objection as triers. Dig. J. A. Gen., 103, par. 20.

[1] *Ibid.*, 101, par. 7. Whether the trial of an officer by officers of an inferior rank can be avoided or not is a question not for the accused or the court, but for the officer convening the court; and his decision (as indicated by the detail itself as made in the convening order) upon this point, as upon that of the number of members to be detailed, is conclusive. An officer, therefore, cannot successfully challenge a member because *merely* of being of a rank inferior to his own. *Ibid.*, 89, par. 1.

[2] Manual for Courts-martial, 29, § 8.

[3] Dig. J. A. Gen., 109, par. 4. Where after arraignment a material and substantial amendment is allowed by the court to be made by the judge-advocate in a specification,

that the accused needs time to procure the assistance of counsel, if it is made to appear that such counsel can probably be obtained within the time asked, and that the accused is not chargeable with remissness in not having already provided himself with counsel.[1]

Where "reasonable cause" is, in the judgment of the court, exhibited, the party is entitled to *some* continuance under the Article. A refusal, indeed, by the court to grant such continuance will not invalidate the proceedings, but, if the accused has thus been prejudiced in his defense, may properly constitute good ground for disapproving the sentence, or for mitigating or partially remitting the punishment.[2]

SWEARING OF THE COURT-MARTIAL.

Swearing of Members.—The challenges offered by the accused and by the judge-advocate, if any such there be, having been disposed of, the

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the effect of which amendment is to necessitate or make desirable a further preparation for his defense on the part of the accused, a reasonable postponement for this purpose will in general properly be granted by the court Dig. J. A. Gen., 109, par. 5.

[1] *Ibid*, 110, par. 6. See, also, G. C. M. O. 25, A. G. O. 1875.

[2] *Ibid.*, 109, par. 2. In making an application for a continuance or postponement under this Article on account of the absence of a witness, the conditions prescribed in section 8, p. 29, of the Manual for Courts-martial should in general be substantially observed. But while the court may refuse the application if these conditions be not followed it may, in its discretion, refrain from insisting that the same be strictly complied with, and accept a modified form.* It should, however, in all cases require that the desired evidence appear or be shown to be material, and not merely cumulative,† and that to await its production will not delay the trial for an unreasonable period. It should also, in general, before granting the continuance, be assured that the absence of the witness is not owing to any neglect on the part of the applicant. This feature, however, will not be so much insisted upon in military as in civil cases.‡ *Ibid.*, 108, par. 1.

Where an accused soldier, by reason of his regiment having been moved a long distance since his arrest, was separated, at his trial, from certain witnesses material to his defense, *held* that he was entitled to a reasonable continuance for the purpose of procuring their attendance or their depositions. *Ibid.*, 109, par. 3.

Postponements.—The foregoing procedure applies to *continuances*, properly so called, that is, to delays during the trial asked for and granted, in conformity with the provisions of the 93d Article of War. If, in advance of the trial, either party desires a postponement of the trial for any cause, "application therefor should properly be made to the convening authority before the accused is arraigned." Manual for Courts-martial, 29, par. 7. So, too, if, during the trial, extended delay becomes necessary, that is, a delay transcending the power of the court-martial to grant under the Article, application therefor "will, when practicable, be made to the authority appointing the court. When made to the court, and if, in the opinion of the court, it is well founded, it will be referred to the convening authority to decide whether the court shall be adjourned or dissolved." Manual for Courts-martial, 29, par. 8.

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* It is not the practice of courts-martial to admit counter-affidavits from the opposite party as to what the absent witness would testify. And as to the civil practice, see Williams *vs.* State, 6 Nebraska, 334.

† Compare People *vs.* Thompson, 4 Cal., 238; Parker *vs.* State, 55 Miss., 414.

‡ A military accused cannot be charged with laches in not procuring the attendance at his trial of a witness who is prevented from being present by superior military authority. Thus in a case in G. O. 53, Dept. of Dakota, 1872, an accused soldier was held entitled to a continuance till the return of material witnesses then absent on an Indian expedition.

It would properly be so held upon common-law principles, even independently of the positive terms of the Article. In Rex *vs.* D'Eon, 1 W. Black., 514, it was declared by Lord Mansfield that "no crime is so great, no proceedings so instantaneous, but that, *upon sufficient grounds*, the trial may be put off."

members of the court and the judge-advocate are then duly and severally sworn; the court and the judge-advocate, together with the accused and his counsel, standing during the administration of the oaths. The oath prescribed by law for the members of the court-martial is administered by the judge-advocate in the following form: "You, A B, do swear that you will well and truly try and determine, according to evidence, the matter now before you between the United States of America and the prisoner to be tried, and that you will duly administer justice, without partiality, favor, or affection, according to the provisions of the rules and articles for the government of the armies of the United States, and if any doubts should arise not explained by said articles, then according to your conscience, the best of your understanding, and the custom of war in like cases; and you do further swear that you will not divulge the sentence of the court until it shall be published by the proper authority, except to the judge-advocate; neither will you disclose or discover the vote or opinion of any particular member of the court-martial unless required to give evidence thereof, as a witness, by a court of justice in due course of law. So help you God."[1]

The 84th Article requires that the oath shall be taken, not by the court as a whole, but by "each member." Where, therefore, all the members are sworn at the same time, the judge-advocate will address each member by name, thus: "You, A B, C D, E F, etc., do swear that you will well and truly try," etc.[2]

Swearing of the Judge-Advocate.—The appropriate oath having been duly administered to the members of the court-martial, the oath prescribed by law for the judge-advocate is then administered to that officer by the president of the court. The judge-advocate's oath is in the following form: "You, A B, do swear that you will not disclose or discover the vote or opinion of any particular member of the court-martial unless required to give evidence thereof, as a witness, by a court of justice in due course of law; nor divulge the sentence of the court to any but the proper authority until it shall be duly disclosed by the same. So help you God."[3]

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[1] 84th Article of War. The words "a court of justice" are deemed to mean a civil or criminal court of the United States, or of a State,* etc., and not to include a court-martial.† A case can hardly be supposed in which it would become proper or disirable for a court-martial to inquire into the votes or opinions given in closed court by the members of another similar tribunal. Dig. J. A. Gen., 98, par. 6.

[2] Dig. J. A. Gen., 97, par. 1.

[3] 85th Article of War. Where the record of a trial failed to show that the court or the judge-advocate was sworn, *held* that the conviction and sentence were without legal validity. The qualification by swearing is enjoined as a necessary preliminary by Articles of War 84 and 85, and the record must show affirmatively whatever is made by

* The only case which has been met with in which the members of a court-martial have been required to disclose their votes by the process of a civil court is that of *In re* Mackenzie, 1 Pa. Law J. R., 356, in which the members of a naval court-martial were compelled, against their objections, to state their votes as given upon the findings at a particular trial.

† In the present corresponding British Article the words "or a court-martial" are added after the words "a court of justice."

This Article makes the administering to the court of the form of oath thereby prescribed an essential preliminary to its entering upon a trial.[1] Until the oath is taken as specified the court is not qualified "to try and determine." The arraignment of a prisoner and the reception of his plea—which is the commencement of the trial—before the court is sworn, is without legal effect.

A member added to the court, after the members originally detailed have been duly sworn, should be separately sworn by the judge-advocate in the full form prescribed by the Article; otherwise he is not qualified to act as a member of the court. A member who prefers it may be *affirmed* instead of *sworn*.[2]

Obligation of the Oath.—The members are sworn to "well and truly try and determine the matter now before them," that is, the particular set of charges which has been furnished the accused and upon which he is presently to be arraigned and tried. From this it follows that "after the accused has been arraigned upon certain charges and has pleaded thereto, and trial on the same has been entered upon, new and additional charges which the accused has had no notice to defend cannot be introduced or the accused required to plead thereto. Such charges should be made the subject of a separate trial, upon which the accused may be enabled properly to exercise the right of challenge to the court, and effectively to plead and defend."[3]

The requirement of the oath that the court "will well and truly try and determine according to evidence," and "will duly administer justice without partiality, favor, or affection, etc., according to the provisions of the rules and articles for the government of the armies of the United States," imposes an obligation upon the members, in reaching a finding and in awarding an appropriate sentence, to exclude from their minds all considerations not derived from the evidence submitted during the trial, or from the application of the law to the facts as thus established in evidence.

It is also a departure from the engagement expressed in the body of the oath—to try and determine according to evidence, and administer justice according to the Articles of War, etc.—for a court-martial to determine a

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statute essential to its jurisdiction and the legality of its proceedings. Dig. J. A. Gen., 650, par. 12. See, also, Runkle *vs.* U. S., 122 U. S., 586.

[1] See, in this connection, G. O. 15, Hdqrs. of Army, 1880, which, in directing that judge-advocates shall be detailed for regimental and garrison as well as general courts-martial, rescinds G. O. 49 of 1871, prescribing a special form of oath for the former courts, and thus provides for their taking the due and regular oath recited in Art. 84.

[2] Dig. J. A. Gen., 97, par. 1. See, also, Section 1, Revised Statutes of the United States.

[3] Dig J. A Gen., 97, par. 4; 227, par. 9. In a case, therefore, where, after the court had been sworn and the accused had been arraigned and had pleaded, an additional charge, setting forth a new and distinct offense, was introduced into the case, and the accused was tried and convicted upon the same,—*held* that as to this charge the proceedings were fatally defective, the court not having been sworn to try and determine such charge. *Ibid.*, 97, par. 2. See G. C. M. O. 39, War Dept., 1867; G. O. 13, Northern Dept., 1864.

case either upon personal knowledge of the facts possessed by the members and not put in evidence, or according to the private views of justice of the members independently of the provisions of the code.[1]

The oath contains the added requirement that "if any doubt shall arise not explained by said articles," justice is to be done, as between the United States of America and the prisoner to be tried, "according to your conscience, the best of your understanding, and the custom of war in like cases." The *doubts* here referred to must originate in, and grow out of, the evidence submitted during the trial of the case; as from conflicting testimony, deficiency of testimony in certain particulars, or from want of credibility as to particular witnesses, such doubt can in no case be derived from mere speculative theories as to the probable existence or non-existence of facts, or their bearing upon the guilt or innocence of the accused.[2]

Obligation to Secrecy.—"No sentence of a court-martial is complete or final until it has been duly approved. Until that period it is, strictly speaking, no more than an opinion which is subject to alteration or revision. In this interval the communication of that opinion could answer no ends of justice, but might in many cases tend to frustrate and defeat them. The obligation to perpetual secrecy, with respect to the opinions of the particular members of the court, is likewise founded on the wisest policy." This end is therefore best attained "by the confidence and security which every member possesses that his particular opinion is never to be divulged. Another reason, of yet stronger nature, is that the individual members of the court may not be exposed to the resentment of parties and their connections, which can hardly fail to be excited by those sentences which it is often obligatory upon courts to award. It may be necessary for officers in the course of their duty daily to associate and frequently to be sent on the same command or service with a person against whom they have given an unfavorable vote or opinion on a court-martial. The publicity of these votes or opinions would create the most dangerous animosities, equally fatal to the peace and security of individuals and prejudicial to the public service."[3]

It will be observed that the strict verbiage of the oath places the obligation of secrecy upon "the sentence of the court" and upon "the vote or opinion of any member," but does not in express terms forbid a disclosure of the "finding." An inflexible custom of the service, however, brings this incident of the trial within the same restriction, and its disclosure would be authorized only in the event of the officer being required to give evidence, in respect to such finding, before a tribunal of competent jurisdiction. The

[1] Dig. J. A. Gen., 97, par. 3. Compare G. O. 21, Dept. of the Ohio, 1866; G. C. M. O. 41, Dept. of Texas, 1874.
[2] U. S. *vs.* Newton, 52 Fed. Rep., 275; Com. *vs.* Drum, 58 Pa. St., 9.
[3] Macomb, § 51.

excepting clause of the oath, authorizing the disclosure of the finding and sentence to the judge-advocate, has been made necessary by a recent enactment of Congress requiring that officer to withdraw from the presence of the court whenever it sits in closed session.[1]

Oath of Judge-Advocate.—The oath which is taken by the judge-advocate contains the same obligation to secrecy as that administered to the members, except so far as it relates to the disclosure of the findings and sentence to the person who is empowered to approve or disapprove the sentence of the court. It is not inconsistent with his oath or duty for the judge-advocate to communicate to the proper authority his views respecting the proceedings of the court.[2]

Oaths of Members, etc., of Minor Courts-martial.—The oaths prescribed by law for the members and judge-advocates of general courts-martial are administered in the same manner and by the same persons to the corre-

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[1] Sec. 2, Act of July 27, 1892, (27 Stat. at Large, 278).

Where the vote of each member of the court upon one of several specifications upon which the accused was tried was stated in the record of trial, *held* that such statement was a clear violation of the oath of the court, though it did not affect the validity of the proceedings or sentence. A statement in the record of trial to the effect that all the members concurred in the finding or in the sentence, while it does not vitiate the proceedings or sentence, is a direct violation of the oath prescribed by this Article. Dig. J. A. Gen., 97, par 4.

The disclosing of the finding and sentence to a clerk by permitting him to remain with the court at the final deliberation and enter the judgment in the record is a violation of the oath and a grave irregularity, though one which does not affect the validity of the proceedings or sentence. *Ibid.*, 98, par. 5. A court-martial, member of court, or judge-advocate cannot of course lawfully communicate to a reporter or clerk, by allowing him to record the same or otherwise, the finding or sentence of the court. Before proceeding to deliberate upon its finding the court should require the reporter or clerk, if it has one, to withdraw. But the fact that the finding or sentence or both may have been made known to the reporter or clerk of a court-martial cannot affect the legal validity of its proceedings or sentence. *Ibid.*, 264, par. 1.

Held that the reopening of the court, after a conviction, to receive evidence of previous convictions was not a violation of the 84th Article of War.* The procedure was designed to carry out the spirit of the legislation which excluded judge-advocates from closed sessions—to place prosecution and defense on a more equal footing, by allowing the accused to be present when evidence of previous convictions is submitted and to scrutinize the same and test their legality. *Ibid.*, 609, par. 1.

Upon a proposed enactment providing that the members of courts-martial be allowed, at their own request, to have their individual votes upon the finding or sentence entered upon the record, *advised* that the same be not favored by the Secretary of War. Such a proceeding would indeed relieve self-respecting members from being implicated in an unjust or irrational finding or sentence, but it would materially impair the effect of the judgment of the court if the composition of the vote were to be thrown open to scrutiny and discussion. The proceeding indeed might readily, contrary to the spirit of the 84th Article, disclose the votes of all the members—as where, in a court of nine, four requested a record of their personal votes. *Ibid.*, 413, par. 17.

[2] Macomb, § 52; O'Brien, 240–243; Benét, 104–105; Ives, 113–121; Winthrop, 318; Tytler, 119–121; Clode, Mil. Law, 113; Man. Mil. Law, 52, 389; Man. for Courts-martial, 28; Dig. J. A. Gen., 96–98; Adye, 154; Harwood, 74, 75.

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* In a recent case this opinion was restated by the Judge-Advocate General in the following terms: "The opening of the court to hear evidence of previous convictions justifies the inference that the accused has been convicted, but would not be such a disclosure as is meant by the 84th Article of War. But the oath does not specify and does not include the finding, and must be construed with reference to the present system, which is established by authority having the force of law. It violates neither the language nor, under our present system, (whatever it may have done before,) the spirit of the Article to open the court, after conviction, to hear evidence of previous convictions."

sponding officers of regimental and garrison courts, and have the same obligatory effect. The officers composing field-officers' courts and the summary court, recently established by law, are not sworn as such, but perform their duties under the sanction of their respective oaths of office.

Interpreter.—If the services of an interpreter are required, he is introduced and sworn at this stage of the trial.[1]

THE ARRAIGNMENT.

Pleadings.—The oaths required by law having been duly administered, the court, as a consequence, becomes a legal tribunal, and the power conferred upon it by statute to try military offenses becomes fully operative. A *pleading*, technically speaking, is the statement, in a logical and legal form, of the facts constituting a particular cause of action or ground of defense. In this sense the *indictment* in a criminal trial, and the *charges and specifications* in a court-martial trial, constitute a part of the pleadings in the case. The first pleading in a court-martial trial consists in the charges and specifications preferred against the accused, to which he is required to make answer, and this answer, which is known technically as the "plea," may consist in either a special plea in bar, presently to be explained, or in a plea of "guilty" or "not guilty" to each of the charges and specifications. In the latter case the accused is said to plead the "general issue," that is, to the merits of the case; and it is this plea upon which, in ordinary cases, the trial on the merits proceeds.[2] The formal answers of the accused to the several charges and specifications, as they are read to him by the judge-advocate, are called "pleas," and the reading of such charges, and the taking of pleas in answer thereto, constitute what is known as the "arraignment." During the arraignment the judge-advocate and the accused and his counsel remain standing.

Classification of Pleas.—The several pleas which an accused may interpose in answer to the charges preferred against him are classified according to their nature and effects into (1) pleas to the jurisdiction, (2) pleas in bar of trial, (3) pleas in abatement, and (4) pleas to the merits of the case, that is, to the "general issue."

Pleas to the Jurisdiction.—It is a rule of law, applying to all courts of special or limited jurisdiction, that their records shall show affirmatively, as to each case tried, that the court acted with full jurisdiction not only as to the offense itself, but also as to the person of the offender. In order, therefore, that a particular court-martial trial may be valid, the following conditions must be fulfilled: (1) the court itself must have been properly constituted; (2) the accused must be subject to its jurisdiction; and (3) the crime for which he is tried must be a military offense. A defect in

[1] For form of interpreter's oath, see page 29, Manual for Courts-martial.
[2] Bishop, Criminal Procedure, § 743.

any one of these particulars will be fatal to the jurisdiction. An objection going to a want of jurisdiction cannot be waived by the accused, for criminal courts derive their power to try cases from formally enacted statutes, and can never acquire jurisdiction by the mere consent of the accused, as expressed in his waiver of a well-grounded objection to its jurisdiction. It is for this reason that pleas to the jurisdiction are submitted first in the order of pleading; since an objection to the jurisdiction of the court must be disposed of before the court can take a single step in the direction of the trial.[1]

Objections to the Constitution of the Court.—Under this head it may be alleged, by a plea to the jurisdiction, that the convening officer is without authority to convene the court. It has been seen that the power to constitute courts-martial is conferred in express terms by statute; it has also been seen that such power, not being subject to delegation, must be personally exercised in every case by the proper convening authority.[2] The several Articles conferring power to appoint courts-martial also make the convening officer the judge of the existence or non-existence of certain facts or conditions, as to the number of officers that can be assembled, and the rank of the officers composing a particular court; in such cases the decision of the convening officer, as expressed in the order appointing the court, is final, and is not subject to inquiry by the court-martial itself, or to subsequent review by a civil tribunal.[3] This question, however, is one which presents but little difficulty in practice; if the convening officer in point of rank and command conforms to the conditions specified in the statute, his power to appoint a court-martial under such statute is complete and, in general, will be sustained.

Convening Officer as Accuser.—The convening officer may also stand, in respect to the accused, in the situation of an accuser or prosecutor; in which event the appointing power passes, by operation of law, to a superior officer therein designated.[4] While, in general, the signing of the charges fixes upon the signer the character of an accuser, such signing is not always conclusive as to the fact, and may be rebutted by evidence showing that the officer whose name is signed to the charges acted *pro forma*, or in a mere ministerial capacity. On the other hand, a convening officer may be the accuser in fact, and within the meaning of the statute, without affixing his signature to the charges, which, indeed, may be signed by another, as by a staff-officer or by the judge-advocate of the court-martial.

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[1] Objections going to the legal constitution or composition of the court, or to its jurisdiction, should properly be specially presented when the accused is first called upon to plead; valid objections of this radical character, however, are not waived if the accused, instead of submitting a special plea, pleads over to the merits, since consent cannot confer jurisdiction where none exists in law. Dig. J. A. Gen., 591, par. 9.

[2] See the chapter entitled JURISDICTION OF COURTS-MARTIAL.

[3] 75th, 81st, and 82d Articles of War.

[4] 72d and 73d Articles of War.

Whether the convening officer is or is not the accuser in a particular case will depend upon the *animus;* and where he himself *initiates* the charge out of a hostile *animus* toward the accused or a personal interest adverse to him, or from a similar motive adopts and makes his own a charge initiated by another, he is to be deemed an "accuser or prosecutor" within the Article. Nor is he the less so where, though he has no personal feeling or interest in the case, he has become possessed with the conviction that the accused is guilty and deserves punishment and, in this conviction, initiates or assumes as his own the charge or the prosecution. For in this case, as in the former, he is unfit to be a *judge* upon the merits of the case: in the one instance he is too much prejudiced to be qualified to do justice; in the other he has condemned the accused beforehand.[1]

While the objection, if known to exist, should be taken at or before the arraignment, being one going to the legal constitution of the court, it may be raised at any stage of the proceedings; and if its existence be not admitted by the prosecution, the accused is entitled to prove it like any other issue.[2]

Objections to the Composition of the Court-martial.—An objection may also be addressed to the composition of the court; as that the accused is a member of the militia forces, and that the court is composed wholly or in part of regular officers.[3] The validity of the plea in this case will be determined by the description of the accused as stated in the charges or as established by the testimony submitted in support of the plea. It is only necessary to observe in this connection that while a regular officer, as such, may not sit as a member of a court for the trial of officers or enlisted men of the militia or other forces, he may lawfully do so by virtue of a separate commission in an organization of militia or volunteers.[4]

Amenability of the Accused to Trial.—It is essential to the jurisdiction of a military tribunal that the person of the accused should be amenable to military jurisdiction. As to an officer, this is shown by the acceptance of his appointment or commission; and as to an enlisted man, by proof of his enlistment, or muster-in, or, in some cases, by his voluntary acquiescence in, or implied acceptance of, the status of a soldier, as evinced by the perform-

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[1] Dig. J. A. Gen., 82, par. 7. See, also, the chapter entitled THE CONSTITUTION OF COURTS-MARTIAL.

[2] *Ibid.*, 84, par. 8. Or it may be taken to the reviewing officer with a view to his disapproving the proceedings, or may be made to the President, after the approval and execution of the sentence, with a view to having the same declared invalid or to the obtaining of other appropriate relief. *Ibid.*

Compare late opinion—to a somewhat similar effect—of the Attorney-General of August 1, 1878,* in which it is also held that where the record of the trial fails to indicate that the convening officer was the "accuser or prosecutor" of the accused, the latter, in applying to the Secretary of War to have the proceedings pronounced invalid on this ground, may establish the fact by the production of *affidavits* setting forth the circumstances of the case and the action of the commander. *Ibid.*, 82, par. 8, note 1.

[3] 77th Article of War; Section 1658, Revised Statutes.

[4] Ives, 29; Dig. J. A. Gen., 43 (edition of 1868).

* 16 Opin. Att.-Gen.

ance of the duties and acceptance of the pay or emoluments attached to the position.[1] Whenever it is proposed to subject a civilian to trial by court-martial, his amenability to such trial must, as a rule, be shown to have been expressly conferred by statute. If such statutory authority be wanting, in no case can it be conferred by the act of the accused; either by an express waiver of objection to trial, or by an implied acceptance of the jurisdiction, as would be shown by his submitting the case to trial by a military tribunal.[2] In some cases—the inmates of the National Homes for Disabled Volunteer Soldiers, for example—even the express authority of a statute is not sufficient to warrant the trial of a citizen by a military court.[3] It is proper to observe that the Articles of War subjecting civilians to trial by court-martial are

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[1] Dig. J. A. Gen., 323, paragraphs 4–6; *ibid.*, 75, paragraphs 1–8.

To give a court-martial jurisdiction of the person of an officer or soldier charged with a military offense, it is not necessary that he shall have been subjected to any particular form of arrest, or that he shall have been arrested at all, or even ordered to attend the court. Here, as before a civil tribunal, his voluntary appearance and submission for trial is all that is essential. *Ibid.*, p. 328, par. 11.

In order to become amenable to the military jurisdiction, an officer or soldier must have been legally and fully admitted into the military service of the United States. Thus *held* that an officer of State volunteers appointed by a governor of a State, but not yet mustered into the United States service, was not amenable to the jurisdiction of a court-martial of the United States for an offense committed while engaged in recruiting service under the authority of the governor. *Ibid.*, 323, par. 4.

It cannot affect the authority of a court-martial to take cognizance of the military offense involved in an injury committed by a soldier against an officer that before the trial the latter has resigned or been otherwise separated from the Army. *Ibid.*, 329, par. 13.

Whether a soldier may legally be held amenable to trial by court-martial for an offense committed by him while on furlough will depend upon the nature of the offense and the circumstances of his situation. In general, indeed, where he is thus absent at his home or at such a distance from his station and from troops that his offenses will not directly prejudice military discipline, he will not render himself amenable to the military jurisdiction unless, indeed, he commits a desertion. *Ibid.*, par. 14. See Manual for Courts-martial, p. 16, par. 7.

The discharge of a soldier not taking effect till delivery, actual or constructive, *held* that a soldier who committed a military offense on the day on which he was to be dishonorably discharged under sentence, but before the discharge was delivered to him (or to the officer in charge of the prison at which he was also to be confined under the same sentence), was amenable to the military jurisdiction for the trial and punishment of such offense as being still in the military service. *Ibid.*, 330, par 16.

Held that when the volunteer army to which a soldier belonged was, at the end of the late war, disbanded, soldiers absent in desertion ceased to be subject to military jurisdiction and became civilians, but that their last military record was that of deserters, and that, as to them, the disbandment of the army did not operate as a discharge from the service. *Ibid.*, par. 17.

Held that an officer could not, by procuring himself to be, or consenting to being, placed under a conservator as an habitual drunkard, in the form prescribed by the local law, withdraw himself from the military jurisdiction; but that he remained amenable to trial and punishment for offenses committed prior to such proceeding and within the period of limitation. *Ibid.*, 331, par. 19.

Held that an acquittal of a soldier by a civil court on an indictment for larceny was no bar to his trial by court-martial for the same act, charged under the 62d Article of War. And so *held* in a case of an acquittal by a civil court of an officer who had committed a homicide of another officer in the course of an altercation in the presence of enlisted men at a military post. *Ibid.*, par. 21.

[2] *Ibid.*, 325, par. 7, and cases cited.

[3] *Ibid.*, 326, par. 8; 705, par. 2; 744, par. 4.

not operative in time of peace: they become so only in time of war and in the immediate theatre of military operations.[1]

The Offense Charged must be a Violation of Military Law.—It is a well-established principle of our constitutional law that there can be no criminal offense against the United States which has not been made such by an enactment of Congress. This principle applies with equal force to military offenses. In the chapter relating to Charges and Specifications it has been shown that a military charge to be valid must allege an offense which is based upon, or consists in, the violation of a particular statute or Article of War; since no other offense, whatever its character or however harmful in its effects upon military discipline, is triable by a military tribunal.

There are some cases, however, in which the authority of several statutes must be appealed to in order to constitute a military offense; one statute defining the crime, and the other conferring power upon a particular court-martial to try and punish the offense. The 58th Article of War is an example of this class; the Article confers jurisdiction upon general courts-martial, in time of war, to try certain specific offenses therein named; for definitions of those offenses, however, the law of the State or, in the absence of a statutory definition, the common law must be referred to. In other cases courts-martial are given jurisdiction over certain wrongful acts which are not expressly described in the statute conferring jurisdiction, or are described only in general terms. Such is the case in respect to offenses included within the terms of the 61st and 62d Articles of War.

Pleas in Bar of Trial.—It has been seen that a plea to the jurisdiction denies the power of the court-martial to hear a case referred to it for trial. In strictness a plea in bar of trial admits the jurisdiction of the court as to the class of cases, and the general amenability of the accused to trial, but, for reasons stated, denies the right of the court to try the particular case before it. Such a plea in bar would be appropriate in any one of the following cases:

A Previous Acquittal or Conviction of the Same Offense.—The Fifth Amendment to the Constitution provides that no person shall for the same offense "be twice put in jeopardy of life or limb."[2] A similar but somewhat less extensive immunity is secured, as to offenders against military law,

[1] Dig. J. A. Gen., 325, par. 7; 326, par. 8. It is inaccurately stated in the report of the case of Renner *vs.* Bennett, 21 Ohio St., 434, (December, 1871,) that no inmate of the National Home had ever been subjected to a trial by court-martial. The instance referred to in the Digest of Opinions of the Judge-Advocate General (page 329, par. 15), however, is the only one known of such a trial.

[2] A person is *in jeopardy* when put upon trial, before a court of competent jurisdiction, under an indictment or information sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance—that is, empaneled and sworn. Cooley, Const. Law, 327, 328, cases; Anderson, Law Dict., title Jeopardy, 572 and cases cited. But see Dig. J. A. Gen., 118, par. 1; U. S. *vs.* Martin, 28 Fed. Rep., 812; Kelly *vs.* U. S., 27 *ibid.*, 616; U. S. *vs.* Barnhart, 22 *ibid.*, 285; U. S. *vs.* Van Vleet, 22 *ibid.*, 35.

by the provision of the 102d Article of War that "no person shall be tried a second time for the same offense." The term "tried" employed in this Article means duly prosecuted, before a court-martial, to a final conviction or acquittal; therefore an officer or soldier after having been duly convicted or acquitted by such a court cannot be subjected to a second military trial for the same offense, except by and upon his own waiver and consent.[1] Such consent may be express, as in the case of an application of the accused for a new trial, or implied by his waiver, at the second trial, of the objection based upon a former trial for the same offense.[2]

Where the accused has been once duly convicted or acquitted, he has been "tried" in the sense of the Article, and cannot be tried again, against his will, though no action whatever be taken upon the proceedings by the reviewing authority, or though the proceedings and findings (and sentence, if any) be wholly disapproved by him. It is immaterial whether the former conviction or acquittal is approved or disapproved.[3]

Where an officer or soldier has been duly acquitted or convicted of a

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[1] Dig. J. A. Gen., 118, par. 1. *Held* that there was no "second" trial, in the sense of the Article, in the following cases, viz.: where the party after being arraigned or tried before a court which was illegally constituted or composed, or was without jurisdiction, was again brought to trial before a competent tribunal; where the accused, having been arraigned upon and having pleaded to certain charges, was rearraigned upon a new set of charges substituted for the others, which were withdrawn; where one of several distinct charges upon which the accused had been arraigned was withdrawn pending the trial, and the accused, after a trial and finding by the court upon the other charges, was brought to trial anew upon the charge thus withdrawn; where, after proceedings commenced, but discontinued without a finding, the accused was brought to trial anew upon the same charge; where, after having been acquitted or convicted upon a certain charge which did not in fact state the real offense committed, the accused was brought to trial for the same act, but upon a charge setting forth the true offense; where the accused was brought to trial after having had his case fully investigated by a different court, which, however, failed to agree in a finding and was consequently dissolved;* where the first court was dissolved because reduced below five members by the casualties of the service pending the trial; where, for any cause, there was a "mistrial," or the trial first entered upon was terminated, or the court dissolved at any stage of the proceedings before a final acquittal or conviction. *Ibid.*, par. 3.

A soldier was convicted of "manslaughter," but the findings and sentence were disapproved. He was then brought to trial on a charge of mutiny, as committed on the occasion of the homicide, the latter being alluded to in the specification as an incidental circumstance of aggravation, and was found guilty and sentenced. *Held* that the accused was not, in the sense of this Article, "tried a second time for the same offense," the mutiny not consisting in the act of homicide, but constituting a distinct offense. *Ibid.*, 120, par. 8.

There cannot, in view of this Article, be a second trial where the offense is really the same, though it may be charged under a different description and under a different Article of War. Thus where the Government elects to try a soldier under the 32d Article for "absence without leave," or under the 42d for "lying out of quarters," and the testimony introduced develops the fact that the offense was desertion, the accused after an acquittal or conviction cannot legally be brought a second time to trial for the same absence charged as a desertion. *Ibid.*, par. 9.

[2] That an accused may *waive* objection to a second trial was held by Attorney-General Wirt in 1818, and has since been regarded as settled law. 1 Opin. Att.-Gen., 233. See, also, 6 *id.*, 205; Dig. J. A. Gen., 118, par. 1.

[3] *Ibid.*, 119, par 5. Compare Macomb, § 159.

* U. S. *vs.* Perez, 9 Wheat., 579.

specific offense, he cannot, against his consent, be brought to trial for a minor offense included therein, and an acquittal or conviction of which was necessarily involved in the finding upon the original charge. Thus a party convicted or acquitted of a desertion cannot afterwards be brought to trial for an absence without leave committed in and by the same act.[1]

New Trials.—It has been seen that a military person once duly tried by a court-martial of competent jurisdiction cannot, against his consent, be tried a second time for the same offense.[2] He may waive his privilege in this regard, however, and request a new trial upon the same charges.

New or second trials have been of the rarest occurrence in our military service. They have only been had, and are only authorized, where the sentence adjudged upon the first trial has been disapproved by the reviewing authority and the accused has asked for a second trial. It was held at an early period by Attorney-General Wirt[3] that the prohibitory provision of the Articles of War (now contained in Art. 102) that "no person shall be tried a second time for the same offense" did not apply to a case in which the accused himself requested a new trial, the objection to such trial being deemed to be subject to be *waived* by the consent and action of the party tried.[4]

The privilege of applying for and being allowed a retrial—for it is not a right, since the trial may be granted or denied at the discretion of the proper superior—has naturally been but seldom exercised; parties convicted and sentenced being in general satisfied that the proceedings in their cases should be terminated by the disapproval, on whatever grounds the same may be based. After a sentence has been duly approved and has taken effect, the granting of a new trial is of course beyond the power of a military commander or the President.[4]

Where an officer or soldier who has been acquitted or convicted of a criminal offense by a civil court is brought to trial by a court-martial for a military offense involved in his criminal act, he cannot plead "a former trial" in the sense of the 102d Article. So where the trial for the military offense has preceded the civil trial he cannot plead *autrefois acquit* or *convict* to an indictment for the civil crime committed in and by the same act.[5] This for the reason already stated that, while the act or omission out of which the offenses grew is the same, the offenses themselves are quite separate and distinct; one being a criminal offense created by the common law, or by statute,

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[1] Dig. J. A. Gen, 118., par. 2; O'Brien, 277; Rules for Bombay Army, 45.
[2] See the 102d Article of War, *post.*
[3] 1 Opin. Att.-Gen., 233; 6 *id.*, 205.
[4] Dig. J. A. Gen., 536. The principal instances of new trials in our practice are that of Captain Hall (in whose case Mr. Wirt's opinion was given) and those of which the proceedings are published in G. O. 18, War Dept., 1861, and G. O. 8, 9, and 26, First Mil. Dist., 1869.
[5] Dig. J. A. Gen., 119, par. 4.

in the jurisdiction within which it was committed, the other a military offense and, as such, created by the Articles of War, or by an enactment of Congress of similar character.[1]

Pardon.—A pardon is an act of grace proceeding from the power entrusted with the execution of the laws, which exempts the individual upon whom it is conferred from the punishment which the law inflicts for the crime which he has committed.[2] Although the issue of a pardon in a particular case is an official act on the part of the pardoning power, it is also personal in the sense that it is not in general publicly promulgated and so does not form a part of that body of public acts and utterances of which the courts are required to take judicial notice. For this reason a pardon must be pleaded, that is, submitted to the court, or brought to its official knowledge, in accordance with the rules regulating the production of documentary evidence, in order that the court may give it effect in support of a plea.[3] A pardon may be pleaded in bar in respect to the particular offense recited, and the recital of a specific, distinct offense in such an instrument limits its operation to that offense, and such pardon does not embrace any other offense for which separate penalties and punishments are provided.[4] In form a pardon is a deed, that is, an instrument under seal, to the validity of which delivery and acceptance are necessary. It may be rejected by the

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[1] It is no objection to the assuming by a court-martial of jurisdiction of a military offense committed by an officer or soldier, that he may be amenable to trial, or may actually have been tried and convicted, by a criminal court of the State, etc., for a criminal offense involved in his act. Thus a soldier may be tried for a violation of Article 21, in striking or doing other violence to a superior officer, after having been convicted by a civil tribunal for the criminal assault and battery. So an officer or soldier may be brought to trial under a charge of "conduct to the prejudice of good order and military discipline" for the military offense (if any) involved in a homicide or a larceny of which, as a civil offense, he has been acquitted or convicted by a criminal court. And the reverse is also law, *viz.*, that the civil court may legally take cognizance of the criminal offense involved without regard to the fact that the party has been subjected to a trial and conviction by court-martial for his breach of military law or discipline. In such instances the act committed is an offense against the two jurisdictions and may legally subject the offender to be tried and punished under both. Dig. J. A. Gen., 328, par. 12. See, also, Moore *vs.* Illinois, 14 How., 19, 20; Fox *vs.* Ohio, 5 *ibid.*, 432; U. S. *vs.* Marigold, 9 How., 560.

Held that an acquittal of a soldier by a civil court, on an indictment for larceny, was no bar to his trial by court-martial for the same act, charged under the 62d Article of War. And so *held* in a case of an acquittal by a civil court of an officer who had committed homicide of another officer in the course of an altercation in the presence of enlisted men at a military post. *Ibid.*, 331, par. 21. See, also, page 120, *ibid.*, par. 7.

The jurisdiction of courts-martial is non-territorial. In a case of an officer who exhibited himself in a drunken condition at a public ball in Mexico, *held* that his offense was cognizable by a court-martial of the United States subsequently convened in Texas by the department commander. This for the reason that the military jurisdiction does not recognize territoriality as an essential element of military offenses, but extends to the same wherever committed; a principle that is amply confirmed by the comprehensive provision of the 64th Article of War. Dig. J. A. Gen., 331, par. 20.

[2] U. S. *vs.* Wilson, 7 Pet., 150, 161; Coke, 3d Inst., 233.

[3] *Ibid.*, *Ex parte* Reno, 66 Mo., 266.

[4] *Ex parte* Weimer, 8 Biss., 321.

person to whom it is tendered, and if rejected there is no power in the court to force it upon the individual.[1]

Time of Exercise; Effects; Limitations upon the Pardoning Power.—The President of the United States has the conditional power to pardon as well before trial and conviction as afterwards; but it is a power only to be exercised with reserve and for exceptional considerations.[2] It is also competent for the President to grant a pardon after the expiration of the term of sentence, thereby relieving from consequential disabilities.[3] The power to pardon does not extend to cases of impeachment; nor can a pardon operate retroactively, or to restore money or property forfeited by conviction or which has, by judicial process, become vested in other persons.[4] Subject

[1] U. S. *vs.* Wilson, 7 Pet., 150; In Matter of Dupuy, 3 Benedict, 307; 6 Opin. Att.-Gen., 403. The President is empowered, by Art. II, Sec. 2, § 1, of the Constitution "to grant pardons for offenses against the United States"; and a pardon, like a deed, must, in order to take effect, be delivered to and accepted by the party to whom it is granted. Dig. J. A. Gen., 551, par. 1.

[2] 6 Opin. Att.-Gen., 20; 1 *ibid.*, 341; 2 *ibid.*, 275; 5 *ibid.*, 687; *Ex parte* Garland, 4 Wall., 333.

[3] Stetler's Case, 1 Phil., 1, 38; Com. *vs.* Bush, 2 Duv. (Ky.), 264.

[4] Knote *vs.* U. S., 10 Ct. Cls., 397, 406; U. S. *vs.* Six Lots of Ground, 1 Woods, 234; Osborn *vs.* U. S., 91 U. S., 474, 477; 5 Opin. Att.-Gen. (2d ed.), 532.

A pardon cannot reach or remit a fully *executed* sentence, though the same may have been unjustly imposed. A pardon cannot of course undo a corporal punishment fully inflicted;* nor can it avail to restore to the army an officer or soldier legally separated therefrom and made a civilian by a duly approved sentence of dismissal† or by a dishonorable discharge. Nor can it restore a fine paid, or pay forfeited, when the amount of the same has once gone beyond the control of the Executive and been covered into the U. S. treasury and become public funds‡ whatever may have been the merits of the case. Otherwise, however, where the money still remains in the hands of a military disbursing officer or other intermediate official.§ Where, however, any portion of a punishment remains *unexecuted*, that portion may be remitted by the pardoning power.‖ Congress alone can restore pay fully forfeited to the United States, or otherwise pecuniarily indemnify an officer or soldier for the consequences of a legally executed sentence. *Ibid.*, 552, par. 4.

Held (January, 1892) that it was beyond the power of Congress to undo the executed legal judgment of a court-martial, and that it could not therefore lawfully authorize the President or the Secretary of War to pardon or remit a legal sentence of such a court adjudged in 1866 and long since duly and fully executed. *Ibid.*, 557, par. 16.

A pardon by the President will reach and remove a continuing disqualification or disability incident upon the commission of an offense against the United States, or upon a conviction by a United States court or a court-martial, but not a disqualification incurred (as upon conviction of grand larceny) under the laws of a *State*. *Ibid.*, par. 17.

A pardon is not retroactive. It cannot remit an executed punishment, or restore an executed forfeiture resulting either by operation of law or sentence. It cannot, therefore, restore the forfeitures incident upon desertion. Further, it cannot modify past history, or reverse or alter the facts of a completed record. From and after the taking effect of a pardon the recipient is innocent in law as to any subsequent contingencies,

* See 8 Opins Att.-Gen., 284

† 12 Opins., 548; *Ex parte* Garland, 4 Wallace, 381.

‡ 2 Opins. Att.-Gen., 380; 16 *id.* 1. This, because the same Constitution which conveys the pardoning power contains a provision "of equal efficiency" (Art. 1, Sec. 9, § 6) to the effect that money in the public treasury shall not be withdrawn except by an appropriation by Act of Congress. 8 *id.*, 281. Compare, in this connection, Knote *vs.* United States, 5 Otto, 149, where it was held that an executive pardon would not entitle a party to the proceeds of certain personal effects, confiscated and sold by the United States as the property of an enemy, *after* such proceeds had been duly paid into the treasury.

§ 14 Opins. Att.-Gen., 601.

‖ And the Executive, in the exercise of the pardoning power, "may pardon or remit a portion of the sentence at one time and a different portion at another." 3 Opins. Att.-Gen., 418.

to the qualifications above stated, however, a pardon issued to and accepted by an individual operates to exempt its beneficiary from the legal consequences of the offense which he has committed, and to restore him to the legal status occupied by him at the time of its commission.

Conditional Pardons.—It is settled that a pardon may be *conditional*—may be granted upon a condition precedent or subsequent.[1] Thus where the President, by his proclamation of March 11, 1865, granted a pardon to all deserters "on condition that" they duly returned (within a certain time stated) to their regiments, etc., and served the remainder of their original terms and, in addition, a period equal to the time lost by desertion—*held* that a soldier who duly returned under this proclamation, but after remaining with his regiment a portion of the period indicated abandoned the service and went to his home, was liable (the legal period of limitation fixed by the 103d Article of War not having expired) to be brought to trial for his original desertion; the *condition subsequent* upon which his pardon for the same had been extended not having been performed.[2]

Pardoning Power, How Exercised.—In the practice of courts-martial, the power to pardon may be exercised in a less formal manner than that above described, and may be exercised; *First* by proclamation. Proclamations of pardon, or amnesty, originate with the President, and are embodied in formal proclamations specifying the class or classes that are included in the amnesty, and the conditions that must be complied with

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but the pardon does not annihilate the fact that he was guilty of the offense. The pardon indeed proceeds upon the theory that the party was guilty in fact. The asking for it is an admission of guilt, and the granting of it is a recognition of the fact of guilt.* Thus *held* that the President could not by a pardon remove the charge of desertion from the record of a former soldier, who had long since become a civilian by reason of the muster-out and non-existence of the volunteer army to which he had belonged in the late war; and that the effect of his pardon would not be to give him an honorable discharge. A pardon would not only not remove a charge of desertion, but would in fact confirm it, and constitute an additional reason for retaining it on the record. And a party cannot by an executive act be discharged from the service unless he is *in* the service. *Ibid.*, 556, par. 15.

[1] *Ex parte* Wells, 18 How., 307; Osborn *vs.* U S., 91 U. S., 474; U. S. *vs.* Wilson, 7 Pet., 150; Com. *vs.* Haggerty, 4 Brewster, 326; 6 Opin. Att.-Gen., 405.

[2] Dig. J. A. Gen., 554, par. 9. The language of the Constitution is such that the power of the President to pardon conditionally is not one of inference, but is conferred in terms, the language being "to grant reprieves and pardons," which includes absolute as well as conditional pardons. Under this power the President can grant a conditional pardon to a person under sentence of death, offering to commute that punishment into an imprisonment for life. If this is accepted by the convict, he has no right to contend that the pardon is absolute and the condition of it void. *Ex parte* Wells, 18 How., 307; Osborn *vs.* U. S., 91 U. S., 474; U S. *vs.* Wilson, 7 Pet., 150. When a pardon is granted with conditions annexed, the conditions must be performed before the pardon is of any effect. Waring *vs.* U. S., 7 C. Cls R., 501. One who claims the benefit of a pardon must be held to strict compliance with its conditions. Haym *vs.* U. S., 7 C. Cls. R., 443; Scott *vs.* U. S., 8 *ibid.*, 457. The condition annexed to a pardon must not be impossible, unusual, or illegal; but it may, with the consent of the prisoner, be any punishment recognized by the statutes, or by the common law as enforced by the State. Lee *vs.* Murphy, 22 Grat. (Va.), 789.

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* See *Ex parte* Garland, 4 Wallace, 333; Knote *vs.* U. S., 95 U. S., 153.

in order to secure the benefits of the proclamation. Such proclamations have been issued, in several instances, in behalf of deserters and absentees without leave. *Second*, by remission of a military sentence. Remission is a partial exercise of the pardoning power, relieving the person from a punishment or the unexecuted portion of a punishment, but not pardoning the offense as such, or removing the disabilities or penal consequences attaching thereto or to the conviction.[1] It originates with the reviewing authority and operates to reduce the severity of the punishment imposed to the extent set forth in the order of promulgation. This power, as will presently be seen, is exercised after the trial has been had and sentence pronounced, and the action of the reviewing authority, by way of remission, is usually embodied in the order announcing the proceedings of the court.[2] *Third*, the offense may be pardoned, or, to speak more accurately, *condoned*, before the prosecution has been commenced, by the restoration of an accused person to duty, without trial, by the authority to order such trial. This form of constructive pardon will presently be explained.

Power of Reviewing Officers to Pardon or Mitigate.—The Articles of War confer upon the several reviewing officers a limited power to pardon or mitigate sentences imposed by courts-martial submitted to them for approval. The extent of and the limitations upon this power will be discussed elsewhere.[3]

Constructive Pardons.—In addition to the methods of exercise above described, an offense may be condoned or pardoned by implication, as a result of certain conduct on the part of a military superior, the effect of which is to indicate a purpose on his part to abandon, or desist from, the prosecution of a particular offender. Such condonation of an offense is known as a *constructive pardon*, and as such may be made the basis of a plea in bar. Where, for example, an officer or soldier under charges is released from arrest or confinement and restored to duty by the authority competent to order his trial, there is said to be a constructive pardon which may properly be pleaded in bar of trial. To constitute such a pardon, however, a prosecution must have been instituted or a legal sentence imposed; and, to be operative as a pardon, the release must have been ordered by the authority competent to order the trial or to review the proceedings and, in consequence, to exercise the power of pardon or mitigation.[4]

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[1] Dig. J. A. Gen., 657, par. 1. The pardoning of "punishment," authority for which is vested in certain commanders by the 112th Article of War, is remission. An offender can be completely rehabilitated only by a full pardon granted under the pardoning power of the Constitution.* *Ibid.*

[2] For a further discussion of this subject, see the chapter entitled THE REVIEWING AUTHORITY.

[3] See chapter entitled THE REVIEWING OFFICER; see, also, the title "Pardon," *supra.*

[4] While to restore to or place upon duty an officer or soldier when under arrest or

* *Ex parte* Garland, 4 Wallace, 380.

Pleading.—To constitute a valid plea in bar of trial, a pardon, as has been seen, must be produced and submitted to the court in support of the plea. Such pardon may be a formal instrument under seal, or may take the form of a written restoration to duty without trial; it may also appear as a proclamation, granting pardon to certain classes of offenders, in which case the burden rests upon the accused of showing that he is included within the classes mentioned in the pardon or amnesty. A constructive pardon will ordinarily be proved by the testimony of witnesses as to its source and authority, as well as to the extent and terms of the alleged release.

PLEAS IN ABATEMENT.

Nature and Character.—The term *abatement* (from the old French *abattre*, to destroy) is applied in pleading to a motion to abate, that is, to destroy, or set aside, a particular specification to which it is addressed, on the ground that it contains some defect which is alleged to be fatal to the maintenance of the action. Pleas in abatement, unlike pleas to the jurisdiction or in bar of trial (which, when properly based, serve to absolutely defeat the action), are merely dilatory in character and serve only to defer or delay a particular trial. For this reason they are not only not favored in military practice, but, in accordance with the rules of procedure in civil cases, pleas of this kind are required to contain such data as will enable the defective specification to be amended or corrected.

Pleas in abatement usually relate to *misnomers* in the specifications, to *false additions*, as when an accused is described by an erroneous designation or an incorrect title of office, and to cases described by the term *idem sonans*, where the name of an accused person, in the plea and specification, though spelled differently, are substantially identical in sound.[1]

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charges on account of an alleged offense would not probably in this country, to the same extent as in England,* be regarded as operating as a condonation of the offense, the promotion of an officer while under arrest on charges has been viewed as a *constructive pardon* of the offense or offenses on account of which he was arrested.† But *held* that such a promotion could not operate as a pardon of *other* offenses committed by him, of the commission of which no knowledge was had by the Executive at the date of the promotion. Dig. J. A. Gen., 553, par. 7.

While ordering or authorizing an officer or soldier, when under *sentence*, to exercise a command or perform any other duty inconsistent with the continued execution of his sentence has been viewed as a constructive pardon, *held* that to allow an officer, while under a sentence of suspension from rank, to perform certain slight duties in closing his accounts with the United States could not be regarded as having any such effect. *Ibid.*, par. 8.

Held that a withdrawal by a department commander of a pending charge against a soldier upon his giving a pledge to abstain in the future from the conduct which was the subject of the charge did not operate as a pardon and could not be pleaded as such. Had it been done by an order of the President, it could have had no further operation than as a *quasi*-conditional pardon, leaving the charge legally renewable upon a repetition of the offense. *Ibid.*, 557, par. 18.

[1] Faust *vs.* U. S., 136 U. S., 452.

* See Clode, Mil. Forces of the Crown, vol. I. p. 173; Prendergast, 244-5, in connection with the cases cited of Sir Walter Raleigh, Lord Lucan, Capt. Achison, etc.

† 8 Opin. Att.-Gen., 237.

A misnaming or misdescription of the rank of the accused in the specification should be taken advantage of by an exception in the nature of a plea in abatement. Where not objected to, the error is immaterial after sentence, provided the accused is sufficiently identified by the plea and testimony. It is not essential to state in a specification the *full* Christian name of the accused or other party required to be indicated. Only such name or initial need be given as will be sufficient unmistakably to identify the party.[1]

A middle name or initial is no part of a person's name in law, and, except where it is necessary to identify the individual, may be omitted from the charge without affecting the validity of the finding or the execution of the sentence. So a misnomer in a charge, consisting of an erroneous middle name or initial, may be disregarded in a charge unless the accused moves to strike out, or interposes an objection in the nature of a plea in abatement, when he must also state his true name. The charge may then be amended accordingly in court, without delaying the proceedings.[2]

Where the Charges upon which an Accused Person is Arraigned Differ Materially from those Served upon Him.—As the purpose of serving the accused with a copy of the charges and specifications is to apprise him of the exact nature of the allegation against him and so enable him to prepare his defense, a material difference between the copy furnished him and that upon which he is arraigned may be taken advantage of by a plea in abatement, or by a motion for a continuance, under the 93d Article of War, as the case may be.[3]

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[1] Dig. J. A. Gen., 229, par. 13.

[2] *Ibid.*, 236, par. 37. A material variance between the name of the accused in the specification and in the sentence should, if possible, be corrected by a re-assembling of the court for a revision of its sentence. If this be rendered impracticable by the exigencies of the service, the sentence should in general be disapproved as fatally defective. Thus *held* in a case where the names in the sentence and the specification were entirely different, the one being John Moore and the other James Cunningham; also in cases in which, while the surnames were the same, the Christian names were quite different, one being George and the other William, etc.; also in a case where the name in the sentence, though similar to that in the specification, was not *idem sonans*, as where the accused was arraigned upon charges in which he was designated as Woodworth, but was sentenced under the name of Woodman. A difference, however, in a middle initial is not a material variance, a middle name not being an essential part of the Christian name in law.* *Ibid* 743.

[3] That the charges and specifications upon which an accused is arraigned differ in a material particular from those contained in the copy served upon him before arraignment may well constitute a sufficient ground for granting him additional time for the preparation of his defense. Dig. J. A. Gen., 109, par. 4.

Where after arraignment a material and substantial amendment is allowed by the court to be made by the judge-advocate in a specification, the effect of which amendment is to necessitate or make desirable a further preparation for his defense on the part of the accused, a reasonable continuance for this purpose will in general properly be

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* That the law "recognizes but one Christian name," and that the insertion or omission of a middle initial or initials "will have no effect in rendering any proceeding defective in point of law," see 2 Opins. Att.-Gen., 332; 3 *id.*, 467; also Franklin *vs.* Tallmadge, 5 Johns., 84; Roosevelt *vs.* Gardinier, 2 Cow., 463; State *vs.* Webster, 30 Ark., 168.

Name of the Accuser or Prosecutor.—To enable an accused person to plead intelligently, it is necessary for him to know, and he is entitled to know, the name and designation of the accuser in the case. Ordinarily, as has been seen, the accuser is the officer whose name is signed to the copy of the charges and specifications which has been furnished the accused; if such be not the case and the charges be unsigned, or the signature is *pro forma* merely, or if the objection when taken is not admitted to exist by the prosecution, the accused is entitled to prove it by the testimony of witnesses like any other issue.[1]

Other Objections to the Charges, etc., How Disposed of.—In general, objections to the charges or specifications in matters of form should be taken advantage of by special pleas in the nature of pleas in abatement. Such are objections to the specifications as inartificial, indefinite, or redundant; or as misnaming the accused (or other person required to be specified), or misdescribing him as to his rank or office; or as containing insufficient allegations of time or place, etc. In such cases the objection should be raised by a special plea in abatement or by motion, in order that errors capable of amendment may be amended on the spot by the judge-advocate, and, the plea of not guilty (or guilty) being then made, the trial may proceed in the usual manner. Objections of this class when not thus taken will properly be considered as *waived* by the plea of guilty or not guilty, and their existence will not then affect the validity of the proceedings or sentence.[2]

Where, without preliminary objection, the accused pleads guilty or not guilty to a specification in which he is incorrectly named or described, such plea will be regarded as an admission by the accused of his identity with the person thus designated, and he cannot thereafter object to the pleadings on account of misnomer or misdescription.[3]

Facts and circumstances which are properly matters of evidence are not legitimate subjects of pleas; as, for example, circumstances going to extenuate the offense. Thus the good conduct of the accused in battle, subsequent to the commission of the offense charged, could not properly be presented in the form of a plea. So the fact that the charge has been preferred through personal hostility to the accused is not matter for a plea, but, if desired to be taken advantage of, should be offered in evidence.[4]

Failure to Serve Charges.—It has been seen that, by statute or custom of service, an accused person is twice entitled to be informed of the nature

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granted by the court. Dig. J. A. Gen., 109, par. 5. See, also, the title "Continuances," page 90, *ante*.

[1] Dig. J. A. Gen., 84, par. 8; 229, par. 14; *ibid.*, 235, par. 32. See, also, in this connection, the chapter entitled THE CONSTITUTION OF COURTS-MARTIAL.

[2] Dig. J. A. Gen., 590, par. 8.

[3] *Idem.*

[4] *Ibid.*, 591, par. 10.

and character of the offense with which he is charged.[1] He becomes so entitled in the first instance upon the occasion of his arrest or confinement; but as the service of charges in this case has no connection with the trial, a failure in respect to the performance of the duty imposed cannot be made the subject of a plea in abatement.[2] The accused also becomes entitled to be informed of the specific charges against him when the court has been appointed for his trial, and the time of his arraignment approaches. In this case he is apprised of the specific offense for which he is to be tried by a formal service of the charges and specifications which have been referred to the court for trial. This duty is performed by the judge-advocate, and the accused is entitled to receive a copy of the charges and specifications a sufficient time in advance of the trial to enable him to secure the necessary witnesses and make proper preparations for his defense. The statutes are silent as to the length of time to be allowed for such purpose, and it can only be said in general terms that it must be reasonable in amount, that is, sufficient to enable the accused to secure the attendance of his witnesses and to make the preparations above indicated.[3]

Waiver of Objections.—A failure, at the arraignment, to take notice of a variance between the form of a specification to which the accused is called upon to plead and such specification as it appeared in the copy of the charges served at his arrest is a waiver of the objection, and the same cannot be taken advantage of at a subsequent stage of the proceedings.[4]

Procedure in Respect to Pleas.—It has been seen that a *plea* alleges matter of fact, in opposition or reply to a particular charge or specification which, if substantiated (as in the case of a pardon or a previous conviction or acquittal), may operate to cause the charge or specification to which it is addressed to be stricken out or materially amended. The matter relied upon by the accused in support of the plea should, therefore, be logically and concisely stated in his plea, which should in general be submitted in writing. He should also be prepared to substantiate the allegations of the plea, if necessary, by documentary evidence or by the testimony of witnesses. The result is to raise an issue on the facts as set forth in the particular plea. The accused, as the party upon whom the burden of proof is cast by the pleading, is entitled to be first heard in its support, and in an important case is entitled to the closing address in reply to the argument or statement of the judge-advocate. After the accused has made his statement or submitted his testimony in support of the allegations contained in the plea, the judge-advocate is entitled to reply and, if he so desires, to submit testimony

[1] See, in the chapter entitled CHARGES AND SPECIFICATIONS, the article relating to the service of charges upon the accused.
[2] Dig. J. A. Gen., 590. par. 8; 591, par. 10.
[3] *Ibid.*, 237, par 39. See, also, U. S. *vs.* Curtis, 4 Mason, 332.
[4] Dig. J. A. Gen., 237, par. 39.

in rebuttal. When both sides have been fully heard, the court is closed for deliberation. The judgment of the court after such deliberation is, if for the accused, that the plea is sustained, and the charge or specification to which the plea was addressed is stricken out, or amended in accordance therewith; if for the judge-advocate, the judgment is that the plea is not sustained. The accused may then submit any other special pleas for which he may have valid ground, or, having no such pleas to submit, he passes at once to the general issue, presently to be explained.

Statutes of Limitation.—Statutes of limitation in criminal cases are enactments which, if pleaded in defense by a person accused of crime, operate to deprive the State of the power to try and punish an offender after the lapse of a specific period, stated in the statute, since the offense was committed. Statutes of limitation are enacted to secure the prompt punishment of criminal offenses, and with a view to obtain the attendance of the witnesses at the trial while the recollection of the event is still fresh in their minds. The period that must elapse in order to constitute a bar to a prosecution varies in general with the gravity of the offense; in murder there is no limitation, and a prosecution may be instituted at any time during the life of the offender. As there is no common-law limitation as to the prosecution of criminal offenses, the period of limitation is fixed by statute in the several States, and by suitable enactments of Congress in respect to the criminal practice of the United States.[1]

Limitation as to Military Offenses in General.—The period of time within which prosecutions must be instituted at military law is fixed by the 103d Article of War, as to all military offenses except desertion in time of peace, at two years prior to issue of the order for such trial, unless the offender "by reason of having absented himself, or of some other manifest impediment, he shall not have been amenable to justice within that period." In view of this Article it is the duty of the Government to prosecute an offender within a reasonable time after the commission of the offense.[2]

Limitation in Desertion.—The statute of limitations in desertion "in time of peace and not in the face of the enemy" is fixed at the same period, but the statute in such case does not begin to run until the end of the period for which said person was mustered into the service. If the deserter "shall

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[1] Anderson's Law Dictionary. See, also, the article *Statutes of Limitation* in the chapter entitled MILITARY LAW, ETC.

[2] Dig. J. A. Gen., 124, par. 11. A mere allegation, in a specification, to the effect that the whereabouts of the offender was unknown to the military authorities during the interval of more than two years which had elapsed since the offense is not a good averment of a "manifest impediment" in the sense of the Article. *Ibid.*, 123, par. 6.

The liability to trial after discharge, imposed by the last clause of Art. 60, *held* subject to the limitation prescribed in Art. 103.* And so held as to the liability to trial after the expiration of the term of enlistment under Article 48. *Ibid.*, 124, par. 9.

* 13 Opin. Att.-Gen., 462; 15 *ibid.*, 152; 16 *ibid.*, 170. See, also, *In re* Bird, 2 Sawyer, 33.

meanwhile have absented himself from the United States, the period of such absence shall be excluded in computing the period of the limitation."

Limitations, When Operative.—As the most important element in a statute of limitations is that of time, it is essential that the exact date upon which the statute begins to run should be known, in order that the court may be enabled to determine whether it shall operate as a bar to the prosecution in a particular case. The time when the general statute begins to run is thus fixed, as to the 103d Article of War, by the requirement that, to constitute a limitation, more than two years must have elapsed between the commission of the offense and the reference of the case for trial, such reference in most cases constituting the order for the trial of the case.[1] A similar date is fixed in the Act of April 11, 1890, by the provision that the period of two years is to be reckoned from the arraignment of the accused for the offense of desertion committed "in time of peace and not in the face of an enemy."

Suspension of the Statute.—The mere lapse of the statutory period is not alone sufficient to constitute a valid plea in bar of trial, for during such period conditions may have existed which operated, during their continuance, to suspend the operation of the statute. The conditions which will operate to suspend such operation are specified, as to the 103d Article, in the clause giving the accused the benefit of the statute "unless, by reason of having absented himself, or of some other manifest impediment, he shall not have been amenable to justice within that period." By the absence thus referred to in the 103d Article of War is believed to be intended, not necessarily an absence from the United States, but an absence by reason of a "fleeing from justice," analogous to that specified in Sec. 1045, Rev. Sts., which has been held to mean leaving one's home, residence, or known abode within the district, or concealing one's self therein, with intent to avoid detection or punishment for the offense against the United States.[2] Thus it has been *held* that in a

[1] 103d Article of War. Where the court is constituted for the trial of a particular case or person, the date of the convening order establishes the time within which the statute may operate. So where the court is convened for "the trial of A B and such other persons as may properly be brought before it," the date of the order fixes the date in the case of A B; the date in subsequent cases being determined, as above stated, by their official reference for trial.

[2] Dig. J. A. Gen., 125, par. 14; U. S. *vs.* O'Brien, 2 Dill., 381; U. S. *vs.* White, 5 Cranch C. C., 88, 73; Gould & Tucker, Notes on Revised Statutes, 349; State *vs.* Howell, 89 Mo., 588. See, also, Gen. Court-martial Orders, No. 20, A. G. O. 1894. A court-martial in a case of an offense other than desertion sustained a plea of the statute of limitations in bar of trial for the reason that the judge-advocate could produce no evidence to show that the accused was not within the territorial jurisdiction of the United States during his absence. *Held* that such showing was not necessary, and that it was sufficient that the absence should be any unauthorized absence from the military service whereby the absentee evades and for the time escapes trial. This construction of the term "absented himself" in the Article corresponds to that placed on the words "fleeing from justice" as used in the statutes of the U. S. to designate those whom the statutes of limitation for the prosecution of crimes do not protect. *Ibid.*, 125, par. 15.

case other than desertion it was not essential for the prosecution to be prepared to prove that the accused had been beyond the territorial jurisdiction of the United States in order to save the case from the operation of the limitation.[1]

Statute of Limitations in Desertion.—The Act of April 11, 1890, mentions but a single cause, "absence from the United States," which will have the effect, during its continuance, to withdraw the case from the operation of the statute. In time of war, or when the offense of desertion has been committed "in the face of an enemy," the limitation in the Act of April 11, 1890, is superseded by the general limitation which is contained in the 103d Article of War.

Statute Applicable to General Courts Only.—The prohibition of the Article relates only to prosecutions before general courts-martial; it does not apply to trials by inferior courts. Courts of inquiry may also be convened without regard to the period which has elapsed since the date or dates of the act or acts to be investigated.[2] Nor does the rule of limitation apply to the hearing of complaints by regimental courts under Art. 30.[3]

Pleading.—The limitation is properly a matter of *defense* to be specially pleaded and proved. By pleading the general issue the accused is assumed to waive the right to plead the limitation by a special plea in bar. But under a plea of not guilty the limitation may be taken advantage of by evidence showing that it has taken effect.[4] The plea being made, however, "and proved by the record or otherwise, it will devolve upon the prosecution to rebut it by evidence of such absence, or other impediment, as shall be sufficient to except the case from the operation of the limitation."[5]

Demurrers.—Demurrers, although not absolutely unknown, are of the rarest occurrence in the practice of courts-martial. The office of a demurrer is to raise an issue of law, as distinguished from the issue of fact which arises when a resort is had to any of the special pleas already discussed; and the issue of law so raised must be decided by the court before the trial can be further proceeded with. The defect in a specification to which a demurrer is addressed must, therefore, be one of substance, that is, the specification

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[1] Dig. J. A. Gen., 125, par. 14.
[2] 6 Opin. Att.-Gen., 239.
[3] Dig. Opin. J. A. Gen., 124, par. 10.
[4] *Ibid.*, par. 12; *In re* Bogart, 2 Sawyer, 297; *In re* White, 17 Fed. Rep., 723; *In re* Davison, 21 *ibid.*, 618; *In re* Zimmerman, 30 *ibid.*, 176; G. O. 22, A. G. O., 1898. A court will not confirm a plea of the statute of limitations "before any evidence is heard. on the ground that the statute of limitations has barred the action; because until the facts shall appear on the trial it cannot appear that the defendent was not fleeing from justice and, therefore, not entitled to the benefit of the limitation of time. If the accused is entitled to the benefit of the statute, he may have it upon plea, or upon evidence under the general issue." U. S. *vs.* White. 5 Cranch C. C., 38. See, also, U. S. *vs.* Cook, 2 Green Crim. Law Rep., 88 (17 Wall., 168), and note on the subject of pleading statutes of limitation. pp. 96–102; U. S. *vs.* Brown, 3 Low., 267; Parsons *vs.* Hunter, 2 Sum., 419; U. S. *vs.* Watkins, 3 Cr. C. C., 341; U. S. *vs.* Smith 4 Day, 121.
[5] Winthrop, 336.

must be defective in some essential respect in regard to the definition or description of the particular military offense which is alleged to have been committed, or must fail to set forth facts sufficient to constitute an offense at military law. In most cases the ground of objection to which a demurrer is addressed can be better met by a plea to the jurisdiction of the court, or by one of the special pleas in bar which have already been described; and where such a course is practicable, the court will in general require the accused to resort to a plea in preference to a demurrer.[1]

Judgment on Demurrer.—If the demurrer be sustained, the accused is not required to plead to the particular specification to which the demurrer has been addressed; if, on the other hand, the demurrer be not sustained, the judgment is that the accused answer over, that is, that he be required to plead the general issue of guilty or not guilty.

Objections to the charges and specifications on account of matter of *substance*—as that they do not contain the necessary allegations, or otherwise do not set forth facts constituting military offenses—should properly be made at the outset of the proceedings by one of the special pleas above described, or they will in general be regarded as *waived*.[2]

THE GENERAL ISSUE.

Pleas to the General Issue.—When the several pleas already described, or such of them as have application to the particular case, have been submitted in behalf of the accused, and have been decided adversely by the court, the accused is called upon to plead to the *general issue*, as distinguished from the *special issues* raised by pleas in bar, abatement, and the like; that is, he is required to enter a plea of guilty or not guilty to the entire body of charges and specifications on which he is arraigned, or to such portions of them as have not been disposed of by the pleas already submitted in his behalf.

Form of Arraignment.—As the charge in court-martial practice rests upon and is supported by the specifications, the pleas are taken, first to the specifications in support of the charge, and then to the charge to which they relate. The first charge and its specifications having been disposed of, the second charge with its specifications is next disposed of in a similar manner,

[1] In the few recent instances in which the demurrer has been resorted to, the specific ground of objection could have been better and more adequately presented in the form of a plea either to the jurisdiction of the court or in bar of a particular charge or specification. In a great majority of cases, therefore, it will be proper for the judge-advocate, after having ascertained the precise ground of objection to which the demurrer is addressed, to advise the court to decline to entertain the objection in the form of a demurrer and to direct the accused to state his objection in the form of an appropriate plea. If, as is sometimes the case, the ground of demurrer constitutes matter of defense merely, the accused should be advised to embody the same in his defense by submitting oral or written testimony in its support.

[2] Dig. J. A. Gen., 591, par. 9.

followed by the third, fourth, etc., until all have been covered by pleas of guilty or not guilty. In making the arraignment, the judge-advocate reads to the accused, both standing, the first charge with its specifications. He then addresses him as follows: "You have heard the charge and specification preferred against you; how say you to the first specification, guilty or not guilty?" The accused is then similarly arraigned upon the other charges, if any such there be, and his pleas are taken and entered upon the record. It is a fundamental principle of pleading that a plea to the general issue must cover every part of the charges and specifications. It is not necessary, however, that the plea should be the same—not guilty, for example—as to an entire specification, but that every portion of it should be covered by a plea of either guilty or not guilty. Words or clauses may be excepted from the major plea by pleading guilty to the specification "except of the words," etc., "and of the excepted words not guilty."

Plea of Guilty, Effects.—If the accused be subject by statute to the Articles of War, and if the offense charged be a violation of military law, the defendant by a plea of "guilty" submits himself to the jurisdiction of the court, admitting that it has jurisdiction over both person and offense.[1]

Statements Inconsistent with Plea.—It not unfrequently happens upon trials of enlisted men that the accused, in pleading guilty, will proceed to make a statement (verbal or written) to the court which is in fact inconsistent with the plea. In such a case the court will properly counsel the accused to plead not guilty, and, this plea being entered, will proceed to a trial and investigation of the merits, the judge-advocate introducing his proof precisely as under an ordinary plea of not guilty.[2]

Withdrawal of Plea.—A court-martial is authorized in any case, in its discretion, to permit an accused to withdraw a plea of not guilty and substitute one of guilty, and *vice versa*, or to withdraw either of these general pleas and substitute a special plea. Where, therefore, the accused applies to be allowed to change or modify his plea, the court should in general consent, provided that the application is made in good faith and not for the purpose of delay, and that to grant it will not result in unreasonably protracting the investigation.[3]

Introduction of Testimony after Plea of Guilty.—It is a general rule of criminal law that where the accused pleads guilty no testimony on the

[1] Dig. J. A. Gen., 592, par. 11. See, also, *In re* Davison, 21 Fed. Rep., 618; *In re* Zimmerman, 30 *ibid.*, 176;, Vanderheydin *vs.* Young, 11 Johns., 160.

[2] Dig. J. A. Gen., 588, par. 3.

[3] *Ibid.*, 590, par. 7. Thus in a case where the accused, being evidently ignorant of the forms of law, pleaded guilty to an artificially worded charge and specification, and immediately thereupon made a verbal statement to the court of the particulars of his conduct, setting forth facts quite incongruous with his plea, and no evidence whatever was introduced in the case, *held* that the statement, ather than the plea, should be regarded as the intelligent act of the accused, and that, upon considering both together, the accused should not be deemed to have confessed his guilt of the specific charge. *Ibid.*, 589, par. 3.

merits is to be introduced. But, in military trials, the court, even against the objection of the accused, may, in its discretion, call upon the judge-advocate to offer evidence, or approve of his doing so, in a case where such evidence is deemed to be essential to the due administration of military justice.[1] An accused cannot be allowed, by pleading guilty, to shut out testimony where the interests of the service require its introduction. But in all cases where evidence is introduced by the prosecution after a plea of guilty, the accused should of course be afforded an opportunity to offer rebutting evidence, or evidence as to character, should he desire to do so.[2]

While it cannot properly be ordered by a commander that courts-martial convened by him shall not receive pleas of guilty, or shall take evidence on the merits notwithstanding pleas of guilty are interposed by the accused, it is yet proper and in general desirable, particularly in cases of enlisted men, and especially where the specifications do not fully set forth the facts of the case, that the prosecution should be instructed or advised to introduce, with the consent of the court, evidence of the circumstances of the offense, where the plea is guilty equally as where it is not guilty. This for the reason that the court may be better enabled correctly to appreciate the nature of the offense committed and thus to estimate the measure of punishment proper to be awarded; and further that the reviewing authority may be better enabled to comprehend the entire case, and to determine whether the sentence shall be approved or disapproved (in whole or in part), or shall be mitigated or (wholly or in part) remitted.[3] Where indeed the sentence is not discretionary with the court, the former reason does not apply, though in such case the evidence may be desirable as the basis for a recommendation by the members. But where the sentence is mandatory the latter reason applies with the greater force, since the mandatory punishments under the Articles of War are in general of the severest quality, and the reviewing officer in acting upon the same is called upon to exercise an especially grave discretion. In capital cases particularly, it is most important that all the facts of the

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[1] The principle that in cases in which the plea is guilty the court should take testimony where necessary to the comprehending of the facts and the doing of justice, though apparently in a measure lost sight of at a later period, was clearly enunciated in early General Orders of the War Department. Thus in G. O. 23 of 1830, Maj.-Gen. Macomb (commanding the Army) expresses himself as follows: "In every case in which a prisoner pleads guilty it is the duty of the court-martial, notwithstanding, to receive and to report in its proceedings such evidence as may afford a full knowledge of the circumstances; it being essential that the facts and particulars should be known to those whose duty it is to report on the case, or who have discretion in carrying the sentence into effect." And see G. O. 21, of 1833, to a similar effect. Dig. J. A. Gen., 587, par. 1, note.

[2] Dig. J. A. Gen., 587, par. 1.

[3] *Ibid.*, par. 2. Where the accused pleads guilty, and the specification does not fully set forth the particulars of the offense, the court is authorized to call upon the judge-advocate to introduce testimony sufficient to inform itself, as well as the reviewing officer, as to the extent of the criminality involved in the offense and the measure of punishment proper to be imposed. *Ibid.*, 316, par. 9.

case—all circumstances of extenuation as well as of aggravation—should be exhibited in evidence.[1]

Wherever, in connection with the plea of guilty, a statement or confession, whether verbal or written, is interposed by the accused, both plea and statement should be considered together by the court; and if it is to be gathered from the statement that evidence exists in regard to the alleged offense which will constitute a defense to the charge or relieve the accused from a measure of culpability, the court will properly call upon the judge-advocate to obtain and introduce such evidence, if practicable.[2]

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[1] Dig. J. A. Gen., 587, par. 2. In practice the absence of evidence to illustrate the offense has been found peculiarly embarrassing in cases of *deserters*. In a majority of these cases in which the plea is "guilty" the record is found to contain no testimony whatever; and a full and intelligent comprehension of the nature of the offense—whether desired upon the original review of the proceedings or upon a subsequent application for remission of sentence—is thus in many instances not attainable.* *Ibid.*, 588, par. 2.

It not unfrequently happens upon trials of enlisted men that the accused, in pleading guilty, will proceed to make a *statement* (verbal or written) to the court which is in fact *inconsistent* with the plea. Thus in a case where the accused, being evidently ignorant of the forms of law, pleaded guilty to an artificially worded charge and specification, and immediately thereupon made a verbal statement to the court of the particulars of his conduct, setting forth facts quite incongruous with his plea, and no evidence whatever was introduced in the case, *held* that the statement, rather than the plea, should be regarded as the intelligent act of the accused, and that, upon considering both together, the accused should not be deemed to have confessed his guilt of the specific charge. In such a case the court will properly counsel the accused to plead not guilty, and, this plea being entered, will proceed to a trial and investigation of the merits, the judge-advocate introducing his proof precisely as under an ordinary plea of not guilty. And where, with a plea of guilty, there was offered by the accused a written statement setting forth material circumstances of *extenuation*, and the court without taking any testimony whatever, or apparently regarding the statement, proceeded to conviction and sentence, *advised*—the case being one in which the sentence had been partly executed—that this action constituted a reasonable ground for a remission of a portion of the punishment. *Ibid*, par. 3.

Statements inconsistent with the plea have not rarely been made in cases like *larceny*, where several distinct elements are required to constitute a crime in law. For example, a soldier will plead guilty to a charge of larceny, and thereupon make a statement disclaiming the peculiar intent (*animus furandi*) necessary to the offense, thus really admitting only an unauthorized taking. In such cases the court will properly instruct the accused that he should change his plea to not guilty, and if he declines to do so will properly call upon the judge advocate to introduce evidence showing the actual offense committed. *Ibid.*, 590, par. 6.

[2] Dig. J. A. Gen., 589, par. 4. It has not unfrequently happened that enlisted men charged with *desertion* have, in connection with a plea of guilty, made a statement disclaiming having had, in absenting themselves, any intention of abandoning the service, and stating facts which, if true, constitute absence without leave only. In such a case the accused cannot in general fairly be convicted of desertion in the absence of an investigation, and the court will properly, therefore, induce him to change his plea to not guilty, or direct this plea to be entered and take such evidence as may be attainable to show what offense was actually committed.† *Ibid.*, par. 5. See, also, note to par. *ante*.

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* See views of the Judge-Advocate General, relating to the subject of this paragraph, published in G. C. M. O. 69, Hdqrs. of Army, 1877.

† The views of the Judge-Advocate General as presented above have been adopted in the General Orders of the War Department and in numerous orders of the various military department, etc., commands. In G. C. M. O 2, War Dept., 1872, the Secretary of War observes, in regard to two cases of soldiers, as follows: "The written statements submitted by the accused are contradictory of their pleas of 'guilty.' The court should have regarded these statements as neutralizing the effect of their pleas, and should have had the accused instructed as to their legal rights, and advised to change their pleas with a view to the hearing of testimony. It not unfrequently happens that soldiers do not understand the legal difference between absence without leave and desertion, or are wholly unable to discriminate as to the grade of their offenses, as determined by their motives. They thus sometimes ignorantly plead guilty and are sentenced for crimes of which they may be actually innocent. The proceedings, findings, and sentences are disapproved." And see G. C. M. O. 31, War Dept., 1876.

Standing Mute.—The 89th Article of War provides that "when a prisoner, arraigned before a general court-martial, from obstinacy and deliberate design stands mute or answers foreign to the purpose, the court may proceed to trial and judgment as if the prisoner had pleaded not guilty." In the early history of criminal trials in England there was a doubt as to whether a person could be convicted of felony and punished capitally who had not entered a formal plea of guilty or not guilty to an indictment for a crime amounting to felony at common law. This doubt was removed by statute in England in 1772,[1] and the practice of courts-martial in this respect was made to conform to that of the criminal courts by the insertion of an appropriate provision in the Articles of War. The provision so inserted was embodied, substantially in its present form, in the American Articles of 1776.

It will be observed, however, that the 89th Article prescribes a form of procedure where the prisoner "from obstinacy and deliberate design stands mute or answers foreign to the purpose." Where the failure to plead results from a visitation of God,[2] that is, from a cause beyond the control of the prisoner,[3] the fact is brought to the attention of the court by the interposition of a suitable plea in bar of trial, the procedure under which will develop the precise nature and extent of the inability to plead, which is alleged in behalf of the accused, and will enable the court to apply an adequate and appropriate remedy.[4]

Nolle Prosequi.—The court having been organized and sworn, and the accused having been arraigned and his pleas to the several charges and specifications having been entered, the court is fully in possession of the case, and the accused is in general entitled to have the trial carried forward to a conviction or acquittal. "A prosecution before a court-martial, however, proceeds in the name and by the authority of the Government. The United States, therefore, through the Secretary of War or the military commander who has convened the court, may require or authorize the judge-advocate to enter a *nolle prosequi* in a case on trial (or, less technically, withdraw or discontinue the prosecution), either as to all the charges, where there are several, or as to any particular charge or specification. But the judge-advocate cannot exercise this authority at his own discretion, nor can the court direct it to be exercised."[5]

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[1] 12 Geo. III., ch. 20.
[2] 2 Hale, Pl. Cr., 317.
[3] For a case in point, see Adye, 132, note.
[4] Macomb, § 64; O'Brien, 247; DeHart, 136 Benét, 107; Ives, 111; Winthrop, 326; Hough, 754; Simmons, § 552.
[5] Dig. J. A. Gen., 536; see, also, Digest, 315, par. 7; *ibid.*, 458, par. 10.
In the British service it is held that the crown and the convening authority may enter a *nolle prosequi* at any stage of the proceedings. This power is deduced from the undisputed power of the crown to enter a *nolle prosequi* at any time in a criminal case. Clode, Mil. Law, 125; Regina *vs.* Allen, 1 B. & S., 855.

THE HEARING.

THE PROSECUTION.

Testimony for the Prosecution.—The arraignment having been completed, the trial proper begins with the introduction of the testimony in behalf of the United States. The judge-advocate, as the prosecutor in behalf of the Government, may open the prosecution with a statement of the case against the accused which he proposes to establish by the testimony of witnesses. Unless the case presents some unusual complications, however, or unless it may become necessary to rely largely upon circumstantial evidence in support of the case for the prosecution, the judge-advocate rarely avails himself of this privilege in practice, but relies upon the charges themselves to convey to the court an outline of the case which he proposes to establish.[1]

Introduction of Witnesses.—The first witness for the prosecution is then called and duly sworn by the judge-advocate. While taking the oath the witness stands, his ungloved right hand raised. The judge-advocate, also standing, then administers the oath to the witness by repeating it in the following form: "*You, A—— B——, do swear, (or affirm), that the evidence you shall give, in the case now in hearing, shall be the truth, the whole truth, and nothing but the truth. So help you God.*" When the prescribed form of oath has been administered by the judge-advocate, the witness signifies his acceptance of the obligation by saying "I do," or by adding thereto the concluding words of the oath itself, "I do, so help me God." In the administration of the oath, any form which the witness regards as of peculiar binding force may be administered in addition to that required by law; but the oath or affirmation prescribed in the 92d Article of War, being a statutory requirement, must be administered in every case.[2] A witness who has once been sworn in a particular case and has testified, is not required to be resworn on being subsequently recalled to the stand by either party.[3]

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[1] Ives, 129; Winthrop, 397. The judge-advocate in his character as prosecutor cannot be interfered with. Ives, 233. In the Stanley-Hazen court-martial the court refused to direct the judge-advocate to proceed with the trial of General Hazen, as requested by General Stanley. The judge-advocate claimed the right to bring forward his cases in the order which he saw fit. The court declined to interfere. Such interference, indeed, would have been quite beyond its power. Other than the judge-advocate, who by the 90th Article of War is "required to prosecute in the name of the United States," our military law and practice recognize no official prosecutor. The party who is in fact the accuser or the prosecuting witness is, in important cases, not unfrequently permitted by the court to remain in the court-room and advise with the judge-advocate during the trial, if the latter requests it; and in some cases he has been allowed to be accompanied by his own counsel. If such a party is to testify, he should ordinarily be the first witness examined; this course, however, is not invariable. Dig. J. A. Gen., 619. See, also, 458, *ibid.*, par. 11.

[2] The Article does not prescribe by whom the oath shall be administered. By the custom of the service it is administered by the judge-advocate. When the judge-advocate himself takes the witness-stand, he is properly sworn by the president of the court. *Ibid.*, 107, par. 2.

[3] This Article prescribes a single, specific form of oath to be taken by all witnesses.

Objections to Competency.—If there are objections to the competency of the witness, they are raised before the oath has been administered. If the cause of incompetency be known to exist, the party objecting must raise the objection at this time or it will be deemed to have been waived.[1] Until they are called upon to testify, none of the witnesses are permitted to appear in court, or to listen to the testimony of others, save in the case of an expert, whose testimony, being in the nature of an opinion, is, or may be, based upon that of other witnesses. While waiting to give their testimony the witnesses are separated, if need be; when the occasion is such as to make that course necessary, suitable precautions may be taken to prevent their communicating with each other during the trial of the case.[2]

Method of Examination.—After having been identified and sworn, the witness is first examined by the judge-advocate. "The first question put to him will ordinarily be for the purpose of determining his identification of the accused; the second, when practicable, should be in such form that the answer may show that the witness was so placed as to personally know something about the matter set forth in the specifications; while the third and subsequent interrogatories should be such as to elicit all the facts, whether they consist of words or actions, that may have come within the witness's personal knowledge."[3] When the direct examination has been concluded the fact is announced by the judge-advocate, and an opportunity is given the accused to cross-examine the witness.[4] After the cross-examination has been completed the witness may be re-examined by the judge-advocate, after which he may be re-examined by the accused. If the accused desires to examine the witness in respect to matters not developed during the examina-

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The Constitution, however, (Article I of Amendments,) has provided that Congress shall make no law prohibiting the free exercise of religion. Where, therefore, the prescribed form is not in accordance with the religious tenets of a witness, he should be permitted to be sworn according to the ceremonies of his own faith or as he may deem binding on his conscience. Dig. J. A. Gen., 107, par. 1. The reswearing of a witness will not affect the validity of the proceedings. *Ibid.*, 108, par. 3.

[1] See the title *Competency of Witnesses* in the chapter entitled EVIDENCE.

[2] Witnesses should not in general be admitted to the court-room, but should be kept as far as practicable apart until required to appear and give their testimony. But that a witness or witnesses may have been permitted to remain in the court-room and hear the testimony of witnesses previously called cannot affect the legality of the proceedings. Dig. J. A. Gen., 753, par. 15.

Before the examination of any particular witness is begun it is customary for the court to require the others to retire. If a witness remains in court after such a request, by a mistake or otherwise, the court will decide whether or not he shall be examined; but whether or not it is essential to the discovery of truth that the witnesses shall be thus examined out of hearing of each other is a matter within the discretion of the court.* Manual for Courts-martial, 41.

[3] Manual for Courts-martial, 41.

[4] Macomb, §§ 77–86; O'Brien, 251–257; DeHart, 150–161; Benét, 125; Ives, 131; Winthrop, 399–406; Tytler, 161; Simmons, §§ 569–587; Clode, Mil. Law, 27; Man. Mil. Law, 606, 607; Man. for Courts-martial, 41–45; Harwood, 98–106; Adye, 175.

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* 1 Greenleaf, § 431.

tion in chief, his proper course is to summon the witness to testify in his behalf at a later stage of the trial. If his questions be few in number, however, they may, with the consent of the court, be put while the witness is on the stand.[1] After the judge-advocate and the accused have completed their examination of a particular witness, an opportunity is afforded to the members of the court to propound questions. In strictness, the court may put questions at any time; they are properly put, however, after the witness has been regularly examined by the parties.[2]

Reducing Questions to Writing.—Questions are reduced to writing by the party with whom they originate, and are put by the judge-advocate, who records the answers, as they are made, in the exact words of the witness. Arguments, motions, pleadings, and other matters of like character arising in the course of the trial, are similarly reduced to writing. In cases in which a stenographer is employed to take down the testimony, the questions are put and answered *viva voce*, as in ordinary civil procedure.

Reading over Testimony to Witness.—The examination of the witness having been concluded, his testimony, or a portion of it, may be read over to him with a view to the correction of inaccuracies, if he request it, or if the court, for some special reason, considers such reading necessary.[3] He is then permitted to retire. Should he be recalled to testify at a subsequent stage of the trial, it is not necessary to re-administer the oath; it is sufficient to call his attention to the fact that he has already been sworn and that the binding force of the oath remains unimpaired.[4]

Leading Questions.—In the examination in chief, what are called leading questions, that is, questions which suggest the answers which it is desired that the witness shall make, or which, embodying a material fact, are susceptible of being answered by a simple Yes or No, if objected to by the opposite party are rejected by the court. This rule, however, is to be understood in a reasonable sense, for otherwise the examinations might be most inconveniently protracted. To abridge the proceedings, the witness may be led at once to points on which he is to testify and the acknowledged facts

[1] Winthrop, 401; Ives, 133; DeHart, 159.

[2] "The manner in which witnesses are to be examined lies chiefly within the discretion of the court. The great object is to elicit the truth from the witness; but the character, intelligence, moral courage, bias, memory, etc., of witnesses are so varied as to require an almost equal variety in the manner of interrogation necessary to attain that end."* Manual for Courts-martial, 41, par. 2.

[3] The reading of previous proceedings and of testimony for approval will be dispensed with, unless, for special reason such reading be considered necessary by the court, or unless a witness desires to have certain part of his testimony read over for correction. Circular No. 27, A. G. O., 1897. A witness who has given his testimony should in general be allowed to modify the same where he desires to do so in a material particular. But where the court has refused to permit a witness to correct his statement as recorded, such refusal need not induce a disapproval of the proceedings unless it appear that the rights of the accused have thus been prejudiced. Dig. Opin. J. A. Gen., 753, par. 14.

[4] A *Ibid.*, 108, par. 3.

* 1 Greenleaf, § 431.

in the case already established may be recapitulated to him. The rule is, therefore, not applicable to that part of the examination which is merely introductory.[1]

In certain cases, however, leading questions may be put. They are permitted during the cross-examination and, during the direct examination, as has been seen, in respect to matters introductory to the material part of the inquiry; or when the witness appears to be hostile to the party calling him; or is reluctant or unwilling to testify, or, from evident want of recollection, which a suggestion may assist, makes an omission in his testimony; and in cases where the mind of the witness cannot be directed to the subject of inquiry without particularization. The question whether a particular question is or is not leading, and if so whether it can be put, is a matter to be determined by the court in every instance.[2]

Objections to Testimony.—A question having been put by either party, the other party to the proceedings, or even a member of the court, may object to its being answered upon the ground that it is leading or irrelevant, or that the answer called for is hearsay, or in the nature of opinion, or otherwise properly subject to objection in accordance with some established rule of evidence.[3] The nature of the objection must be stated in every case, as that the question is leading, irrelevant, or the like; and the party objecting may, if necessary, submit argument in its support, to which the party proposing the question is entitled to reply. If the reason for the objection be at once apparent, or when both sides have been heard as to its admissibility, the court is cleared and closed and the court determines, by a majority of votes, whether the question shall be put.[4]

Questions by Court.—Questions by the court, that is, questions which have been agreed to, or determined on, by the court in its collective capacity, are, of course, not subject to objection. Questions by a member or by a party, however, may be objected to by another member or by the opposite party; if objected to, and if the objection be sustained, such a question is recorded as a "question by a member" and not as a "question by the

[1] Manual for Courts-martial, 41; 1 Greenleaf, § 434.

[2] 1 Greenleaf on Evidence, §§ 434, 435; 1 Wharton, Evid., §§ 449–504; 1 Starkie, 149, 150; U. S. *vs.* Angell, 11 Fed. Rep., 35, 39. In commencing the examination of a witness, it is a *leading* of the witness, and objectionable, to read to him the charge and specification or specifications, since he is thus instructed as to the particulars in regard to which he is to testify and which he is expected to substantiate.* So to read or state to him in substance the charge, and ask him 'what he knows about it,' or in terms to that effect, is loose and objectionable as encouraging irrelevant and hearsay testimony. The witness should simply be asked to state what was said and done on the occasion, etc. A witness should properly also be examined on specific interrogatories, and not be called upon to make a general statement in answer to a single general question.† Dig. J. A. Gen., 394, par. 5.

[3] See, *post*, the chapter entitled EVIDENCE.

[4] Macomb, § 78; DeHart, 155; Benét, 128; Ives, 131; Winthrop, 404; Harwood, 99.

* Compare G. O. 12, Dept. of the Missouri, 1862; do. 36, *id.*, 1863; do. 29, Dept. of California, 1865; do. 67, Dept. of the South, 1874.

† See G. C. M. O., 14, 24, Dept. of Dakota, 1877.

court" in the ordinary form. For this reason questions by members are submitted informally to each member in turn, and if approved they become questions by the court and, as such, are not open to objection.[1]

Conduct of the Prosecution.—A competent judge-advocate will properly be left by the court to introduce the testimony in the form and order deemed by him to be the most advantageous and, generally, to bring on cases for trial and conduct their prosection according to his own judgment.[2] His duty in this respect, however, will depend upon the rank of the accused, the offense with which he is charged, his ignorance or want of intelligence, and, to some extent, upon the fact that he is or is not defended by counsel.[3]

The duty of the judge-advocate toward the accused should not be regarded as confined to the limited province of counsel for the prisoner as the same is indicated in the 90th Article of War. Where the accused is ignorant and inexperienced and without counsel—especially where he is an enlisted man—the judge-advocate should take care that he does not suffer, upon the trial, from any ignorance or misconception of his legal rights, and has full opportunity to interpose such pleas and make such defense as may best bring out the facts, the merits, or the extenuating circumstances of his case.[4]

The judge-advocate should therefore advise the accused, especially when ignorant and unassisted by counsel, of his rights in defense—particularly of his right, if it exists in the case, to plead the statute of limitations, and of his right to testify in his own behalf. A failure to do so, however, will not affect the legal validity of the proceedings; though if it appear that the accused was actually ignorant of these rights, the omission may be ground for a mitigation of sentence.[5]

Prosecutor.—Our military law and practice recognize no official prosecutor other than the judge-advocate, who by the 90th Article of War is "required to prosecute in the name of the United States." The party who is in fact the accuser or the prosecuting witness is, in important cases, not unfrequently permitted by the court to remain in the court-room and advise

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[1] Simmons, § 595; DeHart, 156; Winthrop, 404.

[2] Dig. J. A. Gen., 458, par. 11. Compare G. C. M. O. 97, Dept. of Dakota, 1878; do. 38, Dept. of Texas, 1878; and, as to the civil practice, United States *vs.* Burr, 1 Burr's Trial, 85, 469; Lynch *vs.* Benton, 3 Rob., 105; Davany *vs.* Koon, 45 Miss., 71.

[3] Macomb, §§ 74–97; O'Brien, 282; DeHart, 112; Benét, 124–134; Ives, 124; Winthrop, 394; Simmons, § 550; Clode, Mil. Law, 104; Man. Mil. Law, 54; Man. for Courts-martial, 20.

[4] Dig. J. A. Gen., 458, par. 12. For the judge-advocate to counsel the accused, when a soldier or inferior in rank, to plead guilty must in general be unbefitting and inadvisable. But where such plea is voluntarily and intelligently made, the judge-advocate should properly advise the accused of his right to offer evidence in explanation or extenuation of his offense, and if any such evidence exists should assist him in securing it. And where no such evidence is attainable in the case, the judge-advocate should still see that the accused has an opportunity to present a "statement," written or verbal, to the court, if he has any desire to do so. *Ibid.*, par. 13.

[5] *Ibid.*, 462, par. 28.

with the judge-advocate during the trial, if the latter requests it; and in some cases he has been allowed to be accompanied by his own counsel. If such a party is to testify, he should ordinarily be the first witness examined; this course, however, is not invariable.[1]

Close of the Case for the Prosecution.—When all the witnesses for the prosecution have been called and examined and such documentary evidence as the judge-advocate may desire to introduce has been submitted to the court, the judge-advocate announces that "the prosecution here rests." This to enable the accused to know when the case of the prosecution is complete and the testimony in support thereof fully before the court.

THE DEFENSE.

DEFENSES.

Nature and Character.—The matter offered by an accused in opposition to or in rebuttal of the case established by the prosecution is called the *defense*. Defenses vary considerably in point of sufficiency or legal validity; some being a complete answer to the charges, and others operating merely to reduce the degree of criminality, or to diminish the gravity of the offense which is shown to have been committed. Where the testimony submitted in behalf of an accused is sufficiently strong to absolutely negative the allegations of the charges and specifications the defense is said to be *complete;* as where absolute want of criminal capacity is established in respect to the accused, or where an act charged was done in obedience to the lawful orders of a military superior, etc. A complete defense, however, is not always necessary. It has been seen that, in order to warrant a conviction, the court must be convinced of the guilt of the accused beyond a reasonable doubt; where, therefore, the testimony submitted by the prosecution in support of a particular charge falls short of this standard the accused is entitled to an acquittal as to such charge or specification; and the matter thus submitted in behalf of the accused is said to constitute a *sufficient* or *valid* defense. The principal defenses will now be considered.

Want of Criminal Capacity.—As the law presumes all persons to be capable of enjoying legal rights and of performing legal duties, it also presumes their capacity to violate the law, that is, to commit criminal offenses. When, therefore, a person is charged with the commission of a criminal offense the presumption of criminal capacity attends such a charge, and the burden of proving the existence of such a want of capacity as will serve to deprive the act of all criminality, or diminish it in character or degree, rests upon the accused.

If there be immaturity in respect to age, or mental unsoundness, or if the person is so deficient in intellect or understanding as not to be conscious of

[1] Dig. J. A. Gen., 619.

or capable of controlling his actions, his responsibility for them and for their harmful consequences either ceases to exist or is considerably modified. For acts over which he has no control, or as to which he is incapable of forming or cherishing an intention, he has no responsibility whatever. If he is dangerous to society, the law provides methods by which such restraint may be placed upon his movements as is necessary to the well-being of the community at large. If there be periods or occasions during which he is of sound mind, as to such periods he is fully accountable for his acts. If his mental faculties are merely impaired, the nature and extent of his responsibility is a question of fact to be determined by the court; the presumption being in all cases that an accused person is mentally sound and therefore responsible for his acts, and the burden of proving the existence of mental unsoundness or other incapacity lies upon the defense and must be established by the testimony of witnesses.

Such want of capacity to commit crime may be due to mental or physical causes; under this head fall:

(1) *Infancy.*—It is a well-established principle of criminal jurisprudence that children under seven are not only presumed to be incapable of committing crime, but the presumption is regarded by the courts as conclusive so soon as the age of the offender has been satisfactorily established. Between seven and fourteen the presumption of law is against such capacity, but is subject to rebuttal by evidence showing proper intelligence and knowledge of the character and consequences of the act in question; between the ages of fourteen and twenty-one the same presumption prevails as in the case of a person of full age.

(2) *Idiocy and Lunacy, or Insanity.*—An idiot is a person who has been defective in intellectual powers from birth or from a period before the mind received the impression of any idea. One born deaf, dumb, and blind is looked upon by the law as in the same state with an idiot. Idiocy is regarded at law, not as the condition of a deranged mind, but as an absence of all mind, involving, as a consequence, an absolute incapacity to commit crime.

Insanity.—Insanity, or lunacy, differs from idiocy in that the impairment of mental faculties is, or may be, casual and occasional, rather than permanent. Such periods of mental soundness are called *lucid intervals*, and an accused person as to such periods is fully accountable as to his acts.

Test of Capacity in Case of Insanity.—It has been seen that the test of responsibility for crime lies in the capacity or power of the person to commit the act; and the inquiry is whether the accused was capable of having and did have a criminal intent and the capacity to distinguish between right and wrong in reference to the particular act charged.[1] The test of responsibility

[1] U. S. *vs.* Young, 25 Fed. Rep., 710; Guiteau's Case, 10 *ibid.*, 161; Kansas *vs.* Nixon,

where insanity is asserted is as to the capacity of the accused to distinguish between right and wrong with respect to the act, and the absence of delusions respecting the same. If the accused knew what he was doing and that the act was forbidden by law, and had power of mind enough to be conscious of what he was doing, he was responsible;[1] in other words, had the accused the power to distinguish right from wrong, and the power to adhere to the right and avoid the wrong? If so, he is responsible for the consequences of his act.

Drunkenness.[2]—While drunkenness is no excuse for crime,[3] and one who becomes voluntarily drunk is criminally responsible for all offenses committed by him while in this condition, yet the fact of the existence of drunkenness may be proper evidence to determine the question of the species or grade of crime actually committed, especially where the point to be decided is whether the accused was actuated by a certain specific intent. Thus the fact and measure of the drunkenness of the accused may properly be considered by the court as affecting the question of the existence of an *animus furandi* in a case of alleged larceny.[4]

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4 Pac. Rep., 159; Oregon *vs.* Murray, 5 *ibid.*, 55. For a full discussion of insanity as a defense, see Guiteau's Case, 10 Fed. Rep., 161, and 25 *ibid.*, 715.

[1] Kansas *vs.* Nixon, 32 Kan., 205; *id.*, 4 Pac. Rep., 159.

[2] As to the offense of drunkenness in general at military law, see the 38th Article in the chapter entitled THE ARTICLES OF WAR.

[3] Coke, in laying down the doctrine, now general, that drunkenness does not extenuate but rather aggravates the offense actually committed, says: "It is a great offense in itself." Beverly's Case, 4 Coke, 123, *b*. So "the law will not suffer any man to privilege one crime by another." 4 Blackstone Com., 26. "The vices of men cannot constitute an excuse for their crimes." Story, J., in U. S. *vs.* Cornell, 2 Mason, 111.

[4] Dig. J. A. Gen., 378, par 1. The following are illustrations of the rule:

"1. Thus in a prosecution for passing counterfeit money, the defendant may show that he was so intoxicated at the time as to be unable to distinguish between good and spurious money.

"2. In an indictment for larceny, it might be shown that the defendant was too intoxicated to distinguish the property from his own of similar appearance, or that he was too confused and bewildered to form an intention of stealing, or to know he was doing so.

"3. So when a person is indicted for perjury in having falsely described a former transaction, he may show in defense that he was so grossly intoxicated at the time and place where the transaction occurred that he could not then correctly understand what was done, and so in misstating it in court he did not do so knowingly and corruptly.

"4. So a person indicted for 'knowingly' voting twice at the same election—under a statute—may prove he was so intoxicated the second time as to be unable to know he had voted before.

"5. On a charge of 'assault with intent to kill,' in order to convict of the *whole offense* the specific intent must be proved to exist; it is not necessarily inferred from the *mere fact* of the assault, although the mode and manner of the assault may be sufficient to prove it. If, therefore, the accused was really too drunk to be capable of forming any intention whatever, and none such had ever existed before, it would be a defense to that part of the charge, though not to the minor offense of a common assault.

"6. So, if a statute defining murder in the first degree requires it to be done 'deliberately and premeditately,' evidence that the defendant was too much intoxicated to deliberate and premeditate is certainly competent; and if the jury find the fact to be so, and there was no evidence of a prior premeditation, it would be warranted, if not required, in finding not guilty of that degree of murder.

"So, in such cases, evidence of intoxication is *competent* upon the question whether the killing sprang from premeditation, or from sudden passion excited by inadequate provo-

Drunkenness caused by morphine or other drug prescribed by a medical officer of the army or a civil physician may constitute an excuse for a breach of discipline committed by an officer or soldier, provided it quite clearly appears that this was the sole cause of the offense committed, the accused not being chargeable with negligence or fault in the case.[1]

At military law, where drunkenness (the fact of the existence of which may always be put in evidence) has entered into the commission of a specific offense requiring a peculiar deliberate intent (such as desertion, mutiny, or disobedience of orders), it will in general be more logical, as well as more just, to charge the offender, not with the specific offense, but with the drunkenness as an aggravated disorder, under Article 62. Where it is shown that the accused became drunk in the company of a military superior, who drank with him or exerted no authority to prevent his indulging to excess, this fact should avail materially to mitigate the sentence imposed upon him by the court. In such a case, indeed, it is the superior who mainly deserves trial and punishment.[2]

Compulsion.—The requirement of the 43d Article of War that "if any commander of any garrison, fortress, or post is compelled by the officers and soldiers under his command to give up to the enemy or to abandon it, the officers or soldiers so offending shall suffer death or such other punishment as a court-martial may direct," constitutes a typical instance of compulsion amounting to a complete defense in the case of a commanding officer charged with the surrender of a post or fortified place committed to his charge. The character of the constraint or compulsion referred to in the

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cation; that is, whether the intent to kill preceded the provocation or was produced by it.

"But inadequate provocation for a sober man, insufficient to instigate his act, will not, *in and of itself*, have such effect in case of an intoxicated person. There are not two rules of provocation, one for sober men and one for drunken men.

"But the effect and weight of the fact of intoxication, as tending to show the absence or want of some *specific intent*, or *premeditation*, is solely for the jury. The court as a matter of law does not draw any conclusion from it either way. The fact of intoxication at the moment *is of course not conclusive* of a want of intent or premeditation. The intent may have been formed before, or may exist notwithstanding the intoxication and concurrently with it. But when the offense is made out from implied malice, such as an unprovoked assault and battery, or murder, a malicious stabbing, or maliciously poisoning a horse, the malicious intent being sufficiently proven by the act itself, the fact of drunkenness has very little if any weight." American Law Review (March, 1874).

See, also, Rex *vs.* Pitman, 2 C. & P., 423; 1 Bish. Cr. L., § 490. So the fact of drunkenness has been held admissible in evidence in cases of *homicide* upon the question of the existence of malice as distinguishing murder from manslaughter; as also upon the question of deliberate intent to kill in States where the law distinguishes degrees of murder. State *vs.* Johnson, 40 Conn., 136, and 41 *id.*, 588; People *vs.* Rogers, 18 N. Y., 9; People *vs.* Hammill, 2 Parker, 223; People *vs.* Robinson, *id.*, 235; State *vs.* McCants, 1 Spears, 384; Kelly *vs.* State, 3 Sm. & M., 518; Shannahan *vs.* Commonwealth, 8 Bush, 463; Swan *vs.* State, 4 Humph., 136; Pirtle *vs.* State, 9 *id.*, 663; Haile *vs.* State 11 *id*, 154; People *vs.* Belencia, 21 Cal., 544; People *vs.* King, 27 *id.*, 509; People *vs.* Williams, 43 *id.*, 344; 3 Greenl. Ev., §§ 6, 148; 1 Bish. Cr. L., §§ 492, 493.

[1] Dig. J. A. Gen., 379, par. 2.

[2] *Ibid.*, par. 3.

43d Article constitutes the military offense of mutiny, which will be discussed elsewhere.

Obedience to Orders.—Compulsion at military law may also consist in obedience to the lawful orders of a proper military superior. When the existence of such orders and the fact of obedience have been established in evidence, it will constitute a complete defense for the act charged in a trial by court-martial. For, since implicit obedience to orders is required of all military persons by the Articles of War, it follows that "the order of a commanding officer will in general constitute a sufficient authority for acts regularly done by an inferior in compliance with the same. Where, however, the order of the superior is a palpably illegal order, the inferior cannot justify under it;[1] and if brought to trial by court-martial or sued in damages for an act done by him in obedience thereto, the order will be admissible only in extenuation of the offense."[2]

Other Forms of Compulsion.—In addition to the forms of compulsion already discussed, the law recognizes what is called *marital coercion* as existing in the case of husband and wife, in conformity to which principle the criminal acts of the wife when committed in the presence of the husband are presumed to have been due to his direction and coercion. The law also recognizes it as an excuse for crime that its commission has been due to force, or to threats to kill an offender or to do him grievous bodily harm in the event of his refusal to take part in a particular criminal act. For such a defense to avail, however, the threats must have been such as to place the accused person in danger of imminent death or serious bodily harm, and must have been continuous during the entire period of the existence of the act in question.

Ignorance or Mistake of Fact.—Ignorance or mistake of fact is, subject to certain qualifications presently to be described, regarded as in the nature of an excuse for the commission of a criminal offense. From the point of view of legal responsibility, ignorance of fact is said to be either voluntary or involuntary. It is *voluntary*, and not susceptible of being pleaded as a defense for crime, when one by reasonable exertion might have acquired knowledge as to the consequences of his act.[3] And such failure to acquire

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[1] Dig. J. A. Gen., 547, par. 6. See, also, on this subject, Harmony *vs.* Mitchell, 1 Blatch., 549, and 13 Howard, 421; Durand *vs.* Hollins, 4 Blatch., 451; Holmes *vs.* Sheridan, 1 Dillon, 357; McCall *vs.* McDowell, Deady, 233, and 1 Ab. U. S. R., 212; Clay *vs.* United States, Devereux, 25; United States *vs.* Carr, 1 Woods, 480; Bates *vs.* Clark, 5 Otto, 204; Ford *vs.* Surget, 7 Otto, 594; Skeen *vs.* Monkheimer, 21 Ind. 1; Griffin *vs.* Wilcox, *id.*, 391; Riggs *vs.* State, 3 Cold., 851; State *vs.* Sparks, 27 Texas, 632; Keighly *vs.* Bell, 4 Fost. & Fin., 805; Dawkins *vs.* Rokeby, *id.*, 831. The law is the same although the order to the inferior may emanate directly from the President. See Eifort *vs.* Bevins, 1 Bush, 460.

[2] State *vs.* Sparks, *ante;* McCall *vs.* McDowell, *ante;* Milligan *vs.* Hovey, 3 Bissell, 13; Beckwith *vs.* Bean, 8 Otto, 266. For a discussion of the effects and binding force of military orders, see the 24th Article in the chapter entitled THE ARTICLES OF WAR.

[3] Anderson, Law Dict.

knowledge constitutes a form of guilty negligence, which does not avail as a defense to a person charged with the commission of crime. *Involuntary ignorance* does not proceed from choice, and could not be overcome by the use of any known means. In the law of crimes, ignorance of fact is regarded as a defect of will.[1] It occurs where, when a man intending to do a lawful act does that which is unlawful, the deed and the will do not concur.[2] When admitted it is held to affect the intent, and the burden rests upon the accused of showing want of knowledge, and that he was not chargeable with either negligence or with a want of reasonable care in the performance of the act charged. Where the offense is defined by statute, and neither intent nor guilty knowledge is created or implied, ignorance of fact will not constitute a defense.[3]

The Alibi.—The term *alibi* (meaning elsewhere, or in another place) is employed to describe that method of defense to a criminal prosecution in which the accused undertakes to show that he could not have committed the offense charged, by evidence showing that he was elsewhere, that is, in another place, at the time of its commission; the place being so distant from that in which the offense was committed as to preclude the possibility of his participation in the act charged. This method of defense is called *setting up an alibi.* As this defense is liable to great abuse on account of the ease with which it can be fabricated, testimony tending to prove an alibi should be carefully scrutinized, and should be accepted only upon full, clear, and satisfactory evidence of the facts relied upon to establish the defense.[4]

Testimony for the Defense.—The testimony for the prosecution having been submitted, the accused is now fully informed not only as to the nature and extent of the charges against him, but as to the precise matters of fact in respect to which he must be prepared to defend himself. If he so desires, the accused or his counsel may address the court at this stage of the trial, setting forth his theory of defense and outlining the facts which he proposes to establish by the testimony of witnesses. The witnesses for the defense are now called, in the order desired by the accused, sworn by the judge-advocate, and examined, cross-examined, and questioned by the court in the same manner as were the witnesses for the prosecution. When the examination of each witness has been concluded his testimony or a portion of it may, if he so requests, be read over to him by the judge-advocate, with a view to enable him to correct errors or to explain or reconcile conflicting or contradictory statements.[5]

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[1] Anderson, Law Dict.
[2] *Ibid.*; 4 Blacks. Com., 27; 1 *ibid.*, 46.
[3] Am. & Eng. Encyc., vol. iv., p 689, and cases cited.
[4] As to the degree of proof requisite to establish an alibi, it is not necessary that it should be beyond reasonable doubt; it is sufficient if it operates to cast reasonable doubt upon the case established by the prosecution.
[5] See note 4, page 121, *ante.*

Testimony as to Character.—In addition to the evidence properly relevant to the charges, the practice of courts-martial permits an accused person to introduce testimony as to previous good character. Such testimony may be introduced (1) in the defense proper, that is, in disproof of the particular offense with which the accused is charged, and (2) with a view to affect the punishment, as to kind or amount, where either element of the sentence is discretionary with the court, or to secure a recommendation to mercy, or to obtain a mitigation of punishment at the hands of the reviewing authority where the sentence is mandatory. In the first case it is to be borne in mind that when an offense has been clearly established in evidence, the general character of the offender, whether good or otherwise, is neither relevant nor important. The court is sworn to find "in accordance with the evidence adduced," and if the testimony establishes the commission of an offense beyond a reasonable doubt, the court must find in accordance therewith. It is only in a case in which such doubt exists, or where the testimony is evenly balanced, that testimony as to good character may be received with a view to influence the finding. In such a case the testimony should relate to the conduct outlined in the charges and specifications. If, for example, the charges allege a want of integrity, testimony as to the character or reputation of the accused for integrity would be appropriate; if misbehavior before the enemy be charged, testimony as to gallantry would be apposite.[1]

Evidence of the good character, record, and services of the accused as an officer or soldier is also admissible in all military cases without distinction with a view to mitigate the severity of the sentence, "in cases where the sentence is mandatory as well as those where it is discretionary, upon conviction. For, while such evidence cannot avail to affect the measure of punishment, it may yet form the basis of a recommendation by the members of the court, or induce favorable action by the reviewing officer whose approval is necessary to the execution of the sentence. Where such testimony is introduced the prosecution may offer counter-testimony, but it is an established rule of evidence that the prosecution cannot attack the character of the accused till the latter has introduced evidence to sustain it and has thus put it in issue."[2]

Calling of Witnesses by the Court; Recalling Witnesses; Exclusion of Testimony.—A witness who has testified may be recalled by the court at any time.[3] When a court-martial desires to have the benefit of the testimony of a party who has not been introduced as a witness by the prosecution or defense, it may properly call upon the judge-advocate to have such party

[1] Macomb, § 117; O'Brien, 191; DeHart, 344; Benét, 340; Ives, 137, 314–316; Winthrop, 496; Simmons, §§ 584, 825–828, 977; Clode, Mil. Law, 129; Man Mil. Law, 605, 606; Man. for Courts-martial, 45; Dig. J. A. Gen., 394, par. 4; Harwood, 110, 111; Adye, 187.

[2] Dig. J. A. Gen., 394, par. 4

[3] See page 121, *ante*.

summoned, or, if he is a military person, may apply to the convening authority or post commander to have him ordered before it to testify,[1] and it may adjourn the trial for a reasonable time to await his attendance.[2]

It is the duty of the court to see that injustice is not done the accused by the admission on the trial of improper testimony prejudicing his defense or unfairly tending to aggravate the misconduct charged. In the interests of justice, therefore, the court may exclude such testimony although its admission may not be objected to on the part of the accused. On a similar ground or for the purpose of fully informing itself of the facts the court may, in its discretion, allow the introduction, by either side, of material testimony after the case has been formally closed. Such a proceeding, however, must be of course exceptional, and a party should not be permitted to offer testimony at this stage unless he exhibits good reason for not having produced it at the usual and proper time.[3]

On the other hand, as has been seen, where the accused pleads guilty, and the specification does not fully set forth the particulars of the offense, the court is authorized to call upon the judge-advocate to introduce testimony sufficient to inform itself, as well as the reviewing officer, as to the extent of the criminality involved in the offense and the measure of punishment proper to be imposed.[4]

Member or Judge-Advocate as Witness.—While it is in general undesirable that a member of a military court should testify as a witness at a trial had before such court, unless perhaps his testimony relates to character merely, yet the fact that he is called upon to testify does not affect the validity of the proceedings, nor does it operate to debar the member himself from the exercise of any of the duties or rights incident to his membership. He remains entitled to take part in all deliberations, including indeed those had in regard to the admissibility of questions put to himself or as to his answers to questions; he will naturally, however, in general refrain from expressing himself upon points arising in connection with his own evidence.[5]

[1] In this case the court is said to originate evidence. It has not been the practice in this country for the convening authority to detail an officer to attend a military court in a ministerial capacity—to summon witnesses, enforce the attendance of the accused, etc. In the special case, indeed, of the persons charged with complicity in the assassination of President Lincoln and tried by military commission, it was ordered by the President, May 1, 1865, as follows: "That Brevet Major-General Hartranft be assigned to duty as special provost-marshal general for the purposes of said trial, and attendance upon said commission, and the execution of its mandates." Dig. J. A. Gen., 315, par. 8, note.

[2] Dig. J. A. Gen., 315, par. 8; De Hart, 85; Benét, 357; Ives, 133, 134; Winthrop, 402; Simmons, § 948; Man. for Courts-martial, 44; Dig. J. A. Gen., 315, par. 8; Kennedy, 141; Adye, 179; Gen. Court-martial Orders 48, Div. Pacific, 1880.

[3] Dig. J. A. Gen., 316, par. 10. Compare Eberhardt *vs.* State, 47 Ga., 598; and see the Trial, by court-martial, of B. G. Harris (Ex. Doc. No. 14, Ho. of Reps., 39th Cong., 1st sess., p. 25), where, on the day on which the accused was to present his final argument to the court, and which was two days after the formal closing of the case, the defense was allowed to introduce new testimony on the merits.

[4] *Ibid.*, par. 9. See, also, pp. 115–117, *ante*. Compare the recent case of State *vs.* O'Connor, 65 Missouri, 374.

[5] Dig. J. A. Gen., 496, par. 5.

Should the judge-advocate be required to give evidence as a witness, the clerk or reporter of the court may record his testimony while on the stand; or, if there be no clerk or reporter, he may record his own testimony in the same manner as that of any other witness.[1]

The Accused as a Witness.—By the Act of March 16, 1878, it is expressly provided that at trials before courts-martial and courts of inquiry "the person charged shall be a competent witness at his own request, but not otherwise, and his failure to make such request shall not create any presumption against him."[2] But parties testifying under this Act have no exceptional status or privileges; they must take the stand and be subject to cross-examination like other witnesses.[3] The submission by the accused of a sworn written statement is not a legitimate exercise of the authority to testify conferred by the statute and such a statement should not be admitted *in evidence* by the court.[4]

STATEMENTS AND ARGUMENTS.

The testimony in behalf of the accused having been completed, as evidenced by the announcement made by him, in open court, to the effect that he has no further testimony to offer, he is permitted to submit a statement to the court in support of the case presented in the evidence for the defense. This statement, which is usually in the nature of an argument, may be submitted by the accused in person; or, if he so desire, it may be presented by counsel acting in his behalf. If there be no stenographer present, the statement should be submitted in writing and appended to the record, in which event it should be signed by the accused.

The term "statement," applied by custom of the service to this step in the procedure, indicates that it contains, in addition to matter of argument, allegations of fact, some of which may not have been presented to the court in the form of evidence during the course of the trial. In the early practice of courts-martial the statement was the only agency by means of which the accused could present to the court his side of the case, or bring to the attention of the court facts which had not been established by the testimony of witnesses. As the accused now has the right to be sworn and to testify in his own behalf, the court should consider this fact in attaching weight to

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[1] Dig. J. A. Gen., 460, par. 19.

[2] 20 Stat. at Large, 30. See G. C. M. O. 8, 16, Dept. of the Platte, 1879; do. 6, *id.*, 1880; do. 34, Dept. of Texas, 1879. And compare Wheelden *vs.* Wilson, 44 Maine, 11; Marx *vs.* People, 63 Barb., 618; Bralich *vs.* People, 65 *id.*, 48; People *vs.* McGungill, 41 Cal., 429; Clark *vs.* State, 50 Ind., 514.

[3] Spies *vs.* Illinois, 123 U. S., 131. If incompetent from any cause, the accused cannot testify in his own behalf. U. S. *vs.* Hollis, 43 Fed. Rep., 248. His credibility is for the jury (court) to determine. U. S. *vs.* Brown, 40 F. R., 457.

[4] Dig. J. A. Gen., 749, par. 2. It may be admitted, however, as an unsworn statement to which the court will attach such weight as it believes it to deserve. See, also, the title "Competency" in the chapter entitled EVIDENCE.

such allegations of fact as may be embodied in the statement and will properly require something more in the way of corroboration than was formerly the case.

A large freedom of expression in his statement to the court is allowable to an accused, especially in his comments upon the evidence. So an accused may be permitted to reflect within reasonable limits upon the apparent *animus* of his accuser or prosecutor, though a superior officer and of high rank. But an attack upon such a superior of a *personal* character and not apposite to the facts of the case is not legitimate; nor is language of marked disrespect employed toward the court. Matter of this description may indeed be required by the court to be omitted by the accused as a condition to his continuing his address or filing it with the record.[1]

It is settled in our military procedure that the closing statement or argument, where addresses are presented on both sides, shall be made on the part of the prosecution. The judge-advocate, however, may, and in practice frequently does, waive the right of offering any argument or remarks in reply to the address of the accused. On the other hand, the accused may waive the right, and the judge-advocate alone present a "statement," and the court is not authorized to deny this right to the judge-advocate.[2]

[1] Dig. J. A. Gen., 711, par. 3. In any case tried by court-martial the accused may, if he thinks proper (and whether or not he has taken the stand as a witness *), present to the court a statement or address either verbal or in writing. Such statement is not *evidence*;† as a personal defense or argument, however, it may and properly should be taken into consideration by the court. *Ibid.*, 710, par. 1.

While the statement is not evidence, and the accused is not in general to be held bound by the argumentative declarations contained in the same, yet if he clearly and unequivocally admits therein *facts* material to the prosecution, such may properly be viewed by the court and the reviewing officer as practically facts of the case.‡ So where the accused, in his statement, fully admits that certain facts existed substantially as proved, he may be regarded as waiving objection to any irregularity in the form of the proof of the same. *Ibid.*, par. 2.

[2] Dig. J. A. Gen., 711, par. 4. The judge-advocate is entitled by usage to sum up the case and present an argument at the conclusion of the trial, even though the accused declines to make argument or statement. The court is not authorized to deny this right to be heard to the judge-advocate. *Ibid.*, 462, par. 30.

In our practice the judge-advocate is entitled to the closing argument or address to the court, and he may present an address although the accused waives his right to present any; the function of the judge-advocate at this stage of the proceedings not being confined merely to a replying to the accused. The judge-advocate in his address is not authorized to read to the court evidence or written statements not introduced upon the trial and which the accused has had no opportunity to controvert or comment upon. *Ibid.*, 460, par. 21.

The *publication* by an officer, after his acquittal, of the statement presented by him to the court on his trial, in which he reflected in violent and vituperative language upon the motive and conduct of an officer of the same regiment, his accuser, and denounced him as devoid of the instincts of a gentleman and a disgrace to the service, *held* to constitute a serious military offense, to the prejudice of good order and military discipline, if not indeed a violation of Art. 61; and further that it was no defense to such a publication that the court on the trial had permitted the statement to be made and recorded. *Ibid.*, 711, par. 5.

* See G. C. M. O. 3, Dept. of the Missouri, 1880.

† That a sworn statement cannot be made to serve as the testimony of the accused as a *witness* under the Act of March 16, 1878, see Dig. J. A. Gen., 749, par. 2.

‡ Similarly as a fact clearly admitted or assumed in the course of a trial may be considered as much in the case as if it had been expressly proved. See Paige *vs.* Fazackerly, 36 Barb., 392.

During the progress of the case, what are known as interlocutory questions arise which are decided by the court before proceeding with the trial. Such are objections to witnesses on the ground of competency; to the admission, exclusion, or relevancy of testimony; and the like. Upon such questions both the prosecution and defense have a right to be heard, and the arguments presented on each side, together with the decision of the court, are made a part of the record. The party raising the issue is first heard, and is followed by the other side; in important questions the party upon whom the burden of proof is cast by the issue that is presented being allowed the right to address the court first, and later to make reply to the arguments of the opposite party. If the issue raised is one of considerable importance, involving the hearing of testimony, and if discussion of the questions presented is necessary before a just decision can be reached, the court is closed for the purpose of such discussion and decision; the judge-advocate, the accused and his counsel, the reporters, witnesses, and spectators, if any be present, withdraw, leaving in the room only the members of the court-martial. After discussion the question is put by the President and is decided by a majority of votes; the court is then reopened, the accused and judge-advocate returning, and the decision is announced by the President in open court and is entered upon the record by the judge-advocate. Where the issue raised is not important—as where the relevancy of a question is in issue—the matter is frequently decided by the court without leaving their seats.

HOURS OF SESSION.

The 94th Article of War contained the requirement that "proceedings of trials shall be carried on between the hours of eight in the morning and three in the afternoon, excepting in cases which, in the opinion of the officer appointing the court, require immediate example." This article was expressly repealed by the Act of March 2, 1901, so that there is now no statutory restriction upon the hours of session save such as may be imposed by the convening authority or by the court itself in a particular trial. As the record of each day's proceedings should be completed before the hour appointed for the next meeting of the court, in order that the record of the preceding day may be read at the opening of the session, should the court so desire, the length of each day's session is thus seen to be determined by the time required to make a fair copy of the previous day's proceedings. This will depend upon the manner in which the proceedings are recorded. If a stenographer is employed, the daily sessions can be longer than will be the case if the questions are reduced to writing and the proceedings are written up by the judge-advocate.

Sessions on Sunday; Closed Sessions; Exclusion of Persons.—There is no law prohibiting a court-martial of the United States from sitting on Sunday;

and the fact that a sentence of such a court is adjudged on that day can affect in no manner its validity in law.[1]

It is within the power of the convening authority to direct a court-martial to hold a trial with closed doors when the case is of such a character that the publication of the evidence would scandalize the service.[2] A court-martial is also authorized, in its discretion, to sit with closed doors. Except, however, when temporarily closed for deliberation, courts-martial in this country are almost invariably open to the public during a trial.[3]

A court-martial is authorized to exclude from its session any person who it has good reason to believe will endeavor to intimidate or interrupt the witnesses, or otherwise conduct himself in a disorderly manner.[4]

Adjournments.—Within the limits of time prescribed in the 94th Article of War, a general court-martial has complete control of the time and duration of its sessions, and may meet and adjourn at such hours and for such reasons as it may deem expedient or advantageous to the public interests. It may regulate the length of its daily sessions, and may adjourn, at any instant of its session, for any reason that may commend itself to its judgment. When it adjourns it may fix the hour for its next meeting, or it may adjourn to meet at the call of the president. It may, by proper resolution, fix the hours of its daily sessions,[5] subject, however, to the qualification that such meetings must fall within the hours assigned in the statute. If, at a particular session, there be no agreement as to adjournment, it is the duty of the president at the hour of three P.M. to declare the court adjourned.[6]

A court-martial in session at a military post or station is authorized to adjourn to the quarters, at the same post or station, of a sick witness and

[1] Dig. J. A. Gen., 318, par. 18.
[2] Judge-Adv. Gen.
[3] Dig. J. A. Gen., 318, par. 20.
[4] *Ibid.*, par. 21.
[5] The adjournment from day to day of a military court is not required by law or regulation to be authenticated by the signatures of the president and judge-advocate. Digest J. A. Gen., 145, par. 1.

While the practice of noting the adjournment of the court at the end of the record of a trial is a usual and proper one, and is often of service in indicating the sequence of the cases tried and the course and order of the business transacted, a statement of such adjournment is not an essential part of the record of proceedings, and its omission will not affect their validity. *Ibid.*, par. 2.

Where the order convening a military court is in the usual form, requiring it, generally, to try such cases as may be brought before it, an adjournment at some period of its sessions without a day fixed for its reassembling will not preclude its meeting again and continuing its sessions till its business is terminated. *Ibid.*, par. 3.

An adjournment *sine die* of a court-martial is quite without legal significance, having no more legal effect than a simple adjournment. Such an adjournment does not dissolve the court, since a military court has no power to terminate its own existence or divest its authority. *Ibid.*, par. 4.

After having entered upon a trial which has to be suspended on account of the absence of material witnesses or for other cause, a court-martial is authorized, in its discretion, to take up a new case not likely to involve an extended investigation, and proceed with it to its termination before resuming the trial of the first case. *Ibid.*, 316, par. 12.

there take his testimony if he is in fact, as certified by the medical officer, too ill to come to the court-room.[1]

A court-martial has no power to terminate its own existence or function. Where, therefore, it has adjourned *sine die*, it may, without being formally reconvened in orders, reassemble and take up and try a case referred to it by the convening authority, through its president or judge-advocate, precisely as if it had not adjourned at all. It is its duty, indeed, to hold itself in readiness to try all cases so referred until formally dissolved by the convening officer or his successor in the command.[2]

A court-martial is not legally dissolved till officially informed of an order from competent authority dissolving it. The proceedings of a court-martial had after the date of an order dissolving it, but before the court has become officially advised of such order, will thus be quite regular and valid. Where an order dissolving forthwith a court-martial has been duly officially received by the court and has thus taken effect, an order subsequently received revoking this order will be entirely futile. It will not revive the court, which, to be qualified for further action, must be formally reconvened as a new and distinct tribunal.[3]

Except where it sustains a challenge under Art. 88, a court-martial is not authorized to dispense with the attendance of a member.[4] It cannot excuse a member to enable him to attend to other duties. For such purpose he must be duly relieved by the convening authority.[5]

Absence of Member or Judge-Advocate.—It does not invalidate the proceedings of a court-martial that a member who has been present during a portion of the trial, and has then absented himself during a portion, has subsequently resumed his seat on the court and taken part in the trial and judgment. Nor is the legal validity of the proceedings affected by the adding of a new member to the court pending the trial. In either case, however, the testimony which has been introduced and the material proceedings which have been had while the new or absent member was not present should be communicated to him before he enters or re-enters upon his duties as a member. Such was the ruling of the Secretary of War on Genl. Hull's trial, and this precedent was followed in repeated though not frequent cases during the late war. For a member, however, who has been absent during a substantial part of a trial to return and take part in a conviction and sentence is certainly a marked irregularity, and one which may well induce a disapproval of the findings and sentence in a case where there is reason to believe that the accused may have suffered material disadvantage from the member's action. It is of course to be understood that a member

[1] Dig. J. A. Gen., 146, par. 5; see G. C. M. O. 37, Department of the East, 1870.
[2] *Ibid.*, 317, par. 13. [3] *Ibid.*, par. 14.
[4] VII Opin. Att.-Gen., 98. If it be found necessary, on account of the sickness of a witness, to adjourn to a place other than in which the court is ordered to sit, the authority of the convening authority must be obtained in advance of the journey.
[5] Dig. J. A. Gen., 317, par. 15.

cannot legally resume his seat where, by his absenting himself, the court has been reduced below five members.[1]

An absence of the judge-advocate from the court during the trial does not *per se* affect the validity of the proceedings, but is of course to be avoided if possible. When the judge-advocate is obliged to absent himself temporarily, the court should in general suspend the proceedings for the time; or if his absence is to be prolonged, should adjourn for a certain period.[2]

New Members.—The question of changes in membership has already been discussed, and it is only necessary to observe, at this point, that to "add a *new* member to a military court after any material part of the trial has been gone through with must always be a most undesirable measure, and one not to be resorted to except in an exceptional case and to prevent a failure of justice. Adding a member after all the testimony has been introduced and nothing remains except the finding and sentence is believed to be without precedent."[3]

Performance of Other Duty by Member of Court or by the Judge-Advocate.—The performance of other duties by members of courts-martial is regulated by the Army Regulations, which provide that "a member stationed at the place where a court-martial sits is liable to duty with his command during the adjournment of court from day to day."[4] The rule in respect to the judge-advocate is not quite the same, since his duties, unlike those of the members, do not cease with the daily adjournment of the court; but "a judge-advocate of a court-martial may be detailed to perform other duty, as that of officer of the day or member of a board of survey, if such duty will not interfere with his duties as judge-advocate. In general, however, no duties in addition to those incidental to his function as judge-advocate should be imposed upon him pending an important trial."[5]

[1] Dig. J. A. Gen., 494, par. 3. A member of a court-martial, though strictly answerable only to the convening authority for a neglect to be present at a session of the court, will properly, when prevented from attending, communicate the cause of his absence to the president or judge-advocate, so that the same may be entered in the proceedings. Where a member, on reappearing after an absence from a session, fails to offer any explanation of such absence, it will be proper for the president of the court to ask of him such statement as to the cause of his absence as he may think proper to make. It need scarcely be added that the absence of a member does not affect the legality of the proceedings, provided a quorum of members remain.* *Ibid.*, par. 2; see, also, Dig. J. A. Gen., p. 495, par. 4.

[2] *Ibid.*, 460, par. 18; Ives, 142.

[3] *Ibid.*, 494, par. 3.

[4] Paragraph 918, Army Regulations of 1895. As no more time is required of a member in the performance of court-martial duty than that which is consumed by the daily sessions of the court, the present practice under the regulation is to require members stationed at the place at which the court is assembled to discharge such regular or casual military duties as are or can be performed during the periods of adjournment from day to day. "In an emergency, indeed, arising out of a state of war or other public exigency, additional service may be imposed upon such officers; in a case of this kind, however, their service on the court would preferably be temporarily suspended." Dig. J. A. Gen., 493, par. 1.

[5] Dig. J. A. Gen., 460, par 20.

* 7. Opin. Att. Gen., 101.

Reduced Membership.—Where, in the course of a trial, the number of the members of a general court-martial is reduced by reason of absence, challenge, or the relieving of members, the court may legally proceed with its business so long as five members, the minimum quorum, remain; it is otherwise, however, where the number is thus reduced below five.[1]

While a number of members less than five cannot be organized as a court or proceed with a trial, they may perform such acts as are preliminary to the organization and action of the court. Less than five members may adjourn from day to day; and where five are present and one of them is challenged, the remaining four may determine upon the sufficiency of the objection.[2]

DELIBERATIONS.

Behavior of Members.—Save for the requirement of the 87th Article of War that "all members of a court-martial are to behave with decency and calmness," and for the provision of the 95th Article that "members of a court-martial in giving their votes shall begin with the youngest in commission," the statutes are silent respecting the procedure of courts-martial as deliberative bodies. The effect of the statutes above cited, and of the interpretations that have been placed upon them from time to time by the highest military authority, is to insure an absolute equality of membership in all matters having to do with the preparation and expression of opinions.

The control exercised by the President of the court-martial is, as has been seen, that vested in the chairman of a deliberative body by the ordinary rules of parliamentary procedure, and partakes in no respect of the nature of military command. As the organ of the court, he preserves order in its presence and gives, as a matter "of course, the directions necessary to the regular and proper conduct of the proceedings; but a failure to comply with a direction given by him, while it may constitute 'conduct to the prejudice of good order and military discipline,' cannot properly be charged as a 'disobedience of a lawful command of a superior officer,' in violation of Article 21."[3]

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[1] Dig. J. A. Gen., 87, par. 3.

[2] *Ibid.*, par. 4. A court reduced to four members and thereupon adjourning for an indefinite period does not dissolve itself. In adjourning it should report the facts to the convening authority and await his orders. He may at any time complete it by the addition of a new member or members, and order it to reassemble for business. *Ibid.*, 88, par. 5. Where, though reduced by the absence of members, operation of challenges, etc., to below five members, a court yet proceeds with and concludes the trial, its further proceedings, including its finding and sentence (if any), are unauthorized and inoperative. *Ibid.*, par. 6.

[3] Dig. J. A. Gen., 609, par. 4.

The president of a military court has no *command* as such. As presiden the cannot give an *order* to any other member. *Ibid.* See, also, the title *The Officers of Courts-martial* in the chapter entitled THE INCIDENTS OF THE TRIAL.

In deliberations on questions raised upon a trial, as well as in the finding and the adjudging of the sentence, the presiding member is on a perfect equality with the other

For the president of a court-martial to assume to adjourn the court against the vote of the majority of the members would be an unauthorized act and a grave irregularity, properly subjecting him to a charge under the 62d Article.[1]

CONTEMPT OF COURT.

The 86th Article of War confers upon a court-martial the power to "punish, at discretion, any person who uses any menacing words, signs, or gestures in its presence, or who disturbs its proceedings by any riot or disorder." The contempt described in the Article is that known to the law as *direct* or criminal contempt, that is, the act or omission constituting the offense must have taken place in the actual presence of the court itself. The term *constructive* contempt applies to similar conduct committed outside the presence of the court, or to a willful failure to obey its lawful mandate. Over this form of contempt courts-martial have no jurisdiction; if, however, constructive contempt be charged against a military person, the court may cause charges to be prepared and submitted to the proper convening authority; but if the offender be a civilian, not subject to military jurisdiction, the court-martial is absolutely without power to proceed in the matter, and can ~~neither~~ apply a remedy ~~nor~~ request its application by the civil authority.

Being a tribunal of special and limited jurisdiction, a court-martial has only statutory powers. Its judicial authority being derived wholly from statutes (chiefly from the Articles of War), it can exercise no common-law functions, such, for example, as the general power to punish for contempt. Its origin and authority being statutory, the several enactments investing it with its powers must be closely followed. No presumption can be made in favor of its jurisdiction.[2]

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members. He has no casting vote, nor, if the vote is even, does *his* vote have any greater or other weight or effect than that of any other member. *Ibid.*, par. 3.

"A president of the court will not be announced. The officer highest in rank present will act as president." Besides his duties and privileges as a member, the president is the organ of the court to maintain order and conduct its business. He speaks and acts for the court in every instance where a rule of action has been prescribed by law, regulations, or its own resolution. He administers the oath to the judge-advocate, and authenticates by his signature all acts, orders, and proceedings of the court requiring it. Manual for Courts-martial, 22, par. 1.

[1] Dig. J. A. Gen., 609, par. 3.

[2] Dig. J. A. Gen., 319, par. 25. The authority of a court-martial to punish as for a contempt, being confined by the code (Art. 86) to cases of acts of menace or disorder committed in its presence, such a court would not be empowered to punish, as being in contempt, a witness appearing before it whose attendance it had been necessary to compel by process of attachment. *Ibid.*, 759, par. 33.

A court martial has none of the common-law power to punish for contempt vested in the ordinary courts of justice, but only such authority as is given it by this article. Thus, *held* that a court martial would not be authorized to punish, as for a contempt, under this Article (or otherwise), a civilian witness duly summoned and appearing before it, but, when put on the stand, declining (without disorder) to testify. *Ibid.*, 99, par. 2. See, also, 18 Opin. Atty.-Gen., 278.

Procedure.—Where a contempt within the description of this Article has been committed and the court deems it proper that the offender shall be punished, the proper course is to suspend the regular business and, after giving the party an opportunity to be heard in explanation,[1] to proceed, if the explanation is insufficient, to impose a punishment, resuming thereupon the original proceedings. The action taken is properly summary, a formal trial not being called for, and the approval of the reviewing authority is not necessary either to the validity of the sentence or as a condition precedent to its execution; the punishment imposed by the court being carried into effect by the commanding officer of the post or place at which the trial is in progress. Close confinement in quarters or in the guard-house during the trial of the pending case, or forfeiture of a reasonable amount of pay, has been the more usual punishment. Instead of proceeding against a military person for a contempt in the mode contemplated by this Article, the alternative course may be pursued of bringing him to trial before a new court on a charge for a disorder under Article 62.[2]

THE FINDING.

The arguments or statements having been submitted by or in behalf of the prosecution and defense, the court is cleared and closed for deliberation and finding. Whenever, during the progress of the trial, the court goes into closed session, the judge-advocate, the clerk, the reporter, the interpreter, and all other officers or employees of the court, as well as the accused and his counsel, and the spectators and bystanders if there be any, withdraw from its presence.[3] When the court has thus been cleared and closed, it is prepared to engage in deliberation with a view to determine the guilt or innocence of the accused. It has been seen that in such collateral issues as may arise during the progress of a court-martial trial, the question at issue is determined by a mere preponderance of evidence; the proof required to sustain a conviction, however, is considerably stronger than this, and a finding adverse to an accused person will only be justified when the court is satisfied of his guilt beyond a reasonable doubt.

It has been seen that it is the function of the jury in a criminal trial to determine the weight that is to be attached to the testimony submitted

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[1] See General Court-martial Orders, No. 37, Fourth Military District, 1868.

[2] *Ibid.*, 99, par. 3. Compare Samuel, 634; Simmons, § 434. The latter course has not infrequently been adopted in our practice.

[3] It sometimes happens, in the trial of important cases, that the sessions of the court are held in a room capable of accommodating a large number of spectators, in which event it may not be desirable to require the spectators to withdraw whenever the court is closed for deliberation. In such cases, if there be a suitable room, convenient to that used for the trial, the court itself may withdraw for the purpose of deliberation, returning to the court-room when its deliberations have been concluded. The record in such case should show that the court "withdrew for deliberation," and on its conclusion that the court "returned to the court-room," etc.

by either side, and also to determine the credibility of each of the witnesses.[1] As this duty falls upon the members in a trial by court-martial, it becomes necessary for them to ascertain, *first*, what is alleged against the accused, and, *second*, whether the allegations contained in the charges and specifications have been proved beyond a reasonable doubt. These ends will be attained by reading over the several charges and specifications in connection with the evidence adduced in their support or denial. For this purpose the testimony on both sides may be read, and, after full discussion of the questions of law and fact involved, having assigned to each piece of testimony its true evidential value, the court is prepared to determine whether, as to each charge and specification, the act or omission charged has been proved with the degree of strictness that the law requires.

Reasonable Doubt.—The proof submitted in a court-martial trial must exclude *reasonable* doubt, but not of necessity *all* doubt. "A *reasonable doubt* is an honest, substantial misgiving generated by the insufficiency of the proof; not a doubt suggested by the ingenuity of the counsel or jury, unwarranted by the testimony, nor born of a merciful inclination to permit the defendant to escape, nor prompted by sympathy for him or those connected with him;[2] it is not a fanciful conjecture which an imaginative man may conjure up, but a doubt which reasonably flows from the evidence or want of evidence; a doubt for which a sensible man could give a good reason, which reason must be based upon the evidence or want of evidence; such a doubt as a sensible man would act upon in his own concerns."[3]

Voting.—Having maturely considered the evidence adduced in connection with the arguments or statements submitted in behalf of the prosecution and defense, the court is ready to pass upon the question of guilt or innocence. In voting, the 95th Article requires that the "youngest in commission" shall vote first, and the votes are therefore taken in the inverse order of rank. The charges and specifications are voted upon in the same order which was followed in pleading, the first specification to the first charge being passed upon, then the second, third, etc., in order, followed

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[1] In a case where the evidence is conflicting, it is an important part of the judgment of the court to determine the measure of the credibility to be attached to the several witnesses. In its finding, therefore, the court may, in connection with the testimony, properly take into consideration the appearance and deportment of the witnesses on the stand, and their manner of testifying especially when under cross-examination. Dig. J. A. Gen., 412, par. 14. See, also, the chapter entitled THE REVIEWING AUTHORITY, and compare Callanan *vs.* Shaw, 24 Iowa, 441.

That a court cannot arbitrarily disbelieve and reject from consideration the statement, duly in evidence, of a witness not clearly shown to have perjured himself is held in the recent case of Evans *vs.* George, 80 Ill. 51. See, also, the article *Credibility of Witnesses* in the chapter entitled EVIDENCE.

[2] U. S. *vs.* Harper, 33 Fed. Rep., 471.

[3] Hopt *vs.* People, 120 U. S., 430; U. S. *vs.* Jones, 31 Fed. Rep., 718; U. S. *vs.* Mengher, 37 *ibid.*, 875; U. S. *vs.* Hughes, 34 *id.*, 732; U. S. *vs.* Zes Cloya, 35 *id.*, 493; U. S. *vs.* McKenzie, *id.*, 826; U. S. *vs.* King, 34 *ibid.*, 302; U. S. *vs.* Means, 42 *ibid.*, 599.

by a vote upon the charge itself; the other charges are voted upon in the same manner. A majority vote determines the question of guilt or innocence in every case, anything less than a majority being insufficient for such purpose; hence a tie vote is in substance a finding of not proven, which in law is equivalent to an acquittal.[1]

Basis of Finding.—It has been seen that each member of a court-martial is required, by the obligation of his oath, to "well and truly try and determine" the matter at issue "according to evidence." The finding of the court, therefore, should be governed by the evidence, considered in connection with the plea. Where no evidence is introduced, the general rule is that the finding should conform to the plea.[2]

There should be a separate and independent finding upon each charge and specification, and each separate finding should cover the charge or specification as to which it is made; so that if any charge or specification is deemed by the court to be proved only in part, the finding shall show specifically what is found to be proved and what not.[3]

The finding on the charge should be supported by the finding on the specification (or specifications), and the two findings should be consistent with each other. A finding of guilty on the charge would be quite inconsistent with a finding of not guilty, or guilty without attaching criminality, on the specification. So a finding of guilty upon a well-pleaded specification, apposite to the charge, followed by a finding of not guilty either of the offense charged or some lesser offense included in it, would be an incongruous verdict. No matter how many specifications there may be, it requires a finding of guilty ~~or not guilty~~ on but one specification (apposite to the charge) to support a similar finding upon the charge.[4]

Exceptions and Substitutions.—It is a peculiarity of the finding at military law that a court-martial, where of opinion that any portion of the allegations in a specification is not proved, is authorized to find the accused guilty of a part of a specification only, *excepting* the remainder; or, in finding him guilty of the whole (or any part), to *substitute* correct words or allegations in the place of such as are shown by the evidence to have been inserted through error. And provided the exceptions or substitutions leave

[1] Where, upon the finding, the vote on a charge or specification is *tied*, the accused is in law found not guilty thereon; a majority vote being necessary to any conviction. A statement in the *record* to the effect that the vote upon a specification, etc., was a *tie* and that the accused was therefore acquitted is of course irregular and improper. Dig. J. A. Gen., 412, par. 13.

[2] *Ibid.*, 408, par. 1.

[3] *Ibid.*, par. 3.

[4] *Ibid.*, par. 2. Where there is but one specification, it is not competent for a court-martial to find an accused not guilty of the specification and yet guilty of the charge. By finding him not guilty of the specification they acquit him of all that goes to constitute the offense described in the charge. Where the court believe that the accused is guilty of the charge but not precisely as laid in the specification, they should find him guilty of the latter, but with such exceptions or substitutions as may be necessary to present the facts as proved on the trial, and then guilty of the charge. *Ibid.*, 409, par. 5.

the specification still appropriate to the charge and legally sufficient thereunder, the court may then properly find the accused guilty of the charge in the usual manner.[1]

Familiar instances of the exercise of the authority to *except* and *substitute* in a finding of guilty occur in cases where, in the specification, the name or rank of the accused or some other person is erroneously designated, or there is an erroneous averment of time or place, or a mistaken date, or an incorrect statement as to amount, quantity, quality, or other particular, of funds or other property, etc.[2]

In finding guilty upon a specification, to except from such finding the word or words which express the *gravamen* of the act as charged and found is contradictory and irregular; as, for example, from a finding of guilty on a specification to a charge of fraud under Art. 60, to specially except the word "fraudulent" or "fraudulently," while at the same time finding the accused guilty generally upon the charge.[3]

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[1] Dig. J. A. Gen., 409, par. 4.

[2] *Ibid.*, par. 6. The practice of making exceptions and substitutions in the findings is well illustrated by the finding, authorized at military law when called for by the evidence, of a *lesser kindred offense included as a constituent element in the specific offense charged.* Of this form of verdict the most familiar instance is the finding of guilty of absence without leave under a charge of desertion. A full acquittal of desertion includes, of course, an absence without leave involved in it; but where the evidence falls short of establishing a desertion but shows an unauthorized absenting of himself by the accused, he may and should be convicted of absence without leave as his actual offense. In arriving at this conclusion, the findings on the specification and charge should be consistent, and the finding on the former should be such as to support the latter. In their finding of guilty upon the specification, the court should in terms *except* from its application such words of the specification as allege or describe desertion exclusively, and substitute words describing the lesser offense; the words "did desert," for example, being excepted, and the words "did absent himself without authority" being substituted. The finding on the charge should regularly be "not guilty, but guilty of absence without leave." *Ibid.*, 410 par. 8. A simple finding, however, of guilty of absence without leave, though an irregular form, would amount in law to an acquittal of the higher offense charged. Compare Morehead *vs.* State, 34 Ohio St., 212.

[3] Dig. J. A. Gen., 409, par. 7. But the authority to find guilty of a minor included offense, or otherwise to make exceptions or substitutions in the finding, cannot justify the conviction of the accused of an offense entirely separate and distinct in its nature from that charged. Thus *held* that it was not a finding of a lesser included offense to find the accused guilty merely of absence without leave under a charge of a violation of the 42d Article of War in abandoning his post before the enemy. And so *held* of a finding, under a charge of a violation of Article 39, of not guilty, but guilty of a violation of Article 40. So where a soldier charged with "conduct to the prejudice of good order and military discipline," in concealing the fact that a fellow soldier had appropriated to his own use certain public property, was found not guilty of the specification as laid, but guilty of "having stolen the property himself," and guilty of the charge, and was accordingly sentenced to imprisonment, *held* that such a finding was manifestly unauthorized. Having been found not guilty of the offense set forth in the specification and which alone he was called upon to answer, he should have been acquitted on both charge and specification: the offense of which he was found guilty was not alleged against him, and not being *included* in that charged could not properly form the subject of a finding. The remission of his sentence therefore *recommended.* *Ibid.*, 410, par. 9.

In a case where a court-martial made such exceptions and substitutions in its finding upon the specification to a charge of "forgery to the prejudice of good order and military discipline" as to negative the material allegation of false writing and leave no legal basis for the finding arrived at of guilty of the charge, *advised* that the findings be disapproved as incongruous and insufficient to sustain the sentence. *Ibid.*, 413, par. 15.

Finding as to a Lesser Kindred or Included Offense.—There may also be a finding of not guilty as to the major or principal offense charged, and a finding of guilty of a lesser kindred and included offense.[1] "Of this form of verdict the most familiar instance is the finding of guilty of absence without leave under a charge of desertion. A full acquittal of desertion includes, of course, an absence without leave involved in it; but where the evidence falls short of establishing a desertion but shows an unauthorized absenting of himself by the accused, he may and should be convicted of absence without leave as his actual offense.[2]

But the authority to find guilty of a minor included offense, or otherwise to make exceptions or substitutions in the finding, cannot justify the conviction of the accused of an offense entirely separate and distinct in its nature from that charged.[3]

In arriving at this conclusion, the findings on the specification and charge should be consistent, and the finding on the former should be such as to support the latter. In their finding of guilty upon a specification alleging desertion, for example, the court should in terms except from its application such words of the specification as allege or describe desertion exclusively, and substitute words describing the lesser offense; the words "did desert," for example, being excepted, and the words "did absent himself without authority" being substituted. The finding on the charge should then be "not guilty, but guilty of absence without leave."[4]

The *converse* of the proposition above stated is not true, and a conviction of a graver or more serious offense in lieu of that charged has never been sanctioned; such a finding, indeed, would constitute a departure from the

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[1] The practice of making exceptions and substitutions in the findings is well illustrated by the finding, authorized at military law when called for by the evidence, of a *lesser kindred offense included as a constituent element in the specific offense charged.* Dig. J. A. Gen., 410, par. 8; XIII Opin. Att.-Gen., 460. Compare Reynolds *vs.* People, 83 Ill. 479, and note the similar authority given in criminal cases in the United States courts by Sec. 1035, Rev. Sts. See, also, note 2, p. 143 *ante.*

[2] Dig. J. A. Gen., 410, par. 8. *Held* that a finding, under a charge of desertion, of not guilty of desertion but guilty of a violation of the 40th Article of War was not allowable and should be disapproved; the offense made punishable by that Article—quitting guard, etc.—not necessarily being or involving an absence without leave in the military sense, and the finding not being necessarily a conviction of the absence without leave contained in desertion. *Ibid.*, 413, par. 16.

[3] *Ibid.*, 410, par. 9.

[4] *Ibid.*, par. 8. The authority thus to find, however, has not been extended beyond the case indicated in the last paragraph; the *reverse*, for example, of this form of finding has never been sanctioned. A finding of guilty of a certain *specific* offense under a charge of another specific offense, or under a charge of "conduct unbecoming an officer and a gentleman," or of "conduct to the prejudice of good order and military discipline," would be wholly irregular and invalid. Thus a finding of guilty of disobedience of orders (or of a violation of Article 21), under a charge of mutiny in violation of Article 22, or a finding of drunkenness on duty (or of a violation of Article 38), under a charge for a drunken disorder laid under Article 62 or 61, would be wholly unauthorized. And, if such a finding were made, it could scarcely fail to be formally disapproved. And so of a finding of "conduct unbecoming an officer and a gentleman" under a charge of "conduct to the prejudice of good order and military discipline." *Ibid.*, 411, par. 11.

fundamental rule of interpretation of criminal statutes; *i.e.*, that they are to be construed liberally as to those parts which are in favor of the accused, and strictly as to those clauses which are against him.[1]

Finding under 61st and 62d Articles of War.—It is a further peculiarity of the finding at military law that where an accused is charged with "conduct unbecoming an officer and a gentleman," or with any specific offense made punishable by the Articles of War, and the court is of opinion that while the material allegations in the specification or specifications are substantially made out they do not fully sustain the charge as laid, but do clearly establish the commission of a neglect of military duty or a disorder in breach of military discipline, as involved in the acts alleged, the accused may properly be found guilty of the specification (or specifications), and not guilty of the charge but guilty of "conduct to the prejudice of good order and military discipline" Such a form of finding is now common in our practice (especially where the charge is laid under Art. 61), and its legality is no longer questioned.[2]

Protests.—Where the majority of the members of a court-martial have come to a decision upon any question raised in the course of the proceedings, or upon the finding or sentence, no individual of the minority, whether the president or other member, is entitled to have a *protest* made by himself against such decision entered upon the record. The conclusions of the court (except in cases of death-sentences, where a concurrence of two thirds is required) are to be determined invariably by the vote of the majority of its members, and it is much less important that individual members should have an opportunity of publishing their personal convictions than that the action of the court should appear upon the formal record as that of the aggregate body, and should carry weight and have effect as such. Nor can a protest (against the finding or otherwise) by a minority of the members be appended to the record on a separate paper.[3]

Acquittals.—It has been seen that, in order to convict, the evidence should be such as to satisfy the court of the guilt of the accused "beyond a reasonable doubt." If, therefore, such reasonable doubt exists, it must find

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[1] Dig. J. A. Gen., 411, par. 11.

[2] *Ibid.*, par. 10. The general finding of "conduct to the prejudice," etc., in the cases indicated in the paragraph above cited, is sanctioned in order to prevent a failure of justice, not for the purpose of relieving the accused of any of his due share of culpability. It should not, therefore, be resorted to where the specific offense charged is substantially made out by the testimony. Thus in a case where the facts set forth in the specification to a charge of "conduct unbecoming an officer and a gentleman," and clearly established by the evidence, fixed unmistakably upon the accused dishonorable behavior compromising him officially and socially, *held* that a finding by the court that he was guilty only of "conduct to the prejudice of good order and military discipline" should not be accepted, but that the court should be reconvened for the purpose of inducing, if practicable, a finding in accordance with the facts and with justice. *Ibid.*, 412, par. 12; see also *ibid.*, 411, par. 11.

[3] Dig. J. A. Gen., 619. See also Simmons, § 469; Hough (Precedents), 703, note 4.

expression in a finding of "not guilty" as to the specification in respect to which the doubt exists, and the accused is entitled to an acquittal. The same conclusion is reached where there is a tie vote,[1] or where a sentence is not supported by the majority which is expressly required to support a conviction in respect to certain Articles of War.[2]

Forms of Acquittal.—An acquittal, in the above cases, is an inevitable consequence of the finding of "not guilty," and is entered upon the record in the following form: "and the court does therefore acquit him, —— A B, ——th Regiment of Infantry." Where the accused is a commissioned officer and the circumstances, as set forth in the evidence, are such as to justify the conduct which has been made the subject of inquiry or to negative completely the theory of guilt, a form of acquittal is sometimes agreed to in the following form: "and the court does therefore fully" or "honorably acquit him," etc., or "fully and honorably acquit." Such a conclusion is warranted where the effect of conviction would have been to cast a stigma upon the personal or professional character of the accused. As charges are now required to be carefully investigated prior to their reference to courts-martial for trial, additions of the kind above mentioned have become less frequent than was formerly the case.[3]

Remarks in Connection with Findings and Sentences.—It is a well-established principle of court-martial procedure that a court may, in a proper case, make additions to its finding in the form of remarks or animadversions upon the conduct of parties or witnesses, or the motives which have actuated conduct in particular cases. "Courts-martial, in acquitting, have sometimes remarked in very strong terms of disapprobation on the conduct of the prosecutor, and in reprehension of occurrences prejudicial to discipline which have appeared in their records. They have also declared charges to be frivolous, vexatious, and groundless, and sometimes malicious, and not originating in a desire to promote the good of the service, but proceeding from warmth of temper or ignorance, or from insubordination, or personal animosity to the accused, and from resentment, revenge, conspiracy, or other improper motives. So, on the other hand, courts have frequently declared that, in their opinion, the prosecutor was actuated by no illiberal or improper motives, but from a sense of duty and regard for the benefit of the service, or that his conduct has been laudable and honorable or regular and impartial; such remarks by the court have generally been produced by assertions or insinuations of the prisoner, not supported by evi-

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[1] A tie vote upon any proposition submitted to the court is equivalent to a vote in the negative,—a majority vote being necessary to a determination in the affirmative,—and the proposition is not approved. Where the vote is a tie upon an objection to testimony, the objection is not sustained. Where it is tied upon a certain proposed finding or form of sentence, the same is not adopted. Dig. J. A. Gen., 747.

[2] See 96th Article of War. See, also, Dig. J. A. Gen., 112, par. 1.

[3] Simmons, § 700.

dence; and have occasionally accompanied an acquittal, at other times a conviction.[1]

In submitting such remarks or additions to its finding, the court should bear in mind the well-defined limits which divide the functions of the court-martial from those of the reviewing officer. The officer appointing the court is responsible for the maintenance of discipline in the command; the functions of a court-martial being restricted to the trial of the particular case before it. Its animadversions, therefore, should be rigidly limited to matters disclosed by the evidence submitted in the course of the trial, and should relate to parties thereto, to witnesses who have testified, or to persons whose conduct or motives have been made the subject of inquiry. For the same reason the animadversions, if made, should be specific in character and not general; conduct not sufficiently marked or decided to be susceptible of characterization ought not to be made the subject of either comment or stricture.

PREVIOUS CONVICTIONS.

Procedure.—"In every case where evidence of previous convictions[2] is admissible, and the accused is convicted of the offense, the court, after determining its findings and before awarding sentence, will be opened for the purpose of ascertaining whether there be such evidence and, if so, of hearing it."[3] The judge-advocate and the accused and his counsel return to the presence of the court, and the former submits such evidence of previous convictions as have been referred to the court by the proper convening authority.[4] In presenting such evidence the rules regulating the presentation of documentary testimony are applied by the court.

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[1] The remarking by the court, in connection with the finding or sentence, unfavorably upon an officer or soldier (other than the accused) whose conduct is exhibited by the testimony, or upon an act or practice deemed proper to be noted in the interests of military discipline, though now comparatively unusual, is sanctioned by the authorities as permissible and regular in a proper case. Dig. J. A. Gen., 318, par. 26. See, also, Simmons, §§ 699-707; Kennedy, 196-7; DeHart, 182-3; O'Brien, 268. In Jekyll *vs.* Moore, 2 Bos. & Pul., 341, the expression of opinion by a court-martial, in acquitting an accused, that the prosecution had been actuated by malice was held not to constitute a libel.

[2] By "previous conviction" is meant a conviction where the sentence has been approved by competent authority. This refers to all trials except where the post commander sits as a summary court, when no approval of the sentence is required by law. For instructions as to when evidence of previous convictions must be submitted with charges, see page 19, note 1; and for instructions to summary courts regarding previous convictions, see Manual for Courts-martial, page 78.

[3] Manual for Courts-martial, 49, par. 1. See par. 929, A. R., 1895, and Manual for Courts-martial, p. 60, par. 2.

[4] *Held* that the reopening of the court, after a conviction, to receive evidence of previous convictions was not a violation of the 84th Article of War. The procedure was designed to carry out the spirit of the legislation which excluded judge-advocates from closed sessions—to place prosecution and defense on a more equal footing, by allowing the accused to be present when evidence of previous convictions is submitted and to scrutinize the same and test their legality. Dig. J. A. Gen., 609, par. 1.

A court-martial refused to take into consideration evidence of previous convictions

Proof of Previous Convictions.—Previous convictions by courts-martial other than the summary court are proved by the records of the trials or by duly authenticated orders promulgating them.[1] The proper evidence of previous convictions by summary court is the copy of a summary-court record furnished to company and other commanders, as required by paragraph 932, Army Regulations of 1895, or one furnished for the purpose and certified to be a true copy by the post commander or adjutant.[2]

The previous convictions are not limited to those for offenses similar to the one for which the accused is on trial. The object is "to see if the prisoner is an old offender, and therefore less entitled to leniency than if on trial for his first offense." This information might not be fully obtained if evidence of previous convictions of similar offenses only were laid before the court. It has no bearing upon the question of guilt of the particular charge on trial, but only upon the amount and kind of punishment to be awarded,[3] and to this end it is proper that all previous convictions should be known. As the accused is not on trial for the offenses evidence of the previous convictions of which it is proposed to introduce, the 103d Article of War does not apply.[4]

THE SENTENCE.

Mandatory and Discretionary Sentences.—A finding having been reached, and the evidence of previous convictions, if any such there be,

offered by the judge-advocate, on the grounds, first, that accused had been previously punished for each offense; second, that he had not introduced any testimony in support of his character, and, in the absence of such testimony, the rules of evidence preclude attacking the same. *Held* that such objections were not well taken. Dig. J. A. Gen., 610, par. 2.

[1] If the order of publication does not show the actual offense, as by not setting forth the specifications, the original proceedings (*i.e.*, the original or a duly certified copy) should be put in evidence. A memorandum of the previous convictions is not sufficient; they must be shown either by the records of the trials or by duly authenticated copies of the orders of promulgation. It is unauthorized for the judge-advocate to introduce, or the court to admit, as evidence of previous convictions (or in connection with proper evidence of the same), the statement of service, etc., required by par. 927, A. R. of 1895, to be furnished to the convening authority with the charge. Dig. J. A. Gen., 610, par. 3. See Circ. 13, H. Q. A., 1890.

Previous convictions, except of desertion on a trial for desertion, not adjudged during the current pending enlistment of the soldier, but incurred during a prior enlistment, are not admissible. *Ibid.*, 610, par. 5.

Evidence of a previous conviction is not admissible where the findings were *disapproved* by the proper reviewing authority. As to all trials (except those had by a summary court where the post commander acts as the court, and no approval of the sentence is required by law), the term "previous conviction," as employed in G. O. 21 of 1891 means a conviction to which effect has been given by the approval of the sentence by competent authority. *Ibid.*, 611, par. 7. See Circ. 10, H. Q. A., 1893, and note 2, page 147, *ante*.

Evidence of a previous conviction by a *civil* court is not admissible in this procedure. Dig. J. A. Gen., 611, par. 6.

[2] Paragraph 929, Army Regulations of 1895.

[3] For effect upon amount of punishment, see Manual for Courts-martial, p. 59, sec. 1. See, also, par. 1, *supra*.

[4] Manual for Courts martial, 49, par. 3. This rule is not changed by the order of the President prescribing the limits of punishment.

having been submitted, the court is again cleared and closed to enable the court to vote upon an appropriate sentence. Sentences are either mandatory or discretionary. A *mandatory sentence* is one determined, in kind and amount, by the express terms of a statute, and which must be imposed by the court as an inevitable consequence of conviction of the offense to which it is attached by law. For such offense, indeed, no other sentence may lawfully be imposed. A *discretionary sentence* is one in which an appropriate punishment is determined by the court, having in view the interests of discipline, the character of the offense, and the evidence submitted in proof of its commission.

Between the two classes of sentences above described lies a group of sentences in which the discretion of the court in imposing them is to some extent restricted, being exercised within certain limits established by the President in pursuance of the authority conferred by the Act of September 27, 1890.[1] The limitations of punishment so authorized have been fixed by the President in respect to a number of military offenses, and have been published to the Army in suitable Executive Orders,[2] and, as so established, must be strictly observed by all military tribunals in determining upon the kind and amount of punishment imposed for the specific offenses therein enumerated.

Voting upon the Sentence.—Upon a conviction by a majority vote of the court, all the members of the court, those who voted for an acquittal equally with those who voted for conviction, must vote for some sentence. This, though formerly doubted, has long been established as a principle in our military law. While a member who voted for an acquittal cannot of course be *compelled* to vote a punishment, yet his persistent refusal to do so would be a neglect of duty, rendering him amenable to a charge under Art. 62.[3] The order of voting is the same as that pursued in reaching a finding, in inverse order of rank.

If the punishment attached to the offense be mandatory, such sentence must be imposed, upon conviction, as the sentence of the court. If the sentence be wholly or in part discretionary, the obligation to vote remains unchanged; the term "to vote" as here used, especially when construed in connection with the member's oath and the existing custom of service, implies an obligation on the part of each member to formulate and submit a sentence imposing such punishment as, in his opinion, is adequate to the offense charged.

The approved practice of military courts in determining upon their sentences is believed to be as follows: Each member writes a sentence and deposits it with the president, and (no sentence having been adopted by a

[1] 26 Stat. at Large, 491. See, also, the Act of October 1, 1890 (26 Stat. at Large, 648).
[2] See Executive Orders of February 26, 1891, and March 20, 1895, the latter of which is now in force.
[3] Dig. J. A. Gen., 696, par. 2.

majority of votes) the court, after all the sentences have been read to it by the president, proceeds to vote upon them in the order of their severity, beginning with the least severe, until some one of those proposed is agreed upon by a majority of votes. It is not *essential*, however, that this form of voting should be pursued—it being open to the court, in its discretion, to adopt a different one.[1]

Where the Article of War under which the charge is laid is mandatory as to the punishment,[2] and the sentence imposes, in connection with the mandatory punishment, a further penalty or penalties, this addition to the sentence does not affect its legality so far as relates to the mandatory punishment; as to this it is valid and operative, though as to the rest it is a nullity.[3]

In a case where its sentence is entirely discretionary, a court-martial may impose any punishment that is sanctioned by usage (the "custom of the service" referred to in Art. 84), although (in cases of soldiers) the same may not be included in the list of the more usual punishments contained in the Manual for Courts-martial.[4] Where, however, the discretion of the court is restricted in its exercise by the operation of the Executive order imposing limits upon its power to award discretionary punishments, the terms of such order must be strictly complied with.

Interpretation of Terms used in Sentences.—"*Month*," "*Months*."—The word "month" or "months," employed in a sentence, is to be construed as meaning *calendar* month or months; the same significance being given to the term as is now commonly given to it in the construction of American *statutes* in which the word is employed. The old doctrine that "month" in a sentence of court-martial meant *lunar* month has long since ceased to be accepted in our military law.[5]

"*Day*," "*Days*."—The term "day" or "days," when used in the order of the President imposing limitations upon punishments, has reference to a day of twenty-four hours,[6] and this rule applies generally to the use of the term in connection with a term of imprisonment or confinement. It has been held, however, that the term "days" in a sentence of a regimental court requiring a soldier "to walk four days with a loaded knapsack," etc., did not include nights, and should not be considered as embracing any longer

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[1] Dig. J. A. Gen., 695, par. 1. Where a sentence may or should be composed of more than one of the authorized forms of punishment, as of confinement and forfeiture of pay, for example, the court may, by appropriate motions, pass informally upon the several elements of which the sentence may be composed; this question having been determined by a majority of votes, it only remains to fix upon the amount of pay to be forfeited and the term of confinement to be imposed.

[2] Such punishments are required by Articles 6, 8, 13, 14, 15, 18, 26, 37, 38, 50, 57, 59, 61, and 65.

[3] Dig. J. A. Gen., 696, par. 3.

[4] *Ibid.*, 697, par. 6. For a list of such punishments, see Manual for Courts-martial, p. 50, par. 3; see, also, the chapter, *post*, entitled PUNISHMENTS.

[5] Dig. J. A. Gen., 699, par. 12.

[6] *Ibid.*, 491, par. 4.

period of the twenty-four hours than that included between reveillé and retreat.

Terms Relating to Pay and Allowances.—As will presently be seen, pay cannot be forfeited (in a sentence) by implication. If the court intends to forfeit pay, the penalty of forfeiture should be adjudged in express terms in the sentence.[1] No *other* punishment imposable by court-martial—neither a sentence of death, dismissal, suspension, dishonorable discharge, nor imprisonment—involves *per se* a forfeiture or deprivation of any part of the pay or allowances due the party at the time of the approval or taking effect of the sentence.[2] Nor can pay be forfeited by any misconduct of a soldier, however grave (other than desertion or absence without leave), unless he is brought to trial and expressly sentenced to forfeiture for the same.[4] All forfeitures by sentence, whether or not so expressed to be in terms, are to be understood and treated as forfeitures to the United States, accruing to the general treasury.[5]

Where a sentence imposes a forfeiture of the "monthly" pay or a part of the "monthly" pay of a soldier for a designated number of months, the sum forfeited is the amount indicated multiplied by the number of months. Thus where the sentence of a soldier imposed a confinement for eight months with a forfeiture of eight dollars of his monthly pay for the same period, the sum forfeited was not eight but sixty-four dollars.[6]

A forfeiture by sentence of "pay and allowances," while it does not

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[1] Dig. J. A. Gen., 699, par. 12.

[2] *Ibid.*, 417, par. 2. Compare Elliott *vs.* R. R. Co., 9 Otto, 573.

[3] *Ibid.* This principle is well illustrated by the opinion of the Attorney-General (13 Opins., 103), concurring with an opinion of the Judge-Advocate General in the case of Major Herod, where it was held that the fact that the accused had been sentenced to death, on conviction of murder, did not affect his right to his pay from the date of his arrest to that of the final action taken on the sentence by the President. And see the more recent opinion of the Attorney-General of November 9, 1876, (15 Opins., 175,) to the effect that the pay of officers and seamen of the navy is not divested by the operation of sentences of imprisonment or suspension, but only when forfeited in specific and express terms in the sentence.

[4] *Ibid.*, 417, par. 2. Retained pay may be so forfeited. See par. 1369, A. R. 1895.

[5] *Ibid.*, 418, par. 5. Soldiers' pay forfeited by sentence to the United States was, by the Act of March 3, 1851, (Sec. 4818, Rev. Sts.,) appropriated for the support of the Soldiers' Home. This appropriation, as here expressed, is of "all stoppages or fines adjudged against soldiers by sentence of courts-martial, over and above any amount that may be due for the reimbursement of government or of individuals." The "individuals" here intended were no doubt sutlers and laundresses, or other persons, (including perhaps the class for whom "reparation" is provided by Art. 54,) to whom a lien on soldiers' pay may be given by statute or regulation.

Pay forfeited by sentence of court-martial can accrue to the United States only. A sentence cannot forfeit (appropriate, or "stop") pay for the reimbursement or benefit of an *individual*, civil or military, however justly the same may be due him, either for money borrowed, stolen, or embezzled by the accused, or to satisfy any other pecuniary liability of the accused whether in the nature of debt or damages; nor can a sentence forfeit pay for the support or benefit of the family of the accused, or for the benefit of a company fund, post fund, hospital fund, etc., none of these funds being money of the United States. Dig. J. A. Gen., 418, par. 5.

[6] Dig. J. A. Gen., 419, par. 6. See, also, the opinion of the Judge-Advocate General published in G. O. 121, War Department, 1874, and par. 951, A. R. 1895.

affect the right of the soldier to receive during his term of enlistment the usual allowance of clothing in kind, forfeits any pecuniary allowance that may be due the soldier on account of clothing not drawn.[1] While he remains in the service a soldier must be clothed as well as fed. The exception sometimes made by courts-martial in such sentences, "except necessary clothing," being in the nature of surplusage, is thus seen to be unnecessary.[2]

Where the sentence is confinement for a certain number of months or years, with a forfeiture of pay "for the same period," the execution of the forfeiture properly begins and ends with the term of the confinement.[3]

A forfeiture of pay "now due" means due at the date of the promulgation of the approved sentence.[4] Pay which is not due cannot be forfeited by a sentence purporting to forfeit only pay which is due.[5]

A forfeiture of a soldier's pay, not limited by the sentence to the pay of any particular designated month or months or other space of time, but expressed, as such forfeitures usually are, simply as a forfeiture of a certain number (as three, six, etc.) of months' pay or of a certain amount of pay (as ten, twenty, or more dollars of his pay), is legally chargeable against the pay due and payable to the soldier at the next pay-day after the promulgation of the approval of the sentence, and if no pay is then due, or that due is not sufficient to discharge the forfeiture, against the pay due and payable at successive pay-days till the entire forfeiture is satisfied. The forfeiture, upon the promulgation and notice to the party of the approval of the same, becomes a debt due to the United States, and may legally constitute a charge against the pay then due the party, if any, and be satisfied as far as practicable out of such pay when payable, viz., at the pay-day next succeeding the promulgation of the approval or of the noting of the approved forfeiture of the muster-for-pay rolls.[6]

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[1] Dig. J. A. Gen., 418, par. 4.

[2] *Ibid.*, 266, par. 2. Forfeiture, however, of "all pay and allowances" includes and forfeits extra-duty pay. *Ibid.*, 418, par. 4.

[3] *Ibid.*, 419, par. 7.

[4] See par. 951 and 952, A. R. of 1895; see, also, Dig. J. A. Gen., 423, par. 19.

[5] Dig. J. A. Gen., 423, par. 19.

[6] *Ibid.*, 419, par. 8. In the practice, however, of the Pay Department such forfeitures are charged only against pay accruing *subsequently* to the date of the order promulgating the sentence. See G. O. 53, Hdqrs. of Army, 1879; par. 952, A. R. 1895.

In a case of a forfeiture, by sentence, of "pay due" (or "pay due and to become due"), the amount of pay due and payable to the party at the date of the approval of the sentence is, in contemplation of law, returned from the appropriation for the army to the general treasury, and becomes *public money*, and, being in the treasury, cannot without a violation of Art. I, Sec. 9, § 6, of the Constitution, be withdrawn and restored to the party except by the authority of Congress. And a forfeiture is covered into the treasury when it has passed to the credit of the Soldiers' Home fund in the Treasury Department. A forfeiture thus executed cannot therefore be *remitted*, or restored by the pardoning power, whatever be the merits of the case. A sentence forfeiting pay can be remitted only as to pay not due and payable at the date of the remission. Where a soldier's pay has been forfeited by an executed sentence, no mere amendment of the muster-roll upon which the same has been noted can operate to undo such forfeiture. After pay forfeited by sentence has gone into the treasury, it cannot

In a sentence of forfeiture of "all pay due" (or "all pay now due") imposed with dishonorable discharge, to add "or to become due" would give no further effect to the sentence. It is otherwise, however, where forfeiture is adjudged alone, unaccompanied by dishonorable discharge; there the term "or to become due" would forfeit pay falling due after the date of the promulgation of the approval and while the soldier remained in service.[1]

A forfeiture remitted upon approval does not take effect. So where a forfeiture of pay adjudged a deserter was, upon the approval of his sentence, remitted by the reviewing authority, it was held that he was entitled to pay from the date of his arrest or surrender and return to military control—the date at which a deserter[2] is "considered as again in service," or rather resumes his service.[3]

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add to the authority of the Executive to return it that the sentence was in fact void; the authority of Congress is still necessary to the reimbursement of the officer or soldier. Dig. J. A. Gen., 421, par. 14.

Where a soldier was sentenced to be dishonorably discharged and to forfeit all his pay except twenty dollars, and, upon his discharge, it appeared that he was indebted to the United States in a greater amount, *held* that the excepted sum could not legally be rendered to him. *Ibid.*, 420, par. 9. See, also, par. 953, A. R. 1895.

A sentence forfeiting "pay" or "pay and bounty" does not affect the right of the accused to a pecuniary "allowance," as, for example, an allowance due him for clothing not drawn. *Ibid.*, 418, par. 3.

[1] Dig. J. A. Gen., 423, par. 20. Where a soldier was sentenced to a forfeiture of ten dollars per month of his pay for eighteen months, and his term of enlistment expired before the end of that time, *held* that he could not legally be retained in the service beyond such term for the purpose of the full execution of the forfeiture. *Ibid*, 420, par. 10.

Where a soldier was sentenced to a forfeiture of three months' pay, but his term of enlistment expired in about two months after the approval of the sentence, so that one-third of the forfeiture remained unexecuted,—*held*, on his subsequently re-enlisting, that this balance could not legally be stopped against his pay; the second enlistment being a new and independent contract, and the party contracting not being subject to a liability attaching to the distinct status occupied by him under a previous contract. *Ibid.*, par. 11.

In a case of a non-commissioned officer having pay due him and sentenced to reduction and forfeiture of pay, whether, the forfeiture should be satisfied out of his pay as non-commissioned officer or out of his pay as private after the reduction will properly depend upon the intention of the court, if the same can be gathered from the terms of the sentence. But where a sergeant to whom a month's pay was overdue was sentenced "to be reduced to the ranks, forfeiting three months' pay," *held* that this forfeiture, upon the approval of the sentence, created a debt to the United States which might legally be satisfied out of the pay of the soldier as a sergeant so far as the same would go, and as to the balance, out of his pay as a private. *Ibid.*, par. 12.

Where an officer was sentenced to be dismissed with forfeiture of pay due, and subsequently to the approval of the sentence, but before such approval had been promulgated to the army or the officer had been officially notified of the same, he applied for and received the pay due him, *held* that inasmuch as the forfeiture had not taken effect at the time of the payment no illegal act was committed by the officer, and that the paymaster who paid him was not properly to be held accountable for the amount paid. *Ibid.*, 421, par. 13.

[2] Par. 131, A. R 1895.

[3] Dig., J. A. Gen., 423, par. 21. Where a soldier was sentenced "to be dishonorably discharged, forfeiting all pay and allowances, and to be confined for three months," and the dishonorable discharge was remitted in approving the sentence, *held* that the forfeiture was evidently intended to relate to pay due at the date of discharge, and that, as the discharge had been remitted, the forfeiture could apply only to pay due at the date of promulgation of the sentence. *Ibid.*, par. 22.

Where a sentence of forfeiture of ten dollars per month for a certain number of

Variance in Sentence.—A material variance between the name of the accused in the specification and in the sentence is fatal to its validity and should, if possible, be corrected by a reassembling of the court for a revision of its sentence. If this be rendered impracticable by the exigencies of the service, the sentence should in general be disapproved as fatally defective.[1]

Sentence in Excess of Limit.—Where a sentence in excess of the legal limit is divisible, such part as is legal may be approved and executed. Thus where a sentence of an inferior court imposes a fine or forfeiture beyond the limit of the 83d Article of War, the sentence may be approved and executed as to so much as is within the limit.[2]

Where the court remarks with its sentence that it is "thus lenient" because the prisoner has already been a long time in confinement, or for other ground stated, it exceeds its function. Such a consideration is not pertinent to the fixing of the measure of the punishment, which should be proportioned simply to the facts in evidence as found. Extraneous facts may serve as a basis for a recommendation only.[3]

To be valid a sentence must of course rest upon a formal finding of guilty of an offense for which the accused has been tried. Thus a finding of guilty on *one* of several charges, a conviction upon which requires or authorizes the sentence adjudged, will give validity and effect to such sentence although the similar findings on all the other charges are disapproved as not warranted by the testimony. But a finding of guilty of a specification to a charge, but not guilty of the charge itself, will not support a sentence, unless indeed there is added a conviction of some lesser offense included in that charged.[4]

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months was remitted thirteen days after promulgation, *held* that the forfeiture not affected by the remission was to be executed by stopping against the soldier's pay the thirtieth part of ten dollars for each and every day prior to the remission. Dig. J. A. Gen., par. 23.

Where a forfeiture of ten dollars per month for three months was imposed upon a soldier (in the first year of his enlistment), *held* that this could not be executed by forfeiting thirty dollars in one sum when so much had aggregated as pay due, but that, as his available monthly pay was nine dollars only (four dollars being *retained* under the Act of June 16, 1890), the execution would be best managed by remitting one dollar for each month included in the sentence. *Ibid.*, par. 24.

[1] Dig. J. A. Gen., 743. Thus *held* in a case where the names in the sentence and the specification were entirely different, the one being John Moore and the other James Cunningham; also in cases in which, while the surnames were the same, the Christian names were quite different, one being George and the other William, etc.; also in a case where the name in the sentence, though similar to that in the specification, was not *idem sonans*, as where the accused was arraigned upon charges in which he was designated as Woodworth, but was sentenced under the name of Woodman. A difference, however, in a middle initial is not a material variance, a middle name not being an essential part of the Christian name in law.* *Ibid.*

[2] *Ibid.*, 702, par. 19. See Circular No 2, H. Q. A., 1892. When a sentence of confinement or forfeiture is in excess of the legal limit, the part within the limit is legal and may be executed. Par. 943, A. R. 1895.

[3] *Ibid.*, 702, par. 20. See, also, the title *Recommendations to Clemency, post.*

[4] *Ibid*, 696, par. 5.

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* That the law "recognizes but one Christian name," and that the insertion or omission of a middle initial or initials "will have no effect in rendering any proceeding defective in point of law," see 2 Opins. Att.-Gen., 332; 3 *id*, 467; also Franklin *vs.* Tallmadge, 5 Johns., 84; Roosevelt *vs.* Gardinier, 2 Cow. 463; State *vs.* Webster, 30 Ark., 168.

Upon the conviction of an officer or soldier under a charge of a crime, such as manslaughter, robbery, larceny, etc., to the prejudice of good order and military discipline; while the statute of the United States or of the State providing for its punishment as a civil offense may well be referred to as indicating the nature and extent of the punishment deemed proper for the same by the civil authorities, the punishment to be imposed by the court-martial should nevertheless be measured, less by the criminality of the act as a civil offense than by its gravity as a breach of military discipline. Thus where a soldier, having been brought to trial before a civil court for the homicide of another soldier and inadequately sentenced, was subsequently tried by a general court-martial for the military offense involved in his act, *held* that the court could properly impose upon him a penalty proportioned to the injury done to the good order and discipline of the service, but could not, by an excessive punishment, attempt to compensate for the over-lenient judgment of the civil court.[1]

A military punishment can legally be imposed only by sentence of court-martial after a regular trial and conviction. Such a punishment cannot be imposed by a mere order. Thus a reviewing officer who has disapproved the sentence imposed by a court-martial, in any case, cannot thereupon order an independent punishment to be suffered by the accused. So such an officer, in disapproving an acquittal, cannot order that the accused be confined or otherwise punished. So a commander, in restoring a deserter to duty without trial according to par. 132, Army Regulations of 1895, is not authorized to require him to submit to a punishment as a condition to his being so restored, or otherwise.[2]

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[1] Dig. J. A. Gen., 698, par. 11.

[2] *Ibid.*, 700, par. 14. We have in our military law no system of disciplinary punishments. Except in a few cases, unimportant in themselves or of rare occurrence in practice (see Arts. 25, 52, 53, and 54), our code recognizes no punishments other than such as may be adjudged upon trial and conviction by a military court. In the General Orders punishments inflicted merely at the will of military commanders have been repeatedly condemned as illegal and forbidden in practice. See G. O. 81 (A. G. O.,) 1822; do. 58, Hdqrs. of Army, 1842; do. 2, 4, War Dept., 1843; do. 39, Hdqrs. of Army, 1845; do. 645, War Dept., 1865; do. 49, Northern Dept., 1864; do. 22, Dept. of the Platte, 1867; do. 44, *id.*, 1871; do. 63, Dept. of Dakota, 1868; do. 106, *id.*, 1871; do. 40, Dept. of the East, 1868; G. C. M. O., 112, *id.*, 1870; do. *id.*, 90, 1871; G. O. 14, Dept. of the South, 1869; do. 1, 23, 93, *id.*, 1873; do. 9, Mil. Div. of the Atlantic, 1869; do 31, *id.*, 1873; do. 23, Dept. of the Lakes, 1870; G. C. M. O. 50, Dept. of the Missouri, 1871. Officers who have resorted to such punishments have been repeatedly brought to trial and sentenced. See G. O. (A. & I. G. O., of June 30, 1821; do. 8 A. G. O.), 1826; do. 28, *id.*, 1829; do. 64, *id.*, 1832; do. 2, 6, 68, War Dept., 1843; do. 39, Hdqrs. of Army, 1845; do. 53, Dept. of Va. & No. Ca., 1864; do. 22, Dept. of the Platte, 1867; do 9, Mil. Div of the Atlantic, 1869; do. 14, Dept. of South, 1869; G. C M. O. 50, Dept. of the Missouri, 1871. And enlisted men tried and sentenced for insubordinate conduct, where such conduct has been induced or aggravated by illegal corporal punishments inflicted upon them by superiors, have commonly had their sentences remitted or mitigated or altogether disapproved. See G. O. 49, 76, Northern Dept., 1864; do. 40, Dept of the East, 1868; G. C. M. O. 90, *id.*, 1871; G O 63, Dept. of Dakota, 1868; do. 76, *id*, 1871; G C. M. O. 45, *id.*, 1880; do. 93, Dept of the South, 1873. In proper cases of course, as where violence is employed, escape attempted, etc., by soldiers who are mutinous or disorderly, or in arrest under charges, force may be used against them according to the neces-

Sentences under the 58th Article of War.—The 58th Article of War, a statute applicable only in time of war, contains the requirement that "in time of war, insurrection, or rebellion, larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault and battery with an intent to kill, wounding, by shooting or stabbing, with an intent to commit murder, rape, or assault and battery with an intent to commit rape, shall be punishable by the sentence of a general court-martial when committed by persons in the military service of the United States, and the punishment in any such case shall not be less than the punishment provided for the like offense by the laws of the State, Territory, or District in which such offense may have been committed."

The sentence to be awarded, therefore, upon conviction of any of the offenses above named is mandatory to the extent that it shall not be "less than the punishment provided for the like offense by the laws of the State, Territory, or District in which such offense may have been committed." It may, at the discretion of the court, however, be more severe than that warranted by the local law.[1]

Independence of Courts-martial in Awarding Sentences. — A court-martial, save for the restrictions upon its discretion which are imposed by statute or are contained in the Executive Orders already referred to, is not subject to superior control in determining the punishments to be awarded upon conviction of military offenses.[2]

Recommendations to Clemency.—It is, of course, always discretionary with a member of a court-martial whether he will make or join in a recom-

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sities of the case. See MANSLAUGHTER § 4; also G. O. 53, Hdqrs. of Army, 1842; do. 2, War Dept., 1843; G. C. M. O. 47, Hdqrs. of Army, 1877; G. O. 53, Dept. of Va. & No. Ca., 1864; do. 40, Dept. of the East, 1868; G. C. M. O. 112, *id.*, 1870; do. 90, *id.*, 1871; G. O. 23, Dept. of the Lakes, 1870; do. 106, Dept. of Dakota, 1871; do. 93, Dept. of the South, 1878; do. 31, Mil. Div. of the Atlantic, 1873; G. C. M. O. 37, Dept. of Texas, 1880. This, however, is *prevention* and *restraint*, not *punishment;* the authority to use the needful force in such cases will not justify the superior, when the offender is repressed or apprehended, in subjecting him to arbitrary punitory treatment.

[1] Where a sentence, adjudged by a court convened by the authority of this Article, imposed a punishment of less severity than that provided for the same offense by the law of the State in which the offense was committed (as imprisonment where the law of the State required the death-penalty), *held* that such a sentence was unauthorized and inoperative. But though the punishment must not be "less," it may legally be of greater severity than that provided by the local statute. *Held* that the court, in imposing punishment, should be governed by the local law (so far as required by the Article), although the offense was committed in a State whose ordinary relations to the General Government had been suspended by a state of war or insurrection.* Dig. J. A. Gen., 49, par. 5.

[2] While a specific punishment may be recommended, in orders, to be adjudged by courts-martial in a certain class of cases, it is not competent to order such courts to adopt a particular form of sentence in any case. The duty and discretion of courts-martial in the imposition of punishments are prescribed and defined by the Articles of War. *Ibid.*, 314, par. 3.

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* That the Southern States during the late war were "at no time out of the pale of the Union," see White *vs.* Hart, 13 Wallace, 646.

mendation to clemency. Members, however, will in general do well to refrain from subscribing recommendations where the testimony on the trial, as to the merits of the case or the character of the accused, fails clearly to justify a remission or mitigation of the punishment. Weak and ill-considered recommendations have not unfrequently given rise to severe criticism on the part of reviewing officers.[1]

Members of a court-martial desiring to recommend an accused to clemency need not all sign the same statement. There may be, in any case, two or more separate recommendations each signed by different members.[2]

A recommendation of the accused to clemency is no part of the official record of the trial, or of the proceedings of the court as such, but is merely the personal act of the members who sign it. It should not, therefore, be incorporated with the record proper, but should be appended to or transmitted with the same, as a separate and independent paper.[3]

Additions to Sentence.—Where the punishment which may be imposed upon conviction is discretionary with the court, and the sentence awarded is less than that usually adjudged for the offense charged, it has been customary for the court to add to such sentence the reasons which have actuated it in its leniency. The considerations which have influenced courts in this direction have in general been derived from the youth, inexperience, or good character of the prisoner, or from mitigating causes which have been developed during the progress of the trial. Such indulgence has been shown on account of the youth of the accused, his inexperience in the service, his character as testified to by his superior officers, or his ignorance of orders or regulations, where such ignorance is not due to his own negligence, or was caused by the unlawful conduct of others, or because the fact

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[1] Dig. J. A. Gen., 638, par. 3. Thus in G. C. M. O. 92, Hdqrs. of Army, 1867, the Secretary of War expresses himself as "surprised to find that any officer of the court could recommend remission or commutation of the sentence of dismissal in a case where the conduct of the officer tried was as reprehensible as that of" the accused. In offering recommendations members, should be careful to state the specific grounds upon which they base the same.* *Ibid.*

Where a member of a court-martial who had joined in a recommendation which had been appended to the record and regularly transmitted to the reviewing authority applied to have his name, as subscribed thereto, cancelled on the ground that, because of information since received, his opinion of the accused had been reversed, *advised* that such a proceeding would be exceptional and irregular, and that the preferable course would be to file with the record the application and statement of the member, so that the same might be referred to and considered in connection with the recommendation. *Ibid.*, par. 2.

[2] *Ibid.*, 639, par. 4.

[3] *Ibid.*, 638, par. 1.

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* In G. O. 70, Dept. of Dakota, 1870, Maj.-Gen. Hancock, the reviewing authority, observes: "As the members of the court are silent with regard to the considerations by which they were fluenced in making their recommendation in the prisoner's behalf, it is impossible for the reviewing authority to determine whether their reasons for making the recommendation were sufficient to justify a mitigation of the sentence. No consideration can, therefore, be paid to it. The sentence is approved, and will be duly carried into execution."

A late case in which there were two recommendations—one signed by a single member—is published and remarked upon in G. C. M. O. 92, War Department, 1875.

that the act charged was a first offense, or was committed without malice or criminal intent, or was due to excusable ignorance of fact.

It is proper to remark, however, in this connection, that a court-martial in thus extending leniency to a person convicted of a military offense clearly exceeds its function, and trespasses upon the field expressly reserved by statute to the reviewing authority. Its action in this regard, therefore, should, in general, be restricted to the formal recommendation to clemency above described.[1]

PROCEEDINGS IN REVISION.

Revision of Findings and Sentence.—So long as they continue in the legal custody of the court which imposed them, the findings and sentence are subject to revision and amendment. The procedure in such case is, first, by a proper motion to bring up the finding or sentence for reconsideration, and then by a similar motion to revoke the former finding or sentence, substituting therefor the new conclusion reached by the court as a result of its deliberation. The action of the court in such proceedings must, of course, be fully set forth in the record.

Revision at the Instance of the Reviewing Authority.—Revision proceedings may also originate, in a manner presently to be explained, with the reviewing authority, such power being a necessary incident of his authority to appoint or convene courts-martial. In a proper case, therefore, the proceedings may be returned to the court by the reviewing authority, so long as they remain in his custody awaiting approval or confirmation. Courts-martial should not be reconvened, however, for the purpose of making immaterial amendments in their records, nor, in general, to reduce the punishment awarded so as to bring it within the legal limit when it is in the power of the reviewing authority himself to do this; it being undesirable that courts-martial should be unnecessarily reconvened for the reconsideration of their proceedings.

There is no limit to the number of times that a court may be reconvened for a revision of its proceedings. It is seldom, however, reassembled a second time, where it declines on the first occasion to make the correction desired.[2]

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[1] Where the court remarks with its sentence that it is "thus lenient" because the prisoner has already been a long time in confinement, or for other ground stated, it exceeds its function. Such a consideration is not pertinent to the fixing of the measure of the punishment, which should be proportioned simply to the facts in evidence as found. Extraneous facts may serve as a basis for a recommendation only. Dig. J. A. Gen., 702, par. 20.

[2] Dig. J. A. Gen., 677, par. 1. In the case of Brig.-Gen. Swaim, published in G C. M O. 19, A. G. O. of 1885, the proceedings were twice returned to the court by the President; once for a revision of its findings, and a second time for revision of the sentence, which had been modified by the court, at its own motion, during the proceedings consequent upon the first reference of the case for revision of the findings. In the British service there can be but one such reference. Manual of Military Law, 63.

Return of Proceedings.—Where the record of a trial, as forwarded to the reviewing authority for his action, is deemed by him to exhibit some error, omission, or other defect in the proceedings capable of being supplied or remedied by the court, the court may be reconvened by the order of the reviewing officer for the purpose of correcting the record in the faulty particular, provided a correction be practicable. In a case of an omission, the object of course is that the record may be made to conform with the fact. If the fact is that the proceeding apparently merely omitted to be recorded was actually not had, the proposed correction cannot of course be made.[1]

The order reassembling the court will properly indicate the particular or particulars as to which a revision or correction is desired, or refer to papers accompanying it in which the supposed omission or other defect is set forth. Whether the proposed correction shall be made or not, is a matter which lies altogether in the discretion of the court. The reviewing authority cannot of course compel, and would scarcely be authorized to command, the court to make it.[2]

Procedure in Revision.—A correction can be made only by a legal court. At least five, therefore, of the members of the court who acted upon the trial must be present. That there are fewer members at the reassembling than at the trial is immaterial, provided five are present. The judge-advocate should be present. If the court closes, however, he should withdraw.[3]

It is not in general necessary or desirable that the accused be present at a revision. Where, however, any possible injustice may result from his absence, he should be required or permitted to be present, and with counsel if preferred.[4] It is now settled in our law that a court-martial is not empowered, at this proceeding, to take or receive testimony.[5]

The amendment can only be made by the court when duly reconvened for the purpose, and when made must be the act of the court as such. A correction made by the president or other member, or by the judge-

[1] Dig. J. A. Gen., 677, par. 1. As, for example, an inadequate, excessive, illegal, or irregular sentence, or a finding not authorized by the evidence; or an omission of some material matter—as a failure to prefix to the record a copy of the convening order, or to authenticate the proceedings by the signatures of the president or judge-advocate, or to enter the proper statement as to the members present, or to recite as to the offering to the accused of an opportunity to object to the same, or as to the qualifying of the court by the prescribed oaths, or to fully record the plea, finding, or sentence; or some mere clerical error in a matter of form. *Ibid.*

[2] *Ibid.*, 678, par. 2.

[3] *Ibid.*, par. 3.

[4] Dig. J. A. Gen., 679, par. 4. Thus where the defect to be corrected consists in an omission properly to set forth a special plea made or objection taken by the accused, it may be desirable that he should be present in order that he may be heard as to the proper form of the proposed correction. Where the error is *clerical* merely, or, though relating to a material particular, consists in the omission of a formal statement only, the presence of the accused is not in general called for. *Ibid.*

[5] *Ibid.*, par. 5.

advocate, independently of the court, and by means of an erasure or interlineation, or otherwise, is unauthorized and a grave irregularity. The correction must be wholly made and recorded in and by the formal proceedings upon the revision. The record of the correction, as thus made, will refer of course to the page or part of the record of the trial in which the omission or defect occurs; but this part of the record must be left precisely as it stands. The court is no more authorized to correct the same by erasure or interlineation on the page, or by the substitution for the defective portion of a rewritten corrected statement, than would be the judge-advocate or a member.[1]

Where the court has been dissolved or, by reason of any casualty or exigency of the service, cannot practically be reconvened, there can of course be no correction of its proceedings.[2] The procedure here contemplated is of course quite distinct from the ordinary revision and correction of its proceedings by a court-martial, from day to day, during a trial and before the record is completed.[3]

PUBLICATION AND EXECUTION.

Publication of the Sentence; Execution.—It has been seen that the proceedings, as well as the findings and sentence, of a military tribunal are merely advisory in character, and until they have been approved or confirmed by the proper reviewing authority are legally inoperative. The proceedings in a particular case, therefore, having been acted upon, the findings and sentence, having been formally approved or confirmed, are published in orders; this to the end that execution of the sentence may be had, and that the proper disciplinary effect upon the command of the offender may be secured. Although such publication of the sentence is not essential to its validity, or a necessary preliminary to its execution, its formal announcement in orders is rarely omitted.

"The order promulgating the proceedings of a court and the action of the reviewing authority will be of the same date, when practicable. When this is not practicable, the order will give the date of the action of the reviewing authority as the date of the beginning of the sentence. This does not apply to sentences of forfeiture of all pay and allowances,"[4] such

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[1] Dig. J. A. Gen., par. 6.
The reviewing officer himself can have no authority to make a correction in any part of the record. Thus where, upon a specification duly setting forth a military offense, a court-martial found an accused "guilty but without criminality," and the reviewing commander, in disapproving this contradictory finding, ordered that the words after "guilty" be treated as struck out of the record, *held* that, however objectionable the finding, the reviewing officer could not himself assume to correct it, but, if he desired it amended, should have formally reconvened the court for the purpose. *Ibid.*, 680, par. 8.

[2] *Ibid.*, 680, par. 9.

[3] *Ibid.*, par. 10. See Revision of findings and sentence, p. 158, *ante*.

[4] Par. 945, Army Regulations of 1895.

a sentence being retroactive in its operation, applying to all pay due as well as that to become due.

When the date for the commencement of a term of confinement imposed by sentence of a court-martial is not expressly fixed by the sentence, the term of confinement begins on the date of the order promulgating it. The sentence is continuous until the term expires, except when the person sentenced is absent without authority.[1]

The word "month" or "months," employed in a sentence, is to be construed as meaning *calendar* month or months; the same significance being given to the term as is now commonly given to it in the construction of American statutes in which the word is employed. The old doctrine that "month," in a sentence of court-martial, meant *lunar* month has long since ceased to be accepted in our military law.[2]

When a sentence imposes forfeiture of pay, or of a stated portion thereof, for a certain number of months, it stops for each of those months the amount stated. Thus "ten dollars of monthly pay for one year" would be a stoppage of one hundred and twenty dollars. When the sentence is silent as to the date of commencement of forfeiture of pay, the forfeiture will begin at the date of promulgation of the sentence in orders, and will not apply to pay which accrued previous to that date.[3]

Cumulative Sentences.—Where, while an officer or soldier is undergoing a certain sentence, he is again brought to trial for a military offense, and a further sentence is adjudged him, imposing a punishment of the same species as that which is being executed, it is the general rule of the service that the second sentence is to be regarded as *cumulative* upon the first, and that its execution is to commence when the execution of the first is completed. This whether or not the court, in the second sentence, may have in terms specified that the second punishment should be additional to the

[1] Par. 944, Army Regulations of 1895.

[2] Dig. J. A. Gen., 699, par. 12. *Held* that the term "days," in a sentence of a regimental court requiring a soldier "to walk four days with a loaded knapsack," etc., did not include nights, and should not be considered as embracing any longer period of the twenty-four hours than that included between reveillé and retreat. *Ibid.*

[3] Par. 951, Army Regulations of 1895. A sentence to confinement, with or without forfeiture of pay, cannot become operative prior to the date of confirmation. If it be proper to take into consideration the length of confinement to which the prisoner has been subjected previous to such confirmation, it may be done by mitigation of sentence. Par. 947, *ibid.*

The rule prescribed in pars. 944 and 947, A. R.,* to the effect that confinement and forfeiture, when the sentence is silent as to the time of their taking effect, shall be operative from the date of the promulgation of the sentence in orders, is an exception to the general rule that orders affecting the status or rights of officers or soldiers shall take effect from notice. But where a sentence of dismissal of a cadet of the Military Academy was commuted to suspension from the Academy, without pay, from Oct. 31, 1893, (the date of the order,) to Aug. 28, 1894, *held* that the general rule, in the absence of any specific exception of such a case by the Army Regulations, applied, and that the sentence as commuted took effect upon and from *notice*, the forfeiture commencing to run from its date. Dig. J. A. Gen., 702, par. 21.

* Edition of 1895.

first; such second punishment being made cumulative by operation of law irrespective of any direction in the sentence.[1]

Adding to Punishment.—It is a principle of military law that no military authority, whether the reviewing officer or other commander, can *add to a punishment* as imposed by a court-martial. For this reason neither forfeiture of pay, nor fine, nor a corporal punishment can be inflicted upon an officer or soldier where the sentence fails to adjudge it. And neither the fact that the punishment awarded by the court is regarded as an inadequate one nor the fact that the period is a time of war can affect the application of the principle. Thus where the punishment imposed by the sentence was to carry a weight of twenty pounds, it has been held that it would be illegal for the officer charged with the execution of the sentence to increase the weight to thirty pounds.[2]

A legal sentence of court-martial, when once duly approved and executed, cannot be reached by a pardon, nor revoked, recalled, modified, or replaced by a milder punishment or other proceeding, either by the Executive or by Congress.[3] The only remedy for a party who has suffered injustice from such a sentence is either a new appointment to the Army by the President or some legislation within the province of Congress relieving or indemnifying him for and on account thereof.[4]

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[1] Dig. J. A. Gen., 698, par. 10. When soldiers awaiting result of trial or undergoing sentence commit offenses for which they are tried, the second sentence will be executed upon the expiration of the first. Par. 948, A. R. 1895.

[2] Dig. J. A. Gen., 699, par. 13. So where the sentence imposed simply a forfeiture of pay, *held* that it was adding to the punishment to order it to be executed at a military prison. So *held* that a sentence of simple "confinement" for a certain time did not authorize the imposition, in connection with its execution, of hard labor. So *held* illegal to execute a sentence of "confinement in a military prison" by committing the party to a State penitentiary. (And see more particularly, as to adding to the punishment in cases of sentences of confinement, the title "Imprisonment," Dig. J. A. Gen., 441, §§ 7, 8, 9.) Where an officer, on conviction of the embezzlement of a certain sum, was sentenced, without further penalty, to be dismissed the service, *held* that the department commander, in approving the sentence, could not legally order him to be confined at his station till he should make good the amount embezzled, since this would be an adding to the punishment imposed by the court, as well as an illegal exercise of power over a civilian. *Ibid.*, 699, par. 13. See, also, Barweis *vs.* Keppel, 2 Wilson, 314.

A sentence adjudging a dishonorable discharge, to take effect at such period during a term of confinement as may be designated by the reviewing authority, is illegal. Par. 949, A. R. 1895.

The time at which a dishonorable discharge is to take effect, as fixed by a sentence, cannot be postponed by the reviewing officer. Par. 950, *ibid.*

When the court has sentenced a prisoner to confinement at a post, no power is competent to increase the punishment by designating a penitentiary as the place of confinement. Par. 942, *ibid.*

A mitigated sentence can no more be *added to*, in execution, than can an original sentence approved without mitigation. Dig. J. A. Gen., 702, par. 16.

[3] The well-established principles that mere irregularities in the proceedings will not affect the validity of an *executed* sentence, and that a legal sentence once duly confirmed and executed is "no longer subject to review by the President," so pointedly set forth (in 1843) in 4 Opins. Att.-Gen., 274, are further illustrated in 15 *id.*, 290, 432.

[4] Dig. J. A. Gen., 701, par. 15.

CHAPTER IX.

PUNISHMENTS.

Prohibited Punishments.—Certain forms of punishment are forbidden by statute to be imposed by military tribunals. In some instances this prohibition is absolute, as in case of flogging, or of branding, marking, or tattooing the body; others are prohibited in time of peace only, and may be imposed in time of war or in presence of the enemy.[1] Military duty is honorable, and to impose it in any form as a punishment must tend to degrade it, to the prejudice of the best interests of the service.[2]

The Limits of Punishment Order.—The operation of the Executive Order imposing limits upon the power of courts-martial to impose discre-

[1] Article VIII of the Amendments to the Constitution prohibits the infliction of "cruel and unusual punishments." While this provision does not necessarily govern courts-martial, inasmuch as they are not a part of the judiciary of the United States,* it should be observed as a general rule. Thus where, for an offense not peculiarly aggravated, a court-martial imposed upon a soldier, in connection with a forfeiture of pay for six months, the further penalty of carrying a loaded knapsack, weighing twenty-four pounds, every alternate hour from sunrise to sunset of each day (Sundays excepted) during that period, *held* that this punishment was excessive and exceptional, and, the same having been suffered by the soldier for three months, *recommended* that its unexpired term be at once remitted. Dig. J. A. Gen., 697, par. 7.

Punishments are *cruel* when they are vindictive in character, going both in kind and degree beyond the intention and necessity of their infliction for the vindication of law; they are *unusual* when unknown to the statutes of the land or unsanctioned by the customs of the courts; a punishment is also *unusual* when, though apparently warranted by law, it is so manifestly out of all proportion to the offense as to shock the moral sense by its barbarity, or because it is a punishment long disused for its cruelty until it has become unusual.†

The punishment of ball and chain, though sanctioned by the usage of the service, should, in the opinion of the Judge-Advocate General, be imposed only in extreme cases. Its remission has in general been recommended by him except in cases of old offenders or aggravated crime, where deemed serviceable as a means of obviating violence or preventing escape. This penalty has (as have also those of shaving the head and drumming out of the service) become rare in our army, since the further corporal punishment of branding, marking, etc., has been expressly prohibited by statute. *Ibid.*, par. 8. See Act of June 6, 1872, (17 Stat. at Large, 261,) now incorporated in the 98th Article of War.

[2] Thus *advised* that a sentence "to do extra duty" for a certain term would properly

* That the provisions of the Vth, VIth, and VIIIth Amendments to the Constitution, relating to criminal proceedings, apply only to the courts, etc., of the United States, see Barron *vs.* Mayor of Baltimore, 7 Peters, 243; *Ex parte* Watkins, *id.*, 573; Twitchell *vs.* The Commonwealth, 7 Wallace, 326; Edwards *vs.* Elliott, 21 *id.*, 557; Walker *vs.* Sauvinet, 2 Otto, 90; Pearson *vs.* Yewdall, 5 *id.*, 294; 1 Bish. Cr. L., § 725.

† DeHart 68; Cooley, Constitutional Law, 296.

tionary punishments upon enlisted men is calculated to regulate and, to a certain extent, to restrict such exercise of discretion in respect to the Articles of War to which it relates. The terms of the order must be strictly followed as to all sentences to which it applies, and punishments in excess of those therein prescribed are unauthorized and are not susceptible of being validated by an exercise of power on the part of the reviewing authority.[1] Where, however, a sentence in excess of the legal limit is divisible, such part as is legitimate may be approved and executed. Thus where a sentence of an inferior court imposes a fine or forfeiture beyond the limit of the 83d Article of War, the sentence may be approved and executed as to so much as is within the limit.[2]

Increase of Punishment.—It is a well-established principle of penology that the punishment imposed for a second or any subsequent conviction of a particular offense should in general be more severe than that imposed upon a first or prior conviction of the same or a similar offense. This principle has been applied to the procedure of courts-martial in the rules, established by the President,[3] regulating the limits of punishment to be imposed by courts-martial in cases in which such punishment is discretionary with the court. This with a view to obtain the deterrent effect of increased punishment upon military offenders as a class, and to secure a similar result in respect to individual offenders who have been convicted of repeated violations of particular disciplinary provisions. For the reasons above stated, therefore, the court, having reached a finding of guilty in a particular case, is reopened and the prosecution is permitted to introduce evidence of previous convictions of the ~~same or similar~~ offenses, the purpose being to see whether "the prisoner is an old offender, and therefore less entitled to leniency than if on trial for his first offense."[3]

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be disapproved. So *advised* of sentences imposing "guard duty" for certain periods. So *advised* of a sentence imposing, in connection with a term of confinement in charge of the guard, the penalty of "sounding all the bugle-calls at the post during the same period." So *advised* in regard to a sentence which required a deserter, not for the purpose of making good the time lost by his desertion, but as a *punishment*, to serve for an additional year after the expiration of his term of enlistment. *Ibid.*, 698, par. 9.

[1] Acts of September 27, 1890, (26 Stat. at large, 491,) and October 1, 1891, (26 *ibid.*, 648). Under the authority conferred by these statutes three orders prescribing limits of punishment have been issued by the President. The one now in force bears date of March 30, 1898, and was published to the Army in General Orders No. 16, Adjutant-General's Office, of April 6, 1898.

[2] Dig. J. A. G., 702, par. 19. A sentence cannot legally extend the time of the service of a soldier beyond the term for which he originally contracted. *Ibid.*, par. 17.

The existing law fixing the term of a soldier's enlistment at three years, a court-martial can have no power to prolong it by adding to such term an additional period by way of *punishment*. *Ibid.*, par. 17.

[3] See note 1, *supra*.

PUNISHMENTS.

Sources.—The punishments which courts-martial may inflict upon the conviction of persons accused of military offenses are regulated by statute, as in the Articles of War, or by Executive Order or regulation, in pursuance of a statute, and, to a limited extent, by the custom of service. The following are those most frequently imposed upon commissioned officers.

Death.—To the validity of a death-sentence it is essential that two thirds of the members should concur,[1] and then only when the authority to impose capital punishment has been expressly conferred by law. Several of the Articles authorize "any punishment except death" to be imposed as a consequence of their violation; such sentences, however, must conform in character to the punishments authorized by statute or by the custom of service to be inflicted in such cases.[2]

Execution of the Death-sentence.—For military offenses the form of death-sentence imposed is that by "shooting to death by musketry"; for murder and other common-law offenses which are punishable capitally the

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[1] 96th Article of War. Though it has sometimes been viewed otherwise, it is deemed quite clear upon the terms of the present Article that it is not necessary to the legality of a death-sentence that two thirds of the court should have concurred in the finding as well as the sentence.* Further, in the absence of any requirement to that effect in the Article, it is not deemed essential to the validity of the sentence that the record should state the fact that two thirds of the court concurred therein. The practice, however, has been to add such a statement. Dig. Opin. J. A. Gen., 112, par. 1.

A sentence of death imposed by a court-martial, upon a conviction of several distinct offenses, will be authorized and legal if any one of such offenses is made capitally punishable by the Articles of War, although the other offenses may not be so punishable. *Ibid.*, par. 2.

A court-martial, in imposing a death-sentence, should not designate a time or place for its execution, such a designation not being within its province, but pertaining to that of the reviewing authority. If it does so designate, this part of the sentence may be disregarded, and a different time or place fixed by the commanding general. *Ibid.*, par. 3.

Where a death sentence imposed by a court-martial has been directed by the proper authority to be executed on a particular day, and this day, owing to some exigency of the service, has gone by without the sentence being executed, it is competent for the same authority, or his proper superior, to name another day for the purpose, the time of its execution being an immaterial element of this punishment.† *Ibid.*, par. 4.

[2] Death-sentences may be imposed, as a discretionary penalty, upon conviction of the offenses named in the 21st, 22d, 23d, 41st, 42d, 44th, 45th, 47th, 49th, 51st, and 58th Articles; such a sentence is mandatory upon conviction of the offenses set forth in the 57th Article and in Section 1343, Revised Statutes.

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* Compare McNaghten, 120.

† It was held by the Supreme Court in Coleman *vs.* Tennessee (7 Otto, 519, 520) that a soldier who had been convicted of murder and sentenced to death by a general court-martial in May, 1865, but the execution of whose sentence had been meanwhile deferred by reason of his escape and the pendency of civil proceedings in his case, might at the date of the ruling (October term, 1878) "be delivered up to the military authorities of the United States, to be dealt with as required by law."

More recently (May, 1879, 16 Opins., 349) it has been held in this case by the Attorney-General that the death-sentence might legally be executed notwithstanding the fact that the soldier had meanwhile been discharged from the service, such discharge, while formally separating the party from the Army, being viewed as not affecting his legal status as a military convict. But, in view of all the circumstances of the case, it was recommended that the sentence be commuted to imprisonment for life or a term of years.

sentence usually imposed is that by hanging; the same form is awarded in cases involving ignominy, as for the offense of being a spy, or of desertion to the enemy in time of war. Death-sentences usually contain the requirement that the sentence shall be carried into execution in the presence of so much of the command of the accused (or of the reviewing officer) as can be "conveniently assembled for that purpose."

Dismissal.—This punishment is authorized to be imposed for the violation of a number of the Articles of War, and in a majority of cases is mandatory; in others it may be imposed at the discretion of the court, either separately or in combination with other forms of punishment, such as forfeiture of pay, or fine and imprisonment. Its effect is to completely separate the officer so sentenced from the military service, and to restore him to the status of a citizen. He can re-enter the service only in pursuance of an appointment by the President with the consent of the Senate.[1] A sentence of dismissal becomes operative upon its official delivery to the officer affected thereby, or upon the receipt, on his part, of a formal notification of its approval or confirmation.[2] For convenience the present practice is to designate, in the order promulgating the case, a date upon which the dismissal will take effect.

Publication.—When an officer has been "dismissed from the service for cowardice or fraud," the law requires that "the sentence shall further direct that the crime, punishment, name, and place of abode of the delinquent shall be published in the newspapers in and about the camp, and in the State from which the offender came or where he usually resides; and after such publication it shall be scandalous for an officer to associate with him."[3]

Statutory Consequences of Dismissal.—In several of the Articles a sentence of dismissal serves to bring into operation certain statutory consequences that follow upon and form part of the punishment imposed by the sentence of the court-martial. Such consequences are expressly stated in the particular Article which authorizes them, and need not, and usually do not, form part of the sentence imposed by the court.[4]

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[1] Mimmack *vs.* U. S., 97 U. S., 426; McElrath *vs.* U. S., 102 *ibid.*, 426; Blake *vs.* U. S., 103 *ibid.*, 227; Keyes *vs.* U. S., 109 *ibid*, 336.

[2] Dig. J. A. Gen., 366, par. 3. Dismissal is mandatory upon conviction of any of the offenses named in the 5th, 6th, 13th, 14th, 15th, 18th, 19th, 26th, 27th, 38th, 54th, 59th, and 61st Articles; it is discretionary with the court as to the offense named in Article 3.

[3] 100th Article of War. Cashiering and dismissal were once quite distinct punishments in military law; the former involving, in addition to a dishonorable separation from the service, a disability to hold public office; and this difference was illustrated by the fact that cashiering was sometimes mitigated to dismissal. All distinction, however, between the two forms has long since ceased to exist in our law; cashiering with us meaning nothing more or other than dismissal. A sentence "to be cashiered"—now a rare form—is equivalent to a sentence to be *dismissed* the service. Dig. J. A. Gen., 214.

In the code of 1874 the term "cashiered" has been retained, apparently by inadvertence, in two Articles, the 8th and 50th. Dig. J. A. Gen., 214.

[4] See the 6th, 14th, and 100th Articles of War.

Disqualification for Office.—Disqualification, or incapacity to hold office under the United States, although a punishment sanctioned by precedent in the military service, is no longer regarded as an appropriate penalty in the cases of commissioned officers, save in the cases, presently to be described, in which it is specifically authorized by statute. This for the reason that it comes into conflict with the constitutional power of the President to make appointments to office; a power from its nature not susceptible of limitation, either by statute or by the sentence of a lawfully constituted court-martial. It is specifically authorized in two Articles of War, the 6th and 14th, but is here apparently intended, not as an independent punishment, but as a penal consequence incident upon conviction and sentence of dismissal. As a distinctive punishment, however, there are numerous instances in which it has been imposed,[1] having been regarded apparently as a particularly suitable penalty in cases of embezzlement of public funds or other fraud upon the government. In some instances the disqualification, as adjudged, has extended to the holding of public office in general; in others it has been confined to the holding of military office.

Disqualification, being a *continuing* punishment, may of course be removed by a remission of the same by the pardoning power at any time during the life of the party. But while the disqualification for *military* office is less objectionable than the more general form, it may well be doubted whether this species of punishment, inasmuch as it assumes in effect to inhibit the exercise by the Executive of the appointing power, is within the authority of a court-martial.[2]

Imprisonment.—This punishment, which is awarded only for the more serious offenses, may be imposed separately or in connection with or addi-

[1] Instances of sentences, including (generally with dismissal) the punishment of disqualification, are to be found in the following Orders of the War Department (or Hdqrs. of Army) published before the late war, the instances being none of them cases of conviction of false muster: G. O. of April 2, 1818; do. of Sept. 25, 1819; do. 71 of 1829; do. 15 of 1860. The unfrequency of this punishment in the early Orders may perhaps be owing in part to the fact that it was considered that "cashiering"—a sentence often then adjudged—involved disqualification. See note 3, page 166. Similar instances of the same punishment occur in the following Orders issued from the War Department during and since the late war. For instances of such sentences see Dig. J. A. Gen., 375, par. 1, note 1.

[2] Dig. J. A. Gen., 375, par. 1. This punishment, however, has, since 1870, been discontinued in the practice of our courts-martial, and this discontinuance is to be traced to the ruling of the Attorney-General in an opinion addressed to the Secretary of the Navy in 1868 (12 Opins., 528) to the effect that a sentence of a *naval* court-martial by which a contractor for naval supplies was excluded from future dealings for such supplies with the government was illegal; sentences of disability in general being further held to be "not in accordance with the custom of the service except where expressly authorized by law." This ruling was applied to a military case in G. C. M. O. 22 (as also in do. 57), War. Dept., etc., of 1870, and the punishment of disqualification imposed upon an officer disapproved as unauthorized. But whatever may have been the usage of *naval* courts-martial, the very numerous precedents of cases in which such punishment had been adjudged by *military* courts for a great variety of offenses were, it is considered, quite sufficient to have established that this penalty was sanctioned by custom in the Army. That it is, however, subject intrinsically to serious legal objection is indicated in the text. *Ibid*, note 1.

tion to a sentence of dismissal; it may also be imposed with or without hard labor, at the discretion of the court. The term of imprisonment should be expressly stated in the sentence,[1] although a sentence of imprisonment until a certain fine, specified in the sentence, has been paid is still authorized by custom of service.[2] For a reason presently to be stated, the place of confinement, as a prison, penitentiary, etc., and its character, must be described in the sentence, leaving the particular prison or penitentiary in which the sentence is to be executed to be designated by the reviewing authority in the order promulgating the proceedings of the court.[3] The place so designated for the execution of the sentence may be changed, at any time, at the discretion of the reviewing authority, or his proper superior, or successor in office.[4] In accordance with the present practice,

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[1] A sentence which, in imposing confinement (or imprisonment—the two terms being practically synonymous in sentences of courts martial), fails clearly to indicate how long the same is to continue is irregular and inoperative. Such a sentence should be disapproved by the reviewing authority unless it can be procured to be corrected by a reassembling of the court for the purpose. Dig. J. A. Gen., 439, par. 1.

[2] Sentences of imprisonment till a fine, also imposed by the sentence, is paid are sanctioned by the usage of the service. It is proper, however, in such sentences to affix a limit beyond which the punishment shall not be continued in any event. Where a sentence adjudges a fine, without also adding (with a view to enforcing its payment) a term of confinement, such a confinement cannot of course legally be imposed by the military commander. So, held that par. II of G. O. 61, War Department, 1865,—to the effect that where a court-martial, in imposing a fine, has failed to require that the prisoner shall be confined till the fine is paid, he will not be released without orders from the War Department except on payment of the fine,—transcended the authority of an executive order; such a requirement being a *punishment*, which can be prescribed only by sentence of court-martial. *Ibid.*, 440, par. 4.

[3] Where an officer or soldier is sentenced to be confined in a penitentiary, the proper reviewing authority may legally designate for the execution of the punishment any State or Territorial penitentiary within his command. Where there is no such penitentiary available for the purpose or desirable to be resorted to, he will properly submit the case to the Secretary of War for the designation of a proper penitentiary. *Ibid.*, 114, par. 7.

[4] It is not adding to the punishment, and is authorized at military law, for the commander who ordered the original commitment, or his proper superior, to *change* the place of confinement of a prisoner if such a change is required by the exigencies of the service, provided that no more severe species of confinement than that contemplated in the sentence is enforced after the transfer. *Ibid.*, 442, par. 9. See, also, paragraphs 942 and 946, A. R., 1895.

While the authority upon whom it devolves to execute a sentence of confinement is not authorized to add to the punishment adjudged, he is, on the other hand, not justified in executing the same in so indulgent a manner as to divest the punishment of its intended and legitimate force and effect. Thus where certain prisoners, sentenced to terms of confinement on conviction of grave offenses, were, while in ordinary good health, permitted to be employed upon honorable duties as clerks, etc., in the offices attached to (and one of which was outside of) the prison, *held* that such employment was in derogation of the proper requirements of a sentence of imprisonment and should be ordered to be discontinued. *Ibid.*, par. 10.

It is not adding to the punishment in executing a sentence of confinement to require the prisoner to perform work prescribed for prisoners of his class by the *statute* law. Thus persons sentenced to imprisonment at the Military Prison at Leavenworth may legally be employed in the labor or at the trades indicated by Sec. 1351, Rev. Sts. *Ibid.*, par. 8.

Where an officer or soldier is sentenced merely to a term of confinement without the addition of "hard labor," while he may properly be required to perform the ordinary domestic or police work directed by the sanitary regulations of the prison, he cannot

a sentence of imprisonment becomes operative upon a date fixed therefor by the reviewing authority in the order of promulgation.[1]

Imprisonment in a State Prison or Penitentiary.—With a view to discriminate between military offenses, properly so called, and those which are regarded as felonies by statute or by the common law, the 97th Article of War contains the requirement that "no person in the military service shall, under the sentence of a court-martial, be punished by confinement in a penitentiary, unless the offense of which he may be convicted would, by some statute of the United States, or by some statute of the State, Territory, or District in which such offense may be committed, or by the common law as the same exists in such State, Territory, or District, subject such convict to such punishment."[2]

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properly be put to unusual labor of a severe and continuous character. Thus *held* that to require a soldier sentenced simply to be confined at Alcatraz Prison, to work daily at blasting and quarrying rock was *adding to the punishment* and was therefore unauthorized. To a proper execution, however, of a sentence of confinement a secure keeping of the person is of course essential. Where, therefore, it is not possible otherwise to prevent a prisoner's escape or to prevent violence on his part, he may be *ironed* without adding to the punishment. But such exceptional restraint cannot legally be imposed except where thus *necessary*. Dig. J. A. Gen., 441, par. 7.

[1] The old rule, that the term of a confinement (of so many months, years, etc.) imposed by sentence of court-martial commenced on the day on which the prisoner was delivered to the proper officer—as the officer in charge of the prison or commanding the post—to be confined according to the sentence, having been found inconvenient in practice, there was substituted for it, by G. O. 21, Hdqrs. of the Army, of 1870, the rule that "the confinement shall be considered as commencing at the date of the promulgation of the sentence in orders." This rule being more favorable to prisoners than the old one, its authority is not known to have ever been questioned. *Ibid.*, 441, par. 5. The equally liberal and more exact rule stated in the text is now generally followed.

[2] This Article, by necessary implication, prohibits the imposition of confinement in a penitentiary as a punishment for offenses of a purely or exclusively military character—as desertion, for example.* Dig. J. A. Gen., 113, par. 1.

The term "penitentiary," as employed in this Article, has reference to civil prisons only—as the penitentiary of the United States or District of Columbia at Washington, the public prisons or penitentiaries of the different States, and the penitentiaries "erected by the United States" (see Sec. 1892, Rev. Sts.) in most of the Territories. The military prison at Leavenworth is not a penitentiary in the sense of the Article. The term State or State's prison in a sentence is equivalent to penitentiary. *Ibid.*, 114, par. 5.

A military prisoner duly sentenced or committed to a penitentiary becomes subject to the government and rules of the institution. *Ibid.*, par 6.

A sentence of penitentiary confinement in a case of a purely military offense is wholly unauthorized and should be disapproved. Effect cannot be given to such a sentence by *commuting* it to confinement in a military prison, or to some other punishment which would be legal for such offense. Nor, in a case of such an offense, can a severer penalty, as death, be commuted to confinement in a penitentiary. *Ibid.*, 113, par 2.

Nor can penitentiary confinement be legalized as a punishment for purely military offenses by designating a penitentiary as a "military prison," and ordering the confinement there of soldiers sentenced to imprisonment on conviction of such offenses. *Ibid.*, par. 3.

A punishment of confinement in a penitentiary, where legal, may be mitigated to confinement in a military prison or at a military post. *Ibid.*, 116, par. 15.

Where a court-martial specifically sentences an accused to confinement in a "military prison," he cannot legally be committed to a penitentiary, although such form of

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* See G. O. 4, War Dept., 1867; also the action taken in cases in the following General Orders: G. O. 21, Dept. of the Platte, 1866; do. 21 *id.*, 1871; do. 44, Eighth Army Corps, 1862; G. C. M. O. 34, 35, 43, 46, 72, 73, Dept. of the Missouri, 1870.

The terms of this Article constitute a restriction upon the power of courts-martial to impose sentences of imprisonment in respect to the character of the restraint, or the place in which the sentence is to be executed, and "it is nowhere provided that the punishment may not in other respects be greater than the civil courts could inflict."[1]

Confinement to Limits.—A form of confinement much less severe than imprisonment, called confinement to limits, is recognized by custom of service as an appropriate punishment for commissioned officers. It consists in a restriction of the offender to certain limits expressly described in the sentence. Such confinement may consist in restriction to the limits of a military post or reservation or, as expressed in a recent sentence, to the area or territory within a certain distance from a city specially mentioned in the

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imprisonment would be authorized by the character of his offense. But where a sentence of confinement is expressed in general terms, as where it directs that the accused shall be confined "in such place or prison as the proper authority may order," or in terms to such effect, *held* that the same may, under this Article, legally be executed by the commitment of the party to a penitentiary, to be designated by the reviewing officer or Secretary of War, provided of course the offense is of such a nature as to warrant this form of punishment. Dig. J. A. Gen., 114, par. 9.

An offense charged as "Conduct to the prejudice of good order and military discipline," which, however, is in fact a larceny,* embezzlement, violent crime, or other offense made punishable with penitentiary confinement by the law of the State, etc., may legally be visited with this punishment. *Ibid.*, 114, par. 4.

Where the act is charged as a crime under Art. 62, and charge and specification taken together show an offense punishable with confinement in a penitentiary by the law of the *locus* of the crime, the sentence may legally adjudge such a punishment. So *held* in a case where charge and specification together made out an allegation of perjury under Sec. 5392, Rev. Sts. *Ibid.*, 115, par. 11.

Held that penitentiary confinement could not legally be adjudged upon a conviction of a violation of the 21st Article, alleged in the specification to have consisted in the lifting up of a weapon (a pistol) against a commanding officer and discharging it at him with intent to kill. By charging the offense under this Article, the Government elected to treat it as a purely military offense subject only to a military punishment. So, upon a conviction of joining in a mutiny, in violation of Art. 22, *held* that a sentence of confinement in a penitentiary would not be legal although the mutiny involved a homicide, set forth in the specification as an incidental aggravating circumstance. To have warranted such a punishment in either of these cases the Government should have treated the act as a "crime," and charged and brought it to trial as such, under Art. 62. *Ibid.*, par. 10.

"Obtaining money under false pretenses" is punishable by confinement in a penitentiary by the laws of Arizona. A sentence of court-martial, imposing this punishment, on conviction of an offense of this description committed in this Territory, charged as a crime under Art. 62, *held* authorized by Art. 97. *Ibid.*, par. 12.

A conviction of a larceny of property of such slight value as not to authorize this punishment under the local law would not warrant a sentence of confinement in a penitentiary. In a case of larceny the court should inform itself as to whether the value of the property stolen be not too small to permit of penitentiary confinement for the offense under the law of the State, etc. *Ibid.*, par. 13.

[1] *Ex parte* Mason, 105 U. S., 696; Manual for Courts-martial, p. 52, paragraphs 14 and 15. A court-martial, in imposing by its sentence the punishment of confinement in a penitentiary, is not required to follow the statute of the United States or of the State, etc., as to the *term* of the confinement. It may adjudge, at its discretion, a less or a greater term than that affixed by such statute to the particular offense. At the same time the court will often do well to consult the statute, as indicating a reasonable measure of punishment for the offense. Dig. J. A. Gen. 114, par. 8.

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* In a case of *larceny* the court should inform itself as to whether the *value* of the property stolen be not too small to permit of penitentiary confinement for the offense under the local law. See G. O. 44, Eighth Army Corps, 1862; G. C. M. O. 63, Dept. of the Platte, 1872.

order of promulgation. Such confinement does not partake of the nature of a military arrest, and a failure to observe the limits specified in the sentence would be chargeable under the 62d Article of War.[1] Nor, on the other hand, does such restriction involve any of the statutory consequences incident to imprisonment, or confer incapacity to testify, as would confinement in a state prison or penitentiary.[2]

Suspension.—Three of the elements which go to make up the legal status of a commissioned officer, rank, command, and pay may be reached by a sentence of suspension, and one or more than one of these elements may be affected by the same sentence. "The punishment of suspension, as imposed by sentence, is usually in the form of a suspension from rank or from command for a stated term, sometimes accompanied by a suspension from pay for the same period. Suspension from rank includes suspension from command."[3]

Suspension from Rank or Command.—The effect of a suspension from rank is to detach the officer from the performance of the duties incident to his rank or office in the military service, and to deprive him of the right to *promotion* to a vacancy in a higher grade occurring pending the term of suspension and which he would have been entitled to receive by virtue of seniority had he not been suspended; such right accruing to the officer next in rank.[4] But no such loss of promotion is incident to a mere suspension from command.[5] Suspension from rank does not, however, deprive the officer of the right to rise in files in his grade,—upon the promotion, for example, of the senior officer of such grade.[6]

A suspension from rank does not affect the right of the officer to his office; which he retains the same as before, and, as an officer, remains subject to military control as well as to the jurisdiction of a court-martial for any military offense committed pending the term of suspension.[7]

Suspension from rank or command does not involve a loss of pay or authorize a stoppage thereof during the period of suspension.[8] Pay cannot

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[1] It has been seen that suspension from rank, as such, does not involve a status of confinement or arrest. In sentencing an officer to be suspended from rank, it is not unusual, however, for the court to require that he be confined during the term of suspension to his proper station, or that of his regiment, etc., *i.e.*, that the sentence be executed there. Dig. J. A. Gen., 730, par. 6.

[2] See the chapter entitled EVIDENCE.

[3] Dig. J. A. Gen., 729. par. 1.

[4] *Ibid.*, 730, par. 3; see, also, *ibid*, 617, par. 4.

[5] *Ibid.*, 730. par. 3.

[6] *Ibid.*, 617, par. 4. The number of an officer in the list of his grade is not an incident of his rank, but of his appointment to office as conferred and dated, and, as we have seen, suspension does not affect the *office*. Moreover, loss of files is a *continuing punishment*, and if held to be involved in suspension from rank, the result would be that, for an indefinite period after the term of suspension had expired, the officer would remain under punishment, the sentence imposed by the court being thus *added to* in execution, contrary to a well-known principle of military law. *Ibid.*

[7] *Ibid.*, 729, par. 2; 5 Opin. Att.-Gen., 740; 6 *Ibid.*, 715.

[8] *Ibid.*, 731, par. 7; 4 Opin. Att.-Gen., 444; 6 *idem*, 203.

be forfeited by implication. Unless, therefore, the sentence imposes a suspension from rank (or command) "and pay," or in terms to that effect, the suspended officer remains as much entitled to his pay as if he had not been suspended at all, and to require him to forfeit any pay would be adding to the punishment and therefore illegal.[1]

It is further the effect of a suspension from rank that the officer loses for the time the minor rights and privileges of priority and precedence annexed to rank or command. Among these is the right to select quarters relatively to other officers. And where quarters are to be selected by several officers, one of whom is under sentence of suspension from rank, the suspended officer necessarily has the last choice; or, rather he has no choice, but quarters are *assigned* him by the commander; for, being still an officer of the army, though without rank, he is entitled to some quarters.[2]

Suspension from rank does not involve a status of confinement or arrest. In sentencing an officer to be suspended from rank, it is indeed not unusual for the court to require that he be confined during the term of suspension to his proper station or that of his regiment, etc., *i.e.*, that the sentence be executed there.[3]

While the suspended officer is not entitled to a leave of absence, it

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[1] Dig. J. A. Gen., 731, par. 7 A sentence of suspension from rank and pay does not affect the right of the officer to the allowances which are no part of his pay*—as the allowance for rent of quarters, as also the allowance for fuel, or rather right to purchase fuel at a reduced rate. *Ibid.*, par. 9.

In rare cases the form "to be suspended from the service" has been employed in the sentence. Such a suspension is equivalent, in substance, to a suspension from rank. A still rarer form, "to be suspended from duty," has been deemed to be practically equivalent to a sentence of suspension from command, and would still be appropriate in the case of an officer holding a position involving the performance of administrative duties, as distinguished from actual military command, as is the case of officers of the staff, to whose positions in the service military command, as such, is not attached. *Ibid.*, 732, par. 12. Suspension from duty, as distinguished from suspension from rank, is a recognized punishment in the naval service. Navy Regulations, 1896, par. 1850; Harwood, 134, 135. The form "to be suspended from rank and duty" occurs in G. C. M. O. 19, of 1885

[2] Dig. J. A. Gen., 730, par. 5. But *advised* that an officer sentenced to be suspended from rank could not because of such suspension alone be deprived of quarters previously duly selected, and occupied at the time of the suspension; such a sentence not affecting a right previously accrued and vested. *Ibid.* Under existing usage (1892) an officer suspended by sentence from rank and command is deemed entitled to retain his quarters. But such rule may, in some cases, work a considerable inconvenience as well as prejudice to discipline; as where, for example, the suspended officer is a post commander, and, pending the term of his suspension and while another officer has succeeded him as commander, continues to occupy the proper commanding officer's quarters. An army regulation prescribing that an officer in such a status shall not be entitled to retain or to select quarters by virtue of rank, but shall have assigned him any quarters that are available at his late station or elsewhere, *advised* as desirable to be adopted. *Ibid.*, 733, par. 17.

Under the ruling of the Secretary of War, as published in Circ. No. 3 (H. A.), 1888, an officer under suspension, but not required by his sentence to be "confined to the limits of his post," is not entitled to forage for his horse or horses during the term of his suspension. *Ibid.*, par. 18.

[3] *Ibid.*, 730, par. 6.

cannot affect the execution of his sentence to grant him one, and leaves of absence are not unfrequently granted under such circumstances.[1]

The status of an officer under suspension is the same whether such suspension has been imposed directly by sentence or by way of commutation for a more severe punishment. Thus where a sentence of dismissal was commuted to suspension from rank on half-pay for one year, it has been held that the officer, while forfeiting the rights and privileges of rank and command during such term, was yet amenable to trial by court-martial for a military offense committed pending the same.[2]

Suspension of Pay. — Where, however, the suspension is in terms extended by the sentence to pay, the pay is forfeited absolutely, not merely withheld. And all the pay is forfeited unless otherwise expressly indicated in the sentence. The forfeiture imposed by a sentence of suspension from rank (or command) and pay for a designated term is a forfeiture of the pay of that specific term, the suspension of the rank and that of the pay being coincident.[3]

When Operative.—Like dismissal, suspension takes effect upon and from notice of the approval of the sentence officially communicated to the officer, either by the promulgation of the same at his station or, where he is absent therefrom by authority, by the delivery to him of a copy of the order of approval or other form of official personal notification of the fact of the approval.[4]

Termination of Sentence.—Suspension not divesting the officer of his office or commission, but simply holding in abeyance the rights and functions attached to his rank or command, he properly reverts, when the term of the punishment is completed, to his former rank and the command attached thereto, and continues to hold and exercise the same as before his arrest or trial.[5]

Where an officer, when under a sentence of suspension, is ordered by the commander who approved the sentence, or some higher competent authority, to resume his command or the performance of his regular military duty, such order will in general operate as a constructive remission of the punishment and thus terminate the suspension.[6]

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[1] Dig. J. A. Gen., 730, par. 12. Leave of absence is an indulgence which may be granted or refused at the discretion of the authority empowered by law and regulations to grant it. It is never demandable, as a matter of right, by any officer.

[2] Dig. J. A. Gen., 731, par. 10; *ibid.*, 733, par. 19.

[3] Dig. J. A. Gen., 731, par. 8. Under such a sentence the officer cannot legally be deprived of pay due for a period prior to the suspension. Where an officer was sentenced to suspension from rank and pay for six months, *held* that his entire pay for those months was absolutely forfeited notwithstanding that the pay of officers of his grade was increased by statute pending the term. *Ibid.* See, also, *Ibid.*, 733, par. 19.

[4] *Ibid.*, 732, par. 14.

[5] *Ibid.*, 733, par. 16. Sullivan, who (p. 88) traces this punishment to "the ecclesiastical jurisdiction, which admitted suspension as a minor excommunication," adds, in regard to the officer sentenced: "At the expiration of the term of suspension he becomes a perfect man again."

[6] Dig. J. A. Gen., 732, par. 11.

Suspension of Cadets.—Suspension may be awarded as a punishment in the case of a cadet at the Military Academy; the form "to be suspended from the Military Academy" being usually employed in the sentence. The operation of such a sentence would be to detach the cadet temporarily from duty at the Academy during the period of such suspension. It is usually added in such a sentence that 'at the end of such term of suspension the cadet is to join the next lower class.'[1]

Reduction in Rank.—Loss of or reduction in files or steps (*i.e.*, relative rank) in the list of the officers of his grade is a recognized legal punishment by sentence of court-martial in a case of a commissioned officer. Like disqualification, it belongs to the class of *continuing* punishments.[2]

The effect of this punishment is, by reducing the officer in rank, to deprive him of such relative right of promotion and command, as well as of precedence on courts or boards and in selecting quarters, etc., as he would have had had he remained at his original number. Such effect continues till the sentence is remitted. But this punishment cannot *per se* affect the officer's right to pay.[3]

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[1] Dig. J. A. Gen., 732, par. 13. Suspension does not affect pay unless expressly forfeited in the sentence; nor does a commutation of dismissal to suspension affect pay. When, therefore, a sentence of dismissal in the case of a cadet was commuted to suspension for one year, *held* that he was entitled to full pay during the year of suspension. *Ibid.*, 733, par. 19.

[2] 12 Opin., Att.-Gen., 547; Dig. J. A. Gen., 482, par. 1.

[3] *Ibid.*, 483, par. 3. Where a court-martial convened by a department commander for the trial of an officer sentences the accused, upon conviction, to the punishment of a loss of files or steps in the list of officers of his rank, the approval of the commander is sufficient to give full effect to the sentence, and no action by superior authority can add anything to its effect or conclusiveness. The code does not, as in the case of a sentence of dismissal, render a confirmation by the President essential to the execution of such a punishment, and the fact that the same involves a change in the Army Register does not make requisite or proper a revision of the case at the War Department. All that is called for upon the approval of such a sentence by the commander is simply to notify the Secretary of War thereof by forwarding a copy of the General Order promulgating such approval. The proceedings (or their substance) as affecting officers other than the accused may then well be republished in General Orders from the Adjutant-General's Office. *Ibid.*, 482, par. 2.

This punishment has sometimes been remarked upon as an objectionable one apparently mainly on account of the inequality of its effect upon other officers of the grade of the officer sentenced. Thus where an officer is reduced a certain number of files, those below whom he is placed are advanced, while those below himself gain nothing. Where he is reduced to the foot of the list this objection does not apply; this form of the punishment, however, where the list is a long one is extreme and severe; more severe, often, than suspension for a fixed term. *Ibid.*, 483, par. 4. See G. C. M. O. 25, War Dept., 1873; do. 2, Dept. of Dakota, 1873.

A second lieutenant was sentenced "to retain his present number on the lineal list of second lieutenants for three years." *Held* that this sentence necessarily deprived him of all right to promotion so long as it continued in force, and rendered him for so long ineligible for examination under the Act of October 1, 1890. Lieutenants junior to him may be advanced without any regard to him and precisely as if he were not on the list at all. The promotion of an officer in such a status would have the effect of a pardon. *Ibid.*, par. 5.

A lieutenant was sentenced "to be reduced two files in regimental rank." As the regimental rank of a line officer is the basis of his rank in his arm and in the army at large, *held* that his reduction on the regimental list involved a corresponding reduction on the lists of lineal and relative rank. *Ibid.*, 484, par. 6.

Reduction to the Ranks.—By several statutes[1] enacted during the continuance of the War of the Rebellion the punishment of reduction to the ranks was authorized to be inflicted upon commissioned officers. This punishment, inasmuch as it operated to divest the accused of his office, was in effect a dismissal; the status of an enlisted man, in which the officer was placed, was anomalous, since he occupied it, not voluntarily, but as a result of the sentence imposed and by operation of law. It is no longer legal, and cannot hereafter be imposed unless expressly authorized by statute; the statutory provisions indicated being impliedly confined in their application to the period of the late war (or for a limited period succeeding the same), and not being re-enacted in the Revised Statutes.[2]

Fines.—While punishments in the nature of fines are not frequently imposed by sentences of courts-martial, for the reason that punishments in the nature of pecuniary penalties are in general made the subject of forfeitures of pay, or of suspensions from pay for specific periods, they have been, and, in a proper case, may still be, imposed in such sentences.[3]

An officer, as the result of two successive trials by court-martial, stood sentenced to be reduced to the foot of the list of lieutenant-colonels of cavalry, and to remain there without advancement for two years. *Held* that such a sentence was a legal one, and that as the officer had no rank in the army independent of his rank in the cavalry arm, the former rank being incidental to and measured by the latter, his relative army rank was necessarily affected by the sentence in the same manner as his lineal rank. Dig. J. A. Gen., 484, par. 7. In the execution of his sentences this officer had lost four files in his grade by the promotion over him of four majors. *Held* that his status was equivalent to that of an officer sentenced to *lose files* for two years, and that his sentence was a continuing punishment, subject to be discontinued by pardon. *Ibid.*

A sentence of a first lieutenant "to be reduced in rank so that his name shall appear in the Army Register next below the name of" a certain other first lieutenant of his regiment, *held* not a punishment executed upon approval, so as to be beyond remission, but, like a sentence "to lose files," a continuing punishment removable by pardon.* *Ibid.*, par. 8.

In 1874 an officer, then a first lieutenant, was sentenced "to be reduced in rank so that his name should thereafter be borne on the rolls of the army next after that of" a certain other first lieutenant of the same regiment. This officer was promoted to a captaincy May 10, 1888, and the officer under sentence was similarly promoted August 20, 1889. Upon an application by the latter (July, 1890) to have his sentence remitted, *held* that by the operation of the first of these promotions the sentence was rendered irrevocable. A remission or pardon would not at this time restore the officer to the position he occupied prior to the sentence, nor divest the rights of others acquired by promotion during the pendency of his reduction. The sentence had indeed been fully executed and was therefore beyond the reach of the pardoning power. *Ibid.*, par. 9.

[1] Sec. 22, Act of March 3, 1863 (12 Stat. at Large, 735); Sec. 6, Act of March 12, 1863 (12 *ibid.*, 821).

[2] Dig. J. A. Gen., 653. Cases of officers sentenced to this punishment upon conviction under the first-named statute are published in G. O. 27, War Dept., 1864; do. 80, Dept. of the Gulf, 1863; do. 38, Dept. of the East, 1864; do. 36, Middle Dept., 1864; do. 5, 2d Div., 5th Army Corps, 1864; G. C. M. O. 25, 51, Army of Potomac, 1864; do. 12 *id.*, 1865. No instance has been met with of the imposition of this punishment upon a conviction under the *latter* statute. In some few cases, during the late war, this punishment was adjudged—illegally—for offenses other than those specified in the acts designated in the text.

[3] The only fine known to military law is the fine authorized to be imposed by way of punishment by sentence of court-martial. No military commander is empowered under

* 12 Opins. Att.-Gen., 547; 17 *id.*, 17, 656.

Sentences of imprisonment till a fine, also imposed by the sentence, is paid are sanctioned by the usage of the service. It is proper, however, in such sentences to affix a limit beyond which the punishment shall not be continued in any event. Where a sentence adjudges a fine, without also adding (with a view to enforcing its payment) a term of confinement, such a confinement cannot of course legally be imposed by the military commander.[1]

Fines adjudged by courts-martial accrue to the United States. A court-martial cannot impose a fine for the benefit of an individual, nor can a fine adjudged in general terms be in any part appropriated for the benefit of an individual by executive authority. A court-martial, in sentencing a party to pay a fine, has no authority to direct the collection of the same by a provost-marshal, or by any compulsory process; such a direction added in a sentence should be disregarded as mere surplusage.[2]

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any circumstances to impose a fine upon an officer or a soldier. Dig. J. A. Gen., 414, par. 1. The terms "fine" and "forfeiture" as used in military law are not synonymous. A *fine* is a pecuniary penalty, imposed by the sentence of a court-martial, the operation of which is to require an offender to pay a specific sum to the United States by way of punishment for an offense. The sentence is executed when the sum therein specified has been paid to and received by the United States. A *forfeiture* is a deprivation of pay or allowances awarded by sentence of a court-martial, or imposed by law on conviction of a military offense. A fine bears no relation to the pay of the offender; a forfeiture, on the other hand, is restricted to and can never exceed the total of such pay and allowances, due or to become due during the period of its operation. A forfeiture, therefore, operates to retain from the offender, and deprive him of the possession of, the whole or a part of his current pay or allowances during a period of time expressly set forth in the sentence. A fine or forfeiture imposed by the sentence of a military tribunal may be remitted by the proper reviewing authority, and if it has not been deposited in the treasury may be restored by way of pardon or mitigation.*

A fine is distinguished from a "stoppage." The former is a *punishment* and therefore imposable only by court-martial. The latter is a *charge on account*, being an enforced reimbursement, by means of a debit entered against the pay of the party on the rolls, either for an amount due the United States—as for the value of public property lost, extra clothing issued, reward paid for apprehension as a deserter, etc.—or for an amount due an individual and expressly authorized by law or regulation to be thus charged. See par. 1390, Army Regulations of 1895. Any stoppage, indeed, to be legally executed must be specifically enjoined by statute or authorized regulation. *Ibid.*, par. 2.

[1] *Ibid.*, 440, par. 4. So, *held* that par. 2 of G. O. 61, War Department, 1865, to the effect that where a court-martial, in imposing a fine, has failed to require that the prisoner shall be confined till the fine is paid, "he will not be released without orders from the War Department except on payment of the fine," transcended the authority of an executive order; such a requirement being a *punishment*, which can be prescribed only by sentence of court-martial. *Ibid.*

[2] *Ibid.*, 414, par. 3. Where an officer, sentenced (in connection with dismissal) to the payment of a fine and to imprisonment till the fine was paid, and held for some time in confinement by reason of the non-payment of the fine, applied to be released on the ground that he was quite destitute of means and incapable of satisfying the amount of the fine, suggested that, in order to protect the Government from fraud, the procedure prescribed by Sec. 1042, Rev. Sts., in cases of "poor convicts," imprisoned under sentences of United States courts, be in substance followed, and that the prisoner be not released except upon an investigation as to his pecuniary ability by a proper officer, and,

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* The imposition of fines, as such, is not frequent in the practice of courts-martial. They are properly imposed, however, upon conviction of offenses in the nature of larceny or embezzlement, in which case they are made equal in amount to the sum embezzled or the value of the property converted. In such cases the sentence provides that the offender be imprisoned until the fine is paid. See G. C. M. O. 21, War Department, 1871.

Forfeitures.—Forfeitures are pecuniary penalties which become operative (*a*) by operation of law, upon conviction of certain military offenses, or (*b*) in conformity to, and in execution of, the sentence of a lawfully constituted military tribunal. "A court-martial, in forfeiting pay by sentence, should so fix the amount to be forfeited that the same will clearly and unmistakably appear from the sentence itself, without a reference to any order or other source of information being necessary."[1]

Pay cannot be forfeited (in a sentence) by implication. If the court intends to forfeit pay, the penalty of forfeiture should be adjudged in express terms in the sentence.[2] No other punishment imposable by court-martial—neither a sentence of death, dismissal, suspension, dishonorable discharge, nor imprisonment—involves *per se* a forfeiture or deprivation of any part of the pay or allowances due the party at the time of the approval or taking effect of the sentence.[3] Nor can pay[4] be forfeited by any miscon-

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if found to be indigent as represented, upon his written statement under oath that he was wholly incapable of paying or procuring the means to pay any part of the fine. Dig. J. A. Gen., 415, par. 5.

An officer on trial applied to have certain witnesses summoned from a distance, and a continuance granted to await their appearance. To this the court consented on his making an affidavit setting forth material matter expected to be established by the witnesses. When these appeared it was found that they could give no material testimony upon the points indicated in the affidavit. The court, in making up its sentence upon conviction, proposed to impose upon the accused (in connection with imprisonment) a *fine* of two hundred dollars as the estimated cost to the government of procuring the attendance of the said witnesses. *Advised* that the facts stated did not constitute a proper basis for the imposition of such fine as a punishment for the offense for which the officer was convicted; that if his conduct in the matter was deemed so culpable as to constitute a military offense, it should be made the subject of a separate charge to be investigated on a separate trial. *Ibid.*, 414, par. 4.

[1] *Ibid.*, 417, par. 1. So *held* that a sentence which required a soldier to forfeit an amount of pay sufficient to reimburse the United States for the value of certain property appropriated by him, without fixing the value of such property, was irregular, and might properly be disapproved unless corrected by the court on being reassembled for a revision.* *Ibid.*

A sentence forfeiting "pay" or "pay and bounty" does not affect the right of the accused to a pecuniary allowance—as, for example, an allowance due him for clothing not drawn. *Ibid.*, 418, par. 3.

A forfeiture, by sentence, of "pay and allowances," while it does not affect the right of the soldier to receive, during his term of enlistment, the usual allowance of clothing in kind, forfeits any pecuniary allowance that may be due the soldier on account of clothing not drawn. *Ibid.*, par. 4.

A sentence of forfeiture of "all pay and allowances" includes and forfeits "extra-duty pay." *Ibid.*

[2] Compare Elliott *vs.* Railroad Co., 9 Otto, 573.

[3] This principle is well illustrated by the opinion of the Attorney-General (13 Opins., 103), concurring with an opinion of the Judge-Advocate General, in the case of Major Herod, where it was held that the fact that the accused had been sentenced to death, on conviction of murder, did not affect his right to his pay from the date of his arrest to that of the final action taken on the sentence by the President. And see the more recent opinion of the Attorney-General of November 9, 1876, (15 Opins., 175,) to the effect that the pay of officers and seamen of the navy is not divested by the operation of sentences of imprisonment or suspension, but only when forfeited in specific and express terms in the sentence. See, also, Dig. J. A. Gen., 417, par. 2.

[4] Other than "retained pay," see par. 1369, A. R. 1895.

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* Compare case in G. C. M. O. 65, Dept. of Dakota, 1880.

duct of a soldier, however grave, except for desertion or absence without leave, unless he is brought to trial and expressly sentenced to forfeiture for the same.[1]

Pay forfeited by sentence of court-martial can accrue to the United States only. A sentence cannot forfeit, appropriate, or "stop" pay for the reimbursement or benefit of an individual, civil or military, however justly the same may be due him, either for money borrowed, stolen, or embezzled by the accused, or to satisfy any other pecuniary liability of the accused whether in the nature of debt or damages; nor can a sentence forfeit pay for the support or benefit of the family of the accused, or for the benefit of a company fund, post fund, hospital fund, etc., none of these funds being money of the United States. All forfeitures by sentence, whether or not so expressed in terms, are to be understood and treated as forfeitures to the United States accruing to the general treasury.[2]

Where a sentence imposes a forfeiture of the "monthly" pay or a part of the "monthly" pay of a soldier for a designated number of months, the sum forfeited is the amount indicated multiplied by the number of months. Thus where the sentence of a soldier imposed a confinement for eight months with a forfeiture of eight dollars of his monthly pay for the same period, the sum forfeited was not eight but sixty-four dollars.[3]

Stoppages.—The terms "forfeiture" and "stoppage" are not synonymous. A *forfeiture*, as has been seen, is a pecuniary penalty, in the nature of a fine, imposed by a court-martial by way of punishment for a military offense. Forfeitures are usually based upon, and taken or deducted from, the pay of officers and enlisted men, and accrue in every case to the United States. *Stoppages* are administrative deductions from the pay or allowances of officers or enlisted men, made in pursuance of authority expressly conferred by statute or regulation, with a view to reimburse the United States

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[1] Dig. J. A. Gen., 417, par. 2.

[2] *Ibid.*, 418, par. 5. In a case of a forfeiture, by sentence, of "pay due" or "pay due and to become due," the amount of pay due and payable to the party at the date of the approval of the sentence is, in contemplation of law, returned from the appropriation for the Army to the general treasury and becomes public money, and, being in the treasury, cannot, without a violation of Art. I, Sec. 9, § 6, of the Constitution, be withdrawn and restored to the party except by the authority of Congress. A sentence forfeiting pay can be remitted only as to pay not due and payable at the date of the remission. Where a soldier's pay has been forfeited by an executed sentence, no mere amendment of the muster-roll upon which the same has been noted can operated to undo such forfeiture. After pay forfeited by sentence has gone into the Treasury, it cannot add to the authority of the Executive to return it that the sentence was in fact void; the authority of Congress is still necessary to the reimbursement of the officer or soldier. *Ibid.*, 421, par. 14.

[3] *Ibid.*, 419, par. 6. Where an officer was sentenced to be dismissed with forfeiture of pay due, and subsequently to the approval of the sentence, but before such approval had been promulgated to the Army or the officer had been officially notified of the same, he applied for and received the pay due him, *held* that, inasmuch as the forfeiture had not taken effect at the time of the payment, no illegal act was committed by the officer, and that the paymaster who paid him was not properly to be held accountable for the amount paid. *Ibid.*, 421, par. 13.

for stores or property purchased or used, or for articles of public property lost or destroyed, or for a debt due on account.[1] In a limited number of cases, when authorized by law, stoppages may be made for debts, or amounts due to private individuals, as to the company tailor, in accordance with Section 1220 of the Revised Statutes, or as to post traders and laundrymen, in accordance with the authority conferred by the Act of June 30, 1882.[2]

How Made.—Stoppages are usually entered upon the muster and pay rolls, or are notified to the officers against whom they are made. The correctness of a proposed stoppage must, in general, be admitted by the debtor before the contemplated deduction can be made. If the rolls be signed, or if pay be accepted, however, without question or protest, from which a certain amount has been deducted, such signing or acceptance will operate as an implied waiver of objection to the justice or correctness of the charge.

In a case of supposed liability to stoppage resulting from a neglect or an act chargeable as a military offense, and as to which the facts are disputed, it is in general preferable to have the case investigated and the actual pecuniary liability, if any, fixed by a trial by court-martial.[3]

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[1] Dig. J. A. Gen., 720, par. 3; *ibid.*, 721, par. 8; *ibid.*, 719, par. 1. Stoppages are authorized to be made in Sections 1144, 1145, 1220, 1302, 1303, 1304, 1308, and 1766 of the Revised Statutes.

[2] 22 Stat. at Large, 122. A stoppage is distinguished from a forfeiture or fine, and an executive stoppage, or stoppage by order, cannot be imposed for an *offense*. But it is entirely legal to stop against a soldier's pay, under par. 1390, A. R. 1895, an amount required to reimburse the United States for loss on account of damage done to public property, while at the same time bringing the soldier to trial by court-martial for the offense involved. *Ibid.*, 720, par. 3.

Where subsistence stores were sold, by a post commissary of subsistence, to a mess of three officers of the post, and charged to the mess as such, *held* that such mess was not in the nature of a commercial partnership in which each member was bound for the joint indebtedness, but was simply an association, for purposes of convenience and economy, of three individuals, each of whom was bound to the United States only for his proportion—one third—of the account. And *held* that a member who had paid his proportion to one of the other members who acted as caterer, but who had deceased without paying over this amount to the commissary, remained liable for such proportion to the United States. *Ibid.*, 723, par. 1.

Construing Sec. 1766, Rev. Sts., as applying only to bonded disbursing officers, *held* that a fine of one hundred dollars imposed by a civil court upon a soldier for a violation of the postal laws could not legally be stopped against his pay under that section. But, independently of this statute, the pay of an officer or soldier who is in arrears to the United States may always legally be withheld till the indebtedness is satisfied.* *Ibid.*, 721, par. 9. See, also, par. 2, p. 180, *post*.

[3] Dig. J. A. Gen., 719, par. 1. A recruit absented himself from a detachment of recruits, at a place in Ohio, while *en route* from the recruiting depot to his proper station, Fort Yates, N. D., and was taken to Fort Niagara and tried upon a charge of desertion, but convicted of absence without leave only. *Held* that the only *stoppages* to which he could legally be subjected were the amount of the pay and allowances accruing during his absence, under par. 133, A. R. 1895, and the amount of the expenses incurred in transporting him "to his proper station," under par. 126, A. R. 1895. But *held* further that the words "to his proper station," in the last part of the regulation, were to be construed as equivalent to the expression, in the first part, "to the station of his company *or* to the place of his trial"; that it would not be legal to stop against him the ex-

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* Gratiot *vs.* U. S., 15 Peters, 336; McKnight *vs.* U. S., 98 U. S., 180.

The pay of an officer or soldier cannot be subjected to stoppage except by the authority of a statute or regulation specifically authorizing the same, or by sentence of a court-martial imposing a forfeiture or fine as a punishment, or where the party has become indebted to the United States on account.[1]

The United States is not authorized to stop against the pay of an officer or soldier an amount of personal indebtedness to another officer or soldier, though such indebtedness may have grown out of the relations of the military service. Thus, in the absence of a sentence of court-martial forfeiting the same, an officer's pay cannot legally be stopped with a view to the reimbursement of enlisted men who have deposited with him money for safekeeping, and which he has failed to return when required, the officer being accountable for the same in a personal capacity only.[2]

Stoppages for Certain Injuries done to Citizens of the United States.— The 54th Article of War contains the requirement that "every officer commanding in quarters, garrison, or on the march shall keep good order and, to the utmost of his power, redress all abuses or disorders which may be

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penses of the transportation to both places; that if the place of trial was, as here, different from the station of the company, it would be proper to stop the expenses of transportation to the former and not to the latter; and that, this being done, the stoppage of the expense of transporting him to the station of his company, after the trial, would not be authorized. Dig. J. A. Gen., 722, par. 12.

[1] Dig. J. A. Gen., 719, par. 1. Pay due an officer or soldier can legally be stopped only by reason of an accountability to the United States.* So *held* that it could not legally be stopped to reimburse a telegraph company for moneys received by a sergeant of the then Signal Corps for transmitting private messages over its line, the same not being a line "operated by the United States" in the sense of the Act of March 3, 1883, and the indebtedness of the sergeant being to the telegraph company only, not to the United States. So *held* that it would not be legal to stop the pay of an officer for the amount of a local bounty, alleged to have been neglected to be paid over by him to an enlisted volunteer on whose account it was received. An officer or soldier cannot legally be mulcted of any part of his pay for the satisfaction of a private claim. *Ibid.*, 721, par. 8.

A superior is not authorized to stop against the pay of an inferior the value of property charged to have been criminally misappropriated, and it is the experience of the Judge Advocate-General that most or many of the cases of loss of or injury to public property in which the facts have been investigated and the damage assessed by boards of survey would have been more profitably passed upon by courts-martial, by which, instead of a stoppage, a forfeiture could have been imposed, as a *punishment*, by sentence. *Ibid.*, 719, par. 1.

[2] *Ibid.*, 720, par. 2. Par. 263, A. R. of 1895, requiring deductions to be made from the pay of soldiers in favor of "tradesmen" who, when "relieved from ordinary military duty," are authorized to make or repair soldiers' uniforms, *held* to authorize stoppages for dues to tailors who are in the military service, and also for dues to civilian tailors. *Ibid.*, par. 4; Circular 8, A. G. O., 1896. See, also, note 2, page 179, *ante*.

The Army Appropriation Act of June 16, 1892, provides that "the pay of officers of the army may be withheld under Sec. 1766, R. S., on account of an indebtedness to the United States admitted or shown by the judgment of a court, but not otherwise, unless upon a special order issued according to the direction of the Secretary of War." *Held* that the last part of this provision was not to be construed separately, but in connection with the former, and could not be interpreted as empowering the Secretary of War to stop the pay of officers of the Army to satisfy private debts. *Ibid.*, 722, par. 11.

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* See 16 Opin. Att.-Gen., 477.

committed by any officer or soldier under his command; and if, upon complaint made to him of officers or soldiers beating or otherwise ill-treating any person, disturbing fairs or markets, or committing any kind of riot, to the disquieting of the citizens of the United States, he refuses or omits to see justice done to the offender, and reparation made to the party injured, so far as part of the offender's pay shall go toward such reparation, he shall be dismissed from the service or otherwise punished as a court-martial may direct."

While this Article would certainly appear to contemplate the making of reparation for injuries done to the *persons* of citizens rather than for injuries done to their *property*, in view of the precedents it may probably be regarded as within the equity of the Article to indemnify a citizen for wanton injury done to his property by an officer or soldier or by an organized command, by means of a stoppage against his or their pay summarily ordered upon investigation by the commanding officer.[1] In a few cases a stoppage of the pay of an entire regiment for damage to private property committed by its members has been sanctioned as authorized under the general remedial provisions of this Article.[2]

The stoppage contemplated is quite distinct from a punishment by fine, and it cannot affect the question of the summary reparation authorized by the Article that the offender or offenders may have already been tried for the offense and sentenced to forfeiture of pay. In such a case, indeed, the forfeiture, as to its execution, would properly take precedence of the stoppage. On the other hand, where the stoppage is first duly ordered under the Article, it has precedence over a forfeiture subsequently adjudged for the offense.[3]

It does not affect the question of reparation under the Article that the offender or offenders may be criminally liable for the injury committed, or may have been punished therefor by the civil authorities.[4]

Reprimands.—This form of punishment is frequently resorted to in sentences imposed upon commissioned officers by general courts-martial. The function of the court in imposing a reprimand as a part of its sentence

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[1] See G. O. 35, Hdqrs. of Army, 1868, construing this Article, and prescribing the proceeding under it; reparation for injury to *property* as well as *person* being authorized. The Article, however, is antiquated in form and indefinite and incomplete in its provisions, and calls for repeal or amendment. For some of the principal cases in which it has been applied in our practice the student is referred to G. O. 4, Dept. of the Ohio, 1863; do. 123, Dept. of the Gulf, 1864; do. 161, Dept. of Washington, 1865; do. 59, *id.*, 1866; do. 74, Dept. of Arkansas, 1865; do. 48, 55, Dept. of Louisiana, 1866; do. 6, Dept. of the Cumberland, 1867; do. 10, Dept. of the South, 1870.

[2] Dig. J. A. Gen., 46, par. 1. *Held* that the remedial provision of this Article could not be enforced in favor of military persons, or in favor of the United States, or to indemnify parties for property stolen or embezzled. *Ibid.*, 47, par. 4.

[3] *Ibid.*, 46, par. 2. The pay of the offender or offenders can be resorted to only for the purpose of the "reparation." A military commander can have no authority to add a further amount of stoppage by way of punishment. *Ibid.*, 47, par. 5.

[4] *Ibid.*, 46, par. 3.

ends with the incorporation of such a requirement in the sentence imposed in a particular case. It cannot prescribe its form, indicate its severity, or indeed add anything in regard to its execution save to direct that the reprimand imposed in its sentence shall be administered by the commander who convened the court. A sentence directing a reprimand to be imposed by an officer inferior to the convening authority is not in accordance with the approved practice of the service. It is not necessary or desirable, however, that the court should direct as to the execution of the sentence, the same being the proper province of the reviewing officer.[1]

Although in adjudging a reprimand it is generally intended by a court-martial to impose a mild punishment, the quality of the reprimand is nevertheless left to the discretion of the authority who is to pronounce it, and it is open to him to make it as severe as he may deem expedient without being chargeable with adding to the punishment.[2]

ENLISTED MEN.

The following punishments are those usually imposed upon enlisted men.

Death.[3]—The subject of capital punishment has already been discussed.

Reduction to the Ranks.—This punishment, as the name implies, is applicable only to non-commissioned officers. Reduction may be imposed as a separate punishment, or in connection with forfeiture of pay or confinement. If, however, punishment in the nature of imprisonment or confinement be imposed, reduction to the ranks should constitute the first clause of the sentence, and should be executed before the sentence of confinement becomes operative. In certain branches of the staff, the engineer, and the ordnance departments, for example, where the statutes recognize several grades or classes of privates, a private of the first or highest class may, by sentence of a court-martial, be reduced to a lower class as a punishment for a military offense.[4]

Suspension. — Suspension, as a punishment for a *non-commissioned* officer, is not authorized in terms in the 101st Article, nor is it contemplated

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[1] Dig. J. A. Gen., 660, par. 1.

[2] *Ibid.*, par. 2.

[3] See the title *Death* in the paragraph respecting the punishments applicable to commissioned officers.

[4] A court-martial, in sentencing a non-commissioned officer to be reduced to the ranks, is not empowered to direct that when reduced he be transferred to another regiment or company. The authority to order the transfer of soldiers is expressly vested by Art. XVIII of the Army Regulations of 1895 in certain military commanders. Dig. J. A. Gen., 653, par. 1.

The warrant or certificate given to a non-commissioned officer is as much the personal property of the individual as is the commission given to a commissioned officer. In the absence of any statute or regulation requiring that a sergeant or corporal shall surrender his warrant on being reduced to the ranks (or dishonorably discharged) he may retain it with the same right as that by which an officer retains his formal commission on being dismissed. *Ibid.*, par. 2.

in the Army Regulations. It has been adjudged in but rare cases,[1] and cannot be regarded as sanctioned by principle or usage.[2]

Dishonorable Discharge.—This punishment is frequently imposed upon enlisted men as a penalty for the more serious military offenses, either separately or in combination with forfeiture of pay and a term of imprisonment; in which case it constitutes the severest punishment that is usually imposed upon this class of offenders in time of peace. The effect of a sentence of dishonorable discharge, like that of dismissal in the case of an officer, is to completely sever the soldier from all connection with the military establishment, and he can only re-enter it, if at all, by an enlistment contract executed in the usual manner.

A dishonorable discharge is a discharge expressly imposed as a punishment by the sentence of a general court-martial. It is only in pursuance of such a sentence that a dishonorable discharge can be authorized, for, being a punishment, it cannot be prescribed by an order. In a case of such discharge the word "dishonorably" is inserted before the word "discharged" in the discharge certificate, and it is added that the discharge is given pursuant to the sentence of a certain general court-martial, specifying it by reference to the order in which it was promulgated.[3]

In imposing a considerable term of confinement, courts-martial, now almost invariably add the penalty of dishonorable discharge. In general this penalty is directed by the court to be *first* executed,—as by the form "to be dishonorably discharged and confined," etc. Where there is no *express* indication in the sentence as to which punishment is to be first enforced, the one named first in order is regarded as that intended to be first executed, and is so executed in practice.[4]

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[1] See a comparatively late instance in General Court-martial Orders, No. 33, Dept. of the East, 1872.

[2] Dig. J. A. Gen., 733, par. 15.

[3] *Ibid.*, 361, par. 25. Such a discharge is held also to be involved in a sentence "to be drummed out of the service." *Ibid.*

Held that an executed dishonorable discharge was an absolute expulsion from the Army, and as such did not merely terminate the particular enlistment, but covered all previous unexecuted enlistments of the soldier, if any. A soldier sentenced to a dishonorable discharge, duly approved and executed, cannot be made amenable for a desertion committed under a prior enlistment. *Ibid.*, par. 26.

Held that a subsequent enlistment after a dishonorable discharge would not operate to revive any outstanding amenability of the soldier. This upon a principle of public policy and good faith, and because the acceptance into the service under the later enlistment is in the nature of a condonation. *Ibid.*, par. 27.

The mere fact that at the time of the muster-out of his regiment a soldier was under arrest by the civil authorities for an alleged crime, which, however, was not followed by a trial and conviction, does not justify his being dishonorably discharged. If released without trial, the discharge should be honorable. *Ibid.*, par. 28.

A soldier dishonorably discharged loses his retained pay under Sec. 1281, Rev. Sts. (see par. 1381, A. R. 1895), and his travel pay under Sec. 1290, Rev. Sts. *Ibid.*, par. 29.

[4] Dig. J. A. Gen., 357, par. 7. Where a court-martial, in imposing dishonorable discharge in connection with confinement, directs that the discharge be first executed, or where it is reasonably to be inferred from the terms of the sentence that it was the intention of the court that the punishments should be executed in this order, the

The service of a soldier dishonorably discharged under a sentence of court-martial terminates, and his discharge should be dated, as of the day on which the approval of the sentence is officially published, or the order promulgating such approval is received, at the post where the soldier is held. It is to that date that he is to be paid, if pay is due him.[1]

Where a soldier has been legally sentenced to be dishonorably discharged, and such sentence has been duly executed, it is beyond the power of the Executive, whatever the merits of the case, to substitute an honorable in lieu of the dishonorable discharge. The latter having gone into effect cannot be undone; moreover the soldier, having been thereby wholly detached from the military service and made a civilian, cannot again be discharged from the service until he has been again enlisted into it.[2]

While a dishonorable discharge, standing by itself, imposes no disqualification upon re-enlistment in the military service or employment in the civil service of the United States, such disqualification is in terms imposed by the Act of August 1, 1894,[3] which contains the requirement that "no soldier

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reviewing officer, in approving the sentence, is not empowered to command that the execution of the discharge be *postponed* to the end of the term of confinement.* On the other hand, if the sentence clearly imposes the dishonorable discharge of the soldier *at the end of* the term of confinement, the reviewing officer is not authorized to direct that he be discharged forthwith. Dig. J. A. Gen., 357, par. 8.

Where a court-martial sentenced a soldier, in connection with confinement, to be dishonorably discharged at such date as might be fixed by the reviewing officer, *advised* that such a sentence was exceptional and irregular as devolving upon the reviewing officer a duty pertaining to the court, and that the court would properly be reassembled for the revision of the same.† *Ibid.*, par. 9.

A sentence "to be imprisoned for fifteen years and *then* dishonorably discharged" *held* (in view of the fact that enlistments in our Army are for five years only) to be, so far as related to the discharge, irregular and unauthorized. A sentence of court-martial cannot operate to retain a soldier in the United States' service beyond his legal term of enlistment. And advised that the court be reassembled for the revision of this sentence, and that it be suggested to it to impose the discharge in advance of the imprisonment, in accordance with approved precedents. *Ibid.*, 358, par. 10.

[1] Dig. J. A. Gen., 359, par. 16.

[2] *Ibid.*, 358, par. 12.

[3] Act of August 1, 1894 (28 Stat. at Large, 216). See, also, in this connection the 3d Article of War, in which certain enlistments are forbidden; Dig. J. A. Gen., 385, par. 3; U. S. *vs.* Grimley, 137 U. S., 147; paragraphs 823–827, Army Regulations of 1895; and Dig. J. A. Gen., 358, par. 11. The Act of June 16, 1890, (26 Stat. at Large, 157,) contained the provision "that the Secretary of War shall determine what misconduct shall constitute a failure to render honest and faithful service within the meaning of this Act. But no soldier who has deserted at any time during the term of an enlistment shall be deemed to have served such term honestly and faithfully." Under the authority conferred by this statute the Secretary of War has decided that in the following cases there has been a failure to render honest and faithful service:

(1) Desertion.

(2) When the soldier is in confinement under a general court-martial sentence expressly imposing imprisonment until or beyond the expiration of his term; when discharged under sentence of general court-martial; when discharged by order from the War Department specifying forfeiture, or because of imprisonment by the civil authority.

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* See an opinion of the Judge-Advocate General on this subject published and approved by the Secretary of War in G. O. 71, War Dept., 1875.

† See opinion to this effect published as approved by the Secretary of War in G. O. 90, War Dept., 1872.

shall be again re-enlisted in the Army whose service during his last preceding term of enlistment has not been honest and faithful."

Imprisonment; Confinement.—In respect to their legal effects upon an enlisted man the terms imprisonment and confinement are identical. Such punishments may be executed (*a*) in a state prison or penitentiary when the offense of which he has been convicted "would by some statute of the United States, or by some statute of the State, Territory, or District in which such offense may be committed, or by the common law as the same exists in such State, Territory, or District, subject such convict to such punishment";[1]

(3) When the soldier is discharged for minority concealed at enlistment, or for other cause involving fraud in enlistment, or for disability caused by his misconduct.

(4) Upon the approved finding of a board of officers called under paragraph 148, Army Regulations of 1895, that the soldier has not served honestly and faithfully to the date of discharge.

The cause of forfeiture will be stated on the muster and pay-rolls and on the final statements of the soldier.

Any form of discharge other than such as is prescribed in the 4th Article of War is irregular and inoperative (unless indeed otherwise authorized by subsequent statute). Mere desertion does not operate as a discharge of a soldier; he may then be dropped from the rolls of his command, but he is in no sense discharged from the army. Nor can an official publication, in orders, of a sentence of dishonorable discharge have the effect of discharging a soldier: there must still be notice, actual, as by the delivery of the formal discharge certificate, or constructive, of the formal discharge. A soldier cannot discharge himself by simply leaving the service at the expiration of his term. The final statements required, by Regulations,* to be furnished with the discharge constitute no part of the discharge: the discharge is complete without them. Dig. J. A. Gen., 359, par. 17.

[1] 97th Article of War. This Article by necessary implication prohibits the imposition of confinement in a penitentiary as a punishment for offenses of a purely or exclusively military character—such as desertion, for example.† Dig. Opin. J. A. Gen., 113, par. 1.

A sentence of penitentiary confinement in a case of a purely military offense is wholly unauthorized and should be disapproved. Effect cannot be given to such a sentence by commuting it to confinement in a military prison or to some other punishment which would be legal for such offense. Nor in a case of such an offense can a severer penalty, as death, be commuted to confinement in a penitentiary. *Ibid.*, par. 2.

Nor can penitentiary confinement be legalized as a punishment for purely military offenses by designating a penitentiary as a "military prison" and ordering the confinement there of soldiers sentenced to imprisonment on conviction of such offenses. *Ibid.*, par. 3.

An offense charged as "conduct to the prejudice of good order and military discipline," which, however, is in fact a larceny,‡ embezzlement, violent crime, or other offense made punishable with penitentiary confinement by the law of the State, etc., may legally be visited with this punishment. *Ibid.*, 114, par. 4.

The term "penitentiary" as employed in this Article has reference to civil prisons only, as the penitentiary of the United States, or District of Columbia at Washington, the public prisons or penitentiaries of the different States, and the "penitentiaries erected by the United States" (see Section 1892, Revised Statutes) in most of the Territories. The military prison at Leavenworth is not a penitentiary in the sense of the Article. The term "State (or State's) prison" in a sentence is equivalent to penitentiary. *Ibid.*, par. 5.

A military prisoner duly sentenced or committed to a penitentiary becomes subject to the government and rules of the institution. *Ibid.*, par. 6.

* Par. 139, A. R. 1895.

† See G. O. 4, War Dept., 1867; also the action taken in cases in the following General Orders: G. O. 21, Dept. of the Platte, 1866; G. O. 21, *ibid.*, 1871; G. O. 44, Eighth Army Corps, 1862; G. C. M. O. 34, 35, 43, 46, 72, 73, Dept. of the Missouri, 1870.

‡ In a case of larceny the court should inform itself as to whether the value of the property stolen be not too small to permit of penitentiary confinement for the offense under the local law. See G. O. 44, Eighth Army Corps, 1862; G. C. M. O. 63, Dept. of the Platte, 1872.

or (*b*) in the Military Prison,[1] or at a military post, as a "general pris-

Where a soldier is sentenced to be confined in a penitentiary, the proper reviewing authority may legally designate for the execution of the punishment any State or Territorial penitentiary within his command. Where there is no such penitentiary available for the purpose or desirable to be resorted to, he will properly submit the case to the Secretary of War for the designation of a proper penitentiary. Dig. J. A. Gen., 114, par. 7.

A court-martial, in imposing by its sentence the punishment of confinement in a penitentiary, is not required to follow the statute of the United States or of the State, etc., as to the term of the confinement. It may adjudge, at its discretion, a less or a greater term than that affixed by such statute to the particular offense. At the same time the court will often do well to consult the statute, as indicating a reasonable measure of punishment for the offense. *Ibid.*, par. 8.

Where a court-martial specifically sentences an accused to confinement in a "military prison," he cannot legally be committed to a penitentiary, although such form of imprisonment would be authorized by the character of his offense. But where a sentence of confinement is expressed in general terms, as where it directs that the accused shall be confined "in such place or prison as the proper authority may order," or in terms to such effect, *held* that the same may, under this Article, legally be executed by the commitment of the party to a penitentiary, to be designated by the reviewing officer or Secretary of War, provided, of course, the offense is of such a nature as to warrant this form of punishment. *Ibid.*, par. 9.

Held that penitentiary confinement could not legally be adjudged upon a conviction of a violation of the 21st Article, alleged in the specification to have consisted in the lifting up of a weapon (a pistol) against a commanding officer and discharging it at him with intent to kill. By charging the offense under this Article the government elected to treat it as a purely military offense, subject only to a military punishment. So, upon a conviction of joining in a mutiny, in violation of Article 22, *held* that a sentence of confinement in a penitentiary would not be legal although the mutiny involved a homicide, set forth in the specification as an incidental aggravating circumstance. To have warranted such a punishment in either of these cases the Government should have treated the act as a "crime," and charged and brought it to trial as such, under Article 62. *Ibid.*, 115, par. 10.

Where the act is charged as a crime under Article 62, and charge and specification taken together show an offense punishable with confinement in a penitentiary by the law of the *locus* of the crime, the sentence may legally adjudge such a punishment. So *held* in a case where charge and specification together made out an allegation of perjury under Section 5392, Revised Statutes. *Ibid.*, par. 11.

"Obtaining money under false pretenses" is punishable by confinement in a penitentiary by the laws of Arizona. A sentence of court-martial imposing this punishment, on conviction of an offense of this description committed in this Territory, charged as a crime under Article 62, *held* authorized by Article 97. *Ibid.*, par. 12.

A conviction of a larceny of property of such slight value as not to authorize this punishment under the local law would not warrant a sentence of confinement in a penitentiary. In a case of larceny the court should inform itself as to whether the value of the property stolen be not too small to permit of penitentiary confinement for the offense under the law of the State, etc.* *Ibid.*, par. 13.

A punishment of confinement in a penitentiary, where legal, may be mitigated to confinement in a military prison or at a military post. *Ibid.*, 116, par. 15.

A discharged soldier serving a sentence of confinement in a State or Territorial penitentiary still remains under military control, at least so far as that his sentence may, by competent military authority, or by the President, be remitted, or may be mitigated —as, for example, to confinement in a military prison or at a military post. Where the place of confinement is a State or Territorial penitentiary which is within a department command, the commander may legally remit or mitigate the sentence. But the President may limit this authority by excluding such penitentiaries from the department command. (But now the function of remitting the sentences of discharged soldiers confined in penitentiaries is, by orders, restricted to the President. Paragraph 916, Army Regulations of 1895, Circular No. 5 (H. A.), 1883.) *Ibid.*, par. 16.

[1] The several statutes respecting the confinement of enlisted men in the Military Prison relate to the particular establishment located at Fort Leavenworth, Kansas, by the Acts of March 3, 1873, (17 Stat. at Large, 582,) and May 21, 1874 (18 *ibid.*, 48). By the Act of March 2, 1895, (27 Stat. at Large, 957,) the prison buildings at Fort Leavenworth were

* See G. O. 41, Eighth Army Corps, 1862; G. C. M. O. 63, Dept. of the Platte, 1872.

oner."[1] Such imprisonment is regulated by the statutes creating the Military Prison, and by the standing orders of the War Department in respect to the confinement of such prisoners at military posts;[2] and (*c*) by simple confinement, as a "garrison prisoner,"[3] in the guard-house at a military post.[4]

Confinement at Hard Labor.—This form of confinement is that usually imposed as a punishment of enlisted men. The kind and amount of hard labor required are regulated by General Orders of the War Department.[5]

Confinement with Ball and Chain.—This punishment, although authorized as to enlisted men by custom of service, is imposed only in extreme cases, as where the place of confinement is insecure, or where escape is feared. In a sentence imposing this form of punishment the weight of the ball, the length of the chain, etc., should be expressly set forth in the sentence.[6]

Solitary Confinement.—This punishment, long recognized by custom of service, is now expressly authorized, in the order of the President prescribing limits of punishment, by way of substitution for forfeiture of pay or confinement at hard labor, subject, however, to the restriction that it "shall not exceed fourteen days at one time, nor be repeated until fourteen days have elapsed, and shall not exceed eighty-four days in one year."[6]

It has been seen that a sentence imposing confinement must be specific as to the duration of the imprisonment,[7] and as to the character of the confinement imposed, as solitary confinement, confinement at hard labor,[8] or

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transferred to the Department of Justice, and the military prison *eo nomine* was discontinued. Prisoners of the class formerly sentenced to periods of confinement at the Military Prison are now sentenced to imprisonment at such military posts as may be designated by the reviewing authority, and are subject to such statutory or executive regulations as may be enacted by Congress or published by the President.

[1] See Gen. Orders 55, A. G. O., of 1895, for rules fixing the status of these classes of prisoners.

[2] See Gen. Orders No. 55, A. G. O., 1895.

[3] *Ibid.*

[4] See par. 16, Gen. Orders No. 55, War Dept., 1895.

[5] Manual for Courts-martial, 50, par. 3; *ibid.*, 70, par. 3.

[6] *Ibid.*, 62, Art. VII. *Held* that a sentence of two months' confinement, which prescribed that the confinement for two days out of every three should be solitary, was unauthorized as transcending the proportion fixed in the order of the President establishing limits of punishment; such sentence in fact requiring that the confinement should be solitary for forty days out of sixty, while the order authorizes but *eighty four* days of solitary confinement in an entire year. Dig J. A. Gen., 708.

[7] A sentence which, in imposing confinement (or imprisonment—the two terms being practically synonymous in sentences of courts-martial), fails clearly to indicate how long the same is to continue is irregular and inoperative. Such a sentence should be disapproved by the reviewing authority unless it can be procured to be corrected by a reassembling of the court for the purpose. Dig. J. A. Gen., 439, par. 1.

[8] Where an officer or soldier is sentenced merely to a term of confinement without the addition of "hard labor," while he may properly be required to perform the ordinary domestic or police work directed by the sanitary regulations of the prison, he cannot properly be put to unusual labor of a severe and continuous character. Thus *held* that to require a soldier sentenced simply to be confined, and confined accordingly at Alcatraz Prison, to work daily at blasting and quarrying rock was *adding to the punishment*, and therefore unauthorized. To a proper execution, however, of a sentence of confine-

on bread-and-water diet, and the like; a sentence awarded under the 97th Article of War should also be specific as to the place where the sentence is to be executed, as at a State prison or penitentiary; although the particular prison or penitentiary, however, need not be designated or named in the sentence;[1] in which it would be proper to use the words "at such place as the reviewing authority may direct," leaving it to the reviewing officer to designate a lawful place of confinement in which the sentence imposed may be executed."

Confinement beyond Expiration of Sentence.—It is now established by a long series of precedents that a general court-martial is authorized to adjudge, by sentence, a term of imprisonment to extend beyond the end of the pending term of enlistment of the soldier, or beyond his legal period of service. Thus, for example, where the term of the enlistment of the accused has still a year to run, the court—the gravity of the offense justifying it—may sentence him to an imprisonment for two years or longer; so it may sentence him to be dishonorably discharged (thus itself discontinuing his period of service) and then confined for a designated term. And such sentences may be executed with the same legality as any other sentences of imprisonment. In the former case the soldier will not be entitled to be released from the confinement at the end of his enlistment, nor in the latter will he become so entitled upon the execution of the discharge. In each case, upon the determination of the enlistment or service, the party continues to be held under his sentence not as a soldier but as a civilian United States convict.[2]

Execution of Sentence.—The old rule that the term of a confinement (of so many months, years, etc.) imposed by sentence of court-martial commenced on the day on which the prisoner was delivered to the proper officer

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ment a secure keeping of the person is of course essential. Where, therefore, it is not possible otherwise to prevent a prisoner's escape or to prevent violence on his part, he may be *ironed* without adding to the punishment. But such exceptional restraint cannot legally be imposed except where thus *necessary*. Dig. J. A. Gen., 441, par. 7.

It is not adding to the punishment, in executing a sentence of confinement, to require the prisoner to perform work prescribed for prisoners of his class by the *statute* law. Thus persons sentenced to imprisonment at the Military Prison at Leavenworth may legally be employed in the labor or at the trades indicated by Sec. 1351, Rev. Sts. *Ibid.*, 442, par. 8.

[1] In imposing a sentence of confinement at a military prison, the court should properly add "at such prison as the proper authority may designate," or in words to that effect.* To direct that the place of confinement be designated by an officer inferior to the convening authority is irregular and improper. *Ibid.*, 439, par. 2.

[2] Dig. J. A. Gen., 440, par. 3. Where the approval of a sentence of confinement in a case of a soldier, in which proceedings had been duly commenced pending his term of enlistment, was not promulgated till after such term had actually expired, but no discharge had been given to the soldier before promulgation, *held* that it would be legal to subject him to the confinement adjudged by the sentence. *Ibid.*

* It is not adding to the punishment, and is authorized at military law, for the commander who ordered the original commitment, or his proper superior, to *change* the place of confinement of a prisoner, if such a change is required by the exigencies of the service, provided that no more severe species of confinement than that contemplated in the sentence is enforced after the transfer. *Ibid.*, 442, par. 9.

—as the officer in charge of the prison or commanding the post—to be confined according to the sentence, having been found inconvenient in practice, there was substituted for it, by General Order 21, Hdqrs. of the Army, of 1870, the rule that "the confinement shall be considered as commencing at the date of the promulgation of the sentence in orders." This rule being more favorable to prisoners than the old one, its authority is not known to have ever been questioned.[1]

A sentence of confinement is *executed* by sending the party under a proper guard to the prison or other place of confinement duly designated, and at the same time transmitting to the officer there in charge or command a copy of the order approving the sentence and ordering the execution, together with such other papers as are required to exhibit the status of the soldier.[2]

The duty of a post commander with regard to the holding and restraint of a prisoner, sentenced to be confined at the post, is not affected by the fact that the prisoner was adjudged by the same sentence to be dishonorably discharged and has been discharged accordingly. The amenability to prison discipline continues during the term of the confinement; although, except at the Leavenworth Military Prison, the prisoner cannot legally be brought to trial by court-martial for misconduct during such term.[3]

A prisoner not expressly required by his sentence to be confined in irons cannot legally be subjected to such form of confinement except where there is sufficient ground to apprehend serious violence on his part or an attempt

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[1] Dig. J. A. Gen., 441, par. 5.

[2] Dig J. A. Gen., 439, par. 2. Where a soldier while undergoing a sentence of confinement is brought to trial for a further offense, and, on conviction, is sentenced to a further term of imprisonment, the punishment thus adjudged is *cumulative* upon that pending, and its execution will properly commence at the date when the pending confinement terminates, whether by expiration of time or by remission. To render a punishment thus cumulative, it is not required that it should be designated as such by the court in the sentence. *Ibid.*, 444, par. 15.

Where a soldier was at two successive trials tried for separate offenses and was sentenced upon the first trial to dishonorable discharge and imprisonment, and upon the second to further imprisonment, and the two sentences were approved and promulgated in orders bearing the same date, *held* that, as the law does not recognize fractions of a day, these sentences were to be regarded as having gone into operation at the same moment and taken effect as one sentence, so that the execution of the dishonorable discharge imposed by the former sentence did not affect the enforcement of the punishment of confinement imposed by the latter sentence, but that the same was legally enforceable as cumulative or rather continuing upon the term of confinement imposed by the former sentence. *Ibid.*, par. 16.

[3] *Ibid.*, 445, par. 23. See, also, Sec. 1361, Rev. Sts. Where a deserter under sentence of confinement escaped, re-enlisted, deserted from his second enlistment, and, upon arrest, was again sentenced to confinement, *held* that he was legally liable to be subjected to both terms of confinement, the second as a *cumulative* punishment upon the first. *Ibid.*, 446, par. 24.

A remission of part of a sentence of confinement has the effect of leaving the reduced sentence as though it were the original, and the prisoner will be entitled to the time allowance for *good conduct* precisely as if the original term had not been reduced. *Ibid.*, par. 25.

to escape. A mere threat of violence would not ordinarily justify the use of shackles or fetters.[1]

Fines and Forfeitures.[2]—What has already been said in respect to fines and forfeitures applies equally to commissioned officers and enlisted men.

Reprimands.—The punishment of a reprimand is one usually imposed upon commissioned officers only; in rare cases, however, it has been imposed upon non-commissioned officers of the higher grades. When so awarded the reprimand is administered by the reviewing authority, as has been described in the case of a commissioned officer.[3]

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[1] Dig J. A. Gen., 446, par. 23. See, also, note 5, p. 187, *ante*.

[2] See the titles *Fines* and *Forfeitures* in the article, *supra*, entitled "Punishments of Commissioned Officers."

Detention of Pay.—The detention of pay in the case of enlisted men was authorized, as a punishment to be inflicted by courts-martial, by G. O. 21, A. G. O., of 1891. The effect of a sentence detaining the whole or a part of the monthly pay of a soldier was to prevent the amount so detained from being paid to the offender until his discharge. The practice was abolished by General Orders No. 25, A. G. O., of July 19, 1894.

[3] See the title *Reprimand, supra*. In the British service courts-martial are forbidden to sentence enlisted men to be reprimanded. Simmons, 7th ed., 58; Manual for Courts-martial, 270.

CHAPTER X.

THE RECORD.

General Character.—The Articles of War require all courts-martial to make and keep formal records of their proceedings, and the Army Regulations and the official Manual for Courts-martial contain specific directions as to the form and substance of these records in certain particulars.[1] By a gradual process of development the record of a court-martial has come to be, in our practice, a full report or recital of the details of the trial in each case, including all the testimony introduced, together with the pleas, arguments, and statements submitted to the court during the progress of the trial, in which respect it differs from a judicial record in the civil procedure.[2]

The legal record of a court-martial is that record which is finally approved and adopted by the court as a body, and authenticated by the signatures of its president and judge-advocate. The record is kept, that is, the proceedings are recorded, by the judge-advocate, but the court as a whole is responsible for it, and the instrument which it approves as such is its record, however the same may have been made up. It is immaterial to the sufficiency of a record whether the same was kept or written by the judge-advocate or by a clerk.[3]

Contents of the Record; General Rule.—In connection with the preparation of the record, the question arises as to what portions of the proceedings shall be incorporated in the record and what portion, if any, shall be excluded. In reply it may be said that, as a general rule, everything which takes place in open court goes upon the record, and that no deliberations, discussions, or other proceedings had in closed court are

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[1] Dig. J. A. Gen., 639, par. 1; 113th and 114th Articles of War; Section 1199, Rev. Stat.; paragraphs 954–957, A. R. 1895; Manual for Courts-martial, pp. 65, 66.

[2] Although its proceedings are required to be fully recorded, a court-martial is not a *court of record* in the legal acceptation of the term. A court-martial record is a complete narrative of the proceedings, in a particular case, from beginning to end, and includes not only the acts of the court, but the action of the reviewing authority as well. The record in an action at law, civil or criminal, is much less full than that required to be kept by a military tribunal; part of it consists in entries in books of record, a part is entered upon rolls, and other parts consist of pleas and motions which are preserved and filed in the office of the clerk. See Chambers *vs.* Jennings, 7 Modern, 125; *Ex parte* Watkins, 3 Peters, 209; Wilson *vs.* John, 3 Binney, 215.

[3] Dig. J. A. Gen., 649, par. 5. So where a clerk or reporter appointed and sworn to keep the record did not act, but the record was prepared by the judge-advocate or some other person employed by him to assist him, *held* that this circumstance did not affect the validity of the record as finally approved by the court. *Ibid.*

entered upon the record, except the findings, sentence, or other decision or conclusion reached as a result of deliberation in closed session.

In view, therefore, of the requirement of the Army Regulations that "every court-martial shall keep a complete and accurate record of its proceedings," the entire proceedings and action of the court during the trial should be fully set forth, including the organization, challenges to members (if any), arraignment, pleas, testimony of witnesses, and documentary evidence, motions, and objections, with the substance of the arguments (if any) thereon, rulings of the court on interlocutory questions, adjournments, continuances, closing addresses or statements, findings, and sentence—in short, every part and feature of the proceedings material to a complete history of the trial and to a correct understanding by the reviewing officer both of the merits of the case and of the questions of law arising in the course of the investigation. Where a sentence is pronounced the record should contain everything necessary to sustain it in fact and in law.[1]

Separate Record of Each Case Tried.—Where several cases are tried by a court-martial, the record of each case should be complete in itself and as much an entirety, both in form and in substance, as if it were the only case tried. Each record should be separate and distinct from every other record, containing all that is essential to an original and independent official paper, and so perfected as to leave no material detail to be supplied from any previous or other record. As "the proceedings in each case are required to be made up separately,"[2] records should not be attached together, but should be prepared and transmitted as disconnected documents.[3]

Contents of the Record.—The copy of the convening order should properly be prefixed to the proceedings, as constituting the initial authority for the existence and action of the court. This order should of course be complete, and should exhibit by its heading and its subscription that it has proceeded from a commanding officer competent to order the court.[4]

Where several cases are tried by the same court, a separate copy of the order should accompany the record in each case; to prefix a single copy to the first of a series of records attached together is irregular and in violation of the requirement that every record should be complete in itself.[5] Where subsequent orders have been issued adding or relieving members or a judge-advocate, or otherwise modifying the original convening order, copies of these should follow the original or be elsewhere incorporated in the record. In their absence it may not be possible to determine, on the face

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[1] Dig. J. A. Gen., 640, par. 1, *a*. Compare Coffin *vs.* Wilbour, 7 Pick. (Mass.), 151.
[2] Dig. J. A. Gen., 641, par. 1, *b*. See, also, Manual for Courts-martial, 65, par. 1.
[3] *Ibid.* See, also, par. 954, A. R. 1895.
[4] *Ibid.*, par. 1, *c*.
[5] *Ibid.* See, also, Manual for Courts-martial, 65, par. 1.

of the record, whether the officers who composed the court on the trial were actually or legally detailed therefor, or whether the prosecuting judge-advocate or the judge-advocate who authenticates the proceedings was so detailed.[1]

Organization of the Court.—The record should show that the court met and organized pursuant to the order or orders constituting it. It is necessary, to the due organization of a general court-martial, *first*, that there should assemble at the time and place indicated in the order at least a quorum, *i.e.*, five, of the officers detailed as members. And the record should show that at least five members were present and acting, not only at the original assembling, but also at every day's session throughout the trial, from the beginning to the end.[2]

The record should show that the order or orders convening the court and detailing the members were read to the accused or communicated to him, and that he was afforded an opportunity of objecting to any member, that is to say, that the privilege of challenge accorded and defined by the 88th Article of War was extended to him.[3] This testing of the members is the *second* essential to the due organization of the court, and though the phraseology of the question put to the accused, or of his answer thereto, need not be given in the record, it should clearly appear either that he had (or made) no objection, or if he made any, what it was.[4]

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[1] Dig. J. A. Gen., 641, par. 1, *c*. In connection, however, with any order making a change in the original detail of members or substituting a new judge-advocate, the record should note the fact of the new member taking his seat, or new judge-advocate commencing to officiate, according to the order, on a certain day. Where less than thirteen members are detailed in the original order, it has been usual to add therein a statement to the effect that "No other officers than those named can be assembled without manifest injury to the service." Such addition, however, is not required by Article 75, and is not essential. *Ibid.*

Recommended that, *after* the record of the organization at the first session, there be simply entered at the beginning of a day's session: "Present all the members and the judge-advocate." Also, that when the absence of an officer who has not qualified or has been relieved or excused has been accounted for, no further notice be taken of it. *Ibid.*, 650, par. 7. See Manual for Courts-martial, p. 120, note 2.

[2] Dig. J. A. Gen., 641, par. 1, *d*. The record of a trial by court-martial should include a record of meetings where no business is transacted. *Ibid.*, 650, par. 6. It is not customary to take notice in the record of a mere recess; but if a recess be noted at all, it should appear from the record that on the reassembling the members, judge-advocate, and accused were duly present. *Ibid.*, par. 8.

The importance of keeping an accurate record of adjournments arises from the fact that by such record the court *retains* jurisdiction, once lawfully attached, in a particular case.

[3] Dig. J. A. Gen., 641, par. 1, *e*. Compare Long *vs.* State, 52 Miss., 23.

[4] Dig. J. A. Gen., 642, par. 1, *e*. Where a specific challenge is offered, it should preferably be recorded in the terms in which it is expressed by the accused; and, in connection with each challenge, the record should set forth the remarks of the member, if any, and the action of the court, as also, if an issue be joined on the challenge, the evidence, if any, introduced, and the substance of the argument had. Where a member is added to the court at a subsequent stage of the proceedings, the record should similarly show that the accused was afforded an opportunity of objecting to him, and set forth the action taken if objection was made. It may be added that while, with the convening order, any subsequent orders by which the original detail may have been modified should be read to the accused, the fact that other orders relating to the

Swearing of Court.—The record should show, as the final essential to the due organization of the court, that the members and judge-advocate were qualified by being duly sworn. And this should be shown in the record of every case tried by the same court, since the court and the judge-advocate must be sworn independently and anew for each trial.[1]

Arraignment of Accused, Pleas, etc.—The record should further set forth the arraignment of the accused on the charges and specifications, with the plea or pleas made. The charges and specifications should properly be embodied in the record instead of being referred to as annexed. If special pleas are interposed, the issue joined and action taken upon the same should be clearly stated.[2]

Testimony.—The record should fully set forth all the testimony introduced upon the trial—the oral portion as nearly as practicable in the precise words of the witness. For a judge-advocate to assume to record only such testimony as he considered material, or to summarize the testimony given, has been remarked upon as a gross irregularity. It is usual and proper (though not essential) to specify by which party the witness is introduced and by whom the questions are put. It is also usual to designate the point at which the prosecution is closed and the testimony for the defense is commenced.[3]

It should appear that each witness (whether or not his evidence was important) was duly sworn, but it is not customary to add that he was sworn in the presence of the accused. Objections taken to the admissibility of testimony should be set forth with the substance of the argument had

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court, but not to its *personnel*,—such as an order changing the place of meeting or an order authorizing the court to sit without regard to hours,—may not have been so read will not constitute an irregularity. It is usual, however, and proper to read all such orders, equally with those relating to the composition of the court, in the presence of the accused.* Dig. J. A. Gen., 643, par. 1, *f*.

[1] *Ibid.*, par. 1, *f*. The form that "The members of the court and the judge-advocate were then duly sworn," is a proper one for the statement of the qualifying of a general court.† Any statement, however, will be legally sufficient from which it can be gathered by the reviewing officer, or presumed, that the members and judge-advocate were in fact qualified as required by Articles 84 and 85. Where an absent member joins or a new member is added to the court, or the first judge-advocate is relieved and a new judge-advocate is detailed, at a stage of the proceedings subsequent to the original organization and qualifying, the record should show that such member or judge-advocate, before acting, was sworn as above indicated. Where several persons are tried together the record will properly show that the oath was taken in the presence of *all* the accused. *Ibid.*, 2. *d*.

[2] *Ibid.*, 644, par. 1, *g*. See, also, the title "Pleas" in the Appendix.

[3] *Ibid.*, par. 1, *h*.

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* Compare Coffin *vs.* Wilbour, 7 Pick., 150. It is not considered a compliance with par. 954, Army Regulations, directing that the court is to be sworn at the commencement of each trial, to call several prisoners into court at the same time and swear the members of the court *once* before them all. G. O. 60, War Dept., 1873.

† See this opinion adopted in G. C. M. O. 12, Hdqrs. of Army, 1877.

The inversion of the proper *order* of swearing the court and judge-advocate was held by the Attorney-General (13 Opins., 374) not to have invalidated the proceedings of a naval court-martial.

thereon, if any, and the ruling of the court; and where the court is cleared on any interlocutory objection, the fact will properly be noted.[1]

It is not necessary to encumber a record by spreading upon it documents or other writing or matter excluded by the court. But it should specify the character of the writing and the grounds upon which it was ruled out.[2]

Finding and Sentence.—The record should state the finding on each of the several charges and specifications, and the sentence in the event of a conviction. In a case of a death-sentence it is usual (though not essential, not being required by the 96th Article) to state that it was concurred in by two thirds of the members. Care should be taken that there be no variance in the statement of the name, etc., of the accused between the finding or sentence and the charges.[3]

Authentication of Record.—The record should be "authenticated" by the signatures of the president and the judge-advocate.[4] Where, indeed, there are no material proceedings after the sentence, the subscription of the same by these officers will constitute a sufficient authentication of the record as a whole. Where the president or the judge-advocate has been changed pending the trial, it is of course the last one who is to sign the record. Adjournments from day to day are not required to be authenticated.[5]

Presumption as to Jurisdiction, etc.—Unless it clearly appears to the contrary on the face of the record, it is in general to be *presumed* therefrom not only that the court had jurisdiction in the case, but also that the proceedings were sufficiently regular to be valid in law.[6]

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[1] Dig. J. A. Gen., 644, par. 1, *h*.
[2] *Ibid.*, 651, par. 14.
[3] *Ibid.*, 645, par. 1, *i*.
[4] Par. 954, A. R., 1895.
[5] *Ibid.*
[6] *Ibid.*, 647, par. 3. Among the minor points held by the Judge-Advocate General, in connection with the subject of the form of the record, are the following: That the several stages of the proceedings of the court should appear in the record in the proper order; thus, that the swearing of the court should not be recorded before the statement as to whether the accused objected to any of the members, etc. That, in its statement of the opening of each day's session, the record may well mention, if such was the fact, that the proceedings of the previous day or session (if any were had in the *same* case) were read and approved. Such a reading, however, though desirable as giving the court an opportunity to make corrections, is often not resorted to, and even where it is, is not always noted in the record. That, except where the court is specifically authorized to sit "without regard to hours," the record—though this is not essential, the 94th Article of War not requiring it—may well set forth the hours of assembling and adjourning, so that it may appear that its sessions did not commence earlier than 8 o'clock A.M., or continue later than 3 o'clock P.M. That, though par. 1038, Army Regulations, in directing that "the record shall be clearly and legibly written" and "as far as practicable without erasures or interlineations," contemplates that the record will be written by hand, there is no legal objection to printing the record, or any part of it (such as the charges and specifications where numerous), provided of course the signatures of the president and judge-advocate are written by them in person. That the record will conveniently and properly be indorsed on the outside, or cover, so that the name of the

Revision Proceedings.—Where the court is reassembled for the purpose of a *revision* of its proceedings in any particular, the record should formally recite all that is ordered and done as a new and independent chapter of the history of the case tried. The record of a revision will properly begin with setting forth a copy of the order reconvening the court, and will show that at least five members assembled, together with the judge-advocate and, where the correction required is such as to make it proper that he be present, the accused. The record will further show the action taken by the court, in making the correction or otherwise, under the order, and the proceeding will be finally authenticated by the signatures of the president and the judge-advocate. Where the court decides upon making the correction, the same should be declared to be made in manner and form as determined upon, and with the proper reference to the part of the original proceedings in which the error occurs. The error itself, however, is to be left as originally recorded; all corrections in the body of the record by erasure, interlineation,

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accused, and the court by which he was tried, with the time and place of trial, etc., will be apparent without opening and examining the proceedings.* Dig. J. A. Gen., 646, par. ?.

However desirable it may have been, in view of the numerous and serious defects frequently occurring in the records of courts-martial during the late war, and in order to induce a greater precision and uniformity in the preparation of such records, to treat (as was not unfrequently done) the more grave of these defects as fatal to the validity of the proceedings or sentence, it is conceived that the same, in general, might properly have been regarded, and may now be regarded, as only calling for, or justifying, a disapproval of the proceedings. It is the effect of the rulings of the civil courts that where the court on any trial was legally constituted, had jurisdiction of the case, and has imposed a legal sentence or judgment, every reasonable intendment will be made in favor of the regularity of its proceedings, and even where the same are clearly irregular the validity of the result will not be deemed to be affected, provided no statutory provision has been violated. (See Hutton *vs.* Blaine, 2 Sergt. & Rawle, 75, 79; Moore *vs.* Houston, 3 *Id.* 197; Trinity Church *vs.* Higgins, 4 Robt., 1; Edwards *vs.* State, 47 Miss., 581.) And it is further held that the regularity or validity of the minor details of the proceedings may be shown by evidence outside the record. Van Deusen *vs.* Sweet, 51 N. York, 378. Similarly, it is believed, no omission or error in a record of court-martial, not in contravention of express statute, should, as a general rule, be regarded as absolutely invalidating the proceedings where there remains enough in the record fairly to warrant the presumption that the legal requirements have been complied with, or where the reviewing authority can supply the defect from his own official knowledge, or from current orders or other satisfactory evidence readily available to him. Thus where no copy of the convening order accompanies the proceedings, but the reviewing authority, from the fact of having issued it himself or from the records of the command or otherwise, is officially apprised that the court was duly convened, the proceedings are not to be treated as fatally defective, but—the court appearing in fact to have been constituted and to have acted pursuant to the order—may be regarded as valid in law though imperfectly recorded. Where indeed the record discloses in the proceedings of a general court-martial an irremediable defect in a vital particular, as the fact that the court was composed of but four members, the proceedings and sentence, if any, must be held inoperative, since the *statute law*—Article 75—has fixed five members as the legal *minimum* for such a court. But where the defect occurs in a less material feature or is one of form only, the same, while it may, if of a grave character, properly warrant a *disapproval* of the proceedings,—in case it cannot be removed by a revision by the court on being reassembled for the purpose,—will not in general, it is held, justify the reviewing authority in pronouncing the proceedings to be void, or in treating them as necessarily without legal effect.

* See G. O. 29, War Dept., 1871, prepared by the Judge-Advocate General and containing a form of indorsement for the entitling of records of courts-martial, similar to that prescribed by Maj.-Gen. Scott in G. O. 50, Hdqrs. of Army, 1851.

etc., being irregular and improper. A court-martial is not authorized, either at a revision or during the trial, to expunge bodily any material words or statement forming a part of its record.[1]

Loss of Record.—Where the proceedings of a court-martial have regularly terminated, and the sentence has been confirmed and ordered to be executed by the proper and final reviewing authority, the fact that the record has since been lost does not impair or affect the judgment of the court, and constitutes no legal obstacle to the enforcement of the penalty. But where the record of the trial of a soldier who had pleaded not guilty and in whose case considerable evidence had been introduced was, by a casualty of war, lost before any action had been taken upon the sentence by the reviewing officer, it has been held that, unless the court could be reconvened and a new record could be made out from extant original notes, the proceedings, inasmuch as they could not be intelligently reviewed or formally approved, should properly be considered as inoperative and the sentence of no effect.[2]

The destruction, by fire or other casualty, of the record of the trial, conviction, and sentence of a deserter before action could be taken upon the same has been held of similar effect in law to an acquittal, and relieved the deserter from the forfeiture of pay due at the date of his desertion.[3]

DISPOSITION OF RECORDS.

Disposition of Records of General Courts-martial.—The disposition of the records of general courts-martial is regulated by Section 1199 of the Revised Statutes, which provides that "the judge-advocate general shall receive, revise, and cause to be recorded the proceedings of all courts-martial, courts of inquiry, and military commissions, and perform such other duties as have been performed heretofore by the judge-advocate general of the Army."[4]

Records of Minor Courts.—The Act of March 3, 1877, contains the requirement that the records of regimental, garrison, and field-officer's courts-martial shall, after having been acted upon, be retained and filed, in the judge-advocate's office at the headquarters of the department commander in whose department the courts were held, for two years, at the end of which time they may be destroyed.[5]

Copies of Records to Accused Persons.—The 114th Article of War contains the requirement that "every party tried by a general court-martial

[1] Dig. J. A. Gen., 646, par. 1, *l*. A record cannot legally be *corrected* by an interlineation by the judge-advocate, as by the words "at hard labor" interlined in the sentence. Nor can it legally be corrected by a statement on the margin of a page, signed by the judge-advocate. *Ibid.*, 651, par. 15. See, also, the title *Alterations and Erasures* in the chapter entitled EVIDENCE.

[2] *Ibid.*, 648, par. 4.

[3] *Ibid.*, 651, par. 17.

[4] Section 1199, Revised Statutes.

[5] Act of March 3, 1877 (19 Stat. at Large, 310).

shall, upon demand thereof made by himself or by any person in his behalf, be entitled to a copy of the proceedings and sentence of such court."[1]

The right thus conferred is personal to the accused and, as it ceases to exist at his death, cannot be revived or exercised by or in behalf of his widow, or by his heirs or legal representatives. The statute confers the right in the case of the proceedings of general courts-martial only; it does not authorize the furnishing of copies of the records of the proceedings of any of the minor courts-martial or of courts of inquiry.[2]

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[1] 114th Article of War.

[2] Applications for copies under this Article may be, and in practice commonly are, addressed in the first instance to the Judge-Advocate General, who thereupon furnishes the copy at the expense of the United States, provided the application is made by the accused or in his behalf. If not, he can furnish the copy only by the special authority of the Secretary of War. Any person desiring a copy of the record of a court-martial, or of any portion of a record, who is not entitled to be furnished with the same by the terms of this Article, should apply therefor to the Secretary of War, stating the reason for his application, in order that it may appear that he makes the same in good faith and for a proper purpose. If the application is approved by the Secretary, it will be referred to the Judge-Advocate General, who will then have the copy prepared and transmitted. Dig. J. A. Gen., 134, par. 3.

A person applying for the copy "in behalf" of the accused should exhibit some satisfactory evidence that he duly represents the accused, as his agent, attorney, or otherwise. Where it does not satisfactorily appear that the party is applying for and on behalf of the accused, he cannot be furnished with the copy as of right under the Article. A person other than the accused, applying on his own account, is not entitled to the copy. The fact that the applicant is a member of the family of the accused does not entitle him to the copy in the absence of evidence that he applies at the instance or in behalf of the accused. A party applying in behalf of "friends and creditors" of the accused *held* not entitled to a copy of the record of his trial. So *held* of one who subscribed his application merely as "attorney at law," without showing that he was authorized to act for the accused. *Ibid.*, par. 2.

A copy of the proceedings and sentence cannot properly be furnished under this Article till the same have been finally acted upon and such action has been promulgated in the usual manner. *Ibid.*, 133, par. 1.

The accused or other person entitled under this Article to be furnished with a copy of a record of trial is not entitled to be furnished with a copy of a report of the Judge-Advocate General made upon the case. To receive this, special authority must be obtained from the Secretary of War. *Ibid.*, 134, par. 4.

This Article does not authorize the furnishing of a copy of the record of trial to the widow of the accused or other person applying after his decease. *Ibid.*, 135, par. 7.

The furnishing of a copy of a record of a general court-martial to a person other than the accused and not applying in his behalf will, as a general rule, be authorized by the Secretary of War where the application is evidently made in the interest of justice and the copy furnished will clearly subserve a good and desirable purpose. But this must be made certainly to appear. *Ibid.*, par. 5.

It is only a party "tried by a general court-martial" who is entitled by the Article to the copy. Parties desiring copies of records of *courts of inquiry*, for the use in evidence under Article 121 or for any other purpose, must apply to the Secretay of War, as above indicated. Such copies, however, are rarely accorded, except for use under Article 121. *Ibid.*, par. 6.

CHAPTER XI.

THE REVIEWING AUTHORITY.

Power to Review, in Whom Vested.—This term is employed in military parlance[1] to designate the officer whose province and duty it is to take action upon—approve or disapprove, etc.—the proceedings of a court-martial after the same are terminated and the record has been transmitted to him for such action. This officer is ordinarily the commander who has convened the court. In his absence, however, or where the command has been otherwise changed, his successor in command, or, in the language of Articles 104 and 109, "the officer commanding for the time being," is invested with the same authority to pass upon the proceedings and order the execution of the sentence in a case of conviction.[2]

The "officer commanding for the time being," indicated in this Article, is an officer who has permanently or temporarily succeeded to the command of the officer who convened the court; as where the latter has been regularly relieved and another officer assigned to the command, or where the command of the convening officer has been discontinued and merged in a larger or other command, at some time before the proceedings of the court are completed and require to be acted upon.[3]

To legally act upon the proceedings, however, the "officer commanding for the time being" must have the necessary qualifications. Thus where the sentence is one of a general court-martial, this officer must have the same rank and *status* as the convening officer must have had under the 72d Article; *i.e.*, he must be either a general officer commanding the army, division, or department, or a colonel commanding the department.[4]

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[1] It occurs also in Sec. 1228, Rev. Sts.

[2] Dig. J. A. Gen., 670, par. 1.

[3] *Ibid.*, 127, par. 5. Thus where, under these circumstances, a separate brigade has ceased to exist as a distinctive organization and been merged in a division, or a division has been similarly merged in an army or department, the commander of the division in the one case and of the army or department in the other is "the officer commanding for the time being," in the sense of the Article. So where, before the proceedings of a garrison court convened by a post commander were completed, the post command had ceased to exist and the command become distributed in the department, *held* that the department commander, as the legal successor of the post commander, was the proper authority to approve the sentence under this Article. *Ibid.*

[4] Dig. J. A. Gen., 127, par. 7. Where a department command was discontinued without being transferred to or included in any other specific command, *held* that the General in command of the Army was "the officer commanding for the time being," and the proper authority to act, under this Article and the 109th, upon the proceedings

Approval by President.—In cases, however, of sentences of death or dismissal, imposed in time of peace, and of some death-sentences adjudged in time of war, together with all sentences "respecting general officers," while the convening officer (or his successor) is the *original* reviewing authority, with the same power to approve or disapprove as in other cases, yet, inasmuch as it is prescribed by Articles 105, 106, 108, and 109 that the sentence shall not be executed without the confirmation of the President, the latter becomes in these cases the *final* reviewing officer, and the sentence, having been approved by the commander, the record is transmitted to him for his action.[1] If, however, the proceedings or sentence are disapproved by the original reviewing officer, the record is not transmitted to the President, as there is nothing left in such case for the action of higher authority.

A similar division of the reviewing function exists in cases in which sentences are approved, but the execution of the same is suspended, and the question of their execution referred to the President, under Article 111. The same function is also shared by the inferior and superior commanders, in cases arising under Article 107, in which sentences are imposed by division or separate brigade courts. (So, under Article 110, in cases of sentences adjudged by field officers' courts in time of war.[2])

Where a general court-martial is convened directly by the President as Commander-in-chief, he is of course both the original and final reviewing authority.[3]

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and sentence of a court which had been ordered by the department commander, but whose judgment had not been completed at the time of the discontinuance of the command. Dig. J. A. Gen., 127, par. 6.

Where the original reviewing officer disapproves a sentence, to the execution of which the confirmation of superior authority is made requisite by the code,—as where (in time of peace) the department commander, who has convened the court in the case of an officer, disapproves a sentence of dismissal adjudged thereby,—the sentence being nullified in law, there remains nothing for the superior authority to act upon, and to transmit the proceedings to him for action will be improper and unauthorized. *Ibid.*, 672, par. 2.

[1] *Ibid.*, 670, par. 1.

[2] *Ibid.*

[3] The word "approved" employed by the President in passing upon a sentence of dismissal *held* to be substantially equivalent to "confirmed," the word used in the Article. In practice the two words are used indifferently in this connection. *Ibid.*, 128, par. 1.

The Article does not require that the confirmation of the sentence shall be signed by the President, nor does it prescribe any form in which the confirmation shall be declared. *Held*, therefore, that a written approval of a sentence of dismissal authenticated by the signature of the Secretary of War or expressed to be by his order was a sufficient confirmation within the Article; the case being deemed to be governed by the well-established principle that where, to give effect to an executive proceeding, the personal signature of the President is not made essential by law, that of the head of the department to which the subject belongs shall be sufficient for the purpose; the assent of the President to his order or direction being presumed, and his act being deemed in law the act of the President whom he represents.* *Ibid.*, par. 2.

It is a fundamental general principle of our public law that all acts done by and

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* This view has been sustained by an opinion of the Attorney-General of June 6, 1877, (15 Opins., 290,) and by a report of the Judiciary Committee of the Senate of March 3, 1879, report No. 868, Forty-fifth Congress, third session. (From this report, indeed, two members of the committee dissented in a subsequent report of April 7, 1879, Mis. Doc. No. 21, Forty-sixth Congress, first session.)

Effect of Approval and Disapproval.—While approval gives life and operation to proceedings or sentence, disapproval, on the other hand, quite nullifies the same.[1] A disapproval of the proceedings of a court-martial by the legal reviewing authority is not a mere expression of disapprobation, but a final determinate act putting an end to such proceedings in the particular case, and rendering them entirely nugatory and inoperative; and the legal effect of a disapproval is the same whether or not the officer disapproving is

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directions emanating from the heads of the executive departments in the course of their administrative duties are in law the acts and directions of the President, in whom is reposed by the Constitution the entire executive power of the Government, and whom the heads of departments (except where specially invested by Congress with distinctive authority of their own) simply act for and represent.* Thus all orders made and issued by the Secretary of War in connection with the government and regulation of the military establishment—such as orders convening general courts-martial, or approving and directing the execution of the sentences or otherwise acting upon the proceedings of such courts,† or mitigating or wholly or partially remitting punishments imposed thereby; or orders summarily dismissing officers, or dropping for desertion, retiring or accepting the resignation of, officers; or orders establishing military reservations, or promulgating army regulations, etc.—are to be regarded as the orders and acts of the President, whom the Secretary of War represents in the administration of his department; the same being presumed to be made and issued with the knowledge and by the direction of the President, whether or not he be referred to therein as having directed or commanded the same; and being equally as valid and operative as if signed by the hand of the President himself.‡ Dig. J. A. Gen., 689, par. 1.

This subject has been more recently considered by the United States Supreme Court in a succession of cases (Runkle *vs* U. S., 122 U. S.; 543; U. S. *vs.* Page, 137 U. S., 673; U. S. *vs.* Fletcher, 148 U. S., 84), the effect of which is that a statement of approval of a sentence of dismissal authenticated by the Secretary of War is legally sufficient, provided that it appear, by clear presumption therefrom, that the proceedings have actually been submitted to the President. *Ibid.*, par. 2, note.

In an opinion of the Attorney-General of April 1, 1879, (16 Opins., 298,) it was held that a confirmation of a sentence of dismissal of an officer, though irregularly and unduly authenticated, would be ratified by an appointment by the President of another officer to fill the supposed vacancy, and that the appointment thus made would be valid and operative. *Ibid.*

[1] The 104th Article is properly to be complied with by an approval of the sentence (where the same is approved in fact) by "the officer ordering the court," etc., although, as in a case of a sentence of dismissal in time of peace, he may not be empowered finally to confirm and give effect to the sentence. His approval is required as showing that he does not, as he is authorized to do, disapprove. Dig. J. A. Gen., 126, par. 1.

The approval of the sentence indicated by this Article should properly be of a formal character. An indorsement, signed by the commander, of the single word "Approved," —a form not unfrequently employed during the late war,—though, strictly, sufficient in law, is irregular and objectionable. So *held* that a mere statement written in or upon the proceedings, in transmitting them to the President, that the record was "forwarded" for the action of superior authority, was insufficient as not implying the requisite approval according to the Article. And similarly *held* of a mere recommendation that the proceedings be approved by such authority. *Ibid.*, 2.

Held that a department commander while absent from his headquarters on an expedition against Indians could not legally depute a staff or other officer to act for him, in approving the sentences of courts-martial previously duly convened by him. *Ibid.*, par. 4.

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* Lockington *vs.* Smith, Peters C. C., 472; U. S. *vs.* Benner, 1 Baldwin, 238; Wilcox *vs.* Jackson, 13 Peters, 498; U. S. *vs.* Eliason, 16 *id.*, 302; The Confiscation Cases, 20 Wallace, 109; U. S. *vs.* Webster, Davels, 59; U. S. *vs.* Freeman, 1 Wood. & Minot, 51; Lockington's Case, Brightly, 288; U. S. *vs.* Cutter, 2 Curtis, 617; Hickey *vs.* Huse, 56 Maine, 495; McCall's Case, 5 Philad., 289; In Matter of Spangler, 11 Mich., 322; 1 Opins. Att.-Gen., 380; 6 *id.*, 326, 587, 682; 7 *id.*, 453, 725; 9 *id.*, 463, 465; 11 *id.*, 398; 13 *id.*, 5, 14 *id.*, 453.

† But see 106th Article.

‡ See Wilcox *vs* Jackson, 13 Peters, 498; U. S. *vs.* Eliason, 16 *id.*, 302; Hickey *vs.* Huse, 56 Maine; 493; 2 Opins. Att.-Gen., 67; 13 *id.*, 5; 14 *id.*, 453; 15 *id.*, 290, 463; G. O. 35, W. D., 1850.

authorized finally to confirm the sentence.[1] But to be thus operative a disapproval should be express.[2] The effect of the entire disapproval of a conviction or sentence is not merely to annul the same as such, but also to prevent the accruing of any disability, forfeiture, etc., which would have been incidental upon an approval.[3] A disapproval of a conviction of a particular offense also operates to nullify the conviction of any lesser included offense involved in the conviction of the specific offense charged.[4]

While there are numerous defects, errors, or omissions which may well be deemed sufficient to induce, on the part of the reviewing authority, a disapproval of the proceedings or sentence of a court-martial, there are comparatively few which should be regarded as fatal to the legal validity of the same. Where the court, as shown by its authentic record, was legally constituted and composed and had jurisdiction of the case, and its sentence is a legal one, *i.e.*, one by which a legal punishment is adjudged the accused, a defect in its proceedings which does not amount to a violation of or a failure to comply with a statutory requirement should not in general be regarded as affecting the validity in law of the proceedings or sentence.[5]

Power of Reviewing Authority.—The authority of a military commander as reviewing officer is limited to taking action upon the proceedings and sentence (if any) by approving or disapproving the same, wholly or in part, and directing the execution of the sentence, and to the incidental function, as conferred by Article 112, of pardoning or mitigating the punishments which have been approved by him. Action not included within these powers he is not authorized to take. Thus he cannot himself correct the record of the court by striking out any part of the finding or sentence, or otherwise, nor can he in general change the order in which different penalties are adjudged by the court to be suffered, nor can he add to the punishment imposed by the court though deemed by him quite inadequate to the offense.*

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[1] Dig. J. A. Gen., 671, par. 2.

[2] See 16 Opins. Att.-Gen., 312, where it is remarked that it is not a legal *disapproval* of a conviction or sentence for the original reviewing officer, in forwarding the proceedings for the action of superior authority, to indorse upon the same an opinion to the effect that the finding is not sustained by the evidence.

[3] Dig. J. A. Gen., 671, par. 2. As frequently remarked in the opinions of the Judge-Advocate General, the mere absence of an approval is not a disapproval, nor can a mere reference of the proceedings to a superior without words of approval operate as a disapproval of the proceedings or sentence.* *Ibid.*

A reviewing officer cannot disapprove a sentence and then proceed to mitigate or commute the punishment, since, upon the disapproval, there is nothing left in the case upon which any such action can be based. *Ibid.*

It is quite immaterial to the legal effect of a disapproval whether any reasons are given therefor, or whether the reasons given are well founded in fact or sufficient in law. *Ibid.*

[4] Dig. J. A. Gen., 334.

[5] *Ibid.*, 672, par. 3.

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* A disapproval of a sentence by the proper reviewing authority is "tantamount to an acquittal by the court." 13 Opins. Att.-Gen., 460.

A reviewing officer, however, may in general specify the reasons for the action taken by him without transcending his authority. Thus where a department commander disapproved a sentence as inadequate, and in stating his grounds for so doing commented unfavorably upon the conduct of the accused as indicated by the evidence, it has been held that such comments were a legitimate explanation of the action taken and did not constitute an adding to the punishment.[1]

Where the reviewing officer deems that the proceedings of the court are in any material particular erroneous or ill advised, his proper course in general will be to reconvene the court for the purpose of having the defect corrected, at the same time furnishing it with the grounds of his opinion. Thus if he regards the sentence inadequate, he should, in reassembling the court for a revision of the same, state the reasons why he considers it to be disproportionate to the amount of criminality involved in the offense. But although he cannot compel the court to adopt his views in regard to the supposed defect, he may in a proper case express his formal disapprobation of their neglect to do so.[2]

In acting upon the proceedings of a court-martial, the legal reviewing officer acts partly in a judicial and partly in a ministerial capacity. He "decides" and "orders," and the due exercise of his proper functions cannot be revised by superior military authority. Thus a reviewing officer who has duly acted upon a sentence and promulgated his action in orders cannot be required by a higher commander, or by the Secretary of War, to revoke such action. If the sentence be deemed unwarranted or excessive, relief may be extended through the power of pardon or remission.[3]

The reviewing authority should properly authenticate the action taken by him in any case by subscribing in his own hand (adding his rank and command, as indicating his legal authority to act) the official statement of the same as written in or upon the record. Impressing the signature by means of a stamp is not favored.[4]

[1] Dig. J. A. Gen., 672, par. 3. In passing upon the findings and sentence of a court-martial, the reviewing officer will properly attach special weight to its conclusions where the testimony has been of a conflicting character. This for the reason that, having the witnesses before it in person, the court was qualified to judge, from their manner in connection with their statements, as to the proper measure of credibility to be attached to them individually.*

[2] *Ibid.*, 673, par. 4. Thus where a court-martial, on being reconvened with a view of giving it an opportunity to modify a sentence manifestly too lenient for the offense found, decided to adhere to the sentence as adjudged, and, on being again reassembled to consider further grounds presented by the reviewing commander for the infliction of a severer penalty, again declined to increase the punishment, *held* that it was within the authority of the reviewing officer, and would be no more than proper and dignified for him in taking final action upon the case, to reflect upon the refusal of the court as ill-judged, and as having the effect to impair the discipline and prejudice the interests of the military service. *Ibid.* See, also, the title *Proceedings in Revision*, p. 159, *ante*.

[3] Dig. J. A. Gen., 676, par. 17.

[4] *Ibid.*, 674, par. 6.

* See the early case of Capt. Weisner, Am. Archiv., 5th Series, vol. ii. p. 895. So civil courts will rarely interfere, except in cases of clear injustice, with verdicts of juries which have turned upon the credibility of witnesses. Wright *vs.* State, 34 Ga., 110; Whitten *vs.* State, 47 *id.*, 297.

A military commander cannot of course delegate to an inferior or other officer his function as reviewing authority of proceedings or sentences of courts-martial as conferred by the 104th or 109th Article of War or other statute. Nor can he regularly authorize a staff or other officer to write and subscribe for him the action, by way of approval, disapproval, etc., which he has decided to take upon such proceedings.[1]

When the final action of the reviewing officer has been published in orders to the command and notified to the accused, his power of approval and disapproval in the case is exhausted and his action cannot be recalled or modified.[2]

THE PARDONING POWER.

REMISSION, MITIGATION, AND COMMUTATION.

The Pardoning Power.—The general power to pardon offenses against the United States is vested by the Constitution in the President. As an incident of his power to pardon, the Executive may, by a similar exercise of clemency, mitigate and, in cases in which from the nature of the punishment imposed mitigation, as such, is impossible, his clemency may take a form presently to be described, called commutation. In addition to the power vested in the President by the Constitution, a qualified form of the pardon-

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[1] Dig. J. A. Gen., 674, par. 7. An approval purporting to be subscribed by the commander "by" his staff judge-advocate or assistant adjutant-general would be open to question and quite irregular; as would also be any action subscribed by such an officer purporting to be taken "in the absence and by the direction of" the commander. *Ibid.*

[2] *Ibid.*, 675, par. 13. Where a department commander applied to the War Department for the return of the proceedings of a case in order that he might modify his action thereon, *held* that, as the same had been formally promulgated in orders and had duly taken effect, the power of the reviewing officer over the case was exhausted, and the application could not legally be complied with. *Ibid.*

Action taken by a reviewing officer upon the proceedings and sentence of a court-martial may be recalled and modified before it is published and the party to be affected is duly notified of the same. *After* such notice the action is beyond recall. The power of remission indeed may be exercised so long as any part of the punishment imposed remains unexecuted. But when the final approval of the sentence (or other action taken) has been once officially communicated to the accused, the function and authority of the reviewing officer, as such, over and respecting the same is exhausted and cannot be revived. An approval cannot then be substituted for a disapproval, or *vice versa*. *Ibid.*, 674, par. 8.

A sentence to forfeit certain pay was approved, and such approval promulgated in orders of Feb. 18, 1865. On March 10th following, the reviewing officer "reconsidered" his action and by another order disapproved the sentence, and this order was also promulgated. *Held* that the latter order was of no effect. The first order executed the forfeiture, making the amount forfeited public money, and exhausted the power of the reviewing authority. *Ibid.*, 676, par. 14.

But where, after the reviewing commander had approved a sentence in General Orders and the court had been dissolved, it was discovered that there was a *fatal defect* in the proceedings in that they did not show that the court or judge-advocate had been sworn in the case, *held* that the commander would properly issue a supplemental order declaring the proceedings a nullity and the original order inoperative and withdrawn on account of the defect. *Ibid.*, par. 15.

Where the convening commander dissolves a court pending a trial, his power as to that court is exhausted and he cannot revive it as such. He may reconvene the same members as a court-martial, but it will be another and distinct tribunal. *Ibid.*, par. 16.

ing power, extending to the remission or mitigation of sentences imposed by the several military tribunals, is conferred by statute upon certain military commanders who are authorized by law to approve and carry into effect the sentences of courts-martial.[1]

The President is empowered by the Constitution[2] "to grant pardons for offenses against the United States"; and a pardon, like a deed, in order to take effect must be delivered to and accepted by the party to whom it is granted.[3] Thus there can be no pardon of a deceased officer or soldier; and that the pardon is asked by the party's widow or heir, who is to be pecuniarily benefited thereby, cannot affect the principle.[4]

Effects of Pardon.—It is the effect of the exercise of the pardoning power by the President to relieve the party from all punishment remaining to be suffered. Where, therefore, he remits the unexecuted portion of a term of imprisonment, an additional penalty which, by the express terms of the sentence, was to be incurred at the end of the adjudged term, as a dis-

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[1] The pardon or remission of the unexpired punishments of soldiers, where favored by the Judge-Advocate General, has been recommended on grounds of which the principal were the following: that the soldier was a minor at enlistment; that he was enlisted under false representations as to the kind of service which would be required of him, made by the recruiting officer in disregard of par. 916, Army Regulations; that he enlisted as a mere recruit, did not have the Articles of War read to him, and had no proper comprehension of the gravity of his offense; that he did not comprehend his military obligations on account of an imperfect knowledge of the English language; that he was an Indian scout unacquainted with our language or with the Articles of War; that his offense was wholly or in part induced by harsh or injudicious treatment by a military superior; that excessive or unreasonable duty had been required of him, or that he had been put on duty (as a guard or sentinel, for example) when unfit for the same on account of illness or partial intoxication; that his offense was committed under a provocation, or was accompanied by circumstances of extenuation, to which the court had not given due weight; that prior to his trial and sentence he had been adequately disciplined by his commander; that he had been improperly held in irons, or handcuffed, pending the trial; that his confinement had so seriously impaired his health that if continued it would endanger his life; that an unreasonable time was allowed to elapse between his arrest and trial, or after trial and before the approval and promulgation of the sentence. These and other grounds have been taken into consideration, sometimes alone, and sometimes in combination or in connection with such further favorable circumstances as voluntary return in case of desertion, previous good character, good conduct under sentence, etc. In cases of officers, the principal grounds for recommending pardon or remission have been a previous good record for efficiency in the service, especially in time of war, a high personal character or reputation, and an apparent absence of a fraudulent or criminal intent in the offense as committed. Dig. J. A. Gen., 554, par. 11.

In cases in which military offenders—such as deserters from the army remaining at large, or officers or soldiers who have escaped from military custody while in arrest or under sentence—have applied from their places of refuge for executive pardons, it has almost invariably been *advised* by the Judge-Advocate General that the application be not entertained till the fugitive from justice should return and surrender himself to the military authorities to stand his trial or abide by his sentence. *Ibid.*, 555, par. 12.

[2] Article II, Sec. 2, clause 1.

[3] U. S. *vs.* Wilson, 7 Pet., 150; In the Matter of De Puy, 3 Benedict, 307; 6 Opin. Att.-Gen., 403.

[4] Dig. J. A. Gen., 551, par. 1. So where, in a case of an officer who had died while under a sentence of suspension from rank, a pardon was asked for the purpose of having the stigma removed from his record in the service, *held* that the case was not one in which the pardoning power could be exercised. *Ibid.*

honorable discharge from the service, cannot be enforced. The pardon having intervened, the sentence ceases to have any effect whatever in law, and the soldier—the remainder of his service being regular—must be honorably discharged.[1] It is the effect of a full pardon, therefore, (otherwise of a mere remission of the punishment—see REMISSION) to remove all penal consequences, except of course executed penalties and all disabilities attached by statute or army regulation to the offense or to the conviction or sentence.[2]

Continuing Punishments.—The pardoning power extends to *continuing* punishments, or punishments which are never fully executed,—remitting in each case the punishment from and after the taking effect of the pardon. Of this class is the punishment of disqualification to hold military or public office, as also that of the losing of or reduction in "files" (or relative rank) in the list of officers of the offender's grade; these, being continuing punishments, may be put an end to at any time by a remission by the pardoning power.[3]

Conditional Pardons.—It is settled that a pardon may be *conditional*—may be granted upon a condition precedent or subsequent.[4] Thus where

[1] Dig. J. A. Gen., 553, par. 5.

[2] *Ibid.*, 551, par. 2. Thus the pardon of a convicted deserter will relieve him from the loss of the rights of citizenship attached by the Act of March 3, 1865, (Secs. 1996, 1998, Rev. Sts.,) to a conviction of desertion.* But a pardon by the President will be ineffectual of course to remove a disqualification incurred by the offender under a State statute.†

Ibid., 12 Opins. At. Gen. 81; *Ex parte* Garland, 4 Wallace, 380.

[3] Dig. J. A. Gen., 553, par. 6; 12 Opin. Att.-Gen., 547. A pardon by the President will reach and remove a continuing disqualification or disability incident upon the commission of an offense against the United States, or upon a conviction by a United States court or a court-martial, but not a disqualification incurred (as upon conviction of grand larceny) under the laws of a *State*. *Ibid.*, 557, par. 17.

[4] The language of the constitution is such that the power of the President to pardon conditionally is not one of inference, but is conferred in terms, the language being "to grant reprieves and pardons," which includes absolute as well as conditional pardons. Under this power the President can grant a conditional pardon to a person under sentence of death, offering to commute that punishment into an imprisonment for life. If this is accepted by the convict, he has no right to contend that the pardon is absolute and the condition of it void. *Ex parte* Wells, 18 How., 307; Osborn *vs.* U. S., 91 U. S., 474; U. S. *vs.* Wilson, 7 Pet., 150. When a pardon is granted with conditions annexed, the conditions must be performed before the pardon is of any effect. Waring *vs.* U. S., 7 C. Cls. R., 501. One who claims the benefit of a pardon must be held to strict compliance with its conditions. Haym *vs.* U. S., 7 C. Cls. R., 443; Scott *vs.* U. S., 8 *ibid.*, 457. The condition annexed to a pardon must not be impossible, unusual, or illegal; but it may, with the consent of the prisoner, be any punishment recognized by the statutes, or by the common law as enforced by the State. Lee *vs.* Murphy, 22 Grat. (Va.), 789.

The President may, also, by an exercise of the pardoning power, mitigate or commute a punishment imposed by any court of the United States. *Ex parte* Wells, 18 How., 307; *In re* Ross, 140 U. S., 453. In mitigating the sentence of a naval court-martial, the President may substitute a suspension for a term of years without pay for an absolute dismissal from the service, as suspension is but an inferior degree of the same punishment. 1 Opin. Att.-Gen., 433.

* 8 Opins. Att.-Gen., 284; 9 *id.*, 478; 14 *id.*, 124. And see People *vs.* Bowen, 43 Cal., 439. That this disability can attach only upon a conviction, see the 47th Article in the Chapter entitled THE ARTICLES OF WAR, and authorities cited in note.

† 7 Opins. Att.-Gen., 760.

the President, by his proclamation of March 11, 1865, granted a pardon to all deserters "on condition that" they duly returned (within a certain time stated) to their regiments, etc., and served the remainder of their original terms, and in addition a period equal to the time lost by desertion, *held* that a soldier who duly returned under this proclamation, but, after remaining with his regiment a portion of the period indicated, abandoned the service and went to his home, was liable (the legal period of limitation fixed by the 103d Article of War not having expired) to be brought to trial for his original desertion; the *condition subsequent* upon which his pardon for the same had been extended not having been performed.[1]

Constructive Pardons.—While to restore to or place upon duty an officer or soldier when under arrest or charges on account of an alleged offense would not probably in this country, to the same extent as in England, be regarded as operating as a condonation of the offense, the promotion of an officer while under arrest on charges has been viewed as a *constructive pardon* of the offense or offenses on account of which he has been arrested. But it has been held that such a promotion could not operate as a pardon of other offenses committed by him, of the commision of which no knowledge was had by the Executive at the date of the promotion.[2]

Pardon not Retroactive.—A pardon is not retroactive. It cannot remit an executed punishment, or restore an executed forfeiture resulting either by operation of law or sentence. It cannot, therefore, restore the forfeitures incident upon desertion. Further, it cannot modify past history, or reverse or alter the facts of a completed record. From and after the taking effect of a pardon the recipient is innocent in law as to any subsequent contingencies, but the pardon does not annihilate the fact that he was guility of the offense. The pardon indeed proceeds upon the theory that the party was

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[1] Dig. J. A. Gen., 554, par. 9. *Held* that a withdrawal by a department commander of a pending charge against a soldier, upon his giving a pledge to abstain in the future from the conduct which was the subject of the charge, did not operate as a pardon and could not be pleaded as such. Had it been done by an order of the President, it could have had no further operation than as a *quasi*-conditional pardon, leaving the charge legally renewable upon a repetition of the offense. *Ibid.*, 557, par. 18.

[2] *Ibid.*, 553, par. 7. See Clode, Mil. Forces of the Crown, vol. i., p. 173; Prendergast, 244–5, in connection with the cases cited of Sir Walter Raleigh, Lord Lucan, Capt. Achison, etc.

Held that an order, issued by competent authority at about the close of the war (December, 1865), by which a military prisoner convicted of larceny by court-martial was simply released, before the end of his term, from a State penitentiary, was an act of constructive pardon, operating to remit the unexecuted portion of the sentence; and that a formal pardon by the President was not essential to enable the party to exercise the right of suffrage in a State where a conviction of larceny, unpardoned, was a disqualification. Dig. J. A. Gen., 557, par. 19.

While ordering or authorizing an officer or soldier when under sentence to exercise a command or perform any other duty inconsistent with the continued execution of his sentence has been viewed as a constructive pardon, *held* that to allow an officer while under a sentence of suspension from rank to perform certain slight duties in closing his accounts with the United States could not be regarded as having any such effect. Dig. J. A. Gen., 553, par. 8; 6 Opin. Att.-Gen., 74.

guilty in fact. The asking for it is an admission of guilt, and the granting of it is a recognition of the fact of guilt.[1]

Source of Power to Pardon, Mitigate, etc.—The power to remit or mitigate sentences awarded by military tribunals is conferred, in express terms, by the 112th Article of War, which provides that "every officer who is authorized to order a general court-martial shall have power to pardon or mitigate any punishment adjudged by it except the punishment of death or of dismissal of an officer. Every officer commanding a regiment or garrison in which a regimental or garrison court-martial may be held shall have power to pardon or mitigate any punishment which such court may adjudge.[2]

Sentences of Death and Dismissal.—The power to remit or commute sentences of *death* and *dismissal* is reserved by this Article for the President. A military commander cannot exercise such power even where, in time of war, he is authorized to approve and execute the sentence. He may then, however, if he thinks that the sentence should be remitted or commuted, suspend its execution pending the action of the President, to whom it may be submitted with a recommendation to clemency under the authority conferred by the following Article:[3] "Any officer who has authority to carry into execution the sentence of death or of dismissal of an officer may suspend the same until the pleasure of the President shall be known; and in such case he shall immediately transmit to the President a copy of the order of suspension, together with a copy of the proceedings of the court."[4]

Remission.—The reviewing authority, in the exercise of the power conferred upon him by the 112th Article of War, may see fit to refrain from carrying the entire sentence into effect, or may relieve the accused of a portion of the punishment imposed in the sentence; he is then said to act by

[1] Thus *held* that the President could not by a pardon remove the charge of desertion from the record of a former soldier, who had long since become a civilian by reason of the muster-out and non-existence of the volunteer army to which he had belonged in the late war; and that the effect of his pardon would not be to give him an honorable discharge. A pardon would not only not remove a charge of desertion, but would in fact confirm it, and constitute an additional reason for retaining it on the record. And a party cannot by an executive act be discharged from the service unless he is *in* the service. Dig. J. A. Gen., 556, par. 15. See *Ex parte* Garland, 4 Wallace, 333; Knote *vs.* U. S., 95 U. S., 153.

Held (January, 1892) that it was beyond the power of Congress to undo the executed legal judgment of a court-martial, and that it could not, therefore, lawfully authorize the President or the Secretary of War to pardon or remit a legal sentence of such a court adjudged in 1866 and long since duly and fully executed. *Ibid.*, 557, par. 16.

[2] See, also, for a similar power in respect to the sentences of summary courts, section 2 of the Act of July 27, 1892 (27 Stat. at Large, 277).

[3] Dig. J. A. Gen., 129, par. 1.

[4] 111th Article of War. An officer suspending the execution of a sentence for the action of the President under this Article should first formally approve the same. Simply to forward the proceedings stating that the sentence has been suspended is incomplete and irregular. If the commander disapproves the sentence, he cannot of course suspend and transmit under this Article, since there remains nothing for the President to act upon. Dig. J. A. Gen., 129, par. 1.

Where a case is submitted to the President for his action under this Article, he may approve or disapprove the sentence in whole or in part, and, if approving, may exercise the power of remission or mitigation. *Ibid.*, par. 2.

way of *remission*. The effect of remission, as a form of clemency, is to cancel the entire sentence where a single form of punishment has been imposed, or a portion of it where the sentence is made up of two or more distinct punishments—forfeiture of pay and confinement, for example—either of which may thus be abated or reduced by way of remission.[1]

Mitigation.—The reviewing authority, in approving the punishment adjudged by the court and ordering its enforcement, is authorized, if he deems it too severe, to graduate it to the proper measure by reducing it in quantity or quality without changing its species: this is *mitigation*. Imprisonment, fine, forfeiture of pay, and suspension are punishments capable of mitigation. As an instance of a mitigation both in quantity and quality, it has been held that a sentence of imprisonment for three years in a penitentiary was mitigable to an imprisonment for two years in a military prison.[2]

The pardoning power here given is not limited in its exercise to the moment of the approving of the sentence, but may be employed as long as there remains any material for its exercise. Under this Article, as interpreted by the usage of the service, a department (or army) commander may remit at any time, in his discretion, and for any cause deemed by him to be sufficient, the unexecuted portion of the sentence of any soldier confined within his command under a sentence imposed by a court-martial convened by him or by a predecessor in the command.[3]

A punishment cannot be pardoned or mitigated under this Article where it has been once duly executed. Where, however, a sentence has been executed only in part, it may be remitted as to the portion remaining unexecuted.[4]

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[1] Remission is a partial exercise of the pardoning power, relieving the person from a *punishment* or the unexecuted portion of a punishment, but not pardoning the *offense* as such, or removing the disabilities or penal consequences attaching thereto or to the conviction. Dig. J. A. Gen., 657, par. 1. Compare Perkins *vs.* Stevens 24 Pick., 277; Lee *vs.* Murphy, 22 Grat., 799; 1 Bish. Cr. L., § 763; 2 Opins. Att.-Gen., 329; 5 *Id.*, 588; 8 *Id.*, 283-4.

[2] Dig. J. A. Gen., 131, par. 5.

[3] *Ibid.*, 130, par. 4.

[4] *Ibid.*, par. 3. A military commander vested with the power of pardon or mitigation under this Article is not authorized to delegate the same to an inferior. Thus *held* that a department commander could not legally authorize a post commander to remit in part, upon good behavior, the punishment of a soldier, under sentence at the post of the latter, who had been convicted by a general court convened and whose proceedings had been acted upon by the former. *Ibid.*, par. 2.

Held that it was not a due exercise of the power given by this Article, but irregular and unauthorized, for a post commander to suspend the execution of the sentence of a garrison court convened by him, during good behavior on the part of the soldiers sentenced. *Ibid.*, 131, par. 6. Such an exercise of clemency would constitute a conditional pardon, an exercise of power vested by the Constitution in the President alone. See the title "Commutation," *post*.

A punishment in itself illegal is not capable of mitigation. Thus where a sentence of imprisonment in a penitentiary is not legally authorized, it cannot be made valid by mitigating this imprisonment to confinement in a military prison. In such case the latter will be equally invalid and inoperative with the original punishment. *Ibid.*, 132, par. 11.

A substitution, for a punishment of dishonorable discharge with loss of all pay and

Commutation.—As an exercise of the power to "pardon or mitigate" the sentences of courts-martial operates within the field of the general power to pardon which is vested in the President by the Constitution, the terms of the Article conferring this authority upon military commanders have been strictly construed; and so where a sentence has been imposed of such character as not to admit of mitigation—death, dismissal, or dishonorable discharge, for example—clemency can only be exercised by way of commutation; that is, by the substitution of another and different punishment for that imposed in the sentence. *Commutation*, therefore, is a form of conditional pardon,[1] a power vested in the President alone, and not shared with the several reviewing authorities mentioned in the 111th and 112th Articles of War.[2]

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allowances due and to become due, of a punishment of confinement at hard labor at the post for one year with forfeiture of ten dollars per month for the same period, *held* not a legitimate mitigation. Dig. J. A Gen., 132, par. 12.

Where a sentence of dishonorable discharge with forfeiture of all pay and allowances and confinement at hard labor for four years was *mitigated* to confinement for one year with forfeiture of ten dollars per month for the same period, *held* that the same was regular and legal and not in contravention of Circ. No. 2 (H. Q. A.), of 1885. *Ibid.*, par. 13.

Dishonorable discharge cannot legally be mitigated to "discharge without a character." The latter is not a recognized punishment. *Ibid.*, par. 14.

Where a sentence consists of several punishments, the reviewing officer cannot so exercise the power of mitigation as to exceed in any instance the maximum punishment established by law and orders. Thus he would not be authorized by way of mitigation to reduce a confinement, while at the same time adding to a forfeiture so as to make it in excess of the maximum forfeiture legally allowable for the offense. *Ibid.*, 133, par. 19.

An officer under a sentence of suspension for five years with forfeiture of one quarter of his pay applied to be allowed to receive his full pay for three months, the forfeiture imposed by the sentence for these months to be satisfied in one sum from the pay of the month next succeeding. *Held* that such action—for which there was no precedent—would have to be taken, if at all, by way of mitigation, but that the same would amount to a postponement of the execution (of a part) of the sentence, which would not be legitimate mitigation. *Ibid.*, par 20.

[1] See the title "Conditional Pardons," *supra*.

[2] *Held* that a reviewing officer other than the President was not empowered by this Article to commute a punishment; that the "pardon" here specified was remission, which, unlike the pardoning power vested in the President, did not include commutation or conditional pardon. So held that a reviewing commander was not authorized to commute the punishment of dishonorable discharge, and that, as such punishment was not susceptible of mitigation, it could not legally be reduced under this Article. Dig. J. A. Gen., 131, par. 7.

The substitution of the punishment of confinement for that of dishonorable discharge, imposed by sentence of court-martial, would not of course be authorized by way of mitigation (which cannot change the nature of the punishment), but may be effected by a commutation of the sentence by the President, accepted by the soldier. (See the action of the President in the case of Private Hayes, 5th Artillery, in G. C. M. O. 58, A. G. O., of 1888.) *Ibid.*, par. 8.

Where a prisoner is serving out a sentence of imprisonment at a military prison or place of confinement within the command of the officer who approved the proceedings, such officer or his successor in command may, under this Article, remit, at any time, the unexpired portion of the pending confinement, although the punishment of dishonorable discharge imposed by the same sentence may meantime have been duly executed.* *Ibid.*, par. 9.

* The counter-opinion of the Attorney-General (19 Opin. Att. Gen., 106) was not adopted by the Secretary of War or followed in practice, as is shown by the terms of paragraphs 942 and 946, Army Regulations of 1895. See, also, Manual for Courts-martial, p. 68, par. 9, and notes.

CHAPTER XII.

THE INFERIOR COURTS-MARTIAL.

Jurisdiction in General.—The constitution and composition of the several inferior courts have already been described.[1] The procedure of the garrison court and of the regimental court, when convened for the trial of military offenses, is in all respects similar to that of general courts-martial. That of the Summary Court, as its name implies, is less formal in its nature than that of courts having multiple membership. The jurisdiction of these courts as a class, in respect to persons and offenses, and their power to punish, which are very much less extensive than those of the general court, will now be explained.

The jurisdiction of the several inferior courts is regulated by the 83d Article of War, which provides that "regimental and garrison courts-martial and summary courts detailed under existing laws to try enlisted men shall not have power to try capital cases or commissioned officers, but shall have power to award punishment not to exceed confinement at hard labor for three months, or forfeiture of three months' pay, or both; and in addition thereto, in the case of non-commissioned officers, reduction to the ranks, and in the case of first-class privates reduction to second-class privates."[2] It will thus be seen that two classes of cases are expressly withdrawn from their cognizance, capital cases and those in which the party defendant is a commissioned officer.[3] The limitation upon the power of the inferior courts to punish which is contained in the same Article constitutes an additional restriction upon their jurisdiction, and applies not only to cases in which the death-penalty may be imposed, but to the graver offenses as well—such as larcenies, aggravated acts of drunkenness, protracted absences without leave, and the like—the proper and adequate punishment of which would be beyond the power of such tribunals to inflict. For this reason, therefore, as a reviewing officer is never authorized to *add* to the punishment imposed by any court-martial, the more serious offenses should, where practicable, be referred for trial to general courts-martial, which alone are vested with

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[1] See the chapters, *ante*, entitled respectively THE CONSTITUTION OF COURTS-MARTIAL and THE COMPOSITION OF COURTS-MARTIAL.

[2] Act of March 2, 1901. (31 Stats. at Large, 951.)

[3] Capital offenses, *i.e.*, offenses capitally punishable, not being within the jurisdiction of inferior courts, such courts cannot take cognizance of acts specifically made punishable by Article 21, however slight be the offenses actually committed. Dig. J. A. Gen., 94, par. 2.

jurisdiction to impose punishment in proportion to the gravity of the offense.[1] An inferior court, however, cannot legally decline to try or sentence an offender, being an enlisted man, on the ground that it is not empowered, under this Article, to impose a punishment adequate to his actual offense.[2]

The statutes and the Army Regulations also confer an important privilege in this respect upon cadets and upon certain enlisted men of the higher grades, in the form of an immunity from trial by inferior courts, unless such trial has been ordered by authority of the officer competent to order their trial by a general court-martial.[3] Enlisted men holding certificates of eligibility for promotion are exempted from such trials,[4] and non-commissioned officers "if they object thereto shall not be brought to trial before Summary Courts without the authority of the officer competent to order their trial by general court-martial."[5]

THE SUMMARY COURT.

Constitution and Composition.—The constitution and composition of the Summary Court have already been explained. It may be convened "by the commanding officer of each garrison, fort, or other place, regiment or corps, detached battalion, or company, or other detachment of the Army."[6] The

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[1] Dig. J. A. Gen., 95, par. 7. See, also, in the Manual for Courts-martial, the article entitled "Punishment."

A sentence forfeiting pecuniary allowances in addition to pay, where the entire forfeiture amounted to a sum greater than one month's pay, *held* not authorized under this Article. *Ibid.*, par. 3.

A sentence, adjudged by a garrison court, of confinement "till the expiration of the term of service" of a soldier *held* unauthorized unless the soldier had no more than one month left to serve. *Ibid.*, par. 4.

The limitation of the authority of inferior courts in regard to sentences of imprisonment and fine *held* not to preclude the imposition by them of other punishments sanctioned by the usage of the service; such, for example, as reduction to the ranks either alone or in connection with those or one of those expressly mentioned. *Ibid.*, par. 5.

The limitations imposed by the Article have reference, of course, to single sentences. For distinct offenses made the subject of different trials, resulting in separate sentences, a soldier may be placed at one and the same time under several penalties of forfeiture and imprisonment, or either, exceeding together the limit affixed by the Article for a single sentence. *Ibid.*, par. 6.

[2] *Ibid.*, 95, par. 7. In a case where, because of previous convictions, the punishment may, under the order imposing limits upon punishments, be dishonorable discharge, the department commander may properly require the charges to be brought to trial before a general court-martial, notwithstanding that, if the alternative punishment of dishonorable discharge be not resorted to, the punishment would be within the power of an inferior court. *Ibid.*, 491, par. 1.

An offense covered by the order is cognizable by inferior courts-martial whenever the limit prescribed in the order may, by substitution of punishment under the provisions of the order, be brought within the punishing power of inferior courts as defined by the 83d Article of War. *Ibid.*, par. 2.

[3] Act of June 18, 1898, (30 Stat. at Large, 483,) par. 931, A. R. 1895.

[4] *Ibid.*

[5] *Ibid.*

[6] *Ibid.*

court may be appointed, however, and the officer who is to compose it may be designated by superior authority—that is, by the brigade, division, department, or post commander—when such a course is by him deemed either proper or desirable. The terms of the statute in respect to its constitution are thus seen to be extremely general and authorize the court to be convened by the commanding officer of a fort, camp, or other place, the garrison of which is composed of troops of the same or different corps; or by the commander of a regiment, battalion, separate company, or detachment in the field, without restriction as to its composition, for the trial of enlisted men charged with offenses falling within the jurisdiction of an inferior court in respect to the punishment which may be awarded upon conviction. When but one officer is present with a command the law requires that he shall constitute the court, and shall hear and finally determine such cases as are properly referable to it for trial.[1]

Jurisdiction.—The jurisdiction of the Summary Court is exclusive as to all cases triable by inferior courts-martial, both in peace and war; subject, however, to the exception already explained that "no one while holding the privileges of a certificate of eligibility to promotion shall be brought before it for trial." The statute also provides that "non-commissioned officers shall not, if they object thereto, be brought to trial before summary courts without the authority of the officer competent to order their trial by general court-martial." If, therefore, a non-commissioned officer objects to trial by Summary Court, such objection should, properly, take the form of a motion or request for trial by a regimental or garrison court, and such request, if formally submitted, should be granted as a matter of right. To confer jurisdiction for the trial of a non-commissioned officer, the authority of the officer competent to order his trial by general court-martial should be obtained and submitted to the court prior to the introduction and arraignment of the accused. In respect to its power to punish the Summary Court is subject to a statutory restriction from which the other inferior courts are exempt, in that it is forbidden to "adjudge confinement and forfeiture in excess of a period of one month, unless the accused shall before trial consent in writing to trial by said court; but in any case of refusal to so consent, the trial may be had either by general, regimental, or garrison court-martial, or by said Summary Court; but in case of trial by said Summary Court, without consent as aforesaid, the court shall not adjudge confinement or forfeiture of pay for more than one month."[2]

Time of Trial.—As regards time of trial, the jurisdiction of a Summary Court is not affected by the time when cases are brought before it, the requirement of the law as to time being directory only. The commanding

[1] Act of June 18, 1898, (30 Stat. at Large, 483,) par. 931, A. R. 1895.
[2] Act of March 2, 1901. (31 Stat. at Large, 901.)

officer, and not the court, will determine when and what cases will be brought before it. Delay in the trial of a soldier does not invalidate the proceedings, but may be considered by the court in awarding sentence.[1]

Punishing Power.—The power of the inferior courts to punish offenders which is conferred by the 83d Article of War and by the Act of June 18, 1898, has already been explained. Under the authority thus conferred[2] inferior courts-martial may award sentences of confinement at hard labor and forfeiture of pay for three months, and, as necessarily included in this, may sentence non-commissioned officers to be reduced to the ranks, and first-class privates may be reduced to the second class. This is the limit of their punishing power. For those offenses for which a limit of punishment has been prescribed by the President a Summary Court is restricted to the *kinds* of punishment named, except as to the substitutions in the settled ratio contained in Article VII of the President's order.[3]

Procedure.—As its name implies, the procedure of this court is summary in character.[4] Cases are brought to trial within twenty-four hours after the arrest of the accused, or as soon thereafter as practicable.[5] The Summary Court sits at hours fixed by the post commander in appropriate orders or, in the absence of such orders, at the convenience of the court.[6] The officer constituting the court is not sworn, but performs his duty under the sanction of his oath of office.[7] The accused appears before the court and, as the

[1] Manual for Courts-martial (edition of July 11, 1898), 66, par. 7.

[2] Acts of June 18, 1898, (30 Stat. at Large, 483;) March 2, 1901, (31 *ibid.*, 901.)

[3] Executive Order of March 30, 1898. Gen. Ord. No. 16, A. G. O., 1898.

[4] The procedure of the Summary Court should be similar to that of the older courts-martial. The charges and specifications should be read to the accused, and he be required to plead guilty or not guilty, and the witnesses should be sworn. But the testimony is not set forth in the record. Dig. J. A. Gen., 727, par. 13.

[5] Act of June 18, 1898. (30 Stat. at Large, 483.) The provision of the Act that accused soldiers shall be brought before the Summary Court for trial "within twenty-four hours from the time of their arrest" is not a statute of limitations nor jurisdictional in its character, but directory only—directory upon the officers whose duty it is to bring offenders before the court. The proceedings will thus be legally valid though the accused does not appear for trial within the period specified. So *held*, in a case of an accused soldier arrested on Saturday, that the court did not by not sitting on Sunday lose jurisdiction; and therefore that it is not necessary that a Summary Court should ever sit on a Sunday. *Ibid.*, 726, par. 10.

The provision in the Act in regard to the trial being had within twenty-fours of the arrest being directory only, a trial held after that time is entirely valid. Thus where a soldier, by reason of drunkenness or otherwise, is not in a condition to be tried within that time, his trial may be postponed till he is in such condition. *Ibid.*, 727, par. 11.

The Summary Court will be opened at a stated hour every morning except Sunday, for the trial of such cases as may properly be brought before it. Trials will be had on Sunday only when the exigencies of the service make it necessary. Manual for Courts-martial (ed. of July, 1898), p. 69, par. 19.

[6] *Held* that the provision of the 94th Article of War relating to the hours of session of courts-martial was not applicable to Summary Courts. *Ibid.*, par. 12.

[7] The Act of June 18, 1898, in providing that the trial officer "shall have power to administer oaths" has reference to the oaths of witnesses. The officer himself is not sworn. But the witnesses must be sworn; and in a case in which it appeared that they were not in fact sworn, *held* that the proceedings and sentence were invalidated, and that a forfeiture imposed was illegally charged against the accused, who should be credited with the amount of the same on the next muster and pay roll. But the record need not

right of challenge does not exist, is arraigned in the usual manner. If his plea be guilty, he is given an opportunity to make a statement and, if he so desires, to introduce testimony in respect to character. If the plea be not guilty, the trial is proceeded with in the usual manner; the witnesses are sworn, but the testimony is not recorded. The accused is given the opportunity to cross-examine the witnesses and to introduce testimony in his defense.[1]

Previous Convictions.—Charges submitted for trial by a Summary Court are required to be accompanied by evidence of all convictions of the accused within the twelve months immediately preceding their submission. This evidence is furnished, if practicable, by the officer preferring the charges, and is submitted, with the charges and specifications, to the officer competent to order their trial; if the evidence is contained in the Summary Court record-book, a reference to it in the charges will be sufficient. If this evidence is not submitted with or cited in the charges, the Summary Court may take judicial notice of any such evidence as the record-book contains.[2]

Whenever a Summary Court takes previous convictions into consideration in determining its sentence, a note of the number of such convictions is required to be made in the Summary Court record.

Record and Review.—The Act establishing the Summary Court contains the requirement that "there shall be a Summary Court record kept at each military post and, in the field, at the headquarters of the proper command, in which shall be entered a record of all cases heard and determined and the action had thereon."[3] The record of the trial, which is kept in a book prepared for the purpose,[4] contains the name and designation of the accused, the number of the Article of War violated, with the complete specification in full, the findings, the number of previous convictions, and the sentence imposed. The proceedings as thus recorded are authenticated by the signature of the officer constituting the court, and are submitted to the post commander for review.[5] The proceedings, finding, and sentence are approved and made operative by the signature of the

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state in terms that the witnesses were sworn; it will be presumed that the law has been complied with unless the contrary appears. Manual for Courts-martial (ed. of July, 1898), p. 69, par. 14.

A Summary Court is not empowered to issue process of attachment to compel the attendance of a civilian witness. *Ibid.*, par. 15.

[1] The accused will be arraigned and allowed to plead, according to court-martial practice. When the accused pleads not guilty, witnesses will be called and sworn and evidence received, the accused being permitted to testify in his own behalf and to make a statement, but the evidence and statement will not be recorded. Manual for Courts-martial, (edition of July, 1898), p. 67, par. 9.

[2] Paragraph 934, A. R. 1895.

[3] Manual for Courts-martial (edition of July, 1898), p. 67, par. 12.

[4] *Ibid.*

[5] Act of June 18, 1898. (30 Stat. at Large, 483.)

reviewing authority, which is entered in the book itself, opposite the record of the trial.[1]

The commanding officers who are authorized by law to approve the sentences of Summary Courts have power to remit or mitigate the same. When the commanding officer sits as a Summary Court, no formal approval of the sentence is required by law; but he should sign the sentence, in such case in his official capacity as commanding officer, and date his signature.

Miscellaneous Observations respecting Summary Courts.—Charges for offenses cognizable by inferior courts are submitted to the post or other proper commander, who, if he thinks the accused should be tried, will cause him to be brought before the Summary Court.[2]

Admonitions, Withholding of Privileges, etc., as Disciplinary Measures.—Commanding officers are not required to bring every dereliction of duty before a court for trial, but should endeavor to prevent their recurrence by admonitions, the withholding of privileges, and by taking such steps as may be necessary to enforce their orders and thus secure the maintenance of discipline in their commands. A proper use of this power will, it is believed, make it unnecessary to bring before the Summary Court many of the trifling delinquencies which ought not to be made the subject of a court-martial trial; indeed, by a resort to such measures of prevention such trifling delinquencies will in great measure be prevented. The Army Regulations make it the duty of department commanders to supervise the discipline of their commands and to see that their subordinate commanders fulfill their duties in this regard.[3]

Reports.—A monthly report of cases tried by Summary Court is required, by statute, to be submitted by post commanders. These reports are filed in the office of the judge-advocate of the territorial department in which the post is situated or the command stationed, and constitute a part of the permanent records of the office.[4]

GARRISON COURTS-MARTIAL. REGIMENTAL COURTS-MARTIAL.

Constitution and Composition.—The regimental and garrison courts-martial have already been described, not only as to their constitution and

[1] Paragraph 932, Army Regulations of 1895. The record of proceedings from day to day is entered in a book furnished for the purpose by the Adjutant-General of the Army. For form of record, see page 700, *post*.

[2] Paragraph 932, Army Regulations of 1895.

[3] Paragraphs 192, 193, and 930, *ibid*. Manual for Courts-martial, 68, paragraph 18. Company commanders are now authorized, in accordance with the spirit of the above paragraph, and subject to the control of the commanding officer of the post, to dispose of cases of dereliction of duty in their commands, which would be within the jurisdiction of inferior courts-martial, by requiring extra tours of fatigue, unless the soldier concerned demands a trial; the right to demand such trial must be made known to him, however, before the penalty is imposed. Circular 5, A. G. O., 1898.

[4] See Act of June 18, 1898. (30 Statutes at Large, 483.) These records may be destroyed when no longer of use. *Ibid*.

composition,[1] but as to their jurisdiction, including the limitations upon the same which are imposed by statute and regulation. Except with the authority of the officer competent to order their trial by general court-martial, offenders can only be brought before these courts when the accused, being a non-commissioned officer, objects to being tried by the Summary Court and requests a trial by a garrison or regimental court-martial;[2] Whenever it becomes necessary to convene a regimental or garrison court for the trial of a non-commissioned officer who has objected to trial by a Summary Court, the order convening the court will set forth the fact of such objection.[3]

Judge-advocates.—Regimental and garrison courts-martial are provided with judge-advocates—suitable officers being detailed for that purpose by the convening authority;[4] their duties are precisely the same as those of the judge-advocate of a general court-martial. As the accused frequently appears before these tribunals without counsel, the duty of the judge-advocate to act as counsel for the prisoner in such cases becomes fully operative, and he should see to it that the accused does not suffer, in the course of his trial, in consequence of any ignorance of, or from any misconception respecting, his legal rights, and that he has full opportunity to interpose such pleas and to make such defenses as will best bring out the facts, the merits, or the extenuating circumstances of his case.[5]

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[1] See chapters entitled THE CONSTITUTION OF COURTS-MARTIAL, THE COMPOSITION OF COURTS-MARTIAL, and THE INFERIOR COURTS.

[2] Act of June 18, 1898. (30 Statutes at Large, 483.)

[3] Manual for Courts-martial, 70 (edition of July, 1898), paragraph 4.

[4] In view of the comprehensive terms of the 74th of the new code of Articles of War, it was held by the Judge-Advocate General in December, 1879, that officers empowered by Articles 81 and 82 to order regimental or garrison courts-martial were as fully authorized to detail judge-advocates for the courts convened by them as were the officers who were empowered by Articles 72 and 73 to order general courts.* In consequence of this opinion General Orders No. 15, A. G. O., of February 15, 1870, contained the requirement that, "under the provisions of the 74th Article of War, officers who may appoint a court-martial shall be competent to appoint a judge-advocate for the same. Accordingly, a judge-advocate is hereafter to be appointed for a regimental or a garrison court-martial in like manner as for a general court." General Orders No. 49, of 1871, prescribing a form of oath for the recorders of regimental and garrison courts, is rescinded. Dig. J. A. Gen., 455, par. 1.

Any commissioned officer may legally be appointed judge-advocate of a court-martial. Thus a surgeon, an assistant surgeon, or even a chaplain, is legally eligible to be so detailed. *Ibid.*, paragraph 2.

[5] *Ibid.*, 458, paragraph 10. For the judge-advocate to counsel the accused, when a soldier, to plead guilty must, in general, be unbefitting and inadvisable. But where such plea is voluntarily and intelligently made, the judge-advocate should properly advise the accused of his right to offer evidence in explanation or extenuation of his offense, and, if any such evidence exists, should assist him in securing it. And where no such evidence is attainable in the case, the judge-advocate should still see that the accused has an opportunity to present a "statement," written or verbal, to the court, if he has any desire to do so. *Ibid.*, paragraph 13. See also paragraph 28, page 462, *ibid.*

* In an official communication of May 13, 1880, addressed to the Commanding General of the Military Division of the Atlantic, this order is declared by the Secretary of War to be intended to be mandatory, not directory merely.

Procedure.—Except that the testimony is not required to be reduced to writing, in which their practice resembles that of the Summary Court, the procedure of these tribunals is in all respects the same as that of general courts-martial, and the principles governing the preparation and keeping of the record apply to these tribunals with the same force as to general courts.

Review and Execution.—The reviewing officer in the case of the garrison court is the post or garrison commander;[2] in the case of the regimental court it is the regimental commander; and these officers have power by their approval or confirmation of the sentences imposed to make them legal and operative. The methods of review are the same as those employed in respect to the proceedings of general courts-martial, and the proceedings may be returned to the court for revision for the same purpose and under the same restrictions and limitations as are there described. The sentences of these tribunals, when they have received proper confirmatory action, are published in orders, and carried into execution in the same manner as the sentences of general courts-martial.[3]

Regimental Court for doing Justice.—When a regimental court has been convened for the purpose of investigating the complaint of an enlisted man, under the authority conferred by the 30th Article of War, its pro-

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[1] See the chapters entitled THE INCIDENTS OF THE TRIAL and THE RECORD.

[2] See the 104th, 109th, and 112th Articles of War.

[3] See the chapter entitled THE REVIEWING AUTHORITY. Where after a garrison court had tried the cases referred to it, but before its proceedings had been acted upon, the command of the post was devolved upon the officer who had been president of the court, *held* that such officer would legally and properly act upon the proceedings: the case not being one in which the action of the department or other higher commander was required by the 109th Article of War. Dig. J. A. Gen., 94, par. 5. See, also, Manual for Courts-martial (edition of July, 1898), pp. 81, 82.

So where, before the proceedings of a garrison court convened by a post commander were completed, the post command had ceased to exist and the command become distributed in the department, *held* that the department commander, as the legal successor of the post commander, was the proper authority to approve the proceedings under this Article. Dig. J. A. Gen., 127, par. 5.

The limitation of the authority of the inferior courts in regard to sentences of imprisonment and fine has been held not to preclude the imposition by them of other punishments sanctioned by the usage of service; such, for example, as reduction to the ranks either alone or in connection with those, or one of those, expressly mentioned. *Ibid.*, 95, par. 6. The Act of June 18, 1898, (30 Stat. at Large, 483,) expressly confers upon the Summary Court authority to reduce non-commissioned officers to the ranks.

While inferior courts have, equally with general courts, jurisdiction of all military offenses not capital, yet, in view of the limitation upon their authority to sentence, it is in general inexpedient to resort to them for the trial of the graver offenses—such as larcenies, aggravated acts of drunkenness, protracted absences without leave, etc., a proper and adequate punishment of which would be beyond the power of such tribunals. So, as a reviewing officer is never authorized *to add to* the punishment imposed by any court-martial, the more serious offenses should, when practicable, be referred for trial to general courts-martial, which alone are vested with a full discretion to impose punishment in proportion to the gravity of the offense. Dig. J. A. Gen., 95, par. 7.

An inferior court, however, cannot legally decline to try or sentence an offender upon the ground that it is not empowered, under the 83d Article, to impose punishment adequate to his actual offense. *Ibid.* See, also, par. 2, G. O. 40, A. G. O., 1893.

ceedings are reviewed by the regimental commander by whom the court was appointed, or by his successor in office. His power in respect to review is substantially the same as in the case of a regimental court convened for the trial of enlisted men; he may return the proceedings for revision, he has the same power in respect to approval or disapproval, and the recommendation of the court is carried into effect by him, if the acts necessary to be done in order to make such recommendation operative are within his jurisdiction or authority as a military commander; otherwise he submits the findings in the case, with his recommendations thereon, to the officer having authority to carry them into effect.[1]

[1] For a discussion as to the procedure and jurisdiction of this court see pages 225, 226, *post*.

CHAPTER XIII.

COURTS OF INQUIRY.

Object and Purpose.—A court of inquiry is an agency created by statute for the purpose of investigating questions of fact and, when required to do so by proper authority, of giving its opinion upon the merits of a case submitted to it for examination.[1] If the several statutes relating to these bodies be examined, it will be seen that they are not "courts" in the strict sense of that term; they are without power to try and determine questions of guilt or innocence, or to pass sentences; indeed, their function resembles that of the military tribunals which have already been described only in respect to their power to summon and examine witnesses, and to reach such conclusions or findings of fact as are warranted by the evidence thus obtained. In the exercise of this power they are under considerable limitations; they cannot compel the attendance of witnesses who fail or decline to appear in obedience to their summons, nor can they require them to testify in a particular case which is undergoing inquiry.[2]

Constitution and Composition.—Courts of inquiry may be convened by any military commander, that is, by the particular military commander who has power under the Articles of War to convene a court-martial for the trial of the charge which is to be made the subject of inquiry.[3] In practice they are rarely convened by any less authority than that competent to convene a general court-martial—a department commander at any time, or the com-

[1] Winthrop, Chap. XXIV. A court of inquiry is not a *court* in the legal sense of the term, but rather a council, commission, or board of investigation. It does not administer justice; no plea of specific issue is presented to it for trial; its proceedings are not a trial of guilt or innocence; it does not come to a verdict or pass a sentence. For purposes of investigation, however, a court of inquiry in this country is clothed with ample powers, and, in an important case, its opinion may be scarcely less significant and even final than that of a military court proper—that is to say, a court-martial.

[2] A court of inquiry has no power to punish as for a contempt. Such power of this nature as is conferred by Art. 86 is restricted in terms to courts-martial. Moreover, a court of inquiry, not being in a proper sense a *court*, cannot exercise the strictly judicial function of punishing contempts.* Dig. J. A. Gen., 137, par. 5.

[3] A court of inquiry should not in general be ordered by an inferior—post or regimental—commander where the charges required to be investigated are not such as an inferior court-martial could legally take cognizance of. Courts of inquiry convened by such commanders are, however, of rare occurrence in our service. *Ibid.*, 136, par. 2.

* A loose observation of Hough[a] that "contempts before courts of inquiry are as much punishable as before courts-martial" has been carelessly repeated by several American writers. The recent English writer, Clode, correctly states the law (as to witnesses) in saying[b] that a court of inquiry "has no power to punish them for contumacy or silence."

[a] Precedents, 10. [b] Mil. and Mar. Law, 198.

mander of a division or a separate brigade in time of war. Save in the case of the President, who may convene these tribunals whenever in his opinion the public interest demands that a particular investigation be ordered,[1] they can only be convened upon the application of the officer or soldier whose conduct is to be investigated or inquired into. The terms "officer" and "soldier" are used here, as elsewhere in the Articles of War, in strict relation to military persons.[2] Courts of inquiry are composed of from one to three commissioned officers; the number and rank of members being determined, in a particular case, by the convening authority. A recorder is also detailed whose statutory duty it is to "reduce the proceedings and evidence to writing."[3]

Procedure.—While courts of inquiry are not vested with the powers, they are not restricted by some of the limitations to which courts-martial are subject. The statute of limitations does not apply to their investigations, and the inquiry takes a broader scope than is permitted to a court-martial, not being confined to the precise issue presented by a particular set of charges and specifications. The procedure of these bodies closely resembles that of courts-martial.

Challenges.—Although neither Article 88 nor any provision of the code specifically authorizes the challenging of the members of a court of inquiry, yet in the interests of justice, and by the usage of the service in this country, this proceeding is permitted in the same manner as before courts-martial. Article 117 requires that members of courts of inquiry shall be sworn "well and truly to examine and inquire, according to the evidence, without partiality, prejudice," etc.; and it is the sense of the service that their competency so to do should be liable to be tried by the same tests as in a case of a court-martial.[4]

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[1] 115th Article of War.

[2] This Article authorizes the institution of a *court of inquiry* only in a case of an "officer or soldier," and the word "officer" as employed in the Articles is defined by Sec. 1342, Rev. Sts., to mean commissioned officer. A court of inquiry cannot, therefore, be convened on the application, or in a case, of a person who is not an officer (or soldier) of the Army at the time. Such a court cannot be ordered to investigate transactions of or charges against a party who, by dismissal, discharge, resignation, etc., has become separated from the military service, although such transactions or charges relate altogether to his acts or conduct while in the Army. A court of inquiry cannot be ordered in a case of an "acting assistant surgeon" who is not an officer of the army, but only a civil employee. Dig. J. A. Gen., 135, par 1.

[3] 116th Article of War. The extent to which the prosecution of the inquiry shall be left in the hands of the recorder is determined, as will presently be shown, by the court itself.

[4] Dig. J. A. Gen., 136, par. 4. Though a court of inquiry has sometimes been compared to a grand jury, there is little substantial resemblance between the two bodies. The accused appears and examines witnesses before such a court as freely as before a court-martial, and its proceedings are not required to be secret, but may be open at the discretion of the court.* *Ibid.*, par. 3.

* See Macomb, § 204; O'Brien, 292; DeHart, 278. In the joint resolution of Congress of February 13, 1874, authorizing the President to convene a certain special court of inquiry, it was "provided that the accused may be allowed the same right of challenge as is allowed by law in trials by court-martial." It appears, however, to have been regarded in the debate on this resolution (see Congressional Record, vol. 2, Nos. 38, 40) that this provision was unnecessary to entitle the party to the privilege.

Conduct of the Investigation.—The investigation is conducted by the court or, under its direction, by the recorder, along lines of inquiry determined upon and laid down by the court itself. The officer at whose request the court has been convened is entitled to be present throughout the inquiry; he is also entitled to the privilege of cross-examining the witnesses called in support of the accusations, he may summon witnesses to testify in his defense, and may address the court or submit a statement of his case at the conclusion of the investigation. Where the court is ordered by the President, the several officers whose conduct is being made the subject of inquiry are entitled to be present, in turn, to cross-examine witnesses and to submit testimony as above described. The sessions of the court are open or closed at the discretion of the convening authority or, in the absence of instructions in that regard, at the discretion of the court.[1]

Record.—The record of a court of inquiry consists of two parts: (1) the testimony of the witnesses as given by them during the hearing, including such documentary evidence as may have been submitted and the arguments or statements of the officers or soldiers whose conduct has been made the subject of investigation, and (2) the report proper, that is, a recital or statement of the facts constituting the occurrence referred to the court for examination. This report is in the form of a narrative, and is based upon, and derived from, the testimony submitted during the investigation; and every statement which it contains must be fully supported by the evidence adduced. To that end the testimony of individuals may be cited or referred to in the report, and the use of foot-notes and cross-references is also authorized. The proceedings of a court of inquiry when authenticated by the signatures of the recorder and the president are forwarded to the convening officer.[2]

Opinion.—The 119th Article of War contains the requirement that a court of inquiry shall not give an opinion on the merits of the case inquired of unless specially ordered to do so.[3] Courts of inquiry are convened to accomplish a definite purpose. They investigate the conduct of or accusations against individuals, the management of administrative or military affairs, the conduct of military operations, and the causes which have contributed to the success or failure of particular undertakings. Such investigations being exhaustive in their character, those who are charged with them are peculiarly fitted to express an opinion as to the merits of a particular case thus investigated by them. When required to do so therefore by the convening authority, and not otherwise, courts of inquiry may submit such opinion on the merits of the case.[4]

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[1] Dig. J. A. Gen., 186, par. 8.
[2] 120th Article of War.
[3] 119th Article of War.
[4] An opinion given by a court of inquiry is not in the nature of a sentence or adju-

Nature of Opinion.—Where, as in the majority of cases, the inquiry is instituted with a view of assisting the determination, by the President or a military commander, of the question whether the party should be brought to trial, the opinion of the court will properly be as to whether further proceedings before a court-martial are called for in the case, with the reasons for the conclusions reached. Where no such view enters into the inquiry, but the court is convened to investigate a question of military right, responsibility, conduct, etc., the opinion will properly confine itself to the special question proposed and its legitimate military relations. A court of inquiry, composed as it is of military men, will rarely find itself called upon to express an opinion upon questions of a purely legal character.[1]

Use of Record in a Subsequent Trial.—The 121st Article of War authorizes the proceedings of a court of inquiry to "be admitted as evidence by a court-martial in cases not capital nor extending to the dismissal of an officer, *provided* that the circumstances are such that oral testimony cannot be obtained."[2]

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dication pronounced upon a trial. Upon a subsequent trial by court-martial of charges investigated by a court of inquiry, the accused cannot plead the proceedings or opinions of such court as a former trial, acquittal, or conviction. Dig. Opin. J. A. Gen., 137, par. 1.

While it is of course desirable that the members of a court of inquiry, directed to express an opinion, should concur in their conclusions, they are not required to do so by law or regulation.* The majority does not govern the minority, as in the case of a finding or sentence by court-martial. If a member or a minority of members cannot conscientiously, and without a weak yielding of independent convictions, agree with the majority, it is better that such member or members should formally disagree and present a separate report or reports accordingly. The very disagreement, indeed, of intelligent minds is a material and important fact in the case, and one of which the reviewing authority is entitled to have the advantage in his consideration of and action upon the same. *Ibid.*, par. 2.

It is not irregular, but authorized, for a court of inquiry, in a proper case, to reflect, in connection with its opinion, upon any improper language or conduct of the accused, prosecuting witness, or other person appearing before it during the investigation.† *Ibid.*, par. 4.

[1] *Ibid.*, 138, par. 3.‡

[2] 121st Article of War. While the proceedings of a court of inquiry cannot be admitted as evidence on the merits upon a trial before a court-martial of an offense for which the sentence of dismissal will be mandatory upon conviction, § yet *held* that upon the trial of such offense, as upon any other, such proceedings, properly authenticated, would be admissible in evidence for the purpose of impeaching the statement of a witness upon the trial who, it was proposed to show, had made quite different statements upon the hearing before the court of inquiry.‖ *Ibid.*, 139.

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* In the case of the court of inquiry (composed of seven general officers) on the Cintra Convention, in 1808, the members who dissented from the majority were required by the convening authority to put on record their opinions, and three dissenting opinions were accordingly given. A further instance, in which two of the five members of the court gave each a separate dissenting opinion, is cited by Hough.[a] Mainly upon the authority of the former case, both Hough[b] and Simmons[c] hold that members non-concurring with the majority are entitled to have their opinions reported in the record.

† Thus the court of inquiry on the conduct of the Seminole War animadverted, in its opinion, unfavorably upon certain offensive and reprehensible language employed against each other by the two general officers concerned, the one in his statement to the court and the other in his official communications which were put in evidence. (See G. O. 18, Headquarters of Army, 1837.)

‡ In an exceptional case, that of the special court of inquiry authorized by Congress in the joint resolution of February 13, 1874, the court was required to express an opinion not only upon the "moral" but upon the "technical and legal responsibility" of the officer for the "offenses" charged.

§ Compare G. O. 33, Department of Arizona, 1871.

‖ See G. C. M. O. 40, H. Q. A., 1890.

[a] Precedents, 642. [b] *Ibid.* [c] § 339.

THE REDRESS OF WRONGS.

Methods of Redress in the Case of a Commissioned Officer.—The 29th Article provides that "any officer who thinks himself wronged by the commanding officer of his regiment and, upon due application to such commander, is refused redress may complain to the general commanding in the State or Territory where such regiment is stationed. The general shall examine into said complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, transmit to the Department of War a true statement of such complaint, with the proceedings had thereon."

The Article above set forth provides a very inadequate remedy for a wrong suffered by a commissioned officer at the hands of a military superior; so inadequate, indeed, as to have given occasion for the existence of another method of obtaining redress in cases of by no means infrequent occurrence to which the Article does not apply. The 29th Article applies, as will be seen, to a single case or class of cases, that in which an officer "thinks himself wronged by the commanding officer of his regiment." In a case properly arising under it, therefore, the remedy provided would of course be applied to the exclusion of every other.[1]

Where, however, the wrong or injury for which redress is sought has been suffered at the hands of a superior officer not standing toward the complainant in the relation of a regimental commander, the following practice, based upon the custom of service, may be resorted to. In order that a case may arise to which the method here outlined may with propriety be applied, the following conditions should be fulfilled: (1) The wrong complained of should not constitute a military offense, that is, a violation of a specific Article of War, since the remedy in that case, which consists in the submission of charges and specifications for the offense alleged to have been committed, is not only specific but exclusive; (2) Redress should have been sought from the superior by whom the wrong is alleged to have been committed. These conditions having been fulfilled, the officer should present his case, preferably in writing and through the regular channels of official communication, to the commander having jurisdiction to redress the wrong complained of.

Appeal.—If no redress be afforded by such officer, or if the remedy applied by him be inadequate, the case may be carried through the proper military channels to the Secretary of War, as the representative of the President, who is the commander-in-chief of the military forces of the United

[1] This Article is expressly confined to cases of alleged wrongs on the part of regimental commanders. It cannot be extended to apply to a complaint of wrong done by a post commander who is not also the commanding officer of the regiment of the complainant. Dig. J. A. Gen., 84.

States. Such an appeal is not in general advisable, save in an extreme case where redress has been plainly denied and in which the circumstances of hardship are peculiar and unusual. Should the appeal be found upon due examination to be frivolous or based upon insufficient grounds, the officer submitting it may be made the subject of rebuke or admonition or, in an extreme case, may be subjected to such measures of a disciplinary character as may be demanded by the strict necessities of the case.

Methods of Redress in the Case of an Enlisted Man.—A method of obtaining redress, in many respects analogous to that already described in its relation to commissioned officers, exists in behalf of enlisted men, in all cases not covered by the provisions of the 30th Article of War, which will presently be explained. The procedure under the 30th Article, though applicable, according to its terms, to "any soldier who thinks himself wronged by any officer," is, by reason of the peculiar limitations upon the jurisdiction of the regimental court-martial, restricted to cases arising under the immediate command of the regimental commander, and is not applicable to persons not under the command of that officer or to cases which it is beyond his power to redress. If, therefore, a wrong be inflicted upon an enlisted man to which, for the reasons above stated, the 30th Article would not afford relief, such enlisted man would, through the captain of his company or other immediate commander, invoke the remedy heretofore explained in its application to the case of a commissioned officer.[1]

The Regimental Court for doing Justice.—In addition to the criminal jurisdiction conferred upon the regimental court by the 81st and 83d Articles of War, the [redacted] Article provides that "any soldier who thinks

[1] The duty of hearing and investigating complaints is one of the highest importance to discipline, and should be not only personally but carefully and patiently exercised by company commanders and others to whom, under existing regulations and customs, such complaints are habitually addressed. From their nature they are not susceptible of delegation, especially to non-commissioned officers. A superior officer who yields to a non-commissioned officer powers or privileges not appropriate to his rank and to which he is not properly entitled, places the latter in a false position, while at the same time making himself in great part responsible for any abuse of authority on the part of his inferior. Dig. J. A. Gen., 537. In this connection it has been held by the Judge-Advocate General that "Though I am aware of no law *in terms* prohibiting a company commander from delegating to a non-commissioned officer so important a part of his authority and duty as the entertaining in the first instance of the complaints and requests of the men of the company, I can but consider such a delegation to be at variance with the principle and system of our military organization. Further, such a practice, as it appears to me, must tend to render commissioned officers negligent and irresponsible, and non-commissioned officers arbitrary and overbearing. Indeed I can conceive of nothing that would sooner spoil a good sergeant than to place him in a position to determine at his discretion whether the complaints of his inferiors should be entertained by his superior, and to color them at will when transmitted. Thus, though the practice may, in some instances, have been found convenient and innocuous, its effect in general must, I think, be prejudicial to the best interests of the service." * Dig. J. A. Gen., 270.

* Extract from an indorsement of the Judge-Advocate General in submitting to the Secretary of War a communication (concurred in by the Judge-Advocate General) from Brig.-Gen. E. O. C. Ord, commanding Dept. of Texas, in regard to *the relations between the commissioned and non-commissioned officers of companies.*

himself wronged by any officer may complain to the commanding officer of his regiment, who shall summon a regimental court-martial for the doing of justice to the complainant. Either party may appeal from such regimental court-martial to a general court-martial; but if, upon such second hearing, the appeal appears to be groundless and vexatious, the party appealing shall be punished at the discretion of said general court-martial."[1]

The 30th Article of War is thus seen to confer upon the regimental court-martial a peculiar form of jurisdiction in many respects resembling that exercised by courts of inquiry. This jurisdiction is called into being whenever an enlisted man believes himself to have suffered a wrong, at the hands of a commissioned officer, of a nature fit to be investigated by this tribunal. The court is convened by the regimental commander[1] of the complainant upon application alleging a wrong over which the court has jurisdiction. For a wrong done by an officer not belonging to the regiment this Article provides no remedy.[2]

There are two manifest and unqualified limitations to the province of the regimental court under this Article, viz.: (1) it cannot usurp the place of a court of inquiry; (2) it can take no cognizance of matters which it would be beyond the power of the regimental commander to redress. When the matter is beyond the reach of this commander it is beyond the jurisdiction of this court. If it involve a question of irregular details, excessive work or duty, wrongful stoppages of pay, or the like, a regimental court under this Article may be resorted to for the correction of the wrong. Otherwise when the case is one of a wrong such as can be righted only by the punishment of the officer.[3]

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[1] The authority to summon a regimental court under this Article is vested in terms in the regimental commander. A department or other superior commander cannot properly exercise such authority, nor will his order add to the validity or effect of the proceeding. Dig. J. A. Gen., 35, par. 3.

[2] The court cannot take cognizance of a complaint against an officer no longer in the service. So where a company commander who had entered on the pay-rolls an unauthorized stoppage against a soldier resigned, and the same stoppage was thereupon continued by his successor, *held* that the complaint should be presented against the latter. *Ibid.*, par. 4.

Where the alleged wrong was charged upon certain officers' servants and it did no appear that their acts were authorized or sanctioned by the officers who employed them, *held* that the complaint was not one which could be taken cognizance of under this Article. *Ibid.*, par. 5.

[3] *Ibid.*, 36, par. 6. The "regimental court-martial" under the 30th Article of War cannot be used as a substitute for a general court-martial or court of inquiry, for it cannot try an officer, nor make an investigation for the purpose of determining whether he shall be brought to trial. When, if the soldier's complaint should be sustained, the only redress would be a reprimand to the officer, the matter would not be within the jurisdiction of this court. It can only investigate such matters as are susceptible of redress by the doing of justice to the complainant; that is, when in some way he can be set right by putting a stop to the wrongful condition which the officer has caused to exist. Erroneous stoppages of pay, irregularity of detail, the apparent requirement of more labor than from other soldiers, and the like, might in this way be investigated and the wrongful condition put an end to. The court will in such cases record the evidence and its conclusions of fact, and recommend the action to be taken. The members of the

This Article is not inconsistent, however, with Article 83, which prohibits regimental courts from trying commissioned officers. It does not contemplate or provide for a trial of an officer as an accused, but simply an investigation and adjustment of some matter in dispute—as, for example, a question of accountability for public property, of right to pay or to an allowance, of relief from a stoppage, etc. The regimental court does not really act as a court, but as a board, and the "appeal" authorized is practically from one board to another.[1] But though the regimental court has no power to find "guilty" or "not guilty" or to sentence, it should come to some definite opinion or conclusion, and one sufficiently specific to allow of its being intelligently reviewed by the general court if desired.[2]

Procedure.—The parties to the proceedings are the complainant and the respondent, or defendant. The complainant first presents his case, supporting it, if need be, by the testimony of witnesses or by appropriate documentary evidence. The case of the defendant is then submitted in a similar manner; after which the court is cleared and closed for deliberation. If in favor of the complainant, the judgment of the court is that the complaint is sustained, together with a recommendation as to the proper remedy to be applied to the wrong complained of. If the allegations be not sustained, the judgment is that the complaint be dismissed. If the remedy proposed is within the power of the regimental commander, he makes the recommendation of the court operative by his approval or confirmation of the proceedings; if it be beyond his jurisdiction, the regimental commander is of course without power to act in the matter and can only submit the case to the proper authority for remedial action.

Appeals.—The 30th Article of War provides that "either party may appeal from such regimental court-martial to a general court-martial; but if, upon such second hearing, the appeal appears to be groundless and vexatious, the party appealing shall be punished at the discretion of said general court-martial."

The parties to the appellate proceedings are the *appellant* and the *respondent*, and the case in appeal is reheard from the beginning. By agreement of the parties, and with the permission of the court, the whole or a part of the record in the lower court may be submitted as a part of the case in appeal;

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court (and the judge-advocate) will be sworn faithfully to perform their duties as members (and judge-advocate) of the court, and the proceedings will be recorded as nearly as practicable in the same manner as the proceedings of ordinary courts-martial. Judge-Adv. Gen., see, also, Manual for Courts-martial, 89, note.

[1] See Macomb, §§ 193, 194; G. O. 13, War Dept., 1843; 1 Opin. Att.-Gen., 167.

[2] *Ibid.*, 35, par. 1. The proceeding under this Article, not being a trial, is not affected by the limitation of the 103d Article. Due diligence, however, should be exercised in presenting the complaint, and a delay in a certain case to do so for three years (not satisfactorily explained) *held* wholly unreasonable and properly treated by the court as seriously prejudicing the complaint.* *Ibid.*, par. 2.

* See Manual for Courts-martial, p. 89, note.

otherwise the original record forms no part of the appellate proceedings, and the action of the general court-martial is that of an appellate court properly so called, and in nowise resembles the procedure of the civil courts upon writs of error.

The Article above cited confers upon the court of appeal a summary power to punish the party appealing if the appeal appears to be "groundless and vexatious." The proceedings in this case are summary in character. The charge against the appellant is formulated by the court after due deliberation, and he is given an opportunity to show cause why sentence should not be passed upon him. The findings and sentence are submitted to the reviewing authority in the ordinary way, and are approved and carried into effect in the usual manner.

It is thus seen that the procedure of the regimental court when convened for the purpose of doing justice is, in many respects, analogous to that of a court of inquiry; and its investigation relates to the fiscal or administrative, as distinguished from the criminal or penal side of the case before it. The justice done consists rather in the correction of errors in administration and accounting than in the infliction of penalties for offenses committed by the officer whose conduct has been complained of, since the court is forbidden to entertain a criminal charge against a commissioned officer by the express terms of the 83d Article of War.

CHAPTER XIV.

MILITARY BOARDS.

Boards; Constitution, Powers, etc.—A *board* is a committee of commissioned officers called together by a proper military commmander with a view to conduct an examination, to investigate a question of fact, and, if called upon, to submit a recommendation with respect to the same, or to determine questions of fiscal or property responsiblity. Those charged with the examination of officers, enlisted men, and civilians with a view to their appointment, promotion, or retirement are created by law; others—boards of survey, for example—are provided for in the Army Regulations; still others are called into being by a proper convening officer, whose authority in this regard is limited to the institution of an inquiry into a transaction the subject of and the parties to which are under his command or otherwise subject to his jurisdiction. Unless expressly authorized by statute, military boards are without authority to summon or examine witnesses,[1] but may receive and act upon evidence submitted to them in the form of affidavits duly authenticated in accordance with law.[2]

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[1] A board of officers convened to investigate—obtain, or hear and examine, evidence—and report, can, in the absence of specific statutory authority, exercise none of the peculiar legal functions either of a court-martial or of a court of inquiry.* Its members cannot be sworn; it cannot swear witnesses; civilian witnesses cannot be compelled to appear before it; nor are the witnesses who appear and testify legally entitled to any compensation for attendance or travel. Such a board cannot *try*, nor can it sentence. There is properly no "accused" party required or entitled to appear before it as before a court-martial or court of inquiry. It is not restricted by law as to the period of its sittings, nor is it affected by any statute of limitations. Its members (though in this, indeed, it does not differ from a court of inquiry) may present two or more reports where they cannot concur in one. Dig. J. A. Gen., 178, par. 1.

As a *court of inquiry* cannot be ordered in a case of a *civilian*, a body of officers convened to inquire into and report upon the facts of a case of an officer who has been legally dismissed from the service is a mere board of investigation, and can exercise none of the special powers of a court-martial or court of inquiry. *Ibid.*, 178, par. 2.

[2] The instruments of evidence above referred to are called "affidavits" to distinguish them from the formal "depositions" which are authorized by law to be submitted in evidence in court-martial trials. An affidavit may therefore be defined as a sworn statement, submitted to a board by an interested party, with a view to determine a question of property or administrative responsibility. Being *ex parte* in character, an affidavit has not the evidential value of a regularly executed deposition. Such sworn statements, or affidavits, may now be authenticated in accordance with the requirements of Section 4 of the Act of July, 1894, (27 Stat. at Large, 278,) which provides "that judge-advocates of departments and of courts-martial, and the trial officers of summary courts, are hereby authorized to administer oaths for the purposes of the administration of military justice, and for other purposes of military administration."

* Dig. J. A. Gen., 178, par. 2.

Rules of Procedure; Reports.—The procedure of these boards should conform as nearly as possible to that prescribed for courts-martial. Their records are prepared in accordance with similar rules, and usually begin with the title or object of the investigation, as set forth in the convening order, followed by a copy of the order authorizing its action or prescribing the scope and purpose of its inquiry. The proceedings are, as a rule, authenticated by the signatures not only of the president and recorder, but by those of all the members. When completed they are submitted to the convening authority for his approval or disapproval, or for his orders in the case. The number of copies to be prepared and submitted is determined by the Army Regulations or, in the absence of such provision, by the convening order.

Review.—The reviewing authority in each case is pointed out by the statute or regulation authorizing the board; if created without such authority, the proceedings are reviewed by the officer by whom the board was created. Unless authorized by law or regulation, such bodies are informal, and their findings of fact and their opinions, when submitted, are merely advisory in character and can acquire only such operative force in a particular case as may be given them by the orders of the convening officer.

BOARDS OF EXAMINATION.

General Requirements.—The statutes regulating the appointment and promotion of commissioned officers impose, as a condition precedent to such appointment or promotion, the requirement that the officer or candidate shall be subject to an examination, to be prescribed by the President, with a view to determine his fitness for appointment or for promotion to a higher grade of military rank.[1] The President is also authorized to prescribe a system of examinations for enlisted men for the purpose of determining their fitness for promotion to the grade of second lieutenant.[2] These examinations are conducted with a view to ascertain (1) the physical capacity of the candidate to perform the duties of the higher grade, and (2) his character and his professional qualifications for advancement.[3]

Constitution and Composition of Boards of Examination.—The constitution of the several boards of examination is determined by law, and they are convened in every case by the Secretary of War. Their composition is regulated by the same authority, subject to the restriction "that the examination of officers appointed in the Army from civil life, or of officers who were officers of volunteers only, or were officers of the militia of the several States called into the service of the United States, or were enlisted men in the regular or volunteer service, either in the Army, Navy, or Marine

[1] See, Sections 1159, 1172, 1206, 1207, Revised Statutes; the Acts of October 1, 1890, (26 Stat. at Large, 562,) October 1, 1890, (26 *ibid.*, 653,) and July 27, 1892 (27 *ibid.*, 276).

[2] See the Act of July 30, 1892 (27 *ibid.*, 336).

[3] Sections 2 and 3, Act of October 1, 1890 (26 Stat. at Large, 562).

Corps, during the war of the rebellion, shall be conducted by boards composed entirely of officers who were appointed from civil life or of officers who were officers of volunteers only during said war, and such examination shall relate to fitness for practical service and not to technical and scientific knowledge."[1]

The following composition is required by existing orders:

Officers of the Line.—The board will consist of five members and a recorder. Two of the members will be medical officers and three will be line officers senior in rank to, and, as far as practicable, from the same arm of service as, the officer to be examined.

Officers of the Corps of Engineers, the Signal Corps, the Ordnance, Quartermaster's, and Subsistence Departments.—The board will consist of five members, two of whom will be medical officers and three of the same corps or department, when practicable, as the officer to be examined, and senior to him in rank, the junior of whom will act as recorder.

Medical Officers.—The board will consist of three medical officers, senior in rank to the officer to be examined, the junior of whom will act as recorder; provided that whenever a medical officer is found to be physically disqualified the board will report to the adjutant-general and adjourn, pending appointment of two additional members, who may be from any line or staff officers available, senior in rank to the officer to be examined. The board will then proceed under the rules governing retiring boards.[2]

In practice boards for the examination of officers of the line, and of candidates for appointment from the ranks or from civil life, are composed of officers of the line and of medical officers; boards for the examination of officers of the staff, or for the selection of appointees thereto, are composed as a rule of officers of the department to which the candidate belongs or into which he desires to be appointed. Boards of examination are provided with recorders; in some cases the duty of recorder is performed by the junior member, in others by an officer appointed for the purpose.[3]

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[1] Section 3, Act of October 1, 1890 (26 *ibid.*, 562).

[2] General Orders 41, A. G. O., 1897.

[3] For rules regulating the composition of examining boards under the Act of October 1, 1890, see General Orders, No. 128, A. G. O., of 1890.

The Act of February 2, 1901, provides that "When the exigencies of the service of any officer who would be entitled to promotion upon examination require him to remain absent from any place where an examining board could be convened, the President is hereby authorized to promote such officer, subject to examination, and the examination shall take place as soon thereafter as practicable. If upon examination the officer be found disqualified for promotion, he shall, upon the approval of the proceedings by the Secretary of War, be treated in the same manner as if he had been examined prior to promotion." Sec. 33, Act of February 2, 1901. (31 Stats. at Large, 756.)

Held that Sections 1206 and 1208, Rev. Sts., relating to the examination of officers

Organization; Procedure.—"The organization of boards will conform to that of retiring boards; the recorder swearing the several members, including the medical officers, faithfully and impartially to examine and report upon the officer about to be examined, and the president of the board then swearing the recorder to the faithful performance of his duty. Proceedings will be made separately in each case.[1]

"Previously to the swearing of the board, members thereof may be challenged for cause stated to the board, the relevancy and validity of which shall be determined by the full board, according to the procedure of courts-martial in like cases. The record will show that the right to challenge was accorded. If the number of members is reduced by challenge or otherwise, the board will adjourn, and report the facts to the Adjutant-General, through the president of the board, for the action of the War Department. Medical officers will not take part in the professional examination except in the cases of assistant surgeons. They will make the necessary physical examination of all officers and report their opinion in writing to the board. All questions relating to the physical condition of an officer shall be determined by the full board.[1]

"If anything should arise during the examination requiring the introduction of evidence, the inquiry shall proceed upon written interrogatories as far as possible, the board determining to whom questions shall be forwarded. When, in the opinion of the board, it becomes essential to take oral testimony, the facts should be reported to the War Department for the necessary orders in regard to witnesses to be summoned from a distance. Witnesses examined orally will be sworn by the recorder.[1]

"All public proceedings will be in the presence of the officer under examination; the conclusions reached and the recommendations entered in each case will be regarded as confidential."[1]

During oral and practical examinations all the members excepting the medical officers will be present.[1]

Written examinations may be conducted in the presence of any one member of the board or in that of the recorder, for which purpose the board may be divided into committees, before whom the examination shall be conducted from day to day until completed; after which the board will reassemble to consider its finding.[2]

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of the Engineer and Ordnance Corps were not repealed by the Act of October 1, 1890, but remained fully in force.* Dig. J. A. Gen., 402, par. 2.

Held that assistant surgeons of the rank of lieutenant were subject to examination under the Act of October 1, 1890, "to provide for the examination of certain officers of the army and to regulate promotion therein." *Ibid.*, par. 1.

[1] General Orders, No. 41, A. G. O., 1897.

[2] *Ibid.* Papers should be given out so that everything in the hands of the officer being examined may be answered before a recess or adjournment. A statement showing that such was the procedure during the written examinations will be embodied in

* See G. O. 128, A. G. O., of 1890., par. 8.

The terms of the several statutes authorizing examinations for promotion give precedence to the physical examination, which is conducted by the medical members of the board or by medical officers specially detailed for the purpose. The physical fitness of the candidate is determined by the board from the examination so made. If the officer undergoing examination is found physically disqualified for promotion, his examination is suspended.[1]

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the record. The number and value will be entered on the margin of questions used for the written examination. Original questions prepared by the board will, for convenience of the reviewing authority, indicate where answers may be found. G. O. 46, A. G. O. 1897.

To secure some degree of uniformity of examination of line officers, boards will be furnished by the Adjutant-General with lists of questions, with values attached. Boards will not, however, be confined to the questions contained in these lists, and are authorized to ask any questions, selected from the publications recommended for study, deemed necessary during the progress of the oral, written, or practical examinations.* Where blackboard or other illustrations will facilitate the oral and practical examinations, their use is authorized. Examinations will be conducted in a sufficiently exhaustive manner to determine not only that the subject is thoroughly comprehended, but the degree of proficiency of the officer being examined, and until the board is positively satisfied as to his ability to impart instruction in the various subjects. In case of unpropitious weather, practical exercises may be postponed from day to day, but never omitted or materially curtailed. *Ibid.*

Whenever the oral examination of any line officer is unsatisfactory in any subject the board will at once proceed with a written examination in that subject, and in case the officer is not found proficient the questions and answers will be attached to the proceedings. *Ibid.*

Commanding officers of posts at or in the vicinity of which boards may be appointed to meet will, without further instructions, furnish, upon request of the board, such available troops and material as may be required by boards in the execution of this order. When it is not practicable to obtain the requisite troops and material for the complete practical examination as prescribed for artillery, oral and written examinations will be substituted by the board for the portion omitted. *Ibid.*

At the conclusion of his examination each officer will sign and submit a certificate in his own handwriting to the effect that he has not received assistance from any unauthorized source, or communicated or transcribed any of the questions or problems submitted for his use during the examination. *Ibid.*

In written examinations a numerical value will be given to each question. In the oral and practical examinations a numerical value will be given to each subject. Where both oral and practical examinations are required in the same subject the board will allot the value to be credited to each part. *Ibid.*

[1] *Ibid.* Before proceeding with the physical examination the officer about to be examined

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* In the lists prepared for the use of boards, values of 5, 10, and 15 have been assigned to the questions. Corresponding values will be given by the board to any original questions. It is assumed that an average of twenty questions will be asked in each subject, but the board is not limited to that number. The total values and relative weights of all subjects for which questions are furnished by the Adjutant-General shall be as follows:

Subject.	Total. Value.	Relative Weight.
I. Administration	200	1
II. Drill regulations	200	3
III. Exterior ballistics, etc	200	2
IV. Fire discipline	200	2
V. Hippology	200	2
VI. Military field-engineering	200	3
VII. Military law	200	1
VIII. Military topography	200	2
IX. Minor tactics	200	3

In computing the examination, find the percentage in the various subjects, multiply each by the relative weight of that subject, then divide the sum of these products by the sum of the relative weights of the subjects included in the examination of each officer.

The numerous questions embraced in each list, together with such original questions as may be formulated by the board, admit of considerable variation, and make it possible to arrange examinations radically different as regards particular questions, but essentially the same in respect to scope and character. It is desirable that the questions be selected indiscriminately in each case, to the end that each officer undergoing examination may have a different arrangement of questions, even when simultaneous examinations of a similar character are being conducted. *Ibid.*

If, on the other hand, he is found to be physically qualified, the professional examination is entered upon. The professional examination is in part theoretical, in part practical, and is in part based upon the official record of service of the officer undergoing examination. The examination is required to be conducted as far as possible orally. If the oral examination be unsatisfactory, however, the examination is continued in writing, in the form of questions to which written answers are required. The practical part of the examination, which is carried forward on the drill-ground, consists in the execution of maneuvers, the giving of commands, and of the solution of problems in minor tactics. The record of service of the candidate, as furnished by the War Department, is also considered by the board. The several subjects of examination, and the relative weights to be attached to each, are set forth in the regulations prescribed by the President and in such special instructions as may be furnished the board by the Secretary of War. The order of examination and the supervision of its details, including the selection of questions in each of the prescribed subjects, together with the weight to be attached to particular questions and the time to be devoted to each subject, are regulated by the board.[1]

Record.—The record or report of the examination, which is similar in form to the record of a court-martial, is kept by the recorder under the supervision of the board; a separate report being submitted in each case. In the case of an officer found qualified for promotion the record will set forth the proceedings of the board, to which will be attached a summary of the results of the examination, in accordance with a form furnished for that purpose by the War Department.[1] The report or judgment of the board is that the officer is, or is not, physically and professionally qualified for appointment or promotion.

When the board finds an officer qualified for promotion its conclusion will be stated in the following form: "The board is of the opinion that —— —— has the physical, moral, and professional qualifications to

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will be required to submit, for the information of the board, a certificate as to his physical condition. In event of no cause for disqualification existing the certificate will take the following form:

"I certify, to the best of my knowledge and belief, that I am not affected with any form of disease or disability which will interfere with the performance of the duties of the grade for promotion to which I am undergoing examination."

When the board finds an officer physically incapacitated for service it shall conclude the examination by finding and reporting the cause which, in its judgment, has produced his disability, and whether such disability was contracted in the line of duty.

Any officer reported by a retiring board as incapacitated by reason of physical disability, the result of an incident of service, shall, if the proceedings of said board are approved by the President, be regarded as physically unfit for promotion within the meaning of section 3 of the Act of October 1, 1890, and will be retired with the rank to which his seniority entitles him whenever a vacancy occurs that otherwise would result in his promotion on the active list; provided that before the occurrence of such vacancy he shall not have been placed on the retired list. General Orders, No. 41, A. G. O., of 1897.

[1] *Ibid.*

perform efficiently all the duties of the grade to which he will next be eligible, and recommends his promotion thereto."[1]

Where an officer is found physically disqualified the record will be authenticated by all the members, including medical officers and the recorder. In all other cases the medical officers will not be required to sign the proceedings. If any member dissents from the opinion of the board, the fact of such dissent will be set forth in the record.[1]

Whenever the board finds an officer disqualified for promotion from any cause, the examination papers will be attached to the proceedings and the record will contain a full statement of the case. The record when completed is forwarded to the Adjutant-General of the Army for the action of the Secretary of War.[1]

Approval and Confirmation.—If the report in the case of a particular officer be favorable and the action of the board receives the approval of the Secretary of War, the officer becomes entitled to promotion upon the occurrence of a proper vacancy. If he be a candidate for appointment merely, he becomes eligible to selection for appointment.[2] If the report of the board be unfavorable, the Act of October 1, 1890, becomes operative in the following manner:

(1) If the officer be found physically disqualified and if the disability is found to have been contracted in the line of duty, the candidate is to be retired, as of the date when his promotion accrues, with the rank of the grade to which he would have been promoted had he been found physically qualified.[3]

(2) If the failure to qualify be due to professional incapacity, or to physical disability not contracted in the line of duty, the officer next below him in rank having passed such examination shall receive the promotion, and the officer becomes entitled to a re-examination at the end of one year, during which period he is suspended from promotion; and if upon such re-examination he is found to be still disqualified, the law provides that he shall be honorably discharged from the military service with one year's pay.[3]

(3) If the officer was appointed from civil life, or was an officer of volunteers only, or of the militia, called into the service of the United States during the War of the Rebellion, and is found to be disqualified for

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[1] General Orders, No. 41. A. G. O., of 1897. No officer will be passed who fails to obtain 75 per cent in each of the written, oral, and practical examinations. *Ibid.*

Graduating diplomas of the infantry and cavalry school, and of the artillery school dated not more than five years anterior to examination, shall be accepted as evidence of proficiency, except for physical examination. *Ibid.*

[2] An officer of the line, on passing the examination for a vacancy in the Ordnance or Signal Departments, does not become an ordnance or signal officer by a mere transfer. He must be appointed, confirmed, and commissioned in the usual way. Dig. J. A. Gen., 550, par. 2. The examination being a statutory condition precedent to such appointment.

[3] Section 3, Act of October 1, 1890 (26 Stat. at Large, 562).

promotion, for any cause not incident to the line of duty, he becomes entitled to a re-examination at the end of one year, as in the previous case. If he fails to pass such re-examination, he is to be placed upon the retired list.[1]

RETIRING BOARDS.

Constitution and Composition.—When for any cause an officer has become physically incapacitated for the performance of his duty, the law authorizes the Secretary of War, under the direction of the President, to "assemble an army retiring board consisting of not more than nine nor less than five officers, two fifths of whom shall be selected from the medical corps. The board, excepting the officers selected from the medical corps, shall be composed as far as may be of seniors in rank to the officer whose disability is inquired of."[2]

These boards are constituted in every case by the Secretary of War; their composition, subject to the qualification that, save for "the officers selected from the medical corps, the board shall be composed as far as may be of seniors in rank to the officer whose disability is inquired of," is left to the discretion of the convening authority.[3]

Procedure.—It is the duty of a retiring board to "inquire into and determine the facts touching the nature and occasion of the disability of any officer who appears to be incapable of performing the duties of his office."[4] To enable the President to correctly execute the laws respecting the retirement of commissioned officers, the investigation should be so conducted as to determine (1) whether the alleged disability exists to such an extent as to render the officer incapable of performing the duties of his office, and (2) whether such disability is or is not the result of an incident of service.[5]

Retiring boards are created and their procedure is to a great extent regulated by statute; where the statutes are silent in respect to procedure

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[1] Section 3, Act of October 1, 1890 (26 Stat. at Large, 562).

[2] Section 1246, Revised Statutes.

[3] *Ibid.*

[4] The investigation of a retiring board is not affected by any limitation as to time, as is that of a court-martial. Such a board may therefore inquire into the matter of a disability however long since it may have originated. Dig. J. A. Gen., 664, par. 2.

[5] A retiring board may inquire into and determine the facts touching the nature and occasion of the disability of any officer who appears to be incapable of performing the duties of his office, and shall have such powers of a court-martial and of a court of inquiry as may be necessary for that purpose. Section 1248, Revised Statutes.

It does not affect the authority to retire under Sec. 1251, Rev. Sts., that the incapacity of the officer may have been found to have resulted from a wound received by him while in the *volunteer* service before entering the regular army. Dig. J. A. Gen., 665, par. 4.

Under Sec. 1252, Rev. Sts., an officer may, in the discretion of the President, legally be retired by reason of an incapacity resulting from habitual drunkenness. *Ibid.*, par. 5.

Held that the law—Secs. 1248 and 1249, Rev. Stats.—contemplated an existing and not a purely prospective and contingent incapacity; and that an inquiry into an officer's

Substitute for "Boards of Survey," page 238 to "No Power to Condemn," page 240.

BOARDS OF SURVEY.

Jurisdiction.—Boards of Survey are provided for by Army Regulations for the purpose of investigation of questions of responsibility arising in connection with the receipt, issue, distribution, use, or preservation of public property. Not being created by statute, they have not the powers vested in courts-martial or courts of inquiry to require attendance of witnesses, but the recorder may, however, administer an oath to any witness attending to testify or depose in the course of its investigation.* The board of survey has no power to administer oaths to its members, who act under the sanction of their oaths of office. It should hear in person or by deposition all persons concerned in the subject matter before it.† They may examine the contents of packages, verify their correctness, and should report the condition of stores submitted to them for examination, and fix the responsibility for damage, loss or deficiency. The power of the board of survey is restricted to recommendation, based upon the evidence before it, as to responsibility with respect to the matters referred to it.

Constitution.—A board of survey will he called by the commanding officer of the regiment, independent battalion, post or station, and may, however, be convened by the commanding officer of a department, an army corps, division or brigade. It will be composed of three officers, exclusive of the commanding officer and those who are interested, if that number be present for duty; otherwise of as many as are present exclusive of the commanding officer and interested officers; or, if none but the commanding officer and interested officers be present for duty, then of the commanding officer. When only the responsible or interested officer is present, he will not constitute himself a board of survey, but will furnish the next higher commander authorized to convene such boards, his certificate of facts and circumstances, supported by testimony of witnesses, or by the affidavits of enlisted men or others who are cognizant thereof. Should the case thus presented not be considered satisfactory, or in a case in which only interested officers with opposing interests are present for duty at the post or station, the next higher commander authorized to convene boards of survey may make the necessary investigation. (Army Regulations, 791.)

Procedure.—A board of survey must fully investigate matters submitted to it. It will call for all evidence attainable, and will not limit its inquiries to proofs or statements presented by the parties in interest. It will rigidly scrutinize the evidence especially in cases of alleged theft or embezzlement, and will not recommend the relief of officers or soldiers from responsibility unless fully satisfied that those charged with the care of property have performed their whole duty in regard to it. In no case, however, will the report of the board take the place of evidence required in Paragraph 764, Army Regulations, (which is to the effect that, "officers responsible for property will be charged for any damage to or loss or destruction of the same, and the money value be deducted from their monthly pay, unless they show to the satisfaction of the Secretary of War, by their own affidavits or certificates, or by one or more depositions that the damage, loss or destruction was occasioned by unavoidable causes and without fault or neglect on their part"). Army Regulations, 793.

Evidence.—The party responsible for the property to be surveyed will in all cases furnish the original certificates or affidavits or the testimony of the witnesses upon which he relies to relieve him from responsibility and the number of duly attested copies of such affidavits or certificates thereof required by a board of survey to accompany its proceedings. Army Regulations, 794.

*Army Regulations, 796. †Army Regulations, 795.

Such finding, however, when "approved by the President is conclusive as to the facts. The board finds the facts and the President approves or disapproves the finding, but the law does not empower him to modify the finding or to substitute a different one. There is here a judicial power vested in the two and not in the President acting singly, and when the power has been once fully exercised it is exhausted as to the case."[1]

Action in respect to retirement of an officer is completed by the issuance of an order by the President, in accordance with the approved action of the board, placing the officer on the retired list or wholly retiring him from service.

Retired officers (except as otherwise provided by law) "do not hold public office." They are in fact pensioners. The position and pay given them constitute a form of pension the rate or amount of which is determined by the rank held by them at the date of their retirement. They exercise no functions and receive no emoluments of office, but are pensioned for past faithful services or disabilities contracted in the line of duty." Their condition and the status of a public office have no characteristics in common.[2]

An officer "wholly retired" in conformity with the approved proceedings of a retiring board ceases to be an officer of the Army, and can only be restored thereto in pursuance of an appointment by the President with the advice and consent of the Senate.[4]

BOARDS OF SURVEY.

Jurisdiction.—A board of survey is a tribunal created by the Army Regulations,[5] and called into being by a post or department commander[6] for the purpose of investigating questions of responsibility arising in connection with the receipt, issue, or distribution of public property, or a similar question in regard to its use or preservation. Not being created by statute, boards of survey are without power to call witnesses, or to examine them under oath should they voluntarily appear.[7] They can act only upon evi-

[1] Dig. J. A. Gen., 668, par. 18. See, also, U. S. *vs.* Burchard, 125 U. S., 179.

[2] See Sections 1259, 1260, and 1860, Revised Statutes, and the Acts of June 16, 1880, (21 Stat. at Large, 113,) Aug. 6, 1894, (28 *ibid.*, 235,) July 31, 1894, (28 *ibid.*, 205,) and June 3, 1896 (29 *ibid.*, 205).

[3] *Ibid.*, par. 19. See, also, People *vs.* Duane, 121 N. Y., 367; 20 Opin. Att.-Gen., 686.

[4] Miller *vs.* U. S., 19 Ct. Cls., 338.

[5] See paragraphs 708–723, Army Regulations of 1895.

[6] See par. 709, A. R. 1895.

[7] A board of survey is not a *court* and cannot legally exercise the powers expressly vested by statute in courts-martial or courts of inquiry. It is no part of the province of a board of survey to convict of crime. Where such a board, in fixing upon an officer a pecuniary responsibility for the loss of certain subsistence stores, expressed incidentally the opinion that the same had been stolen by a certain soldier, *held* that this opinion could not operate as a finding of theft, or constitute authority for the stopping against the pay of the soldier of the value of the stores. Dig. J. A. Gen., 179, par. 1.

There is no statute or regulation authorizing the swearing of a board of survey or its members, nor indeed is it necessary or suitable that such a body, not being a court,

dence submitted to them in the form of affidavits by the parties to the investigation. They may also examine the contents of packages, verify their correctness, and report the condition of stores submitted to them for examination.[1] Like other military tribunals, the power of a board of survey is restricted to a recommendation, based upon the evidence submitted to it, in respect to the question of responsibility referred to it for examination.

Constitution.—A board of survey will be called by the commanding officer of the post or station. It will be composed of three officers, exclusive of the commanding officer and those who are interested, if that number be present for duty; otherwise of as many as are so present, exclusive of the commanding and interested officers; or if none but the commanding officer and interested officers be present for duty, then of the commanding officer. When only the responsible or interested officer is present, he will not constitute himself a board of survey, but will furnish the department commander his certificate of facts and circumstances, supported by affidavits of enlisted men or others who are cognizant thereof. Should a case thus presented not be considered satisfactory, or in a case in which only interested officers with opposing interests are present for duty at the post, the department commander may make the necessary investigation.[2]

Procedure.—A board of survey must fully investigate matters submitted to it. It will call for all evidence attainable, and will not limit its inquiries to proofs or statements presented by parties in interest. It will rigidly scrutinize the evidence, especially in cases of alleged theft or embezzlement, and will not recommend the relief of officers or soldiers from responsibility unless fully satisfied that those charged with the care of property have performed their whole duty in regard to it. In no case, however, will the report of a board take the place of the evidence required in paragraph 682.[3]

Evidence.—The party responsible for the property to be surveyed will in all cases furnish the original certificates or affidavits upon which he relies

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should be specially sworn. Dig. J. A. Gen., 179, par. 2. Its members act upon the sanction of their respective oaths of office.

[1] For example, it investigates and determines questions involving the character, amount, and cause of damage or deficiency which public property may have sustained in transit, store, or use, and which is not the result of ordinary wear and tear of the service, and reports the investigation made, its opinions thereon, and fixes responsibility for such damage or deficiency upon the proper party. It makes inventories of property ordered to be abandoned when the articles have not been enumerated in the orders for abandonment. It recommends the prices at which damaged clothing may be issued, and the proportion in which supplies shall be issued in consequence of damage or deterioration that renders them, at the usual rate, unequal to the regulation allowance, fixing in each instance responsibility for actual condition. It verifies the discrepancy between invoices and the actual quantity or description of property transferred from one officer to another, fixes definitely amounts received for which the receiving officer must receipt, and ascertains, as far as possible, where and how the discrepancy has occurred. It inventories and reports the condition of property in the possession of deceased officers as provided for in paragraph 84.

[2] Par. 709, A. R. 1895.

[3] Par. 710, *ibid.* Army Regulations of 1895.

to relieve him from responsibility, and the number of duly attested copies thereof required by a board of survey to accompany its proceedings.[1]

A board of survey has no power to administer oaths either to its members or to witnesses before it, but it should hear in person or by letter all persons concerned in the subject-matter before it.[2]

No Power to Condemn.—"A board of survey cannot condemn public property. Its action is purely advisory. It is called for the purpose of ascertaining and reporting facts, submitting opinions, and making recommendations upon questions of responsibility which may arise through accident, mistake, or neglect";[3] the power to condemn being vested, in accordance with Section 1241 of the Revised Statutes, in officers specially empowered by the Secretary of War for that purpose.

Record.—The proceedings of a board of survey will be prepared in triplicate and signed by each member who concurs in the finding. Should a member not concur, he will submit a minority report, to be embodied in the record immediately after the majority report and signed by the dissenting member. The proceedings will then be submitted to the convening authority for approval or disapproval.[4]

Approval, Confirmation, etc.—When the value of the property submitted for survey or the loss or damage to be inquired into does not exceed five hundred dollars and the interested officer does not request the department commander's action, the proceedings of the board will be considered complete for submission as a property voucher upon the approval of the convening authority. One copy will then be forwarded to department headquarters and the others delivered to the officer accountable.[5]

Should the proceedings be disapproved by the convening authority, or should the value of the property submitted for survey or the loss or damage to be inquired into exceed five hundred dollars, or whatever the amount involved, should the officer pecuniarily interested request it, the proceedings in triplicate will be forwarded to the department commander for review, and with his action are complete. One copy will then be filed at department headquarters and the others sent to the accountable officer. But all proceedings of boards of survey, whatever their nature or the amounts involved, are subject on call to the approval or disapproval of the department commander or such other action on his part as the merits of the case or the interests of the Government may in his opinion require.[6]

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[1] Par. 711, A. R. 1895.

[2] Par. 712, A. R. 1895. See, also, note 7, page 238. A board of survey has no legal capacity to swear persons attending before it as witnesses; nor is it within the province of an executive *order* to authorize such a board to administer an oath either to itself or to a witness. Dig. J. A. Gen., 179, par. 2.

A board of survey, though it may not swear witnesses, may receive and file with its report affidavits of persons cognizant of facts under investigation. But such a board would not in general be justified in charging a soldier with the value of public property lost or damaged, upon the affidavit alone of an interested party—as, for example, the officer responsible in law for such property. *Ibid.*, par. 3.

[3] Par. 713, A. R. 1895. [4] Par. 714, *ibid.* [5] Par. 715, *ibid.* [6] Par. 716, *ibid.*

Properly approved proceedings of boards of survey may be submitted as vouchers to property returns. They are not to be considered as conclusive until accepted by the Secretary of War. Until then they are to be regarded simply as the opinions and recommendations of disinterested officers, to aid in the settlement of questions of accountability between the Government and the individuals concerned. If, on examination in the proper bureau, they exhibit serious errors or defects either of investigation or of finding, they will not be accepted as sufficient vouchers, and the officer submitting them will be duly notified, that he may have opportunity to make explanations or appeal to the Secretary of War.[1]

Boards of Survey in Cases of Desertion.—Whenever a case of desertion occurs, the Regulations require that a board of survey shall "be called to ascertain whether he has lost or abstracted any articles of Government property, and if so, to determine the money value of the same. The value of the articles thus found to be missing will be charged against the deserter on the next muster and pay roll of his company, which will be accompanied by a copy of the board's report. A copy of so much of the proceedings as relates to the property charged on any roll will accompany the return to which the property pertains. The board will also fully investigate the circumstances attending desertion, especially the causes which induced it, and make a separate report in each case of its investigation and conclusions thereon, which will be transmitted to department headquarters through intermediate channels."[2]

[1] Par. 718, A. R 1895. The proceedings of a board of survey which recommends the relief of officers and enlisted men from responsibility should not be approved unless full and careful investigation and convincing proof to sustain the board's findings appear. Par. 717, A. R. 1895.

At posts or stations not under the control of department commanders commanding officers will be governed by these regulations in convening boards of survey and acting upon their proceedings, but in cases referred to in paragraph 716 will forward the papers to the chiefs of bureaus to which the property pertains. *Ibid.*, par. 719.

Separate proceedings of boards of survey will be had for each staff department concerned. *Ibid.*, par. 720.

Whenever a board recommends a stoppage against an enlisted man and the recommendation is approved, the convening authority will cause a copy of the proceedings to be furnished to the company commander, who will charge the amount on the next muster and pay rolls of the company. *Ibid.*, 721.

If an inspection of property follows the action of a board of survey thereon, one copy of the proceedings will accompany the inventory and inspection report which is transmitted as a voucher to the officer's returns, and another, with the inventory and inspection report, will be filed by the officer with his retained papers. *Ibid.*, par. 722.

For private property of officers or enlisted men lost or destroyed in the military service, without fault or negligence on the part of the claimaint, "where the private property so lost or destroyed was shipped on board an unseaworthy vessel by order of any officer authorized to give such order or direct such shipment," or "where it appears that the loss or destruction of the private property of the claimant was in consequence of his having given his attention to the saving of the property belonging to the United States which was in danger at the same time and under similar circumstances," compensation may be made under the provisions of the Act of Congress approved March 3, 1885.* Proceedings of a board of survey will, if possible, accompany each application under this Act, showing fully the circumstances attending the loss. *Ibid.*, par. 723.

[2] Par. 115, A. R. 1895. Department commanders will carefully consider the special

* 23 Stat. at Large, 250.

The purpose in convening this board is twofold: (1) To ascertain the exact accountability of the soldier in respect to the Government property in his possession. This with a view to fix the responsibility therefor and to determine whether, in addition to a charge of desertion, the offender shall be charged with the loss or abstraction of property. (2) To ascertain if possible the exact cause of desertion in every case. This with a view to discover the causes of desertion, generally, in the Army, and thus to enable a resort to be had to such remedial or preventive measures as will be calculated to diminish its frequency or prevent its occurrence.

Boards to Determine the Character given to Discharged Enlisted Men. —The law requires that a soldier, when honorably discharged at expiration of service, or for other cause not involving a status of dishonor, shall be furnished with a formal certificate of discharge, signed by his post commander. This instrument contains a certificate by the company commander of the discharged soldier in respect to the character borne by him during the period of his enlistment.

"The company commander will, before submitting the discharge certificate to the proper officer for signature, inform the soldier of the character he intends to give him. Should the soldier feel that injustice will be done him thereby he may at once apply for redress to the post commander, who will immediately convene a board of officers to determine the facts in the case, and will briefly note the finding of the board, if approved by him, on the discharge certificate. But in all cases where the company commander deems a soldier's services unfaithful, he should whenever practicable notify the soldier, at least thirty days prior to discharge, of the character which he intends to give, in order that the soldier may have ample opportunity to apply for and be heard before the board."[1]

"This board may be called upon the application of the post or company commander, and if by the former the department commander shall appoint it. The character given by the company commander, also the character found by the board, will be noted on the muster-roll."[2]

"The proceedings of the board, showing all the facts pertinent to the inquiry, with the views of the intermediate commanders indorsed thereon, will be transmitted for the consideration and action of the War Department."[3]

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reports made in accordance with the foregoing paragraph, and on or before the 1st of August of each year forward to the Adjutant-General of the Army reports of the desertions which have occurred within their commands during the preceding fiscal year, with an expression of their views as to the causes of the same and the measures which should be taken to prevent their recurrence. Commanders of posts and officers in charge of recruiting stations will take prompt action to arrest all deserters amenable to trial and punishment. Par. 116, A. R. 1895.

[1] Par. 148, A. R. 1895. See, also, the Fourth Article of War.

[2] *Ibid.*

[3] *Ibid.* The cause of discharge and the soldier's age at its date will be stated in the

Other Forms of Discharge.—A *dishonorable discharge* is a discharge expressly imposed as a punishment by sentence. Such a discharge is held also to be *involved* in a sentence "to be drummed out of the service." It is only by a sentence that a dishonorable discharge can be authorized. Being a *punishment*, it cannot be prescribed by an order. In a case of this discharge the word "dishonorably" is inserted before the word "discharged" in the certificate, and it is added that the discharge is given pursuant to the sentence of a certain general court-martial, specifying it by reference to the order by which it was constituted.[1]

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body of the discharge certificate. His character will be accurately described at the bottom of the certificate, but if not sufficiently good to allow of his re-enlistment, that portion of the certificate relating to his character will be cut off. The words "Service honest and faithful" or "Service not honest and faithful," as the case may be, will be entered under "Remarks" in the military record on the back of the discharge certificate, and will also be noted on the final statements. Par. 148, A. R. 1895. See, also, the Fourth Article of War.

The final statements required by par. 141, A. R. 1895, to be furnished with the discharge, constitute no part of the discharge: the discharge is complete without them. Dig. J. A. Gen., 359, par. 17.

The statement of "*character*" appended to the certificate is no part of the discharge. This description is devolved by par. 148, A. R. 1895, upon the commanding officer whose duty it may be to make out the discharge. The Army Regulations do not give to his superior any authority over the subject. (See G. O. 74, H. Q. A., of 1881.) *Ibid.*, par. 18.

[1] Dig. J. A. Gen. 361, par. 25. *Held* that an executed dishonorable discharge was an absolute expulsion from the Army, and as such did not merely terminate the particular enlistment, but covered all previous unexecuted enlistments of the soldier, if any. *Ibid.*, par. 26.

A third species of discharge, recently recognized, is *Discharge without honor*. The causes and occasions for and upon which this form of discharge may be resorted to are defined in par. 151, A. R. 1895. It is employed in cases where there has been no sentence adjudging a dishonorable discharge, but where the discharge awarded is induced by conduct or circumstances not honorable to the soldier—where his status is not one of real honor, as where he has been sentenced to a term of imprisonment in a penitentiary by a civil court; so where the soldier has mutilated himself in order to obtain a discharge, and it is deemed expedient to discharge him without bringing him to trial. *Held* that the summary discharges given during the late war for causes tainting their character were of this kind, although not known by the name of "discharges without honor," or by any other particular name. (Sometimes this discharge is given upon the remission of a sentence. See S. O. 169, A. G. O., of July 26, 1893.) *Ibid.*, par. 30.

The ground for this discharge set forth in par. 151, A. R.—disqualification for service, physically or in character, through his own fault—is a disqualification resulting from the acts and habits of the soldier, and cannot fairly be established by previous convictions. *Ibid.*, 362, par. 31.

Under sec. 4 of the Act of June 16, 1890, the President may, in his discretion, permit a soldier to *purchase* his discharge even if his service has not been faithful. This section does not—as do sec. 1 (relating to pay) and sec. 2 (relating to discharge and furlough)—prescribe as a condition to receiving its benefits that the antecedent service shall have been "faithful." *Ibid.*, par. 32. See, also, the Fourth Article of War.

CHAPTER XV.

EVIDENCE.

The Judicial Ascertainment of Facts.—The methods which are employed by courts of justice to ascertain the facts—that is, the truth—respecting any past transaction closely resemble those resorted to by an individual for a similar purpose. If A desires to ascertain whether a particular act did or did not take place, he addresses himself to those who were in a situation to witness the occurrence itself, and so endeavors to obtain from each person present his version of the occurrence. From the testimony thus obtained he forms his conclusion as to whether or not the act took place. In the course of his investigation, however, he finds that all who were present and witnessed the occurrence as bystanders do not give testimony of equal importance or value. Some, having greater powers of observation or better memories than others, give in consequence more valuable testimony. Some of the witnesses being children or persons of weak or unsound mind, are without the requisite mental capacity to observe facts or to appreciate their relations to each other; others, by reason of their bad character, are not regarded as worthy of belief by their fellow citizens; still others were insane or quite under the influence of intoxicating liquor at the time of the occurrence, and so were incapacitated from observing. A therefore rejects some of the statements as entirely untrustworthy; to others he attaches weight in proportion to their worthiness of belief, and so endeavors to reach a conclusion as to the truth of the occurrence or event which was the original subject of his inquiry.

Evidence.—The term evidence is in general applied to that which tends to render evident or clear.[1] In its legal acceptation the term applies to and includes all matters of fact which a court of justice permits to be submitted to the jury, in the trial of a case, with a view to prove or disprove the existence of a fact in issue.[2]

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[1] I. Best on Evidence, § 11.

[2] The Latin *evidentia* and the French *évidence* are commonly restricted by foreign jurists to those cases where conviction is produced by the testimony of the senses: that which is known as evidence to the English law is discussed by the canonists and civilians under the head *probatio*, and by French writers under that of *preuve*. *Ibid.*, § 11, note.

How Obtained.—Evidence is obtained by the application of a system of rules, partly statutory and in part derived from the common law, called *rules of evidence.* The facts so presented are derived from the *testimony* of *witnesses* who have observed them, or from *documents* relating to the case, the production of which has been compelled by due process of law.[1]

Witnesses.—*Witnesses* are persons who appear in court in obedience to appropriate summons and there relate, under the sanction of an oath, such facts pertaining to a particular case as they have become cognizant of through the medium of their senses.[2]

Purpose of Rules of Evidence.—The *rules of evidence* have to do with determining what is called the *competency* of witnesses; that is, of deciding whether a particular person shall be permitted to testify at all; and with the exclusion of certain testimony from consideration of the court upon the ground that it is likely to mislead and confuse, rather than to make clear, the issue referred to it for trial. They also determine to a certain extent the *credibility* of witnesses, or the weight that is to be attached to their testimony.

WITNESSES.

Duty of Witness to Testify—Appearance.—The giving of testimony in an action at law is an important public duty, due from the individual to the State of which he is a citizen. In a criminal case every person upon whom a subpœna has been duly served must appear and testify, or render himself liable to punishment for contempt.[3]

Appearance of Military Persons.—The attendance of military persons is secured by the issuance of orders from the proper military authority. These orders are based upon the formal request of the court or the judge-advocate, and a failure to appear in obedience thereto constitutes, if unexplained, the offense of disobedience of orders, and is punishable as such. Where the witness is stationed at the post or place at which the court sits, his attendance is obtained by a formal notification to appear signed by the judge-advocate. To avoid misunderstanding, such notification should reach the witness through the proper military channels.

Appearance of Civilians.—To obtain the attendance of a civilian as a witness a formal subpœna[4] is issued by the judge-advocate, in the name of the President, directing him to appear in court as a witness on a day named. If the witness has in his possession a book, paper, or other document

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[1] According to Professor Greenleaf, the term includes "all the means by which any matter of fact the truth of which is submitted to investigation is established or disproved." Greenleaf on Evidence, § 1.

[2] U. S. *vs.* Wood, 14 Pet., 445; Barker *vs.* Colt, 1 Root (Conn.), 225.

[3] I. Greenleaf, §§ 311-319, and cases cited; U. S Constitution, Amendment 6.

[4] This writ is known as the *subpœna ad testificandum*, to distinguish it from the writs next to be described.

material to a cause as an instrument of evidence, a writ called a *subpœna duces tecum*[1] issues commanding him to appear in court on a day certain, and to have with him the particular paper or document named and described in the subpœna. If the witness be a prisoner in jail, his presence is secured by the issue of a peculiar form of the writ of habeas corpus called *habeas corpus ad testificandum.*[2]

Service of Process.—Writs of subpœna for the attendance of civilian witnesses are usually issued in duplicate.[3] They are issued by the judge-advocate in the name of the President of the United States, and are addressed to the witness whose attendance is desired. Being in the nature of a command to the witness himself and not, as is the case with judicial process generally, a command to the officer charged with its service,[4] a subpœna may legally be served by any competent person, civil or military, but will in general be preferably served by an officer or a non-commissioned officer of the Army.[5] This for the reason that none of the appropriations for the support of the military establishment are applicable to the payment of fees or expenses incurred in connection with the service of process.[6]

Method of Service.—To constitute service, the original is shown to the witness, or, if two copies are furnished, the duplicate is delivered to him; a certificate of service is then indorsed upon the original writ, which is returned to the judge-advocate by the officer or other person charged with its service. The personal service thus described constitutes the legal service upon which process of attachment may be based should the witness fail to

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[1] It has been decided in a number of cases that the production of documentary evidence only can be compelled by the issue of this writ, and that its effect does not extend to the production of objects, or things, properly described as real evidence.

[2] As courts-martial have no power to issue any form of the writ of *habeas corpus*, this method of securing the attendance of a witness in confinement or under restraint is not available to military tribunals.

[3] For form of subpœna, see Appendix.

[4] I. Greenleaf, § 315; 24 Am. and Eng. Encyc. of Law, 165, note 4.

[5] Dig. J. A. Gen., 753, par. 13. A summons may legally be served either by a military or a civil person, but will in general preferably be served by an officer or a non-commissioned officer of the Army.

A judge-advocate or a commanding or other officer to whom a summons is sent for service will not be authorized, by employing for the purpose a U. S. marshal or deputy marshal or other civil official, to commit the United States to the payment of fees to such official. The action, however, of a judge-advocate in employing a deputy marshal to serve a summons, where apparently the service could not otherwise be so effectually or economically made, has in a few cases been so far ratified by the Secretary of War as to allow, out of the appropriation for army contingencies, the payment of a small and reasonable account of charges rendered by such official. *Ibid.*

[6] There is no fee or compensation established or authorized to be paid, by statute or regulation, for the service of subpœnas for the attendance of witnesses before civil courts. Neither a commanding officer nor a judge-advocate is authorized to employ a civil official or any civilian for such service, or to commit the United States to the payment of any compensation to such a person. But in a case where the employment of a civilian for such purpose had been resorted to, and it clearly appeared that to employ him was the most economical as well as effectual course open to the officer, *advised* that his reasonable compensation be paid out of the appropriation for contingencies of the Army. *Ibid.*, 760, par. 39.

appear in obedience to the summons.[1] In the summoning of witnesses before courts-martial, what is called constructive service, that is, service by publication or in any other manner than by actual personal delivery of process, is not permitted; nor is it regarded as sufficient service upon which to base a writ of attachment. Personal service may be waived, however, by the witness, and is so held to be waived when he appears in obedience to any summons or notification less formal than that above described.

Operation of the Writ.—The power to issue writs of subpœna is vested by statute not in the court-martial itself but in the judge-advocate, who is not subject to the territorial restrictions in respect to their issue which are imposed by law upon the civil courts of the United States. A court-martial subpœna will therefore run anywhere within the territorial jurisdiction of the United States,[2] and is operative beyond such territorial limits to the extent of conferring authority for the attendance of the witness and the payment of his fees. A writ of attachment, however, will not run beyond the territorial limits of the State, Territory, or District in which the court may be ordered to sit.[3]

Time of Service.—The service of a subpœna upon a witness ought always to be made within a reasonable time before trial, to enable him to put his affairs in such order that his attendance upon the court may be as little detrimental as possible to his interest. On this principle, a summons in the morning to attend in the afternoon of the same day has been held insufficient, though the witness lived in the same town and very near the place of trial. In the United States the time is generally fixed by statute, requiring the allowance of one day for a certain number of miles of distance from the residence of the witness to the place of trial; and this is usually twenty miles. But at least one day's notice is deemed necessary, however inconsiderable the distance may be.[4]

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[1] Section 1202, Revised Statutes.

[2] At whatever place a court-martial may be assembled, a summons for the attendance before it as a witness may legally be issued to and served upon a person civil or military in any other part of the federal domain. Dig. J. A. Gen., 752, par. 12.

[3] Section 1202, Revised Statutes.

[4] The allowances and *per diem* compensation of civilians subpœnaed and attending as witnesses before courts-martial are fixed by paragraphs 962–965, A. R., 1895. Such witnesses are entitled to these fees though they may not be called upon to testify: it is only essential that they duly attend. Civilian employees of the United States are not entitled to the *per diem* allowance specified in par. 963 A. R., of 1895, but only to the reimbursement of the expenses specified in par. 962. Dig. J. A. Gen., 759, par. 34.

The compensation allowed by the Secretary of War for witnesses summoned as *experts* in handwriting before a court-martial (see Smith *vs.* U. S., 24 Ct. Cl., 209), *held* payable out of the annual appropriation "for compensation of witnesses attending upon courts-martial and courts of inquiry." *Ibid.*, par. 35.

Held that duly attending by a civilian witness before a duly authorized official to give a *deposition* to be used in evidence on a military trial was to be regarded as practically equivalent to attending a court-martial, and that the deponent was entitled to be paid the usual allowances (*i.e.*, the same as those of witnesses appearing before the court) out of the regular appropriation for the "compensation of witnesses attending before courts-martial," etc. *Ibid.*, par. 36. See, also, Appendix, and Circ. No. 9, H. Q. A., 1883; Manual for Courts-martial, pp. 38, 39.

THE WRIT OF ATTACHMENT.

Nature and Purpose.—When a person has been lawfully summoned to appear in court on a day certain, as a witness in a case there pending, and fails to appear in obedience to such summons, he is said to be in contempt of the court from which the subpœna issued, and such court is authorized, by the issue of some form of compulsory process, to compel his attendance. The process usually resorted to for this purpose is called the *writ of attachment*, which authorizes the officer charged with its execution to arrest the person named and compel his appearance in court, using such force as may be necessary to accomplish that purpose. The courts of the several States and the civil courts of the United States are each authorized, by appropriate enactments, to make use of compulsory process to obtain the attendance of witnesses who have failed to appear in obedience to lawful summons.

Application in Court-martial Procedure.—Section 1202 of the Revised Statutes[1] confers a similar power upon the judge-advocates of courts-martial. The terms of the statute are peculiar in that the power is vested exclusively and independently in the judge-advocate and cannot be exercised by the court. The writ of attachment is, therefore, not a writ or process of the court, but simply a compulsory instrumentality placed at the disposition of the judge-advocate, as the prosecuting official representing the United States.[2]

Limitation on the Power to Issue Writs of Attachment.—It has been seen that the writ of subpœna lawfully issued by the judge-advocate of a court-martial would have operation anywhere within the territorial jurisdiction of the United States.[3] The power of the judge-advocate to issue writs of attachment is much less extensive, being restricted by the express terms of the statute conferring it[4] to "the State, Territory, or District in which such court shall be ordered to sit." Within such State, Territory, or

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[1] Every judge-advocate of a court-martial shall have power to issue the like process to compel witnesses to appear and testify which courts of criminal jurisdiction within the State, Territory, or District where such military courts shall be ordered to sit may lawfully issue. Section 1202, Rev. Stat.; Act of March 3, 1863 (12 Stat. at Large, 754).

[2] Dig. J. A. Gen., 757, par. 27. The authority to issue process to compel civilian witnesses to appear and testify is vested, by Sec. 1202, Rev. Sts., in "every judge-advocate of a court-martial." A judge-advocate of an inferior court would thus be empowered for the purpose equally with the judge-advocate of a general court. The present statute, however, (unlike the original form,) does not extend the authority to recorders of courts of inquiry. *Ibid.* Or to the summary court. Manual for Courts-martial, 77. Article 42 of the Rules for the Government of the Navy contains the requirement that "any person" who "refuses to give evidence" may be punished by the court-martial by imprisonment "for any time not exceeding two months." Sec. 1624, Rev. Stat.

[3] See the article, *ante*, entitled *Service of Process*.

[4] See note 1, *supra*. Sec. 1202, Rev. Sts., authorizes only judge-advocates of courts-martial to issue process to compel the attendance of witnesses. The court itself, general or inferior, has no such power. Dig. J. A. Gen., 463, par. 33.

Held that the statute could not properly be construed as authorizing the issue of an attachment to compel a witness to attend before a commissioner or other person and give his *deposition*. *Ibid.*, 757, par. 29.

District, therefore, a witness may, by the issue of a writ of attachment, be compelled to appear in court; without such territorial limits, however, the statute above cited would seem to vest no power in the judge-advocate to compel such appearance in court.

Service of Process of Attachment.—To authorize a resort to an attachment there must have been a formal summons, duly issued and served upon the witness and not complied with.[1] The judge-advocate is authorized only to *initiate* the process of attachment. The statute does not specify by whom it shall be executed, and the judge-advocate is not authorized to command any officer or person to serve it; nor has the court any such power.[2]

Whenever, therefore, it becomes necessary to enforce the attendance of a witness, the judge-advocate will issue a warrant of attachment,[3] directing and delivering it for execution to an officer designated by the department commander for the purpose.[4] He will also deliver to this officer the subpœna, indorsed with affidavit of service (to be returned when the warrant is executed), and a certified copy of the order appointing the court-martial.[5]

In executing such process it is lawful to use only such force as may be necessary to bring the witness before the court.[6] Whenever force is actually required, the post commander nearest witness' residence will furnish a military detail sufficient to execute the process.[7]

Although the power to issue process of attachment is expressly conferred by statute, some special precautions are necessary in its exercise, to which attention will now be drawn. The effect of the issue and service of the writ is to place restraints upon individual action, and so for the time being to deprive an individual of his liberty. The restraint thus imposed may be inquired into by an issue of the writ of habeas corpus, and the officer or other person to whom the writ has been entrusted for service should be provided with such papers as will enable him to make full and sufficient return to the writ in the event of its being served upon him in behalf of the witness in his custody. For this purpose the following papers, in such form as to enable them to be used as instruments of evidence, are absolutely necessary: (1) the order convening the court for the trial of the accused; (2) a copy of the charges and specifications, as referred for trial; (3) the original

[1] Dig. J. A. Gen., 757, par. 28.
[2] *Ibid.*, 463, par. 34.
[3] Manual for Courts-martial, 34, par. 6.
[4] *Ibid.; id.*, 758, par. 32; par. 923, A. R. 1895. A judge-advocate cannot properly direct an attachment to a U. S. marshal or deputy marshal or other civil official. Dig. 758, par. 32.
[5] Manual, etc., 34, par. 5.
[6] Dig. J. A. Gen., 758, par. 32.
[7] Manual, etc., 34, par. 6; par. 923, A. R. 1895. A judge-advocate, having attached a civilian witness and had him brought to the place of the court, detained him one hour in the guard-house before bringing him before the court. For this he was indicted (for false imprisonment) in a U. S. District Court in Texas. *Held* that his action was warranted under Sec. 1202, R. S., and *advised* that the Attorney-General be requested to cause the prosecution to be discontinued. Dig. J. A. Gen., 463, par. 35.

subpœna, with the affidavits and certificates of service; (4) evidence, in the form of an affidavit from the judge-advocate, that the party has failed and neglected to appear although sufficient time has elapsed, that he is a material and necessary witness, and that no valid excuse has been offered for such failure to appear.[1]

THE RULES OF EVIDENCE.

The rules of evidence which prevail in the federal courts are those provided for the guidance of those tribunals by successive enactments of Congress. They consist in general of the rules of the common law as they existed in the several States at the adoption of the Federal Constitution in 1789, as modified from time to time by subsequent Acts of Congress.[2]

[1] Upon the subject of the execution of process of attachment in military cases, see XII Opin. Att.-Gen., 501; also the directions—based upon the same—of G. O. 93, H. Q. A., 1868. Dig. J. A. Gen., 358, par. 32, note 2.

Prior to the adoption of the Constitution, Congress (then the Government) appears to have relied upon the State authorities for the necessary process to compel the attendance of witnesses before military courts. See Resolution of Nov. 16, 1779—III Journals of Congress, 392. In the British law, by a provision first incorporated in the Mutiny Act in the year 1800, witnesses neglecting to comply with a summons requiring their presence at such courts are made "liable to be attached in the Court of Queen's Bench," etc. This provision well illustrates the close connection between the executive and the other governmental powers in the British Constitution, where the sovereign is a part of the judiciary as well as of the legislature. The fact of the express distinction and separation of the three powers in our own organic law, one result of which has been to leave courts-martial, as agencies of the executive power, quite independent of any review or control on the part of the U S. courts, has also no doubt availed to preclude the devolving upon the federal tribunals of a power fitly conferred in the foreign statute, but which with us would be anomalous, exceptional, and out of harmony with our constitutional system.

It may be added, in regard to the exercise of the authority to issue compulsory process as vested in judge-advocates by the Act of 1863, (Sec. 1202, Rev. Sts.,) that the occasions of such exercise have been unfrequent in practice, and no case is known in which such authority has been abused. *Ibid.*

[2] In a leading case in the Supreme Court of the United States it was held that "the law by which the admissibility of evidence in criminal cases in the courts of the United States is determined is the law of the State in which the trial is held, as it was when the courts of the United States were established by the Judiciary Act of 1789. The 34th Section of that Act, declaring that the laws of the several States shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply, has no application to the rules of evidence in criminal cases. And no State law made since 1789 can affect the rules of evidence in such cases."* U. S. *vs.* Reid, 12 How., 361; Logan *vs.* U. S., 144 U. S., 263, 300; U. S. *vs.* Brown, 1 Sawyer, 531; U S. *vs.* Dow, Taney, 34; U. S. *vs.* Hawthorne, 1 Dill., 422; King *vs.* Worthington, 14 Otto, 44; Moore *vs.* U. S., 1 *ibid.*, 273; Thompson *vs.* R. R. Co., 6 Wall., 134; Hinde *vs.* Vattier, 5 Pet., 400. Judge Curtis in his "Jurisdiction of the United States Courts" makes use of the following language in speaking of the rules of evidence which apply to criminal trials in the federal courts: "I should suppose the safer rule to be that, in criminal trials, you are to look to the rules of the State except so far as you find they have been modified in any way by Acts of Congress" (p. 244). In the trial of criminal cases removed from the State courts to those of the United States, the rules of evidence in the State courts prevail. Tenn. *vs.* Davis, 100 U. S., 257; *contra*, U. S. *vs.* Hammond, 2 Woods, 197; U S. *vs.* Block, 4 Saw., 211; Conkling's Treatise, 167; Moore *vs.* U. S., 91 U. S., 270; II Story on the Constitution, 1789.

* The rules of evidence in civil and criminal cases are substantially the same (U. S. *vs.* Gooding, 12 Wheat., 460); the few provisions relating especially to criminal cases being derived, as a rule, from statutes rather than from the common law.

Courts-martial being executive agencies form no part of the judicial system of the United States; and although Congress has provided no specific rules for their guidance in this respect, and although their procedure is exempted from the operation of the Fifth Amendment to the Constitution, these tribunals should in general follow, so far as they are applicable to military cases, the rules of evidence observed in the civil courts, and especially those applied by the courts of the United States in criminal cases.[1]

As courts-martial are not bound, however, by any statute in this particular, it is thus open to them, in the interests of justice, to apply these rules with more indulgence than the civil courts—to allow, for example, more latitude in the introduction of testimony and in the examination and cross-examination of witnesses than is commonly permitted by the latter tribunals. In such particulars, as persons on trial by courts-martial are ordinarily not versed in legal science or practice, a liberal course should in general be pursued and an over-technicality be avoided.[2]

COMPETENCY OF WITNESSES. CREDIBILITY.

Competency of Witnesses.—The *competency* of a witness is his legal capacity to testify, and is determined by enactments of Congress or, in the absence of such legislation, by the common law. Competency is always presumed, and the burden of proving incompetency lies upon the party that asserts it in the case of a particular witness. The *credibility* of a witness is his worthiness of belief, and is determined by his character, by the acuteness of his powers of observation, by the accuracy and retentiveness of his memory, and by his capacity to give lucid expression to facts within his knowledge. Questions of competency are determined by the court, and if

[1] Dig. J. A. Gen., 393, par. 1. Courts-martial, in the absence of any specific statutory rules, are in general governed by the rules of evidence of the common law. *Ibid.*, 398, par. 16.

Courts-martial should in general follow, so far as applicable to military cases, the rules of evidence observed by the civil courts, and especially the courts of the United States, in criminal cases. *Ibid.*, 393, par. 1. See 3 Greenl. Ev., sec. 476; Lebanon *vs.* Heath, 47 N. Hamp., 359; People *vs.* Van Allen, 55 N. Y., 39; 2 Opin. Att.-Gen., 343; Grant *vs.* Gould, 2 H. Black., 87; 1 McArthur, 47; Harcourt, 76; DeHart, 334; O'Brien, 169; G. O. 51, Middle Dept., 1865; G. C. M. O. 60, Dept. of Texas, 1879; G. C. M. O. 3, 52, Dept. of the East, 1880.

[2] Dig. J. A. Gen., 393, par. 1. Compare the views expressed in G. C. M. O. 32, War Dept., 1872; G. C. M. O. 23, Dept. of Texas, 1873; G. C. M. O. 60, Dept. of California, 1873.

The rules of evidence should be applied by military courts irrespective of the rank of the person to be affected. Thus a witness for the prosecution, whatever be his rank or office, may always be asked, on cross-examination, whether he has not expressed animosity toward the accused, as well as whether he has not on a previous occasion made a statement contradictory to or materially different from that embraced in his testimony. Such questions are admissible by the established law of evidence, and imply no disrespect to the witness, nor can the witness properly decline to answer them on the ground that it is disrespectful to him thus to attempt to discredit him.* Dig. J. A. Gen., 393, par. 2.

* See opinion of the Judge-Advocate General, as adopted by the President, in G. C. M. O. 60, Headquarters of Army, 1879; and compare remarks of reviewing officers in G. O. 11, Dept. of California, 1865; G. C. M. O. 31, Dept. of Dakota, 1869; G. C. M. O. 8, Fourth Military District, 1867.

decided adversely the witness is not permitted to testify at all. Questions of credibility are always determined by the jury. As a court-martial exercises the powers of both judge and jury, its determination of a question respecting either the competency of a witness, or the credibility to be attached to his testimony is final.

GROUNDS OF INCOMPETENCY.

Grounds of Incompetency.—The principal grounds of incompetency at the common law are: (1) infamy; (2) want of religious belief; (3) interest in the subject of litigation, as a party or otherwise; (4) want of understanding.[1]

The tendency of legislation in the United States as well as in the several States has been to confer competency by statute, but to permit the disqualifying cause to be testified to with a view to affect the credibility of the witness.[2]

INFAMY.

Nature of the Disqualification.—The term *infamous*—without fame or good report — was applied at common law to certain crimes, upon conviction of which a person became incompetent to testify as a witness. This was upon the theory that a person would not commit a crime of such heinous character unless so depraved as to be wholly insensible to the obligation of an oath, and therefore unworthy of credit. The crimes involving infamy are *treason*, *felony*, and the *crimen falsi*. As to whether all species of this last are infamous there is disagreement among the authorities.

Treason.—*Treason* as defined in the Constitution of the United States is declared to consist only "in levying war against them, or in adhering to their enemies, giving them aid and comfort." Similar definitions occur in the constitutions of the several States. The essence of the offense is a repudiation, on the part of the individual, of his allegiance to the State of which he is a citizen. A person convicted of so serious a crime forfeits, upon conviction, such rights as attach to citizenship. He denies the obligation of the laws, and properly forfeits the privileges and immunities conferred by them; one of the most important of which is that of testifying, as a witness, in a court of the State in which he occupies the status of a traitor.

Felony. — When a person had been convicted of certain crimes at common law he occupied, in consequence of such conviction and the judgment had thereon, a peculiar status called *felony*. *Felony* was therefore, in strictness, rather a result or consequence of crime than a crime itself. Any offense which at common law was punishable capitally or with a forfeiture of land and goods was a felony, and a person convicted thereof

[1] I Greenleaf, § 327; 29 Am. and Eng. Cyc., 552–564.

[2] For a list of States in which such legislation has been enacted see, I. Greenleaf, § 529, note *a*.

became infamous and forfeited a number of civil rights, among them the capacity to testify, as a witness, in a court of justice.[1]

Practice of the United States Courts.—It has been seen that the United States, as such, has no common-law jurisdiction. There is, therefore, no status of felony under the laws of the United States unless an offense has been declared felonious or infamous by statute, or unless the punishment attached thereto is such as to render one who has undergone it infamous. "What punishments shall be considered as infamous may be affected by changes of public opinion from one age to another. For more than a century imprisonment at hard labor in the State prison or penitentiary has been considered as infamous punishment in England and America. Such imprisonment, with or without hard labor, is at present considered infamous punishment."[2]

Crimen Falsi.—At common law the *crimen falsi* "was any offense involving falsehood and which might injuriously affect the administration of justice by the introduction of falsehood or fraud";[3] and any person guilty of such an offense was properly regarded as incompetent to testify, in view of such willful disregard of truth and wanton contempt for the solemn sanction of an oath. The offenses included under this head are forgery, perjury, subornation of perjury, suppression of testimony by bribery, or conspiracy to procure the absence of a witness or to accuse one of a crime,

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[1] Greenleaf, §§ 372–381.

[2] Mackin *vs.* U. S., 117 U. S., 350–353; *Ex parte* Wilson, 114 U. S., 117. In the courts of the United States as well as in those of the several States there is some confusion as to the precise meaning of the term felony, and consequently as to what offenses are felonious and, as such, involve incompetency to testify. In some of the States the rules of the common law still prevail; in others all grounds of incompetency have been swept away by statute; between these two extremes falls the practice of the several States of the Union in respect to felony as a cause of disqualification. The practice in a particular State can only be ascertained by an examination of its statutes relating to the competency and credibility of witnesses. In most of the States, however, it may be said that all statutory crimes not capital are classed as felonies or as misdemeanors accordingly as they are, or are not, punishable by imprisonment in the State prison or penitentiary.

Desertion is not a felony and does not render a witness incompetent at common law or before a court-martial. Nor does the loss of citizenship upon conviction of desertion, under Sections 1996 and 1998, Revised Statutes, have such effect, the competency of a witness not depending upon his citizenship. A pardon of a person thus convicted would not, therefore, add to his competency. But where it was proposed to introduce such a person as a material witness for the prosecution in an important case, *advised* that it would be desirable to remit the unexecuted portion of his sentence, if any. Dig. J. A. Gen., 399, par. 24.

The fact that a party is a public enemy of the United States, or has engaged in giving aid to the enemy, does not affect the competency of his testimony as a witness before a court-martial. Where testifying, however, in time of war, either in favor of a person in the enemy's service or an ally of or sympathizer with the enemy, or against a Federal officer or soldier, his statements (like those of an accomplice) are ordinarily to be received with caution unless corroborated. The fact that a party is under a political disability is not one which goes to his competency if offered as a witness. So the fact that a witness has been convicted of desertion may impair his credibility, but cannot affect his competency. *Ibid.*, 397, par. 12.

[3] I. Greenleaf, § 373; U. S. *vs.* Porter, 2 Cr. C. C., 60.

and other offenses of a similar character; each of which involves the repudiation, on the part of the individual, of the sanction of an oath and a willful attempt to introduce falsehood and fraud into judicial proceedings, under the guise of testimony and with a view to subvert the ends of justice.[1]

Procedure in Case of Incompetency from Infamy.—*Incompetency from infamy* is established by the production or proof of the judgment itself. In the case of a person against whom incompetency from infamy is alleged, the incompetency is established by production or proof of the judgment itself.[2] A finding of guilt merely is not sufficient, but the judgment itself must be produced. Incompetency so established is not removed by the mere execution of the sentence,[3] but may be removed by reversal of judgment or by pardon.[4] In the latter case, if the statute imposing the penalty is, in its nature, a rule of evidence and not a measure of punishment only, it has been held that a pardon will not operate to restore competency, but that a reversal of judgment is necessary; the power to pardon being subordinate to the paramount authority of the legislature to prescribe rules of evidence as an incident of procedure in actions at law.[5]

Incompetency based upon conviction of an infamous offense does not, in general, operate to produce incompetency beyond the jurisdiction in which the conviction was had. Persons infamous in one State are therefore not necessarily incompetent in the courts of another State or in the courts of the United States.[6] Such convictions, however, may be established in evidence with a view to affect credibility.

INTEREST.

Reason for the Disqualification.—It was a rule of the common law that in a civil action a party to the record or one who was interested in the result of the litigation was permitted to testify against his interest, but was regarded as incompetent to give evidence in his own behalf. This by reason of his *interest* in the subject of the action, based upon the experience of mankind and the belief that any testimony given by a party would be colored by his relationship to the controversy. It was also regarded as expedient, from the point of view of an enlightened public policy, to remove from the path of a witness every temptation to commit perjury. To disqualify, the interest must be real and actual and not conditional merely;

[1] I. Greenleaf, § 373.
[2] U. S. *vs.* Biebusch, 1 Fed. Rep., 213.
[3] U. S. *vs.* Brown, 4 Cr. C. C., 607; Logan *vs.* U. S., 144 U. S., 263, 302; Boyd *vs.* U. S., 142 U. S., 450.
[4] U. S. *vs.* Rutherford, 2 Cr. C. C., 528. It is proper to say that the rule above stated is one which is not universally accepted. See I. Greenleaf, § 378, notes 2 and 3.
[5] Sections 5392 and 5393, Revised Statutes; Houghtaling *vs.* Kelderhouse, 1 Parker, 241; American Jurist, vol. xi. pp. 360–362.
[6] U. S. *vs.* Logan, 45 Fed. Rep., 872.

the particular degree of interest that will disqualify in any case being determined by the court; the test applied being whether the witness will "gain or lose by the legal operation of the judgment, or that the record will be legal evidence for or against him in some other action."[1]

Application to Criminal Cases. — The rule that interest disqualifies applies in criminal as well as civil cases when the witness has a direct, certain, and immediate interest in the result of the prosecution. The interest may be to recover a penalty, to obtain a reward or other benefit, or to secure immunity from prosecution; the disqualifying interest may also be that of an accomplice or codefendant.[2]

Testimony against Interest.—A party is competent to testify voluntarily against himself at any time and in any case. He may do this under the sanction of an oath, or he may accomplish the same purpose indirectly by means of confessions, or declarations against interest, made out of court in a matter relating to the offense with which he is charged.

The Accused in a Criminal Case.—The party chiefly interested in a criminal prosecution is the accused himself, the prosecutor or plaintiff being always the State, which, for reasons of public policy, regards all criminal acts as directed against the peace and dignity of the commonwealth. The party actually injured by the commission of a criminal offense, who is known as the *prosecutor*, or *prosecuting witness*, is always a competent, and in most cases a necessary, witness.[3] With a view to prevent what were known as inquisitorial trials, it has long been the practice at the common law not only to forbid an accused person to testify against himself (except by way of confession, as will presently be described), but to deprive the courts of the power to compel such testimony. This right is guaranteed to persons accused of crime in the Constitution of the United States and in the constitutions of the several States of the Union.

Competency of Accused Restored by Statute.—The incompetency of an accused person may be removed by a statute permitting him to testify in his own behalf. Such competency to testify is conferred upon persons tried by court-martial by the Act of March 16, 1878, which provides that "in the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors in the United States courts, Territorial courts, and courts-martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request, but

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[1] I. Greenleaf, § 390.

[2] I. Greenleaf, §§ 403, 407.

[3] U. S. *vs.* Murphy, 16 Pet., 203; U. S. *vs.* McCann, 1 Cr. C. C., 207; U. S. *vs.* Brown, *ibid.*, 210; U. S. *vs.* Tolson, *ibid.*, 269; U. S. *vs.* Carnot, 2 *ibid.*, 469; U. S. *vs.* Clancy, 1 Cr. C. C., 13; U. S. *vs.* Hare, 1 Cr. C. C., 82. As to informers, see U. S. *vs.* Wilson, 1 Bald., 78; U. S. *vs.* Patterson, 3 McL., 53.

not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him."[1]

The privilege conferred by this statute is that of competency to testify, of which the accused may avail himself or not, at his discretion. If he declines to appear as a witness, the statute provides that his failure to appear shall create no presumption against him; if he avails himself of the statutory privilege, however, his status is precisely the same as that of any other witness;[2] he is examined in the same manner by question and answer, he is subject to cross-examination, his competency and credibility may be assailed, and his testimony may be rebutted like that of any other witness.[3]

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[1] Act of March 16, 1878 (20 Stat. at Large, 30).

[2] The Act of March 16, 1878, (20 Stat. at Large, 30,) having provided that a person charged with the commission of a crime may, at his own request, be a competent witness in the trial, but that "his failure to make such request shall not create any presumption against him," all comment upon such failure must be excluded from the jury. Wilson *vs.* U. S., 149 U. S., 60. Such failure to testify is not to create a presumption of guilt. U. S. *vs.* Pendergrast, 32 Fed. Rep., 198. When such an accused person elects to testify in his own behalf, his testimony may be impeached. U. S. *vs.* Brown, 40 Fed. Rep., 437.

An accused person cannot testify in his own behalf if incompetent to testify as a witness for any cause. U. S. *vs.* Hollis, 43 Fed. Rep., 248.

Pardon restores competency to testify. Logan *vs.* U. S., 144 U. S., 263; Boyd *vs.* U. S., 142 U. S., 454. But see note 5, page 254, *supra*.

If he waives his privilege as to one act, he does so fully in relation to that act. But he does not thereby waive his privilege of refusing to reveal other acts, wholly unconnected with the act of which he has spoken, even though they be material to the issue. Low *vs.* Mitchell, 18 Me., 372; Tillson *vs.* Bowley, 8 Greenl., 163.

[3] The testimony of an accused party is competent only when presented as authorized by the Act of March 16, 1878, chapter 37, viz., when the party himself requests to be admitted to testify. But such testimony is not excepted from the ordinary rules governing the admissibility of evidence, nor from the application of the usual tests of cross-examination, rebuttal, etc. Dig. Opin. J. A. Gen., p. 398, par. 14. See, also, Manual for Courts-martial, p. 40, par. 2.

It was formerly an established rule that accused parties could not legally testify as witnesses before military courts. But, by the Act of March 16, 1878, chapter 37, it is now expressly provided that at trials not only before the courts of the United States, but before courts-martial and courts of inquiry, "the person charged shall, at his own request, but not otherwise, be a competent witness." It is added: "And his failure to make such request shall not create any presumption against him." But parties testifying under this Act have no exceptional status or privileges; they must take the stand and be subject to cross-examination like other witnesses. The submission by the accused of a sworn written statement is not a legitimate exercise of the authority to testify conferred by the statute, and such a statement should not be admitted in evidence by the court. *Ibid.*, 749, par. 2.

The Act of March 16, 1878, (20 Stat. at Large, 30,) provides that a defendant charged with crime shall, at his own request, but not otherwise, be a competent witness; that is to say, he shall not labor under disability because he is a party in interest, and, notwithstanding this, may testify. But when a party offers himself as a witness in his own behalf, he must be treated as any other witness, and is subject to any exception which would apply to any other witness; in other words, the act frees him from a disability. It does not confer upon him any peculiar exemption. So when a defendant is put on the stand as a witness, his general character for truth may be attacked, and if, by his conduct, he has lost the privilege of testifying in courts of justice by the commission of an infamous crime, this will attach to him and prevent him from testifying in his own behalf. U. S. *vs.* Hollis, 43 Fed. Rep., 248.

"A disposition has been manifested of late to allow the accused to give evidence in his own behalf; and statutes to that effect are in existence in some of the States, the operation of which is believed to have been generally satisfactory. These statutes,

Accomplices and Codefendants.—The testimony of accomplices,[1] codefendants,[2] and the like is, as a rule, excluded. With a view to attain the ends of justice, however, it is sometimes necessary to obtain such testimony in a case in which a serious offense would otherwise go unpunished. An accomplice or codefendant is incompetent for two reasons: first, because of infamy; second, because of interest. The first ground accrues upon conviction and judgment; the second, when an indictment has been obtained or a prosecution begun. If judgment be withheld or suspended, or if a *nolle prosequi* be entered in the case of an accomplice, he becomes competent at common law, so far as infamy is concerned, and may testify for or against the principal or codefendant. The credibility to be attached to such testimony is a question for the court-martial to determine, and great weight will not be given to it unless it is corroborated by other and better testimony, or strongly supported by facts otherwise established in evidence.

Husband and Wife—Exceptions.—The absolute identity of interest in the case of husband and wife, and the peculiar situation of dependence occupied by the latter, are recognized by the common law in a provision making either party to a marriage contract incompetent to testify for or against the other in any action, civil or criminal, to which the other is a party.[3] It does not matter when the relation of marriage existed, or whether it exists at the time of the trial; it is only necessary that that marriage should have been lawful, and that the parties occupied that relation when the crime was committed or the cause of action accrued. An exception to the rule exists in the case of a crime committed by a husband against the person of the wife.[4] In this case, in strictness, the State—not the wife

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however, cannot be so construed as to authorize compulsory process against an accused to compel him to disclose more than he chooses; they do not so far change the old system as to establish an inquisitorial process for obtaining evidence; they confer a privilege, which the defendant may use at his option. If he does not choose to avail himself of it, unfavorable inferences are not to be drawn, to his prejudice, from that circumstance; and if he does testify, he is at liberty to stop at any point he chooses, and it must be left to the jury to give a statement which he declines to make a full one such weight as, under the circumstances, they think it entitled to; otherwise the statute must have set aside and overruled the constitutional maxim which protects an accused party against being compelled to testify against himself, and the statutory privilege becomes a snare and a danger." Cooley, Constitutional Limitations, 6th Edition, 384-386.

[1] In the following cases the testimony of accomplices has been admitted, the degree of credibility in each case being determined by the jury: U. S. *vs.* Troax, 3 McL., 224; U. S. *vs.* Houghton, 14 Fed. Rep., 544; U. S. *vs.* Fleming, 18 Fed. Rep., 901; U. S. *vs.* Brown, 4 McL., 142; U. S. *vs.* Harries, 2 Bond, 311; U. S. *vs.* Lancaster, 2 McL., 431; U. S. *vs.* McKee, 3 Dillon, 551; Steinham *vs.* U. S., 2 Paine,

[2] U. S. *vs.* Schindler, 18 Blatchford, 227; U. S. *vs.* Clements, 3 Hughes, 509; U. S. *vs.* Rutherford, 2 Cr. C. C., 528; Baker *vs.* U. S., 1 Minn., 207; Latcham *vs.* Territory, 1 Oregon, 140; Caldwell *vs.* Walters, 4 Cr. C. C., 675.

[3] The wife of a person accused of crime is not a competent witness for or against him. Comment on her absence by the district attorney *held* to be reversible error. Graves *vs.* U. S., 150 U. S., 118; U. S. *vs.* Jones, 32 Fed. Rep., 569; Lucas *vs.* Brooks, 18 Wall., 436; I. Greenleaf, § 334; Stein *vs.* Bowman, 13 Pet. 209; Co. Lit., 6, b.; Hawk, b. 2, c. 46, § 70; Fitch *vs.* Hill, 11 Mass., 286.

[4] Barrett *vs.* U. S., 137 U. S., 496; U. S. *vs.* Smallwood, 5 Cr. C. C., 35; U. S. *vs.* Fitton, 4 Cr. C. C., 658; Stein *vs.* Bowman, 13 Pet., 209; 1 Hale P. C., 301.

—is the plaintiff; but the exception is made, not for this reason, which would be merely technical, but on the broad ground of public policy. For the reason above stated, the dying declaration of the wife is admissible against the husband, or the reverse, when he is charged with the murder of the declarant.

It has been uniformly held in the practice of courts-martial that the wife of a person on trial could not properly be admitted as a witness for or against him; and the statute authorizing accused parties to testify does not affect this rule. The wife, however, of an officer or soldier may be admitted to testify in his case before a court of inquiry, the proceeding before such a body not being a trial, but an investigation merely.[1]

WANT OF UNDERSTANDING.

Want of Understanding.—Deficiency of understanding becomes a ground of incompetency, because persons so afflicted are not only unable to appreciate the sanction of an oath, but are lacking also in capacity to observe events accurately, to remember them or to testify to them lucidly, or with full understanding of their significance in a court of justice. Under this head fall young children, the deaf and dumb, idiots, the insane, and persons under the influence of drugs or intoxicating liquors.[2] "It makes no difference from what cause this defect of understanding may have arisen, nor whether it be temporary and curable or permanent, whether the party be hopelessly an idiot, or maniac, or only occasionally insane, as a lunatic, or be intoxicated, or whether the defect arises from mere immaturity of intellect, as in the case of children. While a deficiency of understanding exists, be the cause of what nature soever, the person is not admissible to be sworn as a witness. But if the cause be temporary, and a lucid interval should occur, or a cure be effected, the competency is restored."[3]

Children.—In the case of children the question is not so much of age as of intelligence and moral responsibility, which must be present in such a degree as to enable the child to observe facts with accuracy, to testify to

[1] Dig. J. A. Gen., 750, par. 3. Where a court-martial refused to admit in evidence (as being incompetent) the testimony of the wife of the prosecuting witness, *held* that its action was entirely erroneous, no legal objection existing to the competency of such a person. Dig. Opin. J. A. Gen., 750, par. 3. See, also, Manual for Courts-martial, p. 40, par. 3.

A wife is not a competent witness to prove a charge of failing to support her for which her husband is on trial.* *Ibid.*, 399, par. 21.

Nor will the testimony of the wife of an accused be admissible in favor of or against a party jointly charged with him, where her testimony will be material to the merits of the question of the guilt or innocence of her husband. See Territory *vs.* Paul, 2 Montana, 314.

[2] I. Greenleaf, 365–367, and cases cited.

[3] *Ibid.*, 365.

* Under the Act of March 3, 1887, (24 Stat. at Large, 635,) a wife or husband is a competent witness in a trial for bigamy, polygamy or unlawful cohabitation.

them correctly, and to realize the responsibility of an oath. Although the presumption is against the admission of the testimony of children under seven, there are instances in which children of peculiar intelligence and capacity have been permitted to testify below that age, but such cases constitute marked exceptions to a well-defined rule.[1]

Insanity.—If insanity is alleged, and the facts were observed and the testimony given during what are known as *lucid intervals*, competency will be presumed. The burden of proof of incompetency in such cases rests first upon the party who advances it as a ground of objection, to the extent of establishing the general ground of incompetency, and then upon the party producing the witness, of proving the case to be an exception to the rule.[2] As in all other cases of incompetency, questions of mental incapacity are determined by the court.

Want of Religious Belief.—The law regards the giving of testimony not only as an important duty owed by a citizen to the State, but as an act of such serious importance as to require its performance to be accompanied by the solemn sanction of an oath. The administration of an oath is, therefore, not a mere ceremonial observance, but an act presuming religious belief of some kind on the part of the person taking it. If such person is wanting in religious belief, he is not regarded, at common law, as competent to testify as a witness in a court of justice. The particular form of religious belief cherished by a witness is not material, so long as it contemplates the existence of a supreme being to whom he acknowledges a moral accountability. An oath may therefore be defined as "an outward pledge given by the juror (or other person taking it) that his attestation or promise is made under an immediate sense of his responsibility to God."[3] A security to this extent, for the truth of testimony, is all that the law seems to have deemed necessary; and with less security than this it is believed that the purposes of justice cannot be accomplished.[4]

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[1] Commonwealth *vs.* Hutchinson, 10 Mass., 225; Givens *vs.* Com., 29 Gratt. (Va.), 830; State *vs.* Lattin, 29 Conn., 389; Flannigin *vs.* State, 25 Ark., 96; Com. *vs.* Mullins, 2 Allen, 295; I. Greenleaf, § 307, note 2; 1 Green's Crim. Reps., 576; State *vs.* Moren, 2 Ala., 275; State *vs.* Whittier, 2 Mo., 341. Where a conviction (of rape) rested mainly on the testimony of the victim, a child eight years of age, *held* that the competency of the witness was doubtful, and that the trial should have been suspended and the child instructed. Where a court-martial received the testimony of a female child of 3½ years without swearing her, *held* that it had wholly exceeded its authority, unsworn testimony being entirely incompetent in any case. Dig. J. A. Gen., 399, par. 22; I. Greenleaf, § 367.

[2] An insane person is no more competent as a witness before a court-martial than at common law. Testimony admitted of a person shown to be insane should be stricken out on motion made. Dig. Opin. J. A. Gen., 399, par. 23.

A person who is insane at the time is incompetent as a witness. An objection, however, to a witness on account of alleged insanity will not properly be allowed unless sustained by clear proof, a man being always presumed to be sane till proven to be otherwise. *Ibid.*, 751, par. 8; Evans *vs.* Hettick, 7 Wheat., 470; D. C. *vs.* Armes, 107 U. S., 519.

[3] Tayler on Oaths, 15.

[4] Com. *vs.* Winnemore, 2 Brewster (Pa.), 378; 1 Phil. Evid., 19; 1 Law Rep., pp. 346, 347; I. Greenleaf, §§ 368–370; Wakefield *vs.* Ross, 5 Mason, 16. A belief in the exist-

PROCEDURE IN CASES OF INCOMPETENCY.

Procedure.—As has been said, the competency of a witness is presumed in all cases, and the burden of establishing the contrary falls upon him who alleges it to exist. The question of competency should in general be raised and decided before the witness is sworn, but may come up at any time when his incompetency becomes apparent. Being matters of law, or of the application of law to fact, questions of competency are always determined by the court. If the judgment be in favor of the witness, he is allowed to testify; if the contrary, he is not permitted to be sworn and is excused from further attendance upon the sessions of the court. In some cases the fact of incompetency is apparent from some record or judgment, as from a judgment record where infamy is alleged; in others the facts tending to show incompetency are given in evidence, and the question is decided by the court after a full presentation of both sides of the case.

The Voir Dire.—When interest or want of religious belief is alleged as a ground of incompetency the fact may be established by the testimony of

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ence of a God and that offenses will be punished in this life, not in the next, has been held sufficient. U. S. *vs.* Kennedy, 3 McL., 175; Omichund, *vs.* Barker, Willis, 545. The witness may be examined as to his religious belief. U. S. *vs.* White, 5 Cr. C. C., 38; Rutherford *vs.* Moore, 1 Cr. C. C., 404. See, also, U. S. *vs.* Kennedy, 3 McLean, 175; Bennet *vs.* State, 1 Swan, 411.

It is no objection to the competency of a witness that he is the officer upon whom will devolve the duty of reviewing authority when the proceedings are terminated. Dig. J. A. Gen. 751, par. 6.

It is no objection to the competency of a witness that his name is not on the list of witnesses appended to the charges when served. The prosecution is not obliged to furnish any list of witnesses, nor, where one is furnished, to confine itself to the witnesses thus specified. The fact that material testimony is given by an unexpected witness may indeed constitute ground for an application by the accused (under Article 93) for further time for the preparation of his defense. *Ibid.*, par. 7.

The fact that a party is a public enemy of the United States or has engaged in giving aid to the enemy does not affect the competency of his testimony as a witness before a court-martial. Where testifying, however, in time of war, either in favor of a person in the enemy's service or an ally of or sympathizer with the enemy, or against a federal officer or soldier, his statements (like those of an accomplice) are ordinarily to be received with caution unless corroborated. The fact that a party is under a political disability is not one which goes to his competency if offered as a witness. So the fact that a witness has been convicted of desertion may impair his credibility, but cannot affect his competency. *Ibid.*, 397, par. 12.

Desertion is not a felony and does not render a witness incompetent at common law or before a court-martial. Nor does the loss of citizenship upon conviction of desertion, under Sections 1996 and 1998, Revised Statutes, have such effect, the competency of a witness not depending upon his citizenship. A pardon of a person thus convicted would not, therefore, add to his competency. But where it was proposed to introduce such a person as a material witness for the prosecution in an important case, *advised* that it would be desirable to remit the unexecuted portion of his sentence, if any. *Ibid.*, 399, par. 24.

The president or any member of a court-martial, as also the judge-advocate, may legally give testimony before the court. That the court, at the time of a member's testifying, is composed of but five members will not affect the validity of the proceedings, since in so testifying he does not cease to be a member. It is in general, however, most undesirable that the judge-advocate, and still more that a member, should appear in the capacity of a witness, except perhaps where the evidence to be given relates simply to the good character or record of the accused. *Ibid*, p. 750, par 5.

witnesses, or by the admission of the proposed witness, or by his own testimony given under the sanction of a peculiar form of oath known as the *voir dire*. Whether the election of one of these modes will preclude the party from afterwards resorting to the other is not clearly settled by the authorities. If the evidence offered *aliunde*, to prove the interest, is rejected as inadmissible, the witness may then be examined on the *voir dire*. And if the witness on the *voir dire* states that he does not know, or leaves it doubtful whether he is interested or not, his interest may be shown by other evidence. It has also been held that a resort to one of these modes to prove the interest of a witness on one ground does not preclude a resort to the other mode to prove the interest on another ground. But, subject to these modifications, the rule recognized and adopted by the general current of authorities is that where the objecting party has undertaken to prove the interest of the witness by interrogating him upon the *voir dire*, he shall not, upon failure of that mode, resort to the other to prove facts the existence of which was known when the witness was interrogated. The party appealing to the conscience of a witness offers him to the court as a credible witness; and it is contrary to the spirit of the law to permit him afterwards to say that the witness is not worthy to be believed. It would also violate another rule by its tendency to raise collateral issues. Nor is it deemed reasonable to permit a party to sport with the conscience of a witness when he has other proof of his interest.[1]

OPINIONS. EXPERT TESTIMONY.

Opinion—Experts.—As a rule, testimony in the nature of opinion is excluded.[2] This for the reason that witnesses are required to testify to facts only, leaving to the court the duty of deducing conclusions, or of forming opinions as to the effects or consequences of such facts. There are two exceptions to this rule, however, to which attention will now be drawn. In the first place, any intelligent witness may testify as to opinions which are themselves conclusions drawn from numerous facts within the daily observation and experience of all intelligent persons. Such relate to the appearance or demeanor of a person; his sanity, sobriety, or identity, or his resemblance to another; his physical condition, whether sick or well; his condition as

[1] I. Greenleaf, § 423, *ibid.* 423, note 6; Evans *vs.* Eaton, Pet. C. C., 322; The Watchman, Ware, 232; Miles *vs.* U. S., 13 Otto, 304; Citizens' Bank *vs.* Nantucket Steamboat Co., 2 Story, 16.

Witnesses who are *prima facie* competent, but whose competency is disputed, are allowed to give evidence on their *voir dire* to the court upon some collateral issue on which their competency depends; but the testimony of a witness who is *prima facie* incompetent cannot be given to the jury upon the very issue of the case in order to establish his competency and, at the same time, prove the issue. Miles *vs.* U. S., 13 Otto, 304.

[2] Cameron *vs.* State, 14 Ala., 546; Com. *vs.* Mooney, 110 Mass., 99; Com. *vs.* Sturtevant, 117 Mass., 122; Morse *vs.* State, 6 Conn., 9.

regards emotion or passion, as to anger, hope or fear, joy or sorrow, excitement or coolness, and the like. These are matters of every-day occurrence as to which all thoughtful persons form conclusions of fact to which they are competent to testify in a proper case.[1] Second, the opinion of experts in an art, trade, or profession in which they have attained especial proficiency may, at the discretion of the court and under its direction, be given in evidence. This is permitted for the reason that the opinions in question are technical or scientific in character and are based upon experience that is beyond the knowledge or experience of the average juror. Under this head, for example, fall opinions as to the effects of particular poisons; that is, certain symptoms having been observed, expert opinion may be received as to the poisons that would produce such effects. In general, certain facts or effects having been established in evidence, the testimony of experts may be admitted as to the causes which would have produced such effects, or as to the laws of nature applicable to certain causes to produce particular effects.[2] The introduction of expert witnesses, however, is of the rarest occurrence in the procedure of courts-martial.

Procedure.—The party who introduces expert witnesses must show that they are experts in fact; that is, that they actually possess the technical or scientific knowledge which will assist the jury to a correct understanding of the facts in a case.[3] Having established their competency and the necessity for their appearance, they may give opinions as to certain facts, or may testify in answer to a *hypothetical question*, agreed upon by the parties and approved by the court, the answer to which is calculated to afford the jury the assistance of which they stand in need.[4]

THE RULES OF EVIDENCE.

Purpose of Rules of Evidence.—It has been seen that the *rules of evidence* have to do with determining what is called the competency of witnesses; that is, of deciding whether a particular person shall be permitted

[1] Com. *vs.* Sturtevant, 117 Mass., 122; Campbell *vs.* State, 23 Ala., 44; Evans *vs.* People, 12 Mich., 27; McLean *vs.* State, 16 Ala., 672; Messner *vs.* People, 45 N. Y., 1; People *vs.* Eastwood, 14 N. Y., 562.

[2] Milwaukee Railway Co. *vs.* Kellogg, 94 U. S., 409; Chicago *vs.* Greer, 9 Wall., 726; Dexter *vs.* Hall, 15 Wall., 9; Transportation Line *vs.* Hope, 95 U. S., 297; People *vs.* Bodine, 1 Denio, 282; Woodin *vs.* People, 1 Parker, 464; Cook *vs.* State, 4 Zabriskie, 843; State *vs.* Smith, 32 Mann., 369; 1 Green Crim. Reports, 241; McGowan *vs.* American Pressed Tanbark Co., 121 U. S., 575; Union Ins. Co. *vs.* Smith, 124 *ibid.*, 405; Forsyth *vs.* Doolittle, 120 *ibid.*, 73; Gay *vs.* Union Mut. Life Ins. Co., Blatch., 143; Jolly *vs.* Terre Haute Drawbridge Co., 6 McLean, 237. An officer of the Quartermaster Department was admitted by a court-martial to testify as an "expert" in regard to the proper performance of his duties by a chief quartermaster of a military department. *Held* that such testimony was inadmissible and should have been ruled out, the subject being one regulated by law and orders, and the witness being in no proper sense an *expert*. Dig. J. A. Gen., 400, par. 26.

[3] Spring Co. *vs.* Edgar, 9 Otto, 695; Carter *vs.* Baker, 1 Sawyer, 512.

[4] Forsyth *vs.* Doolittle, 120 U. S., 73; U. S. *vs.* McGlue, 1 Curtis, 15; Dexter *vs.* Hall, 15 Wall., 91.

to testify at all; and with the exclusion of certain testimony from the consideration of the jury upon the ground that it is likely to mislead them and to confuse, rather than to make clear, the issue referred to them for trial. They also determine, to a certain extent, the credibility of witnesses, or the weight that is to be attached to their testimony.

Oral and Written Testimony.—The challenges and pleadings having been completed and the accused arraigned, each party in turn submits the testimony of witnesses in proof or disproof of the facts composing the issue. The oral or written testimony offered in support of the case, on either side, makes up the evidence upon which the court bases its finding of fact in accordance with the weight of evidence submitted. Testimony is classified, according to its form, as either oral or written. *Oral testimony* is that given *viva voce* in open court. *Written testimony* is composed of matter in the nature of writings or documents, and these may be presented, as will presently be explained, in the shape of originals or copies.

Direct and Indirect — Real Evidence. — Oral testimony is classified according to its nature and character, and is said to be *direct* or *original* when the witness testifies to facts observed by him through the medium of his senses. It is said to be *indirect* when the witness derives his knowledge as to particular facts from the observation of others and testifies to their declarations or statements concerning them. Such testimony, as will presently be shown, is called *hearsay*, and is in most cases inadmissible. *Real evidence* consists in the production in court of objects or articles that pertain to a case in hearing, in order that the court may be enabled to make a personal examination or inspection of them, or that witnesses may identify them or illustrate their application or use in connection with a matter in issue. Evidence is also said to be *indirect* or, more properly speaking, *circumstantial* when the existence of a fact is inferred, by a process of reasoning, from the existence or non-existence of other facts established in evidence by the testimony of witnesses or by the production of documents.[1]

In addition to determining the competency of witnesses and the credibility of their testimony, the rules of evidence also serve to determine:

1. The *relevancy* of testimony, that is, its relation to the issues raised by the pleadings.

2. The *burden of proof*, that is, to designate the party upon whom the obligation rests of establishing the truth of each issue raised during the progress of the trial.

3. The *quality* of evidence that shall be submitted or received in support of an issue, which is accomplished by requiring the *best evidence* to be submitted which the nature of the case will admit of.

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[1] People *vs.* Kendall, 32 N. Y., 141; Brig Struggle *vs.* U. S., 9 Cranch, 71; Bank of U. S. *vs.* Corcoran, 2 Pet., 121.

4. The *amount* of evidence necessary to establish the facts composing the *substance* of a particular issue.

I. RELEVANCY OF EVIDENCE.

Relevancy.—*Evidence must be relevant; that is, must bear directly upon the issue.*[1] The issue here referred to is that obtained by an application of the rules of pleading, and the reason for the rule is simple. From the nature of pleading it is apparent that no testimony can be received which does not tend to prove or disprove the facts of which the issue is composed. This question alone engages the attention of the court-martial, to the exclusion of every other, and it would be the veriest waste of time were the court to permit other testimony to be heard.

Relevancy of Facts.—A fact is said to be *relevant* when it is the cause or effect of another fact, or is the effect of the same cause, or is the cause of the same effect.[2] Particular testimony is said to tend to prove a fact when, taken in connection with other and similar testimony, it is calculated to establish such fact in evidence; each fact so testified to forming a link in the chain of proof submitted in support of the case of either party to the action. Testimony as to collateral facts is, as a rule, inadmissible unless the burden rests upon a party of proving intent or the existence of particular knowledge on the part of a person, or when good faith, malice, state of mind, or bodily health is in question. In a trial for desertion, for example, testimony that an accused purchased a ticket for a distant point, or attempted to dispose of his uniform, or to exchange it for civilian's dress would be admissible to show the intent of not returning, which is essential to the offense of desertion. So the fact that a person charged with receiving stolen goods from A had received similar stolen goods from B or C, or had received stolen goods from A on a previous occasion, would be admissible as showing the guilty knowledge which is an essential ingredient of the offense of receiving stolen goods. Such testimony is therefore admitted, to a limited extent, to furnish the basis of fact from which the court may deduce a just conclusion as to the specific intent with which an offense has been committed.

When particular testimony is objected to as irrelevant, it may be admitted upon the statement of the party producing it that its relevancy will apear at a later stage of the proceedings.[3]

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[1] Turner *vs.* Fendall, 1 Cranch, 117; Stringer *vs.* Young, 3 Pet., 320; Winans *vs.* N. Y. & Erie R. R., 21 How., 88; U. S. *vs.* Gibert, 2 Sumner, 19; Lucas *vs.* Brooks, 18 Wall., 436; Polk *vs.* Robertson, 1 Overton (Tenn.), 456.

[2] Stephen's Digest of the Law of Evidence, p. xii.

[3] U. S. *vs.* Flowery, 1 Sprague, 109. If evidence tends, in any degree, to establish the existence of a material fact, it cannot be rejected as irrelevant, but must be received in connection with the other facts and circumstances of the case. U. S *vs.* Babcock, 3 Dill., 571. The admission of incompetent or irrelevant evidence is not a sufficient rea-

Circumstantial Evidence.—Although positive proof in a criminal action is desirable, it is not absolutely necessary, and a conviction may be had on circumstantial evidence, that is, evidence in which the guilt of the accused is inferred from his acts and from other facts established in evidence. In a case depending upon circumstantial evidence, the court, in order to convict, must find the circumstances to be satisfactorily proved *as facts*, and must also find that those facts clearly and unequivocally imply the guilt of the accused and cannot reasonably be reconciled with any hypothesis of his innocence.[1] Whenever a necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry or from the failure of direct proof, objections to testimony upon the ground that any particular circumstance is irrelevant or of an inconclusive nature and tendency are not favored, for the reason that the force and effect of circumstantial facts usually and almost necessarily depend upon their connection with each other or with the direct proofs in the case.[2]

Character—Reputation.—The term *character*, as used at common law, is not synonymous with *reputation;* this for the reason that the character of a person, using the term in relation to his disposition, cannot, from its nature, be established by the testimony of witnesses. Its outward manifestation, however, in the *reputation* which a person enjoys in the community is a fact, and, like other facts, is susceptible of observation by neighbors and others who may testify as to such reputation in a proper case. Testimony as to character is in general inadmissible. In a civil action it rarely occurs that the character of a party is drawn in question; in a criminal trial, however, the character of the accused, as evidenced by his reputation, may become an element of importance in two cases: first, when the evidence of guilt is not strong, testimony as to the good reputation of an accused may be admitted to strengthen the presumption of innocence;[3] and second, such testimony may be admitted where the punishment is discretionary with the court, with a view to reduce the sentence imposed upon conviction.

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son for reversing a judgment when it is apparent that it cannot have affected the verdict or the finding injuriously to the plaintiff in error. Mining Co. *vs.* Taylor, 10 Otto, 37; Turner *vs.* Fendall, 1 Cr., 117. If irrelevant evidence has been introduced by one party, the other party has no right to introduce equally irrelevant evidence in rebuttal. Stringer *vs.* Young, 3 Pet., 320. When *improper* testimony has been admitted the appellate court cannot look into its importance or operation, but the verdict founded upon it cannot stand. Smith *vs.* Carrington, 4 Cr., 62; Church *vs.* Hubbart, 2 Cr., 187.

[1] The Robert Edwards, 6 Wheat., 187; U. S. *vs.* Douglass. 2 Blatch., 207; U. S. *vs.* Martin, 2 McL., 256; McGregor *vs.* The State, 16 Ind., 9; U. S. *vs.* Goldberg, 7 Biss, 175; U. S. *vs* Babcock, 3 Dill., 621; U. S. *vs.* Butler, 1 Hughes, 457; U. S. *vs.* Lyman, 5 McL, 513; 7 *vs.* Wood, 14 Pet., 430.

[2] U. S. *vs.* Hartwell, 3 Cliff., 221; Lawrence *vs.* Dana, 4 *ibid.*, 1; U. S. *vs.* Bark Isla de Cuba, 2 *ibid.*, 295.

[3] Edgington *vs.* U. S., 164 U. S., 361; Brown *vs.* U. S., 164 U. S., 221; State *vs.* Ford, 8 Strobh., 517, note; Fields *vs.* State, 47 Ala., 603; Storrs *vs.* People, 56 N. Y., 315; People *vs.* Ashe, 44 Cal., 288.

Evidence of the good character, record, and services of the accused as an officer or soldier is admissible in all military cases without distinction—in cases where the sentence is mandatory as well as those where it is discretionary with the court. For while such evidence cannot avail to affect the measure of punishment, it may yet form the basis of a recommendation by the members of the court, or induce favorable action by the reviewing officer whose approval is necessary to the execution of the sentence. Where such evidence is introduced the prosecution may offer counter-testimony, but it is an established rule of evidence that the prosecution cannot attack the character of the accused till the latter has introduced evidence to sustain it, and has thus put it in issue.[1]

It is also, in general, competent on trials by court-martial for the accused to put in evidence any facts going to extenuate the offense and reduce the punishment, as the fact that he has been held in arrest or confinement an unusual period before trial, the fact that he has already been subjected to punishment or special discipline on account of his offense, or the fact that his act was, in a measure, sanctioned by the act or practice of superior authority.[2]

Reputation, How Established.—As has been observed, the testimony offered in support of character is that of persons who know the reputation of the accused in the community in which he lives, and can testify as to the reputation which he there enjoys for sobriety, integrity, morality, and the like.[3] Testimony so submitted should relate to character as indicated in the charge; if fraud or dishonesty be alleged, testimony as to integrity is appropriate; if a crime of violence be charged, testimony as to good disposition would be relevant. Testimony as to general good reputation would properly be submitted with a view to affect the discretion of the court or reviewing authority in the matter of leniency.

II. THE BURDEN OF PROOF.

How Determined.—The rules as to the burden of proof are necessary to the orderly and methodical presentation of evidence in actions at law. It has been seen that the issues referred to a jury for trial are decided in civil actions by a preponderance of proof, and in criminal cases by proof sufficient to establish guilt beyond a reasonable doubt. What is called the *burden of proof*—that is, the task of establishing the truth of a proposition outlined in the pleadings—rests primarily upon the one who alleges a fact or makes the contention that such fact exists.

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[1] Dig. J. A. Gen., 394, par. 4.
[2] *Ibid*, 398, par. 15.
[3] State *vs.* O'Neal, 4 Iredell, 88; U. S. *vs.* Van Sickle, 2 McL., 219; Élam *vs* State, 25 Ala., 33; People *vs* Mather, 4 Wend., 231; Hamilton *vs.* People, 29 Mich., 173; State *vs.* Howard, 9 N. H., 485.

Burden of Proof in Criminal Trials.—In a criminal trial the burden of proof never shifts, but rests upon the prosecution of establishing in evidence the facts constituting the offense as set forth in the indictment.[1] The accused goes to trial with the benefit of the presumption that he is innocent, which attends him throughout the trial; but when the prosecution has succeeded in establishing the facts constituting guilt, by the testimony of competent and credible witnesses, the defense is required to meet and rebut, or disprove, the facts established in evidence by the prosecution.[2] In collateral issues arising in the course of the trial as to the competency of witnesses, the admissibility of testimony, and the like, the burden of proof rests upon the party who alleges incompetency or objects to the admission of particular testimony.[3]

III. THE BEST EVIDENCE.

The Best Attainable Evidence must be Submitted.—This rule is calculated to prevent fraud, and to enable the court to base its finding upon the best attainable evidence in every case. All evidence, whether oral or written, is of various degrees, or orders, in point of primariness and originality. If a witness testify as to facts which he has heard or seen, or if the original of a document be produced, such testimony is, in the nature of the case, the best attainable, and is said to constitute primary evidence. If, on the other hand, the witness testifies to facts the knowledge of which he has gained from another, or if a copy of a document be submitted, or if neither the original nor a copy be forthcoming and the contents of the paper be testified to orally, such evidence is not the best, and is said to be secondary or derivative. In some cases, as where the testimony is pure hearsay, it is rejected; in others, especially in the case of documents, it is

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[1] Lillienthal *vs.* U. S., 97 U. S., 237; Potter *vs.* U. S., 155 U. S., 438; Agnew *vs.* U. S., 165 U. S., 36.

[2] Agnew *vs.* U. S., 165 U. S., 36; Coffin *vs.* U S.. 156 *ibid.* 432.

[3] Lillienthal *vs.* U. S., 98 U. S., 237. Where the court charged the jury that, when the prosecution had made out a *prima facie* case, the burden of proof was on the defendant to restore him to that presumption of innocence in which he was at the commencement of the trial, it was held that the instruction was erroneous, and that the jury should have been told that the burden was on the commonwealth to establish the guilt of the defendant, and that he was to be presumed innocent unless the whole evidence in the case satisfied them of his guilt. Commonwealth *vs* Kimball, 24 Pick., 366. When the matter of defense set up by the accused, however, is wholly and entirely disconnected with the body of the crime charged, the burden of proof rests upon the accused. State *vs.* Murphy, 33 Ind., 270. So, too, where the subject matter of a negative averment relates to the defendant personally, or is peculiarly within his knowledge, the averment will be taken as true unless disproved by him. State *vs.* McGlynn, 34 N. H., 422; Com. *vs.* Knapp, 9 Pick., 496; Com. *vs.* James, 9 Pick., 375; Madden *vs.* State, 1 Kan., 340 A. for example, is indicted for bigamy; he wishes the court to believe that at the time of the first marriage he was a minor. The burden of proof to establish minority is upon A. B., charged with theft, wishes the court to believe that at the time of the commission of the theft, he was elsewhere. The burden of establishing the alibi rests upon B. Stephen on Evidence.

accepted upon proof by the party offering it that it is the best evidence attainable; that is, that the original has been lost or destroyed, or is in the possession of the opposite party or in that of a person beyond the jurisdiction of the court.

Hearsay.—What is called hearsay testimony is inadmissible. *Hearsay testimony* is that obtained from a witness who has not himself observed the facts to which he testifies, but whose knowledge of them is gained from the statements of others. Hearsay is objectionable for several reasons: *first*, because it is secondary, and the law requires primary evidence—the best evidence attainable—in every case; *second*, the real witness is not testifying in court, under the sanction of an oath; and *third*, the opposite party, and especially the defendant in a criminal case, has no opportunity to be confronted with the witnesses against him or to exercise the right of cross-examination.[1] There are some necessary exceptions to this rule, and there are some apparent exceptions which, upon close examination, will be found to relate to relevant facts and to be, as such, not liable to objection as hearsay. The principal exceptions are:

1. **Confessions.**—One form of criminating testimony, known as confessions, has always been received from accused persons in criminal cases. "Subject to the cautions to be observed in receiving and weighing confessions of guilt, they are among the most effectual proofs in the law. Their value depends on the supposition that they are deliberately made, and on the presumption that a rational being will not make admissions prejudicial to his interest and safety, unless when urged by the promptings of truth and conscience."[2]

The most common form of confession is that afforded by the plea of guilty made by the accused, in answer to an indictment, with full knowledge of the legal consequences that will ensue. Confessions may be made by a plea of guilty, as above described, or by a statement made in open court by or in behalf of the accused; if made elsewhere, they may be testified to by those who heard them, or to whom they were addressed, if made under such circumstances as to make it clear that the admissions of guilt were entirely voluntary.[3] Any evidence going to show that a confession was extorted by means of threats or promises, or by the use of force, especially by a person in authority, will completely destroy its evidential value.[4] When offered under the conditions above described a confession

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[1] Queen *vs.* Hepburn, 7 Cr., 290; Ellicott *vs.* Pearl, 10 Pet., 412.

[2] U. S. *vs.* Montgomery, 3 Sawy., 544; U. S. *vs.* Williams, 1 Cliff., 5; U. S. *vs.* Wilson, 1 Bald., 78; Yelm, Jr., *vs.* Wash Ty., 1 Wash Ty., 63.

[3] U. S. *vs.* Kurtz, 4 Cranch C. C., 682; U. S. *vs.* Williams, 1 Cliff., 5; U. S. *vs.* Griff, 14 Blatch., 381; U. S. *vs.* Nott, 1 McLean, 499; U. S. *vs.* Coons, 1 Bond, 1.

[4] U. S. *vs.* Pumphrey, 1 Cranch C. C., 74; U. S. *vs.* Hunter. *ibid.*, 317; U. S. *vs.* Negro Charles, 2 *ibid.*, 76; U. S. *vs.* Pocklington, *ibid.*, 293; Berry *vs.* U. S., 2 Colo. Ty., 186. A confession is competent evidence when free and voluntary; otherwise

must be received in its entirety,[1] and weight must be attached to those parts which weigh for the accused as well as those which operate to his prejudice.

Corroboration.—A mere confession not made in open court, or otherwise corroborated, and without proof *aliunde* that a crime has been committed, will not justify a conviction.[2]

Proof of Facts obtained through an Inadmissible Confession.—Where an inadmissible confession leads to the discovery of a fact, so much of the inadmissible confession as relates to such fact may be received.[3] It has also been held that testimony obtained as a result of an inadmissible confession is both competent and receivable.

2. Declarations; Admissions against Interest.—Acts, declarations, and conduct of the defendant on the occasion of the commission of an offense are to be considered as *indicia* of his guilt or innocence. Where, however, an offense against the law is shown to have been committed, the law raises a presumption of guilty intent. This presumption cannot be overthrown by the declarations of the accused made *after* the commission of the offense, and such declarations cannot be proved.[4]

Dying Declarations.—A *dying declaration* is an *ante-mortem* statement made by the declarant in relation to the injury from which he is suffering. The statement is receivable in evidence in a trial for the murder or manslaughter of the declarant, and only when made in view of impending death and when he no longer cherishes any hope of

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where made through the influence of hope or fear.* So where an officer admitted to a superior, in writing, the commission of a military offense, and promised not to repeat the same, under the well-founded hope and belief that a charge which had been preferred against him therefor would be withdrawn, *held* that, in case he were actually brought to trial upon such charge, the admission thus made would not properly be received in evidence against his objection. Confessions made by private soldiers to officers or non-commissioned officers, though not shown to have been made under the influence of promise or threat, should yet, in view of the military relations of the parties, be received with caution.† Mere silence on the part of an accused when questioned as to his supposed offense is not to be treated as a confession.‡ Dig. J. A. Gen., 397, par. 13.

A confession that he had deserted made by an alleged deserter to a police officer, who on arresting him assured him that if he told the truth he (the officer) would give him an opportunity to escape before being delivered up to the military authorities, *held* clearly not admissible in evidence, as having been induced by promise of favor on the part of a person in authority. *Ibid.*, 399, par. 20.

[1] U. S. *vs.* Pryor, 5 Cr. C. C., 37; U. S. *vs.* Barlow, 1 *ibid.*, 94.

[2] Territory *vs.* McLinn, 1 Mont. Terr., 394; Bergen *vs.* People, 17 Ill., 426; Stringfellow *vs.* State, 26 Miss., 157; Brown *vs.* State, 32 Miss., 433; Jenkins *vs.* State, 41 Miss., 582; Anderson *vs.* State, 26 Ind., 89; State *vs.* Guild, 10 N. J. L., 163.

[3] State *vs.* Vaigneur, 5 Rich., 391; White *vs.* State, 3 Heisk., 338; Jordan *vs.* State, 32 Miss., 382; Belote *vs.* State, 36 *ibid.*, 96; McGlotherlin *vs.* State, 2 Cold. (Tenn.), 223; Frederick *vs.* State, 3 West Va., 695; People *vs.* Ah Ki, 20 Cal., 177; Done *vs.* People, *ibid.*, 321; Duffy *vs.* People, 5 Parker, 364; Com. *vs.* James, 99 Mass., 438.

[4] U. S. *vs.* Imsand, 1 Woods, 581; U. S. *vs.* Hanway, 2 Wall, Jr., 139.

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* United States *vs.* Pumphreys, 1 Cranch C. C., 74; United States *vs.* Hunter, *id.*, 317; United States *vs.* Charles, 2 *id.*, 76; United States *vs.* Pocklington, *id.*, 293; United States *vs.* Nott, 1 McLean, 499; United States *vs.* Cooper, 3 Qu. L. J., 42.

† See General Court-martial Orders, No. 3, War Department, 1876; General Orders, No. 54, Department of Dakota, 1867. Compare Cady *vs.* State, 44 Miss., 332.

‡ See Campbell *vs.* State, 55 Ala., 80.

recovery. In this case the sense of impending death is held to replace the sanction of an oath, and for this reason the statement will not be received if it appears that the declarant cherishes any hope, however slight, of ultimate restoration to health. The competency of the declarant as a witness, and the sufficiency of his statement, are determined by the court, which, after hearing all the facts, admits the statement or rejects it as not proper to be submitted to the jury.[1]

RES GESTÆ.

Res Gestæ.—A form of testimony remains to be described which conforms to the definition of hearsay, because it consists of the admissions, statements, and other utterances of accused persons or interested parties which are testified to by those who heard them. Such testimony, as will presently be shown, is not hearsay, or secondary, but primary, or original, in character.[2]

What Constitutes Res Gestæ.—If the several acts or events which constitute a cause of action or a criminal offense be analyzed, or separated into their constituent elements, it will be seen that they consist in part of acts and in part of oral declarations or statements, and, in some cases, of exclamations or other expressions of emotion or feeling. These utterances are as essential to the crime, or cause of action, as are the other acts of which it is composed. They are, indeed, *verbal facts*, and as such may be testified to by witnesses who observed them or in whose presence or hearing they were uttered. They consist in general of oral declarations or admissions, but may take the form of written entries in certain cases to be explained hereafter.[3]

When Admissible.—The rule applies to the statements of a partner whose declarations bind the firm of which he is a member; to the representations of an agent, which, within the scope of his agency, are binding upon his principal; to the confessions of accused persons; and to the utterances of a conspirator which, if made in furtherance of the common purpose, are binding upon co-conspirators. It also applies to the case in which the fact in question is as to whether a particular statement was or was not made, its truth or falsehood being a matter of secondary importance. The rule has an extensive application in criminal cases. For example: A, by acci-

[1] Carver *vs.* U. S., 164 U. S., 694; Johnson *vs.* State, 17 Ala., 618; Thompson *vs.* State, 24 Ga., 297; People *vs.* Vernon, 35 Coe, 49; Com. *vs.* Carey, 12 Cushing (Mass.), 246; Com. *vs.* Cooper, 5 Allen (Mass.), 495; Nelson *vs.* State, 7 Humph. (Tenn.), 542; Smith *vs.* State, 9 *ibid.*, 9; U. S. *vs.* Woods, 4 Cranch C. C., 484; People *vs.* Lee, 17 Cal., 76.

[2] Beavor *vs.* Taylor, 1 Wall., 637; Ins. Co. *vs.* Mosley, 8 Wall., 397; Ins. Co. *vs.* Weide, 9 Wall., 677; James *vs.* Wharton, 3 McLean, 492; Bacon *vs.* Charlton, 7 Cush., 586; Smith *vs.* Shoemaker, 17 Wall., 630.

[3] James *vs.* Wharton, 2 McLean, 492; Ins. Co. *vs.* Weide, 9 Wall., 677; Greenleaf Evid., § 143.

dent, discharges a pistol and wounds B; A gives expression to an exclamation of horror the instant that the result of his act is made known to him. Such exclamation is a verbal fact, and as such forms an essential part of the transaction. B stabs C, and, as he inflicts the wound, exclaims, "Take that," or "Now we are even," or words of similar effect; in this case, also, the exclamation is an essential ingredient of the offense. If, however, A shoots and kills B, and some time after the event, when he has had time to arrange a theory of defense, expresses regret at the occurrence, it is obvious that such expression of regret, if offered in evidence, should be rejected.[1]

Rule as to Admission.—The rule governing the admission of such statements is that they are receivable when they are strictly contemporaneous with and form an essential part of the event to which they relate, and not otherwise. Whether they are or are not contemporaneous is a question for the court to decide. Under this head falls testimony as to the information under which a persons acts; statements or declarations in regard to bodily health; expressions of feeling; statements in regard to pedigree or relationship, or to the facts in regard to birth, marriage, or death; declarations of a testator; inscriptions on monuments or tombstones; entries in family Bibles, charts, pedigrees, or the like.[2] The court in every case will determine the question of admissibility, and will satisfy itself that the testimony offered is the best attainable before allowing it to be entered upon the record.

IV. SUBSTANCE OF THE ISSUE. DEPARTURES.

The Substance of the Issue only Need be Proven.—By the substance is meant the material or essential part, as indicated in the pleadings upon which issue has been joined.[3] In the application of this rule a distinction is made between matter of substance, which pertains to an issue, and matter of description. The latter must be proved as alleged; the former, as to its legal or material part only. This rule is somewhat more strictly enforced in criminal than in civil actions, as personal rather than property rights are there drawn in question.[4]

For example: A is charged with the larceny of a horse, the property of B. It is sufficient in the indictment to allege that a horse, the property of B, was feloniously taken by A with intent to convert the same to his own use. If the indictment describes the animal as a black horse, the color

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[1] People *vs.* McMahon, 15 N. Y., 384; Phillips *vs.* People, 57 Barber, 353; Com. *vs.* Keyes, 11 Gray, 323; State *vs.* Mahon, 32 Vt., 241; Smith *vs.* State, 41 Tex., 352; Kingen *vs.* State, 50 Ind., 557; People *vs.* Simonds, 19 Cal., 275.

[2] U. S. *vs.* Howard, 3 Sumner, 12; U. S. *vs.* Foye, 1 Cush., 364; Wilson *vs.* Codman, 3 Cranch, 193.

[3] I. Greenleaf, §§ 108, 123.

[4] *Ibid.*, §§ 56–73.

must be proven; and if the horse proves to be white, the variance is fatal. So, too, if A be charged with the larceny of two bank-notes of a certain denomination, it is enough to allege the larceny of two bank-notes each of the denomination of five dollars, and to prove the felonious taking. If, however, the notes be described by the names of the banks of issue and the names and titles of the officers who signed them, such description will have to be proved as alleged. A departure from the allegations of a pleading in matters of description is called a variance, and is fatal unless aided by statute in the jurisdiction in which the trial is had.[1]

JUDICIAL NOTICE.

There are certain facts of which all courts take what is called *judicial notice*; that is, accept them without proof, as they are alleged or referred to in pleading or argument during the progress of a trial. This is done as to certain facts because the law requires it, and as to others because of their notoriety and general acceptance by the community at large. To the former class belong the laws which the court applies in the decision of the cases before it, including the Constitution, laws, and treaties of the United States, those of the State in which the court sits, the common law, the law of nations, the custom of merchants, and the admiralty or maritime law of the world.[2] They also recognize the great seal of the United States, those of the several States, the seals of courts of record when attached to their records, orders, and decrees, together with the seals of notaries public and the great seals of foreign States. Under the latter head they will take judicial notice of the ordinary divisions of time, of calendar and lunar months, of weeks and days, and of the hours of the day; of astronomical and physical facts; of the laws of nature, including their ordinary operations and consequences;[3] of the government of the United States and those of the several States, with their principal officers; of the existence of foreign States and their rulers; of war and peace; and of the great facts of history as recorded in the works of writers of standard authority.[4]

The Revised Statutes; Supplements.—The law of the United States, which is applied by courts-martial in military trials, is contained in the

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[1] I. Greenleaf. § 65.

[2] Bridge Prop. *vs.* Hoboken Co., 1 Wall., 116; U. S. *vs.* Randall, 1 Deady. 524; Evans *vs* Cleveland & Pittsburg R. R. Co., 5 Phil., 512; Gardner *vs.* The Collector, 6 Wall., 499; Jones *vs.* Hays, 4 McL., 521; Cheever *vs.* Wilson, 9 Wall., 108; Owings *vs.* Hull, 9 Pet., 607; Course *vs.* Stead, 4 Dall., 22, note.

[3] Floyd *vs.* Ricks, 14 Ark., 286; Dixon *vs.* Nicolls, 39 Ill., 372; Patterson *vs.* McCausland, 3 Bland (Md.), 69; Mossman *vs.* Forrest, 27 Ind., 233.

[4] Payne *vs.* Treadwell, 16 Cal., 220; Hart *vs.* Dodley, Hard (Ky.), 98; Bell *vs.* Barnet, 2 J. J. Marsh. (Ky.), 516. See, also, 17 Myers Fed. Dec., §§ 2276–2354; V. U. S. Dig. (1st Ser.), 484–491.

Revised Statutes[1] and the authorized Supplements[2] thereto, and in the biennial volumes of Statutes at Large, containing the legislation of Congress which has become law since the enactment of the Revised Statutes in 1874. Courts-martial take cognizance of the laws of the United States which are contained in the volumes above referred to, when read from books published with the proper authority. Statutes which relate especially to the military establishment may be taken notice of when read from the General Orders of the War Department in which they have been officially published to the Army.

The Statutes at Large.—The current legislation of Congress from year to year will be found in the volumes called Statutes at Large, which are published biennially with the authority of Congress. These volumes, twelve of which have appeared since the general revision of the laws in 1873, contain the public and private statutes enacted since December 1, 1873, together with all treaties and conventions with foreign powers which have acquired the force of law during the same period. Each volume also con-

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[1] The Revised Statutes are an Act of Congress (Act of June 22, 1874, 18 Stat. at Large, 113) containing such statutes as were in force on December 1, 1873. The enactment was approved and became the law on June 22, 1874. The publication thus sanctioned and authorized is known as the First Edition of the Revised Statutes; its contents were embodied in the Second Edition, presently to be described, which appeared in 1878. Wright *vs.* U. S., 15 C. Cls. R., 80. In case of doubt, ambiguity, or uncertainty the previous statutes may be referred to. *Ibid.* See, also, Bowen *vs.* U. S., 100 U. S., 508. U. S. *vs.* Brown, 100 U. S., 508; Bate Refrigerating Co. *vs.* Sulzberger, 157 U. S., 1.

The Revised Statutes must be accepted as the law on the subjects which they embrace as it existed on the first day of December, 1873, and were enacted to present the entire body of the laws in a concise and compact form. When the language of the Revised Statutes is plain and unambiguous, the grammatical structure simple and accurate, and the meaning of the whole intelligible and obvious, a court is not at liberty, by construction, to reproduce the law as it stood before the revision. U. S. *vs.* Bowen, 100 U. S., 508. See, also, Wright *vs.* U. S., 15 C. Cls. R., 80, 86.

The edition in general use is the second, published, with the authority of Congress in 1878, in accordance with the Act of March 2, 1877 (19 Stat. at Large, 268). The Second Edition of the Revised Statutes is only a new publication; a compilation containing the original law with specific amendments incorporated therein according to the judgment of the editor. Wright *vs.* U. S., 15 C. Cls. R., 80. The Revised Statutes did not affect statutes passed between December 1, 1873, and June 22, 1874.

The First Edition of the Revised Statutes is a transcript of the original in the State Department. It is *prima facie* evidence of the law, but the original is the only conclusive evidence of the exact text of the law. Wright *vs.* U. S., 15 C. Cls. R., 80, 87.

[2] *Supplements.*—Supplements to the Revised Statutes have been authorized from time to time by suitable enactments of Congress. The first of these was the Supplement of 1881, which was authorized by Joint Resolution No. 44 of June 7, 1880, (21 Stat. at Large, 308,) and contains all legislation of a permanent character enacted between December 1, 1873, and March 4, 1881; this work was subsequently merged in the Supplement of 1891. The Supplement of 1891 was authorized by the Act of April 9, 1890, (26 Stat. at Large, 50,) and contains such legislation of a permanent character as was enacted between December 1, 1883, and March 4, 1891; this work is now known as Volume I, Supplement to the Revised Statutes of the United States. A second supplementary volume, authorized by the Act of February 27, 1893, (27 Stat. at Large, 477,) known as Volume II, Supplement to the Revised Statutes, etc., has been published, containing all permanent legislation of Congress between March 5, 1891, and March 4, 1895.

tains such proclamations as were issued by the President during the biennial period to which it relates.[1]

Evidential Value.—It is provided by law that the First Edition of the Revised Statutes "shall be legal evidence of the laws and treaties therein contained, in all the courts of the United States and of the several States and Territories."[2] It is also provided that the Second Edition of the Revised Statutes "shall be legal evidence of the laws therein contained, in all the courts of the United States and of the several States and Territories, but shall not preclude reference to, nor control in case of any discrepancy, the effect of any Act as passed by Congress since the first day of December, eighteen hundred and seventy-three."[3] The several volumes of Supplements are similarly declared to be "*prima facie* evidence of the laws therein contained, in all the courts of the United States and of the several States and Territories therein; but shall not preclude reference to, nor control in case of any discrepancy, the effect of any original Act as passed by Congress."[4] The several volumes of Statutes at Large published subsequent to the enactment of the Revised Statutes are also declared to be "legal evi-

[1] Twenty-nine volumes, in all, of Statutes at Large have been published since March 4, 1789.

TABLE SHOWING THE PERIOD COVERED BY EACH OF THE TWENTY-SEVEN VOLUMES OF THE STATUTES AT LARGE.

Stat. L.	Period. From	Period. To	Stat. L.	Period. From	Period. To
Vol. 1.....	Mar. 4, 1789	Mar. 3, 1799	Vol. 16.....	Mar. 4, 1869	Mar. 4, 1871
2.....	Dec. 2, 1799	Mar. 3, 1813	17.....	Mar. 4, 1871	Mar. 4, 1873
3.....	May 29, 1813	Mar. 3, 1823	18.....	Dec. 1, 1873	Mar. 4, 1875
4.....	Dec. 1, 1823	Mar. 3, 1835	19.....	Dec. 6, 1875	Mar. 3, 1877
5.....	Dec. 7, 1835	Mar. 3, 1845	20.....	Oct. 15, 1877	Mar. 4, 1879
6*...	Mar. 4, 1789	Mar. 3, 1845	21.....	Mar. 18, 1879	Mar. 4, 1881
7†...	.....	.....	22.....	Dec. 5, 1881	Mar. 3, 1883
8‡...	.....	.....	23.....	Dec. 3, 1883	Mar. 3, 1885
9.....	Dec. 1, 1845	Mar. 3, 1851	24.....	Dec. 7, 1885	Mar. 3, 1887
10.....	Dec. 1, 1851	Mar. 3, 1855	25.....	Dec. 5, 1887	Mar. 2, 1889
11.....	Dec. 3, 1855	Mar. 3, 1859	26.....	Dec. 2, 1889	Mar. 3, 1891
12.....	Dec. 5, 1859	Mar. 4, 1863	27.....	Dec. 7, 1891	Mar. 3, 1893
13.....	Dec. 7, 1863	Mar. 4, 1865	28.....	Aug. 7, 1893	Mar. 3, 1895
14.....	Dec. 4, 1865	Mar. 4, 1867	29.....	Dec. 2, 1895	Mar. 3, 1897
15.....	Mar. 4, 1867	Mar. 4, 1869			

[2] Section 2, Act of June 20, 1894 (18 Stat. at Large, 113).

[3] Section 4, Act of March 2, 1877 (19 Stat. at Large, 268); Act of March 9, 1878 (20 *ibid.*, 27).

[4] Joint Resolution, No. 44, June 7, 1880 (21 Stat. at Large, 308); Act of April 9, 1890 (26 *ibid.*, 50); Act of February 27, 1893 (27 *ibid.*, 477).

* Private laws. † Indian treaties.
‡ European treaties, with general index to Vols. I to VIII, inclusive, Statutes at Large.

dence of the laws and treaties therein contained, in all the courts of the United States and of the several States therein."[1]

PUBLIC DOCUMENTS.

Public Documents.—For evidential purposes a *public document* may be defined as any written instrument emanating from or filed or recorded in any office or department of the Government.[2] Under this head are included the statutes, resolutions, and other acts of the legislature; the treaties, proclamations, orders, regulations, reports, and other utterances of the Executive; and the records, judgments, orders, and decrees of courts of justice. Every public document pertains to or is said to be *of record* in some public office, the chief of which is its legal custodian. Public documents are, as a rule, so far regarded as confidential that they are not subject to examination by the public at large without the authority of law or the consent of their legal custodian.[3]

Production of, in Evidence, How Secured.—When it becomes necessary to produce a public document in court, as the public business would be delayed and considerable inconvenience caused by its removal from the files of the office to which it pertains, secondary evidence of its contents in the form of copies is usually furnished, and authenticated, in strict conformity with the requirements of statutes, by the seal of the office from which it emanates. Copies so certified are given, by statute, the full evidential value of originals. For this reason all courts of record and the several executive departments are provided with seals of which the courts take judicial notice

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[1] Section 8, Act of June 20, 1874 (18 Stat. at Large, 113).

[2] I. Greenleaf, § 470; Wharton, § 639; McCall *vs* U. S., 1 Dak., 321. Where a statute requires the keeping of an official record for the public use, by an officer duly appointed for the purpose and subject not merely to private suit but to official prosecution for any errors, such record, so far as entries made in it in the course of business, is admissible in evidence as *prima facie* proof of the facts it contains.* Nor is it necessary to verify such record by the oath of the person keeping it. That it is directed by statute to be kept for the public benefit, and that it is kept, so far as appears on its face, with regularity and accuracy, entitles it to be received in evidence, and throws the burden of impeaching it on the opposite side.† To make the record itself evidence, it is only necessary that it should be produced, and that it should be proved to have come from the proper depositary ‡

[3] I. Greenleaf, §§ 471–478. It is an established general rule that a head of a Department of the Government will not make public or furnish copies of confidential official reports or papers the disclosure of which will rather prejudice than promote the public interests. In a case of an officer of the Army who, having been dismissed the service by sentence of court-martial, applied to be furnished with copies of, or to be allowed to examine, the report of the Judge-Advocate General and the remarks of the General commanding the Army, in his case,—*advised* that the application be not acceded to by the Secretary of War, the same being no part of the record of trial of the officer, but confidential communications addressed to the President through the Secretary of War. Dig. J. A. Gen., 691, par. 5.

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* I. Wharton, §§ 120, 639, 649.
† I. Greenleaf, § 483; I. Wharton, § 639; Taylor, § 1429.
‡ I. Wharton, § 639, and cases cited.

when attached to copies or exemplifications of documents issuing therefrom. As has been said, all courts are required to take judicial notice of the laws which they apply in the decision of cases. In this way the public statutes of the United States, and of the State in which they sit, are recognized by courts when read from books purporting to have been published by authority. The same rule applies to the public statutes of the several States of the Union. Foreign statutes and judgments are proven by copies under the great seal of the State to which they pertain, or by the certification of an officer authorized by law to execute copies and certify to their correctness. Acts of magistrates, and in some cases of notaries public, must be authenticated by the seal of the court of record within whose territorial jurisdiction they act.[1]

DOCUMENTARY EVIDENCE.

Documents.—A *document* is a statement of fact in a written instrument, or anything upon which inscriptions, characters, or signs have been recorded and which is susceptible of use as evidence. The term includes deeds formally executed under seal, all forms of written or printed instruments, together with maps, plans, and inscriptions upon monuments, buildings, churches, or headstones. The writing may be in any language or character, and may be expressed pictorially or in the language of signs. Written instruments are classified, according to their source and authority, into *public* and *private documents*, and, according to the formality attending their execution, into *specialties*, or *instruments under seal*, and writings or *documents not under seal*, a term which includes all other writings of whatever character.[2]

From the point of view of evidence, a written instrument is regarded as of the highest authority upon the subject to which it relates; and, as a general rule, cannot be varied or contradicted by parol testimony.[3] If executed under seal, no testimony will be received which is calculated to change its meaning or to modify its terms in the slightest degree, the presumption being that if a person reduces a proposition to writing, under the sanction of a seal, the instrument so executed must be held to embody his fully considered views as to the subject so expressed in permanent and enduring form. For these reasons the rules of evidence attach the greatest value to documentary evidence, and place peculiar safeguards about its introduction, with a view to give to this form of testimony its true evidential value.

Primary and Secondary Evidence.—Written evidence is derived from documents, and is said to be either *primary* or *secondary* in character or

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[1] I. Greenleaf, §§ 479–496; Wharton, §§ 317–321.
[2] Wharton Crim. Evid., 519. [3] I. Greenleaf, §§ 275–277.

degree, depending upon its originality. *Primary evidence* consists in the production of the document itself. In the absence of the primary or original document, evidence called *secondary* may be admitted to prove its contents. This may exist in several degrees, consisting of copies of the original, or in parol testimony as to its contents, derived from witnesses who are familiar therewith. As between copies of a document produced by printing, photography, or by any fac-simile process, all are primary as respects each other, but all are secondary in their relation to the instrument of which they purport to be copies.[1] The production of written evidence is *voluntary* when done by a party in his own interest, or *compulsory* when required by the court in obedience to its order, rule, or subpœna. When a document is produced, the burden of identifying it, and of proving that it is the best evidence attainable, rests upon the party in whose behalf it is produced.

Copies of Public Documents.—It has been seen to be a fundamental rule of evidence that the best evidence must be submitted in every case. This applies with perhaps greater force to documentary evidence than to oral testimony, and to the production of public as well as private documents. In its application to public documents, however, it is subject to the qualification, presently to be described, that, as it would be highly detrimental to the public interests to permit original documents to be removed from the offices in which they are of record, copies of such documents, made in a form duly prescribed by law, are received in evidence as to the facts to which they relate, and are given by statute the same evidential value as the originals themselves.[2]

The principal forms of these are: First, *exemplifications*, that is, transcripts of records or judgments under the great seal of the State, or the seal of the court from which the judgment issued or to which the record pertains.[3] An exemplification has the same evidential value as would the production of the original itself. It is a recognition, in the most solemn

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[1] A printed copy of a manuscript is secondary to the manuscript itself, which must be produced or accounted for. Rex *vs.* Watson, 32 How. State Tri., 82. But the several printed copies produced by a single impression, and issued in a single edition, though secondary evidence of the original, are primary in respect to each other. Rex *vs.* Ellicombe, 5 C. & P., 522; I. Wharton, § 92. Whether photographs of writings may, in any view, be treated as primary evidence may be doubted, and it is clear that when an original is required the original must be produced. I. Whart., § 91.

Strictly speaking, a press copy is secondary to the original document from which it is taken. Nodin *vs.* Murray, 3 Camp, 228; Chapin *vs.* Siger, 4 McL., 378; Marsh *vs.* Hand, 35 Md., 123. The fact that a party keeps letter-press copies of letters does not obviate the necessity of producing the originals, or of laying the foundation in the ordinary and usual way for secondary evidence. Earl C. Foot *vs.* Bentley, 44 N. Y., 171. Such a copy is receivable on the loss of the original. Goodrich *vs.* Weston, 102 Mass., 362; I. Whart., §§ 72, 92, 133. At the best, however, it continues secondary. I. Whart., 93.

[2] Stebbins *vs.* Duncan, 108 U. S., 32, 50; Saxton *vs.* Nimms, 14 Mass., 320; I. Greenleaf, § 484.

[3] II. Wharton, §§ 95–119; I. Greenleaf, § 501.

form, by the Government itself of the validity of its own grant under its own seal, and imports absolute verity as matter of record. Exemplifications are usually attested by the certificate of the clerk of the court from which they issue, attested by the signature of the presiding judge. Second, copies may be made by an officer specially authorized, by statute, to perform that duty. In such case the statute authorizing the copy must be strictly followed by the officer authorized to furnish the same. Copies so authenticated are called *certified* or *office copies*, a term which is also applied to the transcripts of records pertaining to the several executive departments of the United States, made by the proper officer or custodian, and authenticated, as a rule, by the seal of the department from which the copy emanates. Third, *sworn copies*. These are transcripts of public records made under the sanction of an oath. *Examined copies* are those which have been compared with the original, or with an official record thereof. Such copies are proved by some one who has compared them with the originals.[1]

Records of Executive Departments.—"Copies of any books, records, papers, or documents in any of the executive departments, authenticated under the seals of such departments, respectively, shall be admitted in evidence equally with the originals thereof."[2]

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[1] Wharton, § 94.

[2] Section 882, Revised Statutes. The muster-rolls on file in the War Department are official records, and copies of the same, duly certified, are* evidence of the facts originally entered therein and not compiled from other sources, subject, of course, to be rebutted by evidence that they are mistaken or incorrect. So, though such rolls are evidence that the soldier was duly enlisted, or mustered into the service, and is therefore duly held as a soldier, they may be rebutted in this respect by proof of fraud or illegality in the enlistment or muster (on the part of the representative of the United States or otherwise), properly invalidating the proceeding and entitling the soldier to a discharge. (But that the entries in such rolls are not proof of the commission of an offense, as desertion, for example, see Desertion.) Dig. Opin. J. A. Gen., 395, pars. 9, 10.

A descriptive list is but secondary evidence and not admissible to prove the facts recited therein. It is not a record of original entries, made by an officer under a duty imposed upon him by law or the custom of the service, but is simply a compilation of facts taken from other records. *Ibid.*, 401, par. 33.

The "enlistment-paper," the "physical-examination paper," and the "outline-card" are original writings made by officers in the performance of duty and competent evidence of the facts recited therein. Copies, authenticated under the seal of the War Department, according to Section 882, Revised Statutes, are equally admissible with the originals. *Ibid.*, 401, par. 31.

The morning report book is an original writing. To properly admit extracts in evidence, the book should be first identified by the proper custodian, and the extracts then not merely read to the court by the witness, but copied, and the copies, properly verified, attached as exhibits to the record of the court. *Ibid.*, par. 32.

Copies of pay accounts (charged to have been duplicated) are admissible in evidence where the accused has by his own act placed the originals beyond the reach of process

* But note in this connection the ruling of the Supreme Court of Massachusetts in the case of Hanson *vs.* S. Scituate, 115 Mass., 336, that an official certificate from the Adjutant-General's Office to the effect that certain facts appeared of record in that office, but which did not purport to be a transcript from the record itself and was therefore simply a personal statement, was not competent evidence of such facts.

It has been held by the United States Supreme Court in a recent case, Evanston *vs.* Gunn, 9 Otto, 660, that the record made by a member of the United States Signal Corps of the state of the weather and the direction and velocity of the wind on a certain day was competent evidence of the facts reported, as being in the nature of an official record kept by a public officer in the discharge of a public duty.

Copies of any documents, records, books, or papers in the office of the Solicitor of the Treasury, certified by him under the seal of his office or, when his office is vacant, by the officer acting as solicitor for the time, shall be evidence equally with the originals.[1]

"When suit is brought in any case of delinquency of a revenue officer or other person accountable for public money, a transcript from the books and proceedings of the Treasury Department, certified by the Secretary or an Assistant Secretary of the Treasury, and authenticated under the seal of the Department, or, when the suit involves the accounts of the War or Navy Departments, certified by the auditors respectively charged with the examination of those accounts, and authenticated under the seal of the Treasury Department, shall be admitted as evidence, and the court trying the cause shall be authorized to grant judgment and award execution accordingly. And all copies of bonds, contracts, or other papers relating to or connected with the settlement of any account between the United States and an individual, when certified by such auditor to be true copies of the originals on file, and authenticated under the seal of the Department, may be annexed to such transcripts, and shall have equal validity and be entitled to the same degree of credit which would be due to the original papers if produced and authenticated in court: *provided* that where suit is brought upon a bond or other sealed instrument, and the defendant pleads *non est factum*, or makes his motion to the court, verifying such plea or motion by his oath, the court may take the same into consideration, and, if it appears to be necessary for the attainment of justice, may require the production of the original bond, contract, or other paper specified in such affidavit."[2]

"Upon the trial of any indictment against any person for embezzling public moneys, it shall be sufficient evidence, for the purpose of showing a

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and fails to produce them in court on proper notice. So where the originals are in the hands of a person who has left the United States, so that they cannot be reached on notice to the accused to produce them, or otherwise. Dig. Opin. J. A. Gen., 401, par. 34.

The provisions of this section relate to documents of record in one of the executive departments in the city of Washington. Documents of a public nature filed elsewhere, as at a military post, or at the headquarters of a military department, or of an army in the field, are in strictness proved by the production of the originals, or, in the absence of objection, by the production of copies duly authenticated by the proper custodian. See the paragraph, *post*, entitled *Military Orders, Reports, Documents, etc., filed elsewhere than in the War Department.*

[1] Section 883, Revised Statutes.

[2] Section 886, Revised Statutes; Walton *vs.* U. S., 9 Wh., 651; U. S. *vs.* Buford, 3 Pet., 12; Smith *vs.* U. S., 5 Pet., 292; Cox *vs.* U. S., 6 Pet., 172; U. S. *vs.* Jones, 8 Pet., 375; Gratiot *vs.* U. S., 15 Pet., 336; U. S. *vs.* Irving, 1 Howe, 250; Hoyt *vs.* U. S., 10 How., 109; Bruce *vs.* U S., 17 How., 437; U. S. *vs.* Edwards, 1 McLean, 467; U. S. *vs.* Hilliard *et al.*, 3 McLean, 324; U. S. *vs.* Lent, 1 Paine, 417; U. S. *vs.* Martin, 2 Paine, 68; U. S *vs.* Van Zandt, 2 Cr. C. C., 328; U. S. *vs.* Griffith, 2 Cr. C. C., 336; U. S. *vs.* Lee, 2 Cr. C. C., 462; U. S. *vs.* Harrill, 1 McAll., 243; U. S. *vs.* Mattison, Gilp., 44; U. S. *vs.* Corwin, 1 Bond, 149; U S. *vs.* Gaussen, 19 Wall., 198; U. S. *vs.* Bell, 111 U. S., 477; U. S. *vs.* Stone, 106 U. S., 525.

balance against such person, to produce a transcript from the books and proceedings of the Treasury Department, as provided by the preceding section."[1]

"A copy of any return of a contract returned and filed in the returns office of the Department of the Interior, as provided by law, when certified by the clerk of the said office to be full and complete, and when authenticated by the seal of the Department, shall be evidence in any prosecution against any officer for falsely and corruptly swearing to the affidavit required by law to be made by such officer in making his return of any contract, as required by law, to said returns-office."[2]

"Copies of all official documents and papers in the office of any consul, vice-consul, or commercial agent of the United States, and of all official entries in the books or records of any such office, certified under the hand and seal of such officer, shall be admitted in evidence in the courts of the United States."[3]

State and Territorial Laws; Legislative and Judicial Records of States and Territories.—"The acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory, or country affixed thereto. The records and judicial proceedings of the courts of any State or Territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."[4]

Journals of Congress.—"Extracts from the journals of the Senate or of the House of Representatives, and of the executive journal of the Senate when the injunction of secrecy is removed, certified by the secretary of the Senate or by the clerk of the House of Representatives, shall be admitted as

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[1] Section 887, Rev. Stats. U. S. *vs.* Gaussen, 19 Wall., 198.

[2] Section 888, Rev. Stats.

[3] Section 896, *ibid.*

[4] Section 905, *ibid.* Ferguson *vs.* Harwood, 7 Cr., 408; Mills *vs.* Duryea, 7 Cr., 481; U. S. *vs.* Amedy, 11 Wh., 392; Buckner *vs.* Finley, 2 Pet., 592; Owings *vs.* Hull, 9 Pet., 627; Urtetiqui *vs.* D'Arbel, 9 Pet., 700; McElmoyle *vs.* Cohen, 13 Pet., 312; Stacey *vs.* Thrasher, 6 How., 44; Bank of Alabama *vs.* Dalton, 9 How., 522; D'Arcy *vs.* Ketchum, 11 How., 165; Railroad *vs.* Howard, 13 How., 307; Booth *vs.* Clark, 17 How., 322; Mason *vs.* Lawrason, 1 Cr. C. C., 190; Buford *vs.* Hickman, Hemp, 232; Craig *vs.* Brown, Pet. C. C., 354; Stewart *vs.* Gray, Hemp., 94; Gardner *vs.* Lindo, 1 Cr. C. C., 78; Trigg *vs.* Conway, Hemp, 538; Turner *vs.* Waddington, 3 Wash. C. C., 126; Catlin *vs.* Underhill, 4 McL., 199; Morgan *vs.* Curtenius, 4 McL., 366; Hale *vs.* Brotherton, 3 Cr. C. C., 594; Mewster *vs.* Spalding, 6 McL., 24; Parrot *vs.* Habersham, 1 Cr. C. C., 14; Talcott *vs.* Delaware Ins. Com., 2 Wash. C. C., 449; James *vs.* Stookey, 1 Wash. C. C., 330; Bennett *vs.* Bennett, Dist. Ct., Oregon, 1867.

evidence in the courts of the United States, and shall have the same force and effect as the originals would have if produced and authenticated in court."[1]

Public Records of States and Territories.—"All records and exemplifications of books which may be kept in any public office of any State or Territory, or of any country subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any court or office in any other State or Territory, or in any such country, by the attestation of the keeper of the said records or books, and the seal of his office annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county, parish, or district in which such office may be kept, or of the governor, or secretary of state, the chancellor or keeper of the great seal, of the State or Territory, or country, that the said attestation is in due form and by the proper officers. If the said certificate is given by the presiding justice of a court, it shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or, if given by such governor, secretary, chancellor, or keeper of the great seal, it shall be under the great seal of the State, Territory, or country aforesaid in which it is made. And the said records and exemplifications, so authenticated, shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the State, Territory, or country, as aforesaid, from which they are taken."[2]

Judgments of Courts.—The judgments of courts may, in a proper case, be submitted in evidence during a trial by court-martial. As in the case of all documentary testimony, the best evidence of a particular judgment or decision consists in the production of the record itself. This can be done, however, only in the court to which the record pertains, or in a higher court to which it has passed in the regular course of judicial proceedings. In all other cases, a copy of the record, in some form, replaces the judgment itself and is given, usually by statute, the same evidential value.[3]

Decisions of Courts.—What are known as the decisions of courts, a more comprehensive expression than the term "judgments" as used in the technical sense above described, and which includes, in addition to the mere judgments of the courts, in particular cases, the reasons assigned therefor by the judges who rendered them, are to be found in the volumes of reports published with the official sanction of the courts that issued them. "Deci-

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[1] Section 895, Revised Statutes.

[2] Section 906, *ibid*; U. S. *vs.* Johns, 4 Dallas, 412; U. S. *vs.* Amedy, 11 Wheaton, 392; Watkins *vs.* Holman, 16 Pet., 25; Gregg *vs.* Forsyth, 24 How., 179; Post *vs.* Supervisors, 15 Otto. 667; Savage's Case, 1 Ct. Cls., 170; Leathers *vs.* Salvor Wrecking Co., 2 Woods, 680; McCall *vs.* U. S., 1 Dak., 320. See, also, 17 Myers Fed. Dec., 132–135.

[3] See, also, the article entitled *Copies of Public Documents*, page 277, *supra*.

sions are only evidence of what the laws are, and are not of themselves laws. They are often re-examined, reversed, and qualified by the courts themselves, whenever found to be defective, ill founded, or otherwise incorrect."[1]

Records of Courts-martial.—Copies of the records of general courts-martial, authenticated under the seal of the War Department, as provided in Section 882, Revised Statutes, are admissible in evidence "equally with the originals."[2] Where the purpose in introducing the record is to prove previous convictions of the same or similar offenses, the order or orders promulgating the proceedings in such cases may be submitted to the court. If the order of publication does not, as by not setting forth the specifications, show the actual offense, the original proceedings (*i.e.*, the original or a duly certified copy) should be put in evidence.[3]

The Act of March 3, 1877,[4] makes the judge-advocates at the several department headquarters the custodians of the records of the garrison, regimental, and field-officer's courts-martial pertaining to the posts and regiments stationed therein. Those records are required to be retained in such office of record for two years, at the end of which time they may be destroyed. Copies of such records, properly authenticated by the signature of the judge-advocate of the department in which they are of official record, are receivable in evidence by courts-martial in cases to which they relate.

General Orders of the War Department, etc.—General orders issued from the War Department or headquarters of the Army may ordinarily be proved by printed official copies in the usual form. The court will in general properly take judicial notice of the printed order as genuine and correct. A court-martial, however, should not in general accept in evidence, if objected to, a printed or written special order which has not been made public to the Army without some proof of its genuineness and official character.[5]

Military Orders, Reports, Documents, etc., Filed Elsewhere than in the War Department.—Orders, returns, reports, records, and other documents pertaining to departments, divisions, armies, posts, and other military com-

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[1] Swift *vs.* Tyson, 16 Pet., 18; Anderson's Law Dict.

[2] Dig. J. A. Gen., 400, par. 30. Except by the consent of the opposite party, the testimony contained in the record of a previous trial of the same or a similar case cannot properly be received in evidence on a trial by court-martial; nor, without such consent, can the record of a board of investigation ordered in the same case be so admitted. In all cases (other than that provided for by the 121st Article of War) testimony given upon a previous hearing, if desired to be introduced in evidence upon a trial, must (unless it be otherwise specially stipulated between the parties) be offered *de novo* and as original matter. *Ibid.*, 395, par. 7.

[3] *Ibid.*, 610, par. 3. A memorandum of the previous convictions is not sufficient: they must be shown either by the records of the trials or by duly authenticated copies of the orders of promulgation. It is unauthorized for the judge-advocate to introduce or the court to admit, as evidence of previous convictions (or in connection with proper evidence of the same), the statement of service, etc., required by par. 927, A. R. 1895, to be furnished to the convening authority *with the charges*. *Ibid.* See, also, *ibid.*, 611, par. 9.

[4] 19 Stat. at Large, 810. See, also, Dig. J. A. Gen., 400, par. 30.

[5] Dig. J. A. Gen., 396, par. 10.

mands, not being documents pertaining to the several executive departments within the meaning of Section 882 of the Revised Statutes, are proved by the production of the originals, or, in the absence of objection, by copies duly authenticated by the proper staff officer of the command to which they pertain. When the originals of such documents or records are produced, they are identified by the proper custodian, *i.e.*, the post books and records by the post adjutant, company books by the company commander, hospital records by the post surgeon, etc.[1]

PRIVATE DOCUMENTS.

How Produced—How Proved.—*Private documents* differ from public documents chiefly as to the kind and amount of testimony necessary to establish their identity, such burden of proof, in any case, falling upon the party in whose interest the paper is produced. In general the best evidence of the contents of a paper is that obtained by the production of the instrument itself. If it be a sealed instrument, its execution must be proved by the testimony of at least one subscribing witness, unless the document is in the hands of the opposite party, or be over thirty years old and comes from the proper custodian, in which case it is said to prove itself, the subscribing witnesses being supposed to be dead. When admitted subject to the foregoing conditions, no testimony will be received to vary its terms in the slightest degree.[2]

Notice to Produce; Proof of Handwriting.—The production of a paper, if in the hands of the opposite party, is obtained by a formal *notice to produce;*[3] if the paper be in the possession of a third party—that is, in the custody of one not a party in interest—its production is compelled by a *subpœna duces tecum.* When the means above described have been fully resorted to, or upon satisfactory proof that the paper has been lost or destroyed, or that it is in possession of a person not within the jurisdiction of the court, secondary

[1] The "enlistment-paper," the "physical-examination paper," and the "outline-card" are *original* writings made by officers in the performance of duty and competent evidence of the facts recited therein. Copies authenticated under the seal of the War Department, according to Sec. 882, Rev. Sts., are equally admissible with the originals. Dig. J. A. Gen., 401, par. 31.

The Morning-Report Book is an original writing. To properly admit extracts in evidence, the book should be first identified by the proper custodian, and the extracts then not merely read to the court by the witness, but copied, and the copies, properly verified, attached as exhibits to the record of the court. *Ibid.*, par. 32

A *descriptive list* is but secondary evidence and not admissible to prove the facts recited therein. It is not a record of original entries, made by an officer under a duty imposed upon him by law or the custom of the service, but is simply a compilation of facts taken from other records. *Ibid.*, par. 33.

Copies of *pay accounts* (charged to have been duplicated) are admissible in evidence where the accused has by his own act placed the originals beyond the reach of process, and fails to produce them in court on proper notice. So where the originals are in the hands of a person who has left the United States, so that they cannot be reached on notice to the accused to produce them or otherwise. *Ibid.*, par. 34

[2] I. Greenleaf, §§ 275, 276, and cases cited; 2 Starkie, Evid., 544-578; Thayer, Evid., 1014-1069; Martin *vs.* Berens, 67 Pa. St., 463; Bernart *vs.* Riddle, 29 *id.*, 96; Bast *vs.* Bank, 101 U. S. 93.

[3] U. S. *vs.* Winchester, 2 McL., 135; Hylton *vs.* Brown, 1 Wash., 343.

evidence may be submitted as to its contents. Such testimony may consist in written, printed, photographic, or letter-press copies, or in parol testimony as to the contents of the paper in question. When written copies are submitted, witnesses are called to prove handwriting, and they testify: (1) from having seen the document written; (2) from having seen writings personally admitted by the writer to be genuine; and (3) by a comparison of writings, the comparison being made between papers already in evidence before the court. In England comparison of writings proved to the satisfaction of the court to be genuine is authorized by statute, and a similar rule exists in several of the States; in others, however, the comparison is required to be made of writings already in evidence, the reason being that the introduction of writings not pertinent to the case may give rise to fraud in the matter of the selection, or prejudice unduly the minds of the jury in reaching their finding.[1]

Production of Telegrams.—A court-martial (by *subpœna duces tecum*, through the judge-advocate) may summon a telegraph-operator to appear before it bringing with him a certain telegraphic dispatch. But it is beyond the power of such court to require such witness, against his will, to surrender the dispatch, or a copy, to be used in evidence.[2]

ALTERATIONS AND ERASURES.

Nature and Effect.—When an alteration or erasure appears upon the face of an instrument, and its validity is drawn in question, the burden of explaining the change falls upon the party who produces the document.

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[1] To the admission in evidence of a letter written and signed by the accused (of which the introduction is contested), proof of his handwriting is necessary. Evidence of handwriting by comparison is not admissible *at common law* except where the standard of comparison is an acknowledged or proved genuine writing already in evidence in the case. A writing not in evidence and simply offered to be used as a standard is not admissible. Dig. J. A. Gen., 401, par. 36; U. S *vs.* McMillan, 29 Fed. Rep, 247. For a full discussion of the subject of comparison of handwriting, see I. Greenleaf, §§ 576–581; 1 Wharton, §§ 711–718. See, also, Winthrop, Ch. XVIII.

At the trial, in 1894, of an officer charged with a disorder and breach of discipline which involved the killing by him of another officer, there was offered in evidence on the part of the accused, to exhibit the character and disposition of the officer killed, a copy of a general court-martial order of 1872, setting forth certain charges alleging dishonest and unbecoming conduct, upon which the latter officer was then tried and convicted, and the findings on the court thereon. *Held*, that such evidence was wholly inadmissible for the purpose designed. Dig. J. A. Gen., 402, par. 37.

[2] *Ibid.*, 401, par. 35. In view of the embarrassment which must generally attend the proof, before a court-martial, of the sending or receipt of telegraphic messages by means of a resort, by *subpœna duces tecum*, to the originals in possession of the telegraph company,* *advised* that the written or printed copy furnished by the company and received by the person to whom it is addressed should in general be admitted in evidence by a court-martial in the absence of circumstances casting a reasonable doubt upon its genuineness or correctness. But where it is necessary to prove that a telegram which was not received, or the receipt of which is denied and not proven, was actually duly sent, the operator or proper official of the company, or other person cognizant of the fact of sending, should be summoned as a witness. *Ibid.*, 396, par. 11.

* The subject of the extent of the authority of the courts to compel telegraph companies to produce original private telegrams for use in evidence is most fully treated in an essay by Henry Hitchcock, Esq., on the "Inviolability of Telegrams," published in the Southern Law Review for October, 1879.

Alterations are usually in the nature of interlineations or erasures. *Interlineations* consist of words or clauses inserted between the lines of an instrument; *erasures* are effected by striking out words or clauses, usually by means of a line drawn through the matter to be omitted. As such alterations suggest fraud, it is incumbent upon the party who would benefit by the change to explain its cause and the time of its execution. The effect of a material alteration, unexplained, is to invalidate the instrument.[1] Alterations made at the time of execution of a legal instrument can be made valid by the insertion of a clause explaining them, immediately over the signatures of the parties.[2] In a sealed instrument and, when no ground of suspicion appears, in other writings as well, alterations are presumed to have been made prior to the complete execution of the document.[3]

EXAMINATION OF WITNESSES.[4]

Method of Examination—Oaths—Objections to Competency.—Before testifying, witnesses are sworn by the judge-advocate, or by the court itself in military tribunals having summary jurisdiction. While the forms of oath or affirmation prescribed by statute must be administered in every case, any extra-statutory form may also be used which a witness may regard as having special binding force. Objections to the competency of a witness are properly made before the administration of the oath, but will be considered at any stage of the trial, provided the cause of incompetency was not known to exist at the time the witness was sworn; if the objection be sustained, the court will disregard any testimony that the witness may have given prior to the discovery of his incompetency.

Order of Examination.—Witnesses are first examined in chief by the party in whose behalf they appear, and are then cross-examined by the opposite party. Considerable latitude is allowed a party in the examination of his witnesses, so long as the questions asked are relevant to the issue. They may then, if necessary, be re-examined by the party producing them.

Cross-examination.—The right to cross-examine is in general limited to matters stated by the witness in his direct examination.[5] As it is the purpose of the cross-examination to test the credibility of the witness, it is permissible to investigate the situation of the witness with respect to the parties and to the subject of the litigation, his interest, his motives, inclina-

[1] Morrill *vs.* Otis, 12 N. H., 466; Richmond Mfg. Co. *vs.* Davis, 7 Blackford (Ind.), 412; Boston *vs.* Benson, 12 Cushing (Mass.), 61; Davis *vs.* Carlisle, 6 Ala., 707.

[2] Ravisies *vs.* Alston, 5 Ala., 297; Booton *vs.* Benson, 12 Cush., 61.

[3] North River Meadow Co. *vs.* Shrewsbury Church, 22 N. J. Law (2 Zabriskie), 424; Matthews *vs.* Coalter, 9 Mo., 705; Beaman *vs.* Russell, 20 Vt., 205.

[4] See, also, the chapter entitled THE INCIDENTS OF THE TRIAL.

[5] Houghton *vs.* Jones, 1 Wall., 702; Aurora *vs.* Cobb, 21 Ind., 492; Cokely *vs.* State, 4 Iowa, 477; Helser *vs.* McGrath, 52 Pa. St., 531; Campau *vs.* Dewey, 9 Mich., 381; Carr *vs.* Gale, Dav., 328.

tions, and prejudices, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used those means, his powers of discernment, memory, and description.[1] On cross-examination, a witness may be asked questions which would not be pertinent or relevant on his examination in chief.[2] While a witness may be cross-examined as to collateral or irrelevant facts with a view to test his accuracy or veracity, the party must be bound by the answers of the witness and cannot adduce proof in contradiction of such answers;[3] nor is it competent, upon cross-examination, to question a witness upon matters irrelevant to the issue solely for the purpose of discrediting him.[4] Degrading questions, also, are forbidden upon cross-examination unless they relate to facts in issue in the record.[5] If a party wishes to examine a witness of the opposite side with regard to new matter not introduced by the opposite party, he must make the witness his own by introducing him at a subsequent stage of the trial.[6]

Leading Questions.—Leading questions—that is, questions which suggest their answers—are excluded if objected to by the opposite party. Questions merely introductory in character, questions asked for purposes of identification or to assist defective memory, and questions asked of a witness who seems to be hostile to the party introducing him are exceptions to this rule. The purpose of cross-examination is to test the credibility of the witness, and to that end leading questions may be put in cross-examination, together with questions not otherwise relevant, the purpose of which is to test his powers of observation, the accuracy of his memory, and his correctness of statement.[7]

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[1] Winston *vs.* Cox, 38 Ala., 268; Winter *vs.* Burt, 31 Ala., 33; Chandler *vs.* Allison, 10 Mich., 460; Storm *vs.* U. S., 4 Otto, 76.

[2] Winter *vs.* Burt, 31 Ala., 33.

[3] Stevens *vs.* Beach, 12 Vt., 585; Cornelius *vs.* Com., 15 B. Mon. (Ky.), 539; U. S. *vs.* Dickinson, 2 McLean, 325.

[4] Bivens *vs.* Brown, 37 Ala., 422; Seavy *vs.* Dearborn, 19 N. H., 351.

[5] U. S. *vs.* White, 5 Cr. C. C., 73; U. S. *vs.* Hudland, 5 *ibid.*, 309.

[6] Phil. R. R. Co. *vs.* Stimpson, 14 Pet., 448; Brown *vs.* State, 28 Ga., 199; Patton *vs.* Hamilton, 12 Ind., 256. See, also, for power of court in control of this subject. Storm *vs.* U. S., 4 Otto, 76; Wills *vs.* Russell, 10 *ibid.*, 621; Chicago *vs.* Greer, 9 Wall., 726. See, also, Starkie on Evid., 10th Ed. pp. 195-224.

[7] U. S. *vs.* Dickinson, 2 McLean, 325; Bevins *vs.* Pope, 7 Ala., 371; Green *vs.* Gould, 3 Allen (Mass.), 465; Burton *vs.* Kane, 17 Wis., 37; U. S. *vs.* Angell, 4 Fed. Rep., 34. In commencing the examination of a witness, it is a *leading* of the witness, and objectionable, to read to him the charge and specification or specifications, since he is thus instructed as to the particulars in regard to which he is to testify and which he is expected to substantiate.* So to read or state to him in substance the charge, and ask him "what he knows about it," or in terms to that effect, is loose and objectionable as encouraging irrelevant and hearsay testimony. The witness should simply be asked to state what was said and done on the occasion, etc. A witness should properly also be examined on specific interrogatories, and not be called upon to make a general statement in answer to a single general question.† Dig. J. A. Gen., 394, par. 5.

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* Compare G. O. 12, Dept. of the Missouri, 1862; do. 36, *id.*, 1863; do. 29, Dept. of California, 1865; do. 67, Dept. of the South, 1874.

† See G. C. M. O. 14, 24, Dept. of Dakota, 1877.

PRIVILEGED QUESTIONS.

Nature of Privilege.—Witnesses are permitted to decline to answer certain questions, and in a proper case will be sustained by the court in so doing. Such questions are said to be *privileged*, and are made so as a matter of public policy, with a view to prevent inquisitorial trials, or to forbid the disclosure of facts the discovery of which would affect injuriously the public business, or trespass unduly upon certain private relations the continued existence of which it is the policy of the law to secure. The principal cases of privilege are:

1. *State Secrets.*—This privilege extends to all departments of the Government, and has its origin in the belief that the public interests would suffer by a disclosure of certain facts relating to the administration of state affairs. It covers the statements of persons engaged in the discovery of crime, the deliberations of courts and of certain bodies, like grand and petit juries and boards of arbitration, the results of whose deliberations only the public has a right to know. It extends to the transactions of legislative committees and to the deliberations of legislative bodies in closed session. It includes diplomatic correspondence and all communications between the principal officers of the several executive departments on matters of public business, together with the proceedings of commissions, courts-martial, and courts of inquiry, and generally all oral or written communications in which the production of documents or oral disclosures of any kind is restrained by law or would, in the opinion of the Executive, be detrimental to the public interests.[1]

2. *Attorney and Client.*—The disclosures made by a client to his counsel or legal adviser are privileged during the entire period within which the relation of attorney and client exists; and the privilege extends to the clerks, agents, stenographers, interpreters, and other employees whose services are necessary to an attorney or counselor in the transaction of his business.[2] Knowledge in relation to a cause of action, or to a criminal offense, obtained by an attorney as the result of his observations as a private

[1] Greenleaf, § 251; Wharton, § 578; 2 Robertson's Burr's Trial, 501; U. S. *vs.* Six Lots of Ground, 1 Woods, 234. Official communications between the heads of the departments of the Government and their subordinate officers are privileged. Were it otherwise it would be impossible for such superiors to administer effectually the public affairs with which they are entrusted. Dig. J. A. Gen., 398, par. 18.

An accused party at a military trial can rarely be entitled to demand the attendance, as a witness, of a chief of a staff corps, much less that of the President or Secretary of War, especially as some minor official can almost invariably furnish the desired facts. If, however, the testimony of one of these officials be found to be necessary or most desirable, and the same cannot legally be taken by deposition, the court, if convened at a distance, may properly be adjourned to Washington or other convenient point, in order that the witness may be enabled to attend without detriment to the public interests. *Ibid.*, 752, par. 11.

[2] People *vs.* Atkinson, 40 Cal., 284; Alderman *vs.* People, 4 Mich., 414; People *vs.* Blakely, 4 Parker, 176.

individual, and not due, in any degree, to his professional relation to his client, may be testified to in any case and at any time. The same is true of information gained before his employment as counsel began or after it has ceased to exist. At common law this privilege extends to attorneys and counsel only, as above explained, and any confidential communications made to physicians, clergymen, or others may be testified to unless specially privileged by statute.[1]

3. *Husband and Wife.*—The disability of the parties to a marriage contract, due to their identity of interest, has already been discussed. In addition to this, the law forbids either husband or wife to testify as to any confidential communications made during the continuance of the marriage relation, as opposed to public policy.[2]

4. *Criminating Questions—By Whom Determined.*—At the common law a witness was privileged to decline answering a question when the effect of such answer was to criminate him or expose him to a penalty or forfeiture. The privilege is that of the witness, not of the party in whose behalf he appears.[3] The term "criminate" is here used in a technical sense, and means that the effect of a particular answer will be to expose the witness to a criminal prosecution or to a penal action.[4] Nor can the witness be compelled to produce documents which would tend to incriminate him,[5] or be required to make what is called "profert of the person," that is, to expose any part of his body usually covered by his clothing, as to remove a shoe and fit his foot into an impression in clay, or to disclose a scar or the like for the purpose of identification.[6] The question as to whether a particular question shall be answered is one for the court to determine, in view of all the circumstances of the case; and if, upon such examination and consideration, it appears, that the answer will tend to criminate the witness—that is, if the answer, taken in connection with other facts, will be calculated to form a link in the chain of criminating circumstances—the court will instruct the witness to refuse to answer.[7] A similar rule prevails in equity procedure.

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[1] People *vs.* Stout, 3 Parker, 670; People *vs.* Gates, 13 Wendell, 311.

[2] Hopkins *vs.* Grimshaw, 165 U. S., 342; Graves *vs.* U. S., 150 U. S., 118; U. S. *vs.* Jones, 32 Fed. Rep., 569.

[3] Com. *vs.* Shaw, 4 Cushing, 594.

[4] If a witness consents to testify, so as to criminate himself as well as the defendant, he must answer all questions legally put to him concerning that matter. Com. *vs.* Price, 10 Gray, 472; People *vs.* Carroll, 3 Parker, 73; Com. *vs.* Lannan, 13 Allen, 563; Com. *vs.* Mullen, 97 Mass., 545; Com. *vs.* Bonner, *ibid.*, 587.

[5] Bynss *vs.* Sullivan, 21 How. (N. Y.), Pr., 50.

[6] Blackwell *vs.* State, 3 Crim. Law. Mag., 393; Doyns *vs.* State, 63 Ga., 699; Stokes *vs* State, 5 Baxter (Tenn.,) 619. But see State *vs.* Ah Chung, 14 Nev.

[7] Whether the answer may tend to criminate the witness is a point which the court will determine under all the circumstances of the case, and without requiring the witness to explain how he may be criminated by the answer. State *vs.* Staples, 47 N. H., 11; Commonwealth *vs.* Brainerd, Thach. Crim. Cases, 146; Ward *vs.* State, 2 Mo., 98; People *vs.* Mather, 4 Wend., 231; Richmond *vs.* State, 2 Greene. 532. See, also, State *vs.* Duffy, 15 Iowa, 425; Floyd *vs.* State, 7 Fed., 215. But see U. S. *vs.* Burr, 1 Burr's

5. *Questions Tending to Disgrace Witness.*—A witness is privileged to decline to answer a question which tends to disgrace him, unless the answer

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Trial, 245; U. S. *vs.* Miller, 2 Cranch C. C., 247; Warner *vs.* Lucas, 10 Ohio, 306; Poole *vs.* Perritt, 1 Spears (S. C.), 128.

It is not sufficient to excuse the witness from testifying that he may, in his own mind, think his answer to the question might, by possibility, lead to a criminal charge against him, or tend to convict him of it if made. The court must be able to perceive that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. U. S. *vs.* McCarty, 18 F. R., 87.

The privilege, recognized by the common law, of a witness to refuse to respond to a question the answer to which may criminate him is a personal one, which the witness may exercise or waive as he may see fit. It is not for the judge-advocate or accused to object to the question or to check the witness, or for the court to exclude the question or direct the witness not to answer. Where, however, he is ignorant of his right, the court may properly advise him of the same. But where a witness declines to answer a question on the ground that it is of such a character that the answer thereto may criminate him, but the court decides that the question is not one of this nature and that it must be answered, the witness cannot properly further refuse to respond, and if he does so will render himself liable to charges and trial under Article 62. Dig. Opin. J. A. Gen, 754, par. 17.

Where a witness has voluntarily answered as to material criminating facts, it is held with uniformity that he cannot then stop short and refuse further explanation, but must disclose fully what he has attempted to relate. This view is adopted by the text-writers, and is very well explained in several of the authorities, where the principle is laid down and enforced. 1 Starkie Evid. (10th Am. ed.) 214; Roscoe's Crim. Ev., 174; 1 Greenl., sec. 451; 2 Phil. Ev., 935; 2 Russ. Cr., 931; Coburn *vs.* Odell, 10 Foster, 540; State *vs.* K., 4 N. H., 562; State *vs.* Foster, 3 Foster, 348; Foster *vs.* Pierce, 11 Cush., 437; Brown *vs.* Brown, 5 Mass., 320; Amherst *vs.* Hollis, 9 N. H., 107; Low *vs.* Mitchell, 18 Me., 372; Chamberlain *vs.* Willson, 12 Vt., 491; People *vs.* Lohmann, 2 Barb. S. C., 216; Norfolk *vs.* Gaylord, 28 Conn., 309.

Upon a trial of a cadet of the Military Academy, the court (against the objection of the accused) required another cadet, introduced as a witness for the prosecution, to testify as to facts which would tend to criminate him. *Held* that such action was erroneous, the not answering in such cases being a privilege of the witness only, who (whether or not objection were made) could refuse to testify, and who, if ignorant of his rights, should be instructed therein by the court. Dig. Opin. J. A. Gen., 400, par. 27.

At the trial of a cadet of the Military Academy, the accused, while on the stand as a witness, was advised by the court that while it was his privilege to refuse to answer any question that might tend to criminate him, yet the court would "put its own interpretation" on the fact of his refusing. *Held* a grave error, which might well induce the disapproval of the finding and sentence adjudged. *Ibid.*, par. 28.

Section 860, Revised Statutes.—In the case of Tucker *vs.* United States (151 U. S., 164, 168), the Supreme Court of the United States has placed an interpretation upon certain clauses of Section 860, Revised Statutes. That section contains the requirement that "no pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: *provided* that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid." In its decision the court held that "pleadings of parties" are the allegations made by the parties to a civil or criminal case for the purpose of definitely presenting the issue to be tried and determined between them. "Discovery or evidence obtained from a witness by means of a judicial proceeding" includes only facts or papers which the party or witness is compelled by subpœna, interrogatory, or other judicial process to disclose, whether he will or no, and is inapplicable to testimony voluntarily given or to documents voluntarily produced. The clause as to discovery or evidence is conceived in the same spirit as the Fifth Amendment of the Constitution, declaring that "no person shall be compelled in any criminal case to be a witness against himself"; and [as] the Act of March 16, 1878, (20 Stat. at Large, 30,) enacted that a defendant in any criminal case may be a witness at his own request, but not otherwise, and that his failure to make such request shall not create any presumption against him. Tucker *vs.* U. S., 151 U. S., 164, 168; Boyd *vs.* U. S., 116 U. S., 616; Wilson *vs.* U. S., 149 U. S., 60; Lees *vs.*

would bear directly upon the issue;[1] and the court may, in its discretion, allow or disallow a question which tends, not to criminate, but only to degrade or disgrace the witness.[2]

CREDIBILITY OF WITNESSES.

Credibility in General.—The credibility of a witness is his worthiness of belief. In a civil trial it has been seen that the credibility of witnesses is determined by the jury; in the procedure of courts-martial such questions, like those relating to competency, are determined by the court. The presumption as to credibility, like that respecting competency, is always in favor of the credibility of the witness; in other words, the law presumes, and the court is bound to act on the presumption, that a witness testifying under oath speaks the truth;[3] but this presumption is not conclusive and may be overcome, wholly or in part, by the witness himself: first, by his demeanor on the stand, or by his behavior under cross-examination; second, by testimony directed against his credibility by the opposite party.

In determining the weight to be attached to the testimony of a particular witness, regard must be had to his capacity, whether he was able to see and understand the transaction, whether he was attentive or careless, prejudiced or impartial, or whether he has some sinister motive that might lead him to fabricate that which he did not see.[4] Where one witness testifies positively and another negatively, both being credible, greater weight is to be given to the former; so, too, the testimony of one witness who testifies positively to a fact is entitled to more consideration than that of several whose statements are merely negative.[5]

In determining the credibility of testimony, the manner of the witness in respect to coherency or consistency, his memory, whether accurate or

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U. S., 150 U. S., 476. No statute which (like Section 860, R. S.) leaves the party or witness subject to prosecution, after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution. Counselman *vs.* Hitchcock, 142 U. S., 547.

The immediate object of the legislation of February 25, 1868, from which section 860, R. S., is taken, was to protect against certain forfeitures agents of the Confederate States whose testimony in regard to assets of the Confederacy it was desired to obtain abroad. Congressional Globe, 40th Cong., 2d sess., part 2, p. 1334.

[1] Lohman *vs.* People, 1 Comst., 379; Howell *vs.* Com., 5 Gratt., 664. See, also, People *vs.* Rector, 19 Wend., 569; Clementine *vs.* State, 14 Mo., 112; Barnes *vs.* State, 19 Conn., 398. See, also, note 5, page 286, *ante*.

[2] State *vs.* Blansky, 3 Minn., 246. To excuse the witness from answering, it is not sufficient that his answer will have a tendency to expose him to infamy or disgrace; the question must be such that the answer to it which he may be required to make, by the obligation of his oath, will directly show his infamy. People *vs.* Mather, 4 Wend., 229.

[3] Comstock *vs.* Rayford, 20 Miss., 369.

[4] People *vs.* Bodine, 1 Edm. (N. Y.) Sel. Cas., 36.

[5] Pool *vs.* Devers, 30 Ala., 672; Harris *vs.* Bell, 27 Ala., 520; Auld *vs.* Walton, 12 La. Ann., 129; Todd *vs.* Hardie, 5 Ala., 698; Johnson *vs.* State, 14 Ga., 55; Coles *vs.* Perry, 7 Tex., 109.

defective, and his powers of observation should be carefully considered; so, too, his position with regard to the parties, his relationship to the accused, his hostility to, or friendship for, the accused or for the prosecutor, and his interest in a conviction or acquittal are all matters which may seriously affect the amount of weight to be attached to particular testimony. Where certain grounds of incompetency have been removed by statute, as where an accused person has been permitted to testify in his own behalf, it is usually provided that the cause of incompetency so removed may be established in evidence with a view to affect the credibility of a particular witness; and when such cause of incompetency has been established, either by the admissions of the witness or by the evidence of others, the weight to be attached to the testimony of such a witness is very materially diminished.

Conflicting Testimony.—If witnesses contradict each other, the court must determine the degree of credibility to be attached to their testimony. In case of conflict, the greater weight should be given to the testimony of those witnesses whose position gave them the best opportunity for observation.[1] If such conflict arises in the testimony of witnesses who are alike unimpeached and have equal opportunities for obtaining information, the testimony of the greater number must prevail;[2] so, too, where there is an irreconcilable conflict in the testimony of witnesses, and circumstances of suspicion attach to their credit, on both sides, the balance of evidence will be regarded as in favor of the party having the greater number.[3]

Impeaching Credit.—The *credibility* of a witness may be attacked, as has been seen, in cross-examination, or his testimony may be rebutted by the testimony of other witnesses. In addition, in a proper case, his reputation for truth and veracity may be impeached.[4]

Reputation and Character.—It has been seen that the terms "reputation" and "character" are not synonymous. The character of a person, using that term in the sense of disposition, is known to no one but himself; the outward manifestations of character, however, as evinced by the life he lives and the reputation he enjoys in the community at large, are facts, and as such are susceptible of being established by the testimony of witnesses. One element of reputation pertaining to every person in a particular community is that of veracity in their communications with others. It is to this reputation for veracity that testimony impeaching credibility is usually addressed.[5] When the reputation of a witness in this regard has been estab-

[1] Barrett *vs.* Williamson, 4 McLean, 589; Hitt *vs.* Rush, 22 Ala., 563; Durham *vs.* Holeman, 30 Ga., 619.

[2] Vaughan *vs.* Parr, 20 Ark., 600; Dowdell *vs.* Neal, 10 Ga., 148.

[3] The Napoleon, Olcott Adm., 208.

[4] Com. *vs.* Lincoln, 110 Mass., 410; Brown *vs.* State, 24 Ark., 620, State *vs.* Hamilton, 32 Iowa, 572; State *vs.* Foye, 53 Mo., 336; Stephens *vs.* People, 19 N. Y., 549; Hamilton *vs.* People, 29 Mich., 133; State *vs.* Howard, 9 N. H., 485; Com. *vs.* Billings, 97 Mass., 405; Keator *vs.* People, 32 Mich., 484; People *vs.* Tyler, 35 Cal., 563.

[5] Brown *vs.* U. S., 164 U. S., 221; Edgington *vs.* U. S., *ibid.*, 361.

lished in evidence it is permitted in some jurisdictions to ask the witness whether he would believe such a person on his oath. This calls for an expression of opinion, not of fact, and the rules as to its admissibility are not uniform. In England and in some of the States of the Union the inquiry is permitted; in others such conclusions of fact are left to the jury for determination in attaching weight to the testimony of a witness whose reputation for truth and veracity has been shown to be bad.

Inconsistent Statements.—Witnesses may be shown, by their own testimony or that of others, to have made statements out of court not consistent with, and in some cases opposed to, those made in their sworn testimony. Such statements must have been relevant to the case, however, and fully identified by the admissions of the witness or the testimony of others.

REFRESHING MEMORY.

When Permissible.—A witness while undergoing examination may refresh his memory from notes made by himself or another at the time of the transaction to which he testifies, if he can identify them as contemporaneous and can swear that they were made or read by him at the time when the events occurred.[1] Such notes may be examined by the opponent's counsel and may be made the subject of cross-examination.[2]

ADMISSION OF FACTS WITHOUT PROOF.

Admissions.—The existence of a fact may to a limited extent, and with the permission of the court, be admitted by either party, or by an agreement or stipulation between both parties; and when so admitted in evidence, no testimony in proof or disproof of such fact will be received.

NUMBER OF WITNESSES.

When Important.—As all matters affecting the credibility of witnesses are decided by the court, the question of attaching weight to particular testimony, which is an incident or consequence of their credibility, rests with and is determined by the court.[3] When the testimony is conflicting this task

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[1] Under this head would fall official papers made and signed by the witness at the date of the transaction as to which he is giving testimony.

[2] Hill *vs.* State, 17 Wis., 675; State *vs.* Bacon, 41 Vt, 526; Com. *vs.* Fox, 7 Gray, 585; State *vs.* Taylor, 3 Oreg., 10; State *vs.* Colwell, 3 R. I., 132.

Where a witness for the prosecution was permitted by a court-martial to temporarily suspend his testimony and leave the court-room for the purpose of refreshing his memory as to certain dates, *held* that such action was irregular and the further testimony of the witness as to such dates inadmissible. By the course pursued the court and accused were prevented from knowing by what means the memory of the witness had been refreshed—whether, for instance, it may not have been refreshed by oral statements of some person or persons. Dig. J. A. Gen., 399. par. 19.

[3] The weight of evidence does not depend upon the *number* of the witnesses. A single witness, whose statements, manner, and appearance on the stand are such as to

is frequently attended with difficulty, and is sometimes impossible of attainment, resulting in disagreement.[1] It may be laid down as a general rule, however, that the testimony of a single competent and credible witness is sufficient to establish a fact in evidence unless the Constitution, a statutory provision, or a rule of the common law requires otherwise. The Constitution of the United States provides that in case of treason the testimony of two witnesses to the same overt act, or a confession in open court, shall be necessary to a conviction, and it has been held that a confession out of court must also be substantiated by the testimony of two witnesses. In cases of perjury, also, the testimony of two witnesses is necessary to convict, as otherwise the oath of one man would be balanced against that of another. This rule has been relaxed in some jurisdictions, however, and the testimony of a single credible witness, supported by corroborating circumstances, is there held to be sufficient to establish guilt beyond a reasonable doubt.[2]

Cumulative Evidence.—Cumulative evidence is further or additional proof as to a point or fact which has already been established by the testimony of competent and credible witnesses. If it only serves to strengthen a fact already established, and not to support or introduce a new one, it is cumulative.[3] When, therefore, a fact has been conclusively established in evidence and there is no conflict of testimony in regard to its existence, it is obviously unnecessary to consume the time of the court by introducing new or additional testimony in its support, and such testimony if objected to will in general be rejected.

Written Testimony, When Necessary.—In some cases written testimony is required to establish particular facts, and cannot be replaced by oral testimony. In such a case the testimony is introduced in accordance with the rules regulating the admission of documentary evidence.

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commend him to credit and confidence, will sometimes properly outweigh several less acceptable and satisfactory witnesses.* But a court-martial cannot properly exclude from consideration the testimony of a witness because it is diffuse and inconclusive (peculiarities which may result from embarrassment or infelicity of expression), provided it be pertinent to the issue. Dig. J. A. Gen., 394, par. 3.

[1] It is an important part of the judgment of the court, in a case where the evidence is conflicting, to determine the measure of the credibility to be attached to the several witnesses. In its finding, therefore, the court may, in connection with the testimony, properly take into consideration the appearance and deportment of the witnesses on the stand and their manner of testifying, especially when under cross-examination. *Ibid.*, 412, par. 14.

[2] U. S. *vs.* Coons, 1 Bond, 1; State *vs.* Raymond, 20 Iowa, 502; Com. *vs.* Farley, 1 Thach. Crim. Cases, 654; State *vs.* Hayward, 1 Nott & McCord, 546.

[3] Aiken *vs.* Bemis, 3 Woodbury & Mason, 348. Starkie, 10th Am. Ed. 826.

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* Although the testimony of a single witness, whose credit is untainted, is sufficient to warrant a conviction, even in a criminal case, yet undoubtedly any additional and concurrent testimony adds greatly to the credibility of testimony, in all cases where it labors under doubt or suspicion; for then an opportunity is afforded of comparing the testimony of the witnesses on minute and collateral points, on which, if they were witnesses of truth, their testimony would agree, but if they were false witnesses, would be likely to differ. Starkie (10th Am. Ed.), 828.

DEPOSITIONS.

Depositions in Evidence.—In its provisions respecting civil and criminal trials the law assumes that evidence will be obtained, as a general rule, from the testimony of witnesses, given under the sanction of an oath in open court. This is especially true of criminal cases, in which the accused is guaranteed the right of being confronted with the witnesses against him and of exercising the privilege of cross-examination.[1] It is also essential to a just determination of the case that the court should have the privilege of hearing testimony from the lips of the witnesses, in order that it may judge of their credibility and attach proper weight to their evidence. In some instances, however, this is impossible, and the testimony of such material witnesses as are sick, or absent, or who reside out of the jurisdiction of the court, and who are thus not subject to its process, must, if taken at all, be procured in writing, under such conditions as are calculated to secure the best evidence attainable under all the circumstances of the case. This is accomplished by written instruments called *depositions*, which the law places at the disposal of litigant parties for this purpose. A deposition may therefore be defined as a written declaration under oath, made upon notice to the adverse party for the purpose of enabling him to attend and cross-examine, or to make use of written interrogatories for that purpose.

Distinguished from Affidavits.—From the definition above given, it will be seen that *depositions*, properly so called, are sharply distinguished from what are known to the law as *affidavits*, which are simply voluntary oaths attesting the correctness of certain facts contained in the written instrument to which an affidavit is attached. Affidavits are generally, if not always, *ex parte* in character and, in the procedure of courts-martial, serve to show "reasonable cause" upon which a court-martial may base its action upon a request for a continuance, under the 93d Article, or to verify service in the case of a subpœna, and establish the fact that the writ was personally served. Depositions, on the other hand, are instruments of evidence and, when prepared in strict accordance with the requirements of statutes, constitute means by which the guilt or innocence of an accused person may be determined. Affidavits are recognized, by statute and regulation, in what is known as *military administration*, in determining questions of money or property accountability, but, save for the purposes above set forth, are not admissible in the practice of courts-martial.[2]

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[1] See Constitution, Article VI of Amendments and Dig. J. A. Gen. 752, par. 10.

[2] The instruments referred to as "depositions" in Sections 224, 225, and 1304, Revised Statutes, and paragraphs 682 and 683, Army Regulations of 1895, are in fact affidavits, and not depositions in the proper sense of the term. The so-called depositions ("affidavits or depositions") referred to above are entirely distinct from the depositions provided for in Art. 91, being merely sworn *ex parte* statements used for the purpose of settling questions of "property accountability." The regulation has no application

Depositions in Court-martial Procedure.—The use of depositions in the practice of courts-martial is regulated by the 91st Article of War, which contains the requirement that "the depositions of witnesses residing beyond the limits of the State, Territory, or District in which any military court may be ordered to sit, if taken on reasonable notice to the opposite party and duly authenticated, may be read in evidence before such court in cases not capital."

The authority conferred by the 91st Article is coupled with several important statutory restrictions. Depositions cannot be received in capital cases, and in other cases only when the witness resides without the State, Territory, or District in which the court may be ordered to sit.[1] As the compulsory process authorized by Section 1202, Revised Statutes, does not run beyond the territorial limits therein set forth,[2] the authority conferred by the 91st Article must be construed in connection therewith, and, as a consequence, the testimony of witnesses residing beyond such territorial limits will ordinarily be taken by deposition; but this cannot be done when it is necessary that the witnesses should be confronted with the accused. In such cases their testimony can only be taken on their voluntary appearance in court. The testimony of military witnesses stationed or residing beoynd the State, Territory, or District in which the court sits will, also, ordinarily be taken by deposition.[3]

The Article, in specifying that the deposition, to be admissible in evidence, shall be "duly authenticated," makes it essential that the same shall be sworn to before, *i.e.*, taken under an oath administered by, an official competent to administer oaths for such purpose. As will presently be seen,

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whatever to depositions proper of the class authorized by this Article. Dig. J. A. Gen., 106, par. 10.

The provisions of Secs. 866–870, Rev. Sts., relate to depositions in the U. S. courts, and have no application to courts-martial, which are no part of the U. S. judiciary. *Held*, therefore, that there was no authority whatever for prescribing, as was done in G. O. 2. Dept. of Texas, 1888, that the laws of Texas in regard to the taking of depositions should govern depositions in military courts held within that State. *Ibid.*, 107, par 19.

[1] A deposition cannot be read in evidence in a capital case—as in a case of a violation of Art. 21, or a case of a spy, or one of desertion in time of war; otherwise in a case of desertion in time of peace. Nor is the deposition admissible of a witness who resides in the State, etc., within which the court is held, except by consent. Dig. J. A. Gen., 104, par. 1.

[2] See the article entitled *The Writ of Attachment, supra.*

[3] Manual for Courts-martial, 35, par. 1.

Where the evidence of high officers or public officials—as a department commander or chief of a bureau of the War Department—is required before a court-martial, the same, especially if the court is assembled at a distant point, should be taken by deposition, if authorized under this Article. Such officers should not be required to leave their public duties to attend as witnesses, except where their depositions will not be admissible, and where the case is one of special importance and their testimony is essential. The Secretary of War should not be required to attend as a witness, or to give his deposition, in a military case where the chief of a staff corps or other officer in whose bureau the evidence sought is matter of record, or who is personally acquainted with the facts desired to be proved, can attend or depose in his stead. Dig. J. A. Gen., 104, par 2.

a deposition should now be sworn to before one of the military officers specified in the Act of July 27, 1892,[1] or, if such an officer be not accessible, by a civil official competent to administer oaths in general.[2]

Procedure.—In a proper case the questions, or *interrogatories*, as they are called, are drawn up by the party who desires the testimony of the witness to be taken. Cross-interrogatories are framed by the opposite party, and both lists are submitted to the court by whom such questions are added as, in its judgment, are necessary to elucidate the whole of the witness's testimony. The interrogatories and cross-interrogatories are prepared under the direction of the court, which decides all points that arise as to the relevancy or materiality of the questions submitted.

The interrogatories having been accepted by the court, the judge-advocate prepares duplicate subpœnas requiring the witness to appear in person at a time and place to be fixed by the officer, military or civil, who is to take the deposition.[3]

The judge-advocate will then send the interrogatories and subpœnas to the convening authority, with a request that the deposition be secured.[4] This to secure authority for the necessary expenditure involved in the undertaking, and to obtain the detail of a military officer or the designation of a civil officer to take the deposition.

Judge-advocates of departments and of courts-martial, and the trial officers of summary courts, are authorized to administer oaths and take depositions.[5] If none of these officers are available for this purpose, an army officer may be designated to see that the deposition is properly taken; but the oath in such a case must be administered and the deposition authenticated by a civil officer empowered by law to administer oaths for general purposes.[6]

The officer so designated will, before serving the subpœna, complete it if necessary by inserting the name and official designation of the notary (or other official having authority to administer the oaths) before whom it is to be taken, and the date on which, and the place where, it is proposed to take it. When the deposition has been duly taken, he will certify to this fact and transmit it to the president of the court.[6]

[1] Section 4, Act of July 27, 1892 (27 Stat. at Large, 278); G. O. 57, A. G. O., 1892. A court-martial has of course no power to qualify or authorize a commanding officer, or any other officer or person, to take a deposition or administer an oath. Dig. J. A. Gen., 106, par. 11.

[2] Dig. J. A. Gen., 105, par. 9. An official empowered to administer oaths only for a certain special purpose or purposes cannot legally qualify a witness whose deposition is sought to be taken under this Article. A deposition, introduced by either party, which is not "duly authenticated" should not be admitted in evidence by the court, although the other party may not object. A deposition *held* irregular and inadmissible where it failed to show that the officer by whom it was taken was authorized to take it, or that he was qualified to administer the oath to the witness. *Ibid.*, 105, par. 8.

[3] If the name of this officer is not known, the space for it will be left blank. Manual for Courts-martial, 36, par. 2.

[4] Section 4, Act of July 27, 1892, (27 Stat. at Large, 270); Dig. J. A. Gen., 106, par. 15; Manual, etc., 36, par. 3.

[5] Manual, etc., 36, par. 3.

[6] *Ibid.* 36, par. 3, note.

On reasonable notice to the opposite party, depositions may also be taken before the assembling of the court-martial, by means of interrogatories and cross-interrogatories, subject to exceptions when read in court.[1]

In *capital* cases, however (*i.e.*, those in which the offense is punishable by death), or in cases where the judge-advocate can certify "that the interests of justice demand that the witness shall testify in the presence of the court," the witnesses will be formally summoned by the judge-advocate in accordance with the method already described.[2]

Evidential Value.—The statutory conditions set forth in the Article having been fully complied with in any case within its terms, entitles either party to have depositions so taken read in evidence.[3] Objections to the competency of a deponent should be raised prior to the reading of his deposition, and in accordance with the rules, already explained, for determining the competency of witnesses. Should the deponent be found to be incompetent for any cause, his deposition is rejected. The credibility of the deponent is determined, as in the case of other witnesses, by the court itself.

The party at whose instance a deposition has been taken cannot be admitted, against the objection of the opposite party, to introduce only such parts of the deposition as are favorable to him, or such parts as he may elect to use; he must offer the deposition in evidence as a whole or not offer it at all.[4] If the party at whose instance a deposition has been taken decides not to put it in, it may be read in evidence by the other party. One party cannot withhold a deposition against the consent of the other.[5]

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[1] Manual for Courts-martial, 36, par. 2.

Upon the receipt of the deposition, the judge-advocate will also prepare and sign the ordinary "accounts for a civilian witness," substituting for the usual statement in regard to attendance before the court a statement that he duly attended as a witness at a certain time and place and duly gave his deposition before a certain official named, and then transmit them to the witness with duplicate copies of the order convening the court. The *period of attendance* can be ascertained from the deposition. *Ibid.*, 36, par. 5 See, also, Dig. J. A. Gen., 106, par. 16.

[2] *Ibid.*, 37, par. 6. Regular subpœnas will be made out by the judge-advocate, certified to as above, if necessary, and transmitted to the department commander, with a request that they be duly forwarded to the witness, if an officer, or to the nearest post commander for service, if the witness is an enlisted man or a civilian.

[3] Dig. J. A. Gen., 105, par. 7. A deposition duly taken, under the Article, on the part of the prosecution, is not subject to objection by the accused, and cannot be rejected by the court merely upon the ground that it is declared in the VIth Amendment to the Constitution that "in all criminal prosecutions the accused, shall enjoy the right . . . to be confronted with the witnesses against him." This constitutional provision has no application to courts-martial: the "criminal prosecutions" referred to are prosecutions in the U. S. civil courts. *Ibid.*, 107, par. 18.

[4] Dig. J. A. Gen., 104, par. 3.

[5] *Ibid.*, 105, par. 4. Where a deposition, introduced by the prosecution, though legal, was incomplete, but the defect was waived by the accused, *held* that the prosecution was estopped from afterwards questioning it as competent evidence. *Ibid.*, 106, par. 14.

Where the judge-advocate offered in evidence on the part of the prosecution a deposition which proved to have been given by a person other than the one to whom

The depositions of civilian witnesses, while their taking generally involves less expense than would the personal attendance of the parties, are usually quite sufficient as testimony, except when the purpose of the evidence is to personally identify the accused before the court.[1]

Depositions in Foreign Countries.—The operation of the 91st Article, not being restricted by its terms to the territory of the United States, "the deposition of a witness residing in a foreign country, taken before a qualified person—an American consul, for example,—would be admissible in evidence under this Article equally with the deposition of a resident of the United States."[2]

PRESUMPTIONS.

Nature and Character.—What are known as presumptions play an important part in the law of evidence, the nature of which will now be explained. Presumptions are either legal assumptions, or logical inferences from the existence of certain facts, as to the existence or non-existence of facts in issue. If logical inferences, they are *presumptions of fact;* if legal assumptions, they are *presumptions of law.*[3]

Presumptions of Fact.—Presumptions of fact are mere logical inferences, or conclusions, as to the existence of a particular fact, drawn from the existence or non-existence of other facts. The facts upon which such a presumption are based, in a particular case, must be derived from the evidence submitted; and to justify a court-martial in reaching a conclusion in respect to the guilt of an accused person, the facts from which it is inferred must not only be consistent with the theory of guilt, but must be irreconcilable with any reasonable theory as to his innocence.

Presumptions of Law.—Presumptions of law are assumptions of the truth of certain facts without proof of their existence, made with a view to facilitate the administration of justice, and to dispense with the introduction of testimony in their support, or to make it for the time being unnecessary. A presumption of law, therefore, assumes a certain fact or set of facts to exist as a probable consequence of the existence of other facts, either absolutely, as will presently be explained, or until the contrary has been proved to exist. The assumption that public officers perform their duties in good

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the interrogatories were addressed, and the accused objected to its introduction, but the objection was overruled by the court, *held* error; the fact that the intended deponent was but the agent, in the transaction inquired about, of the person who actually furnished the deposition not being sufficient to make such deposition admissible except by consent of parties. Dig. J. A. Gen., 105, par. 6.

[1] Dig. J. A. Gen., 106, par. 13. A deposition is not in general satisfactory evidence for purposes of personal identification by description, and should not be resorted to for the identification of an accused where reliable oral testimony can be obtained. *Ibid.*, par. 12.

[2] *Ibid.*, 105, par. 5.

[3] Am. and Eng. Encyc. of Law, article *Presumptions.*

faith, that infants are incapable of making contracts, and the like, are examples of such presumptions.

Presumptions of law are again classified into conclusive or absolute presumptions and disputable presumptions.[1] A *conclusive, absolute,* or *indisputable presumption* is one which assumes a fact or condition of fact to exist, and forbids all proof to the contrary. Such are the presumptions that a crime committed by the wife in the presence of the husband is committed by his direction or coercion, that a child under seven cannot commit crime, or that a boy under fourteen or a girl under twelve is incapable of matrimonial consent.

A *disputable presumption* consists in the assumption of the truth of a fact until the contrary is proven. Such are the presumptions that an accused person is innocent until proven guilty, that an assault with a deadly weapon presumes an intent to kill, or that persons are sane, living, or competent to testify until the opposite has been established in evidence. To this class belong most of the presumptions which are recognized in the practice of courts-martial.

Effects.—Presumptions of law are arbitrary in their nature and assume certain rules of conduct to have been observed in the past. Some of them take the form of legal enactments—as in the case of statutes of limitation—others are customary or are derived from the common law. Presumptions of fact become operative only when the facts upon which they are based have been conclusively established in evidence and the inferences from them are so strong as to remove all doubt and uncertainty from the minds of those whose duty it is to draw them.

Presumptions of law are, as a rule, continuous and favor an existing status, and the burden of showing the opposite to be true rests upon him who asserts it. Hence a person is presumed to be living until seven years have elapsed since he was last heard from; he is then presumed to be dead until the contrary has been shown. A person having a legal residence or domicile is presumed to continue in such residence, and a similar rule applies to sanity, competency, and marriage. Presumptions also favor order, regularity, and good faith. The power of persons to contract, the legitimacy of children, the proper and regular execution of instruments, the validity of public acts, the constitutionality of laws, the correct performance of administrative duties, and the like, are examples of this class of presumptions. So, also, the possession of real or personal property presumes ownership, the acceptance of services presumes an agreement to pay for them, the mailing of letters, where a delivery exists, affords a presumption of delivery, while the fact of registration affords a very strong presumption of such delivery.

[1] II. Wharton Evidence, §§ 1226–1365; Wharton Crim. Law, § 707; I. Greenleaf, §§ 14–48; Stephens Dig. Evid. Art. 1; 1 Best, §§ 303–334.

CHAPTER XVI.

MARTIAL LAW.

MILITARY GOVERNMENT. MILITARY COMMISSIONS.

Martial Law or, to speak more correctly, Martial Rule, is a term applied to the temporary government, by military authority, of a place or district in which, by reason of the existence of a state of war and the pendency of military operations, the civil government is, for the time being, unable to exercise its functions.[1] Such inability may be due to the occupation of a portion of the territory of a State by the enemy, or to the existence of an insurrection or rebellion of such magnitude as to suspend, for the time, the operation and execution of the laws. Martial law may be regarded from several points of view:

1. In its Application to the Occupied Territory of an Enemy in War.—In this case it is more appropriately called *the law of hostile occupation*, and its exercise is authorized by the usage of nations, being regulated by what are known as the Laws of War, a branch or subdivision of Public International Law.

When Applicable.—It applies to territory over which the Constitution and laws of the United States have no operation, and in which the guaranties which are contained in that instrument are entirely ineffective. Its exercise is sanctioned because the local authority is unable to maintain order and protect life and property in the immediate theatre of military operations and, to some extent, because the invading belligerent may, as a war measure, suspend, wholly or in part, the municipal law of the enemy in such territory.[2]

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[1] The terms Martial Law and Military Law are by no means synonymous. Military law "is the code of rules for the government of the Army and Navy; it is a department of the municipal law applicable to a small portion of the people engaged in a special service; it is enacted by Congress and executed by the President; civilians are, by the very terms of the Constitution, exempted from its operation."* Martial law, in its extreme form, is described by a recent writer as "the suspension of all law but the will of the military commanders entrusted with its execution, to be exercised according to their judgment, the exigencies of the moment, and the usages of the service, with no fixed and settled rules or laws, no definite practice, and not bound even by the rules of the military law."*

[2] Dig. J. A. Gen., 471, par. 11. The law of hostile occupation (military government) "is military power exercised by a belligerent, by virtue of his occupation of an

* Finlason on Martial Law, 107.

Mere hostile occupation, however, does not operate *ipso facto* to suspend the laws in force in the occupied territory. It is a principle of the law of war that the municipal laws of a conquered country continue in force during the military occupation by the conqueror, except in so far as the same may necessarily be suspended, or their operation be affected by his acts.[1] Such conqueror or belligerent occupant "may suspend or supersede them, for the time being, but, in the absence of orders to that effect, they remain in force."[2]

"Supreme military authority in a city" or other place "is not incompatible with the existence and authority of courts of civil jurisdiction and procedure."[3] But where the courts of a hostile country are left open by the conqueror, it is only the citizens of such country that are subject to their jurisdiction: the officers and soldiers of the occupying army are in no manner amenable to the same.[4]

2. Application to Territory of the United States in Insurrection or Rebellion.—When an insurrection has attained such strength and volume that the public armed forces are called upon to suppress it, and a state of public war exists, which is recognized as such by the several departments of the Government, participants in such insurrection or rebellion become, for the time, public enemies, and the territory constituting the theatre of operations becomes the territory of the enemy. Such was the case in respect to several States of the Union during the War of the Rebellion. The military operations undertaken with a view to its suppression were carried on in accordance with the usages of war. Citizens of or residents in such territory were regarded by the courts of the United States as alien enemies, and "all

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enemy's territory, over such territory and its inhabitants.* This belongs to the Law of War, and therefore to the Law of Nations." Man. for Courts-martial, 3.

"By the well-recognized principles of international law, the mere military occupation of a country by a belligerent power or a conqueror does not *ipso facto* displace the municipal laws. Such conqueror or belligerent occupier may suspend or supersede them for the time being, but, in the absence of orders to that effect, they remain in force." Wingfield *vs.* Crosby, 5 Cold., 246. So where a testator had executed, in Vicksburg, Mississippi, after its capture and during its occupation by our forces, a will devising real estate, but such will, in not being attested by the required number of witnesses, was invalid under the State law, *held* that, as this law was in no respect modified upon the capture, the devisee under the will, however loyal, could not properly be invested by military authority with the legal title to such estate against the heirs at law. Dig. J. A. Gen., 471, par. 11.

[2] Wingfield *vs.* Crosby, 5 Cold., 246.

[3] Pepin *vs.* Lachenmeyer, 45 N. Y., 27. And see Kimball *vs.* Taylor, 2 Woods, 37; Rutledge *vs.* Fogg, 3 Cold., 554; Hefferman *vs.* Porter, 6 *id.*, 391; Murrell *vs.* Jones, 40 Miss., 566; Dow *vs.* Johnson, *post.*

[4] This principle has recently been illustrated by the Supreme Court in the cases of Coleman *vs.* Tennessee, 7 Otto, 509; Dow *vs.* Johnson, 10 Otto, 158, 166.

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* Military government "is the authority by which a commander governs a conquered district when the local institutions have been overthrown and the local rulers displaced," as a consequence of military operations, "and before Congress has had an opportunity to act under its power to dispose of captures or to govern territories. The authority, in fact, belongs to the President; and it assumes the war to be still raging, and the final status of the conquered territory to be undetermined, so that the apparent exercise of civil functions is really a measure of hostility." Pomeroy, Constitutional Law, 3d ed., 477.

trade and intercourse with the enemy, except so far as permitted by the President under authority from Congress, or in rare cases by a commanding general in the field representing the President, was necessarily suspended." [1]

[1] Dig. J. A. Gen, 468, par. 1. See Prize Cases, 2 Black, 666–9; Dow *vs.* Johnson, 10 Otto, 164; Brown *vs.* Hiatt, 1 Dillon, 372; Phillips *vs.* Hatch, *id.*, 571; Sanderson *vs.* Morgan, 39 N. Y., 231; Perkins *vs.* Rogers, 35 Ind., 124; Leathers *vs.* Com. Ins. Co., 2 Bush, 639; Hedges *vs.* Price, 2 West Va., 192; The Ouachita Cotton, 6 Wallace, 521; Cappell *vs.* Hill, 7 *id.*, 542, 554; McKee *vs.* United States, 8 *id.*, 163; United States *vs.* Grossmayer, 9 *id.*, 72; Montgomery *vs.* United States, 15 *id.*, 395; Hamilton *vs.* Dillin, 21 *id.*, 73; Mitchell *vs.* United States, *id.*, 350; Matthews *vs.* McStea, 1 Otto, 7; Dow *vs.* Johnson, 10 *id.*, 164; Kershaw *vs.* Kelsey, 100 Mass., 561; Lieber's Instructions, G. O. 100, War Dept., 163, par. 86. Besides the suspension incident to the state of war, a suspension of commercial intercourse with the enemy was specially directed by Act of Congress of July 13, 1861, and proclaimed by the President on August 16, 1861. By authority conferred by the same statute, General Regulations concerning commercial intercourse with and in the States declared in insurrection were approved by the President, January 26, 1864, and published in G. O. 53, Dept. of the Gulf, of April 29, 1864.

Non-intercourse.—It is a fundamental principle of the law of war that, during a state of war, all commercial intercourse between the belligerents is interdicted and made illegal except when and where it may be expressly authorized by the Government. See note 1, *supra;* Dig. J. A. Gen., 468, par. 1.

Offenses against the law of non-intercourse between the belligerents in time of war are no less such when committed by foreigners than when committed by citizens. Thus where certain persons made their way early in the late war from Scotland to South Carolina, engaged for a considerable period in the manufacture of treasury notes for the Confederate authorities, and at the end of their employment came secretly and without authority into our lines with the design of returning to their home, *held* that, though British subjects, they had identified themselves with the cause of the enemy, and were properly amenable to trial for the offense of penetrating our military lines in violation of the laws of war. *Ibid.*, 469, par. 4. See, also, pars. 5 and 6, *ibid.*

Correspondence with the Enemy.—*Held* (January, 1865) that a system of correspondence which had been concerted and maintained between northern and southern newspapers by means of an interchange of published communications entitled "Personals" was an evasion of the rule interdicting intercourse with the enemy in time of war, and, not being within the regulations established for correspondence by letter between the lines by flag of truce, should not, however innocent might be many or most of the communications, be sanctioned by the Government, but that the proprietors of the northern newspapers concerned should be notified that unless the practice were discontinued they would be liable to be proceeded against for promoting correspondence with the enemy in violation of the laws of war or of the special Act of February 25, 1863.* *Ibid.*, 470, par. 8.

There can be no doubt as to the authority of the commander of an army in occupation and government of the enemy's country to suppress a newspaper or other publication deemed by him to be injurious to the public interests in exciting opposition to the dominant authority or encouraging the support of the enemy's cause on the part of the inhabitants. A newspaper may be a powerful agent for such a purpose, and when it is so it may, under the laws of war, as legally be silenced as may a fort or battery of the enemy in the field. *Ibid.*, 469, par. 7. See, also, the 46th Article of War.

Contributions, etc.—The taking possession, by the order of the commander of the military department at New Orleans, for the use of the military service in the prosecution of the war, of moneys belonging to enemies on deposit in the banks of that city, while occupied (in 1863) by our Army, *held* an act justified by the strict law of war.† *Ibid.*, 470, par. 9.

Contributions of money exacted from the enemy by competent military authority

* See G. O. No. 10, Department of the East, 1865.

† See New Orleans *vs.* Steamboat Company, 20 Wallace, 394; Witherspoon *vs.* Farmers' Bk., 2 Duvall, 497. But in Planters' Bank *vs.* Union Bk., 16 Wallace, 483, this particular order was held to have been an exceeding of authority, not because unauthorized by the law of war, but for the reason that a previous commander, General Butler, by his proclamation, on first occupying the city, of May 1, 1862, had pledged the Government to the holding inviolate of all rights of property. And see The Venice, 2 Wallace, 258.

3. Application of Martial Law to Domestic Territory in Case of Civil Disorder, or of Resistance to the Execution of the Laws.—This subject may also be regarded from the point of view of its application, in a modified form, to a portion of the territory of the United States in which, by reason of civil disturbance or resistance to the execution of the laws, the proper civil authorities are unable to preserve the peace or to afford adequate pro-

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being justified by the law of war and conquest.* *held* that a tax of five dollars per bale, levied (in 1864) by the military commander at New Orleans, General Canby, upon cotton brought into that city and applied to hospital, sanitary, and charitable purposes, was authorized under the discretionary power with which such a commander was properly invested in time of war.† Dig. J. A. Gen., 470, par. 10.

Military Courts.—It is authorized by the laws of war for a military officer commanding in time of war in a region in military occupation, and where the ordinary courts are closed by the exigencies of the war, to appoint a special court or judge for the determination of cases not properly cognizable by the ordinary military tribunals. In the late war such courts were not unfrequently constituted, and were commonly designated *provost courts.* Such courts had no jurisdiction of purely military offenses (*i.e.*, offenses which the Articles of War make cognizable by court-martial), and were therefore not properly authorized to impose forfeitures of pay or other strictly military punishments upon officers or soldiers of the Army. These courts were in general resorted to as substitutes for the ordinary police courts of cities, and their jurisdiction was in general confined to cases of breaches of the peace and of violation of such civil ordinances or military regulations as might be in force for the government of the locality. Some of these courts, however, took cognizance, in the course of their existence, of cases of very considerable importance, civil as well as criminal.‡ *Ibid.*, 471, par. 12.

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* Lewis *vs.* McGuire, 3 Bush, 202; Clark *vs.* Dick, 1 Dillon, 8. And see Maj.-Gen. Scott's order (G. O. 395, Hdqrs. of Army, 1847) levying assessments upon Mexican communities for the support of the military government and occupation.

† See Hamilton *vs.* Dillon, 21 Wallace, 73.

‡ See the following General Orders establishing or relating to provost courts and similar tribunals: G. O. 41, Dept. of Virginia, 1863; do. 45, Dept. of the Gulf, 1863; do. 6, 77, *id.*, 1864; do. 103, 146, Dept. of Washington, 1865; do. 39, *id.*, 1866; do. 102, Dept. of the South, 1865; do. 30, 38, 49, 68, Dept. of S. Carolina, 1865; do. 37, *id.*, 1866; do. 31, Dept. of the Mississippi, 1865; do. 12, Dept. of Arkansas, 1865; do. 5, Mil. Div. of the James, 1865; do. 31, First Mil. Dist., 1867; Circ., Second *id.*, May 15, 1867; G. O. 29, 61, *id.*, 1868; do. 4, Fifth *id.*, 1869; also Gen. Wool's G. O. 516 of 1847.

While the majority of these special tribunals were confined to the exercise of such functions as are commonly devolved upon police or justices' courts, their authority, when empowered for the purpose by a competent military commander, to take cognizance of important civil actions has been affirmed by the Supreme Court of the United States in the case of the Mechs.' and Traders' Bk. *vs.* Union Bk., 22 Wallace, 276, in which a "provost court," established at New Orleans by an order of the department commander, of May 1, 1862, was held to be a lawful tribunal, and a judgment rendered by it in an action for the recovery of $130,000, money borrowed by one bank from another, was recognized as legal. (See this case also in 25 La. An., 387.)

So, the authority of the "Provisional Court of Louisiana" (which succeeded the "provost court" last indicated, and was established by the President in an executive order of Oct. 20, 1862) to determine a cause in admiralty was affirmed by the United States Supreme Court in The Grapeshot, 9 Wallace, 129, and later its jurisdiction in a civil action on a mortgage debt was recognized by that tribunal in Burke *vs.* Miltenberger, 19 Wallace, 519. (And see the same case, as Burke *vs.* Tregree, in 22 La. An., 629.) The authority of the same court to take cognizance of a case of murder and one of arson (as also of civil controversies) was maintained in an elaborate opinion of its judge, Hon. C. A. Peabody (in 1865), in the cases of the United States *vs.* Reiter & Louis, reported in 13 Am. Law Reg., 534.

The civil jurisdiction of a similar *war* court—the "commission" established by the department commander in Memphis in 1863—was similarly recognized in Hefferman *vs.* Porter, 6 Cold., 391. And as to the full authority of this tribunal as a substitute for the ordinary civil courts of the locality, see, also, State *vs.* Stillman, 7 Cold., 341. But see, *contra*, Walsh *vs.* Porter, 12 Heisk., 401.

In the cases thus sustaining the action of special tribunals during the late war, the courts in general refer to the earlier and leading case of Leitensdorfer *vs.* Webb, 20 Howard, 176, in which was affirmed the authority of the courts established in 1846 in New Mexico as a part of the system of civil government instituted by Gen. Kearney, the military commandant. (With this case consult also United States *vs.* Rice, 4 Wheaton, 254; Cross *vs.* Harrison, 16 Howard, 164.)

The reasoning upon which the above-cited later rulings is based is, that the authority to create courts with a civil as well as a criminal jurisdiction in a conquered country in military occupation attaches to the dominant power by the law of war and of nations, as an incident to the power to establish a military government; that it is not only the right but the duty of the conqueror to institute such courts "for the security of persons and property and for the administration of justice"; and that when during the late war such courts were created by commanding generals—such as the commanders of separate departments or armies—the order of the commander was to be presumed to be the order and act of the President.

For the criminal jurisdiction exercised in enemy's territory by military commissions, see the article so entitled, *post.*

tection to life and property. This is martial law in the proper sense of the term, and to understand its character and operation from this point of view it is necessary to regard the question from the standpoint of the Constitution.

How Different from Military Law.—Military law, as has been seen, is in general statutory in character, and regulates the conduct of military persons at all times and in all places, without as well as within the territorial jurisdiction of the United States. Martial law, on the other hand, is not statutory in character, and arises in every case out of strict military necessity.[1]

Declaration or Recognition; Source of Authority.—It is not created by law, for, as will presently be seen, Congress is without power to make or enforce such an enactment; for a similar reason—the want of constitutional authority—it cannot be called into being by an exercise of legal discretion on the part of the judiciary or Executive; its existence, however, *as a matter of fact*, may and in a proper case *must* be recognized, or declared by the Executive, as a question of overruling necessity,[2] but its existence is recognized by the several departments of the Government solely as a matter of

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[1] Martial law is a modified degree of the law of war, or a law assimilated to the latter, called into exercise temporarily and for a specific purpose, at a time of war or public emergency, and generally in a place or region not constituting enemy's country, or under permanent military government.* Whether proclaimed by the President or declared by a competent military commander, martial law overrides and supersedes, for the time being all civil law and authority, except in so far as the same may be left operative by the terms of the announcement,† or the action or acquiescence of the dominant power. While the status of martial law continues, the military power, instead of being subordinate, is superior to the civil power, and the natural and normal condition of things is thus reversed. But while martial law will warrant a resort by the commander, at his will, to summary and arbitrary measures, by which the liberty of the citizen may be restrained, his action coerced, and his rights suspended, it cannot be availed of by subordinates to justify acts of unnecessary violence, personal persecution, or wanton wrong.‡ Dig. J. A. Gen., 488, par. 1.

[2] It follows that there are occasions when martial rule can properly be applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority thus overthrown, to preserve the safety of the Army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for if this government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open and in the proper and unobstructed exercise of their jurisdiction. *Ex parte* Milligan, 4 Wall., 2. This is the status of martial law at home (or as a domestic fact); by which is meant, military power exercised in time of war, insurrection, or rebellion in parts of the country retaining their allegiance, and over persons and things not ordinarily subject to it. Manual for Courts-martial, 8.

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* Note the distinction between *military government* proper and *martial law* as illustrated in Milligan's Case, 4 Wallace, 142.

† Luther *vs.* Borden, 7 Howard, 13, 14; United States *vs.* Diekelman, 2 Otto, 526; *In re* Egan, 5 Blatch., 319, 321; Griffin *vs.* Wilcox, 21 Ind., 376; Johnson *vs.* Jones, 44 Ills., 153; *In re* Kemp; 16 Wisc., 359; Clode (Military and Martial Law), 183–191; Hough (Precedents), 514, 549; G. O. 100, War Dept., 1863, sec. 1.

‡ "But the existence of martial law does not authorize general military license, or place the lives, liberty, or property of the citizens of the States under the unlimited control of every holder of a military commission" Despan *vs.* Olney, 1 Curtis, 308. And see Luther *vs.* Borden, 7 Howard, 14; G. O. 100, War Department, 1863, Sec. I, § 4.

necessity, and not as a status which, under any authority conferred by the Constitution, it is within their power to create or terminate.

The Government, under the Constitution, being one of limited and defined powers, it follows that there can be no exercise of authority, by any department of the Government so created, unless such authority is conferred by the Constitution, either expressly or by necessary implication. The power to establish martial law, if it exists in any department of the Federal Government, is one of the highest importance, since it involves, not the power to make and execute laws, but the right to suspend the operation of all law, and to replace it for a limited time by a form of government entirely arbitrary in character and not resting upon the will of the people or subject to the control of the constituted authorities. If it had been intended by the framers of the Constitution to confer such a power upon any department of the Federal Government, it would have been vested by that instrument, in unmistakable terms, in some one of the recognized departments of government and, from its nature, would have been accompanied by strict and definite limitations. A careful examination of the Constitution makes it clear that no such power was conferred, or intended to be conferred, upon any department of the Government, either directly or by necessary implication.

When in Existence; By Whom Recognized.—It has been seen that martial law comes into being, *as a question of imperative necessity*, and as such may be recognized by the Executive only when the proper civil authorities are, for some controlling reason, unable to enforce the laws or to preserve the peace by a resort to the ordinary agencies provided for that purpose. Its exercise can only be justified by the emergency of an existing situation, when life and property can only be protected by an exercise of military power or by the use of military force.[1] It disappears, with the emergency which brought it into being, when such forcible resistance to the execution of the laws has been overcome, or has ceased, and the civil authority has been enabled to resume the exercise of its appropriate functions.[2]

How Declared, or Recognized to Exist.—It has been seen that the status of martial law is the result, not of legislation or of executive or judicial action, but of *emergency* or *necessity*. While, therefore, the President may

[1] See note 2, page 304, *ante*.

[2] The occasion for the exercise of martial law properly ceases when the emergency has passed which made it necessary or expedient.* So—the commander of the Middle Military Department having, in view of the presence in the department of an army of the enemy, proclaimed, by order of June 30, 1863, a state of martial law in Baltimore city and county and the counties of the western shore of Maryland, with the assurance expressed that such status should not extend beyond the necessities of the occasion—*held* (June, 1865,) that, as the exigency had long ceased to exist, the order, though never in terms revoked, should properly be considered as no longer operative. Dig. J. A. Gen., 489, par. 4.

* *In re* Egan, 5 Blatch., 319, 322; In the Matter of Martin, 45 Barb., 145; Hough (Precedents), 535.

not create the *status*, he may, in the event of a sufficient emergency, recognize its existence by proclamation or other executive act, and announce his purpose of making use of such measures, involving the use of military force, as may be necessary to bring about the restoration of civil order and the lawful supremacy of the civil authority. Such a proclamation may be issued by the President or by the proper military commander. It should describe the emergency and define the limits, territorial or otherwise, within which it exists; and should prescribe such rules of conduct for the guidance of individuals as are warranted by the strict necessities of the case. It is customary, in such proclamations, to call upon all law-abiding citizens to assist in the restoration of order by strict observance of the laws, by continuing in the quiet pursuit of their usual avocations, and by refraining from participation in assemblages which are or are likely to become tumultuous or otherwise unlawful. Insurgents and other disaffected or evilly-disposed persons are warned of the illegality of their conduct, and of the consequences which will ensue upon a continuance of the same.

Extent of its Application.—As the emergency may be in the nature of an insurrection, that is, in resistance to the execution of *all law*, or in resistance to the execution of a single law, the employment of force must be in direct proportion to the emergency.[1] It may thus consist in the furnishing of support to the civil authority in the execution of a single enactment,—the neutrality laws, or the laws regulating interstate commerce, for example,—or it may become necessary to establish military government in a disturbed district. The kind and amount of force used in any case must be in direct proportion to the resistance to be overcome, and can be applied only during the continuance of such resistance to the execution of the laws.[2]

By Whom Exercised.—Martial law is executed by the general commanding the military forces in occupation of a disturbed district; it is exercised, under the direction of the President, the constitutional commander-in-chief, in conformity with the usages of war or the necessities of the case, as determined by the extent and character of an existing emergency. Where a city or district has been put under martial law by the commanding general, he becomes its supreme governor, and, in governing, is ordinarily to be presumed to be empowered to exercise the same authority which the President might have exercised had *he* proclaimed martial law therein.

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[1] See, in this connection, General Orders, No. 100, A. G. O., of 1863, and the chapter entitled THE EMPLOYMENT OF MILITARY FORCE.

[2] In all cases of civil disorders or domestic violence it is the duty of the Army to preserve an attitude of indifference and inaction till ordered to act by the President, by the authority of the Constitution or of Sec. 2150, 5297, or 5298, Rev. Sts., or other public statute. An officer or soldier may indeed interfere to arrest a person in the act of committing a crime, or to prevent a breach of the peace in his presence, but this he does as a citizen and not in his military capacity. Any combined effort by the military, as such, to make arrests or otherwise prevent breaches of the peace or violations of law in civil cases, except by the order of the President, must necessarily be illegal. In a case of civil disturbance in violation of the laws of a State, a military commander cannot

Rules for its Exercise.—The exercise of martial law must be conservative in character; the civil laws, even in an extreme case, are not repealed or annulled, but temporarily suspended, and should be conformed to in spirit even where their strict execution is impossible. No measures involving restraints upon personal liberty or the taking or destruction of property can be resorted to unless warranted by an existing emergency. The status itself being the result of emergency, every step taken must be with a view to the restoration of order, must be justified by the strict necessities of the existing situation, and must have in view such restoration of order and the replacement of the lawful civil authority. This purpose will be accomplished, as to a district in insurrection, by the dispersal of rioters and by the capture or apprehension of those who have fermented the disorder or have actively participated in the insurrectionary movement.

MILITARY COMMISSIONS.

Authority and Function.—To the successful exercise of martial law, especially in the territory of the enemy, some form of tribunal having jurisdiction to try and punish criminal offenses is absolutely essential. Such power cannot be exercised by courts-martial, which are created by and derive their jurisdiction from enactments of Congress, and martial law or martial rule, as has been seen, is not statutory in character and derives its sanction from the laws of war.

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volunteer to intervene with his command without incurring a personal responsibility for his acts. In the absence of the requisite orders he may not even march or array his command for the purpose of exerting a moral effect or an effect *in terrorem;* such a demonstration indeed could only compromise the authority of the United States while insulting the sovereignty of the State. Dig. J. A. Gen., 164, par. 7.

It sometimes happens that "the initiation of a system of martial law is made necessary by the occurrence of events which afford the Government no opportunity for forethought; indeed, the emergency may be so great, and the disorder may suddenly assume such formidable dimensions, as to give no time for Executive consideration, and martial law may go into operation without any deliberate proclamation of its existence. In ordinary circumstances, a riot which the peace officers endeavor to suppress precedes it. Then troops are called in to aid the civil power, and act, for a time at least, under the directions of the magistrates. From necessity or supineness the latter may either retire or their authority may be completely destroyed, so that the military officer alone has to suppress the riot and restore peace. Thus a united force of constables and soldiers, originally arrayed under the civil power, in the course of events, pass under the command of the military officer, who rightly assumes the responsibility—when the civil authorities have shown themselves incapable—of upholding public order. Such, in outline, were the facts of the case in 1780, when the followers of Lord George Gordon sought to destroy London. The military, in acting without the civil power, were so far supreme; but this supremacy ceased when the riots were put down, and the prisoners were handed over to and tried by the civil tribunals of the country." Clode, Mil. Law, 187: *ibid.*, II. Mil. Forces of the Crown, 166, 635, 636.

For the reason above stated, a proclamation, though usual as a warning to those thus made subject thereto, is not a condition precedent essential to the establishment of martial law. Sir D. Dundas, Ceylon Inquiry, 1850, Ques. 5459; Opinion of Lords Campbell and Cranworth, II. Clode, Mil. Forces, 400. The same remark applies to the reading of the Riot Act in ordinary civil commotions. Clode, Mil. Law, 187.

By a practice, therefore, dating from 1847,[1] and renewed and firmly established during the late war,[2] military commissions have become adopted as authorized tribunals in this country in time of war. They are simply criminal war-courts, resorted to for the reason that the jurisdiction of courts-martial, created as they are by statute, is restricted by law, and cannot be extended to include certain classes of offenses, which in war would go unpunished in the absence of a provisional forum for the trial of the offenders. Their authority is derived from the law of war,[3] though in some cases their powers have been added to by statute.[4] Their competency has been recognized not only in Acts of Congress,[5] but in executive proclamations,[6] in rulings of the courts,[7] and in opinions of the Attorneys-General.[8]

[1] The court which tried Major Andre during the War of the Revolution, though in name a court-martial, was in fact a military commission, as a general court-martial was, under the then existing Articles of War, without power to take cognizance of the offense of being a spy when committed by an individual of the enemy. See Maj.-Gen. Scott's G. O. 20, Hdqrs. of Army, Tampico, Feb. 19, 1847, republished "with important additions" in G. O. 190 and 287 of the same year. And see the following orders convening military commissions, issued by Gen. Scott: G. O. Hdqrs. of Army, 1847, Nos. 81, 88, 121, 124, 147, 171, 194, 215, 239, 267, 270, 273, 292, 334, 335, 380, 392; also No. 9 of 1848. Also the following issued by Gen. Taylor: G. O. 66, 106, 112, 121, of 1847; and the following issued by Gen. Wool: G. O. 140, 179, 216, 463, 476, 514, of 1847.

In this connection note also the institution by Gen. Scott of "councils of war"—summary courts for the punishment of certain violations of the laws of war—as exhibited in G. O. Hdqrs. of Army Nos. 181, 184, and 372 of 1847 and Nos. 35 and 41 of 1848.

[2] The first military commission of the war is believed to have been that convened by Maj.-Gen. Fremont, by G. O. 118, Western Department, St. Louis, Sept. 2, 1861.

[3] See G. O. 100, War Dept., 1863, Sec. I, § 13; do. 1, Dept. of the Missouri, 1862; do. 20, Hdqrs. of Army, 1847; U. S. *vs.* Reiter, 13 Am. Law Reg., 534; State *vs.* Stillman, 7 Cold., 341; Hefferman *vs.* Porter, 6 do., 697. And see, also, Opins. Att.-Gen. cited in note 8, *post*.

[4] See Act of March 3, 1863, c. 75, s. 30, declaring that in time of war, etc., murder, manslaughter, robbery, larceny, and other specified crimes, when committed by persons in the military service, shall be punishable by sentence of court-martial "or military commission," etc.—an enactment repeated, as to courts-martial, in the 58th Article of War; also s. 38 of the same Act (repeated in Sec. 1343, Rev. Sts.) making spies triable by general court-martial "or military commission" and punishable with death. See, further, Act of July 2, 1864, c. 215, s. 1, by which commanders of departments and commanding generals in the field were authorized to carry into execution sentences imposed by *military commission* upon guerrillas; also Act of July 4, 1864, c. 253, s. 6 and 8 (not now in force), making inspectors in the Quartermaster Department triable and punishable by sentence of court-martial or "military commission" for fraud or neglect of duty, as also other employees and officers of that department for accepting bribes from contractors, etc.; also the Reconstruction Act of March 2, 1867, c. 153, s. 3, by which commanders of military districts were authorized to convene *military commissions* for the trial of certain offenders.

[5] See the Acts cited in last note, together with Secs. 1199, 1343, and 1344, Rev. Sts., as also the recent Appropriation Acts of July 24, 1876, Nov. 21, 1877, June 18, 1878, June 23, 1879, and May 4, 1880, in which, among other items for the Pay Department, appropriation is made "for compensation for citizen clerks and witnesses attending upon courts-martial and military commissions."

[6] See the proclamations of Sept. 24, 1862, and April 2, 1866.

[7] *Ex parte* Vallandigham, 1 Wallace, 243; In the Matter of Martin, 45 Barb., 146; *Ex parte* Bright, 1 Utah, 145; State *vs* Stillman, 7 Cold., 341. In the last case the court say: "A military commission is a tribunal now (1870) as well known and recognized in the laws of the United States as a court-martial." It has been "recognized by the executive, legislative, and judicial departments of the government of the United States."

[8] See 5 Opins. At.-Gen., 55; 11 *id.*, 297; 12 *id.*, 332; 13 *id.*, 59; 14 *id.*, 249.

During the Rebellion they were employed in several thousand cases; more recently they were resorted to under the "Reconstruction" Act of 1867; and still later one of these courts has been convened for the trial of Indians as offenders against the laws of war.[1]

Constitution and Composition.—Except in so far as to invest military commissions in a few cases with a special jurisdiction and power of punishment,[2] the statute law has failed to define their authority, nor has it made provision in regard to their constitution, composition, or procedure. In consequence, the rules which apply in these particulars to general courts-martial have almost uniformly been applied to military commissions. They have ordinarily been convened by the same officers as are authorized by the Articles of War to convene such courts; the accusations investigated by them have been presented in charges and specifications similar in form to those entertained by general courts; their proceedings have been similar and similarly recorded; and their sentences have been similarly passed upon and executed.

Composition.—Their composition has also been the same, except that the minimum of members has been fixed by usage at three. They have generally also been supplied with a judge-advocate as a prosecuting officer. A military commission constituted with less than three members, or which proceeded to trial with less than three members, or which was not attended by a judge-advocate would be contrary to precedent.[3] In the absence, however, of any statutory provision on the subject, a commission which departed from the general usage in any of these respects would not necessarily be held to be an illegal tribunal.[4]

Jurisdiction.—Military commissions are authorized by the laws of war to exercise jurisdiction over two classes of offenses, committed, whether by civilians[5] or military persons, either (1) in the enemy's country during its occupation by our armies and while it remains under military government, or (2) in a locality, not within the enemy's country or necessarily within the theatre of war, in which martial law has been established by competent authority.[6] The two classes of offenses are: (1) Violations of the laws of war; (2) Civil crimes, which, because the civil authority is superseded by the military, and the civil courts are closed or their functions suspended, cannot

[1] Dig. J. A. Gen., 499, par. 1; The Case of the Modoc Indians tried by military commission in July, 1873 (G. C. M. O. 32, War Dept., 1873). See 14 Opins. Att.-Gen., 249

[2] See statutes cited in note 4, page 308, *ante*.

[3] Dig. J. A. Gen., 500, par. 2.

[4] *Ibid.*

[5] The General Orders issued during the late war contain nearly one hundred and fifty cases of *women* tried by military commissions.

[6] See Martial Law, § 1. And note in this connection Chief-Justice Chase's description of the jurisdiction exercised under military government and martial law, as distinguished from that conferred by the military law proper, in *Ex parte* Milligan, 4 Wallace, 142.

be taken cognizance of by the ordinary tribunals. In other words, the military commission, besides exercising, under the laws of war, a jurisdiction of offenses peculiar to war, may act also as a substitute, for the time, for the regular criminal judicature of the State or district.[1]

A military commission, whether exercising a jurisdiction strictly under the laws of war, or as a substitute in time of war for the local criminal courts, may take cognizance of offenses committed, during the war, before the initiation of the military government or martial law, but not then brought to trial.[2]

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[1] Dig. J. A. Gen., 501, par. 1.

[2] *Ibid.*, 502, par. 2. So *held* that an enemy, taken prisoner of war, was triable by a military commission for a violation of the laws of war committed before his capture. But when an officer or soldier of the enemy's army is, upon capture, charged before a military commission with a violation of the laws of war, the proof should of course be clear that the act committed was as charged, *i.e.*, was not a legitimate act of war. *Ibid.*

During the late war a very great number and variety of offenses against the laws and usages of war—charged either generally as "violation of the laws of war," or specifically by their particular names or descriptions—were passed upon and punished by military commissions. Of these some of the principal (committed mostly by civilians) were as follows: unauthorized trading or commercial intercourse with the enemy; unauthorized correspondence with the enemy; blockade-running; mail-carrying across the lines; drawing a bill of exchange upon an enemy, or by an enemy upon a party in a northern city;* dealing in, negotiating, or uttering Confederate securities or money;† manufacturing arms, etc., for the enemy; furnishing to an enemy articles contraband of war; dealing in such articles in violation of military orders; publicly expressing hostility to the U. S. government or sympathy with the enemy; coming within the lines of the army from the enemy without authority; violating a flag of truce; violation of an oath of allegiance or of an amnesty oath; violation of parole by a prisoner of war; aiding prisoner of war to escape; unwarranted treatment of Federal prisoners of war; burning, destroying, or obstructing railroads, bridges, steamboats, etc., used in military operations; cutting telegraph-wires between military posts; recruiting for the enemy within the Federal lines; engaging in "guerrilla" or partisan warfare; assisting Federal soldiers to desert; resisting or obstructing an enrollment or draft; impeding enlistments; violating orders in regard to selling liquor to soldiers or other military orders of police in a district under military government; attempt without success to aid the enemy by transporting to him articles contraband of war; conspiracy by two or more to violate the laws of war by destroying life or property in aid of the enemy. *Ibid.*, 502, par. 3.

Of the ordinary *crimes* taken cognizance of under similar circumstances by these tribunals, the most frequent were murder and manslaughter, and, after these, robbery, aggravated assault and battery, larceny, receiving stolen property, rape, arson, burglary, riot, breach of the peace, attempt to bribe public officers, embezzlement and misappropriation of public money or property, defrauding or attempting to defraud the United States, etc. *Ibid.*, 503, par. 4.

Not unfrequently the crime as charged and found was a combination of the two species of offenses above indicated; as in the case of the alleged killing by shooting or unwarrantably harsh treatment of officers or soldiers after they had surrendered, or while they were held in confinement as prisoners of war, of which persons were in several cases during the war convicted by military commissions under the charge of "murder in violation of the laws of war."‡ A more recent illustration was the principal offense of the Modoc Indians (tried by military commission in July, 1873), which, as a treacherous killing of an enemy during a truce, was charged as "murder in violation of the laws of war."§ *Ibid.*, 504, par. 5.

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* See Britton *vs.* Butler, 9 Blatch., 457; Williams *vs.* Mobile Sav. Bk., 2 Woods, 501; Woods *vs.* Wilder, 43 N. York, 164; Lacy *vs.* Sugarman, 12 Heisk., 354.

† See Horn *vs.* Lockhart, 17 Wallace, 580.

‡ See G. C. M. O. 607, War Dept., 1865; do. 153, *id.*, 1866.

§ G. C. M. O. 32, War Dept., 1873.

From the jurisdiction, however, of military commissions, under the circumstances above indicated, are properly excepted such offenses as are within the legal cognizance of the ordinary criminal courts when, upon the establishing of military government or of the *status* of martial law, such courts have been, by express designation or in fact, left in full operation and possession of their usual powers. Thus, although during a considerable period of the Civil War the District of Columbia was practically placed under a mild form of martial law, ordinary criminal offenses committed therein by civilians or military persons were in general allowed to be taken cognizance of by the civil tribunals, which were at no time seriously interrupted in the exercise of their judicial functions.[1]

It is a further restriction upon the jurisdiction of the military commission that, except where it may be invested by statute with a jurisdiction *concurrent* with that of courts-martial (as by secs. 30 and 38 of the Act of March 3, 1863),[2] its authority cannot be extended to the trial of offenses which are, specifically or in general terms, made cognizable and punishable by courts-martial by the Articles of War or other statute. In repeated instances during the late war the proceedings of military commissions, in cases in which these tribunals had improperly assumed jurisdiction of offenses legally triable by courts-martial only, were recommended by the Judge-Advocate General to be disapproved.[3]

A military commission convened for the trial of offenses under the law of war has no jurisdiction of civil suits or proceedings either based upon contract or brought to recover damages on account of private transactions or personal injuries.[4]

So, in a State or district where military government or martial law has not prevailed, or, having prevailed for a time, has ceased to be exercised and the regular criminal courts are open and in operation, a military commission cannot be empowered to assume jurisdiction of a public offense, although the *nation* be still involved in war.[5]

The jurisdiction of a military commission convened under the law of war may be exercised up to the date of a peace agreed upon between the

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[1] Dig. J. A. Gen., 504, par. 6.

[2] 12 Statutes at Large, 736.

[3] *Ibid.*, 506, par. 9. See the leading case of *Ex parte* Milligan, 4 Wallace, 1; also Milligan *vs.* Hovey, 3 Bissell, 13; *In re* Murphy, Woolworth, 143; Devlin *vs.* United States, 12 Ct. Cl. 271; 12 Opins. Att.-Gen., 128.

[4] *Ibid.*, 507, par. 12. As to the *civil* jurisdiction of special courts and commissions instituted during the late war, see Martial Law.

[5] Dig. J. A. Gen., 504, par. 7. *A fortiori*, where, at the date of the offense, there was, properly, no state of war in which the nation was involved with an enemy. Thus *held* (January, 1875) that a military commission could not legally be convened for the trial of Indians, for violations of the laws of war, on account of thefts, robberies, and murders committed by them upon incursions made into the State of Texas, where said Indians (unlike the Modocs, see note 1, page 309, *ante*) were mere raiders, with whose

hostile parties or the declaration by the competent authority of the termination of the war status.[1]

As to the special statutory jurisdiction with which the military commission has in certain cases been invested, the Acts of Congress by which this has been conferred and defined have already been cited. Of these, the provision of the Act of March 3, 1863, by which a jurisdiction concurrent with that of the court-martial is given to this tribunal in cases of *spies*, is the only one now in force, being embodied in Sec. 1343, Revised Statutes.[2]

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tribe, as such, the United States was not engaged in war, and whose crimes, therefore, were not committed *flagrante bello*.*

Where the State was not under martial law or military government, the fact that the offense was committed by a prisoner of war at a prison-camp (within the State) for the confinement of prisoners of war, and guarded by Federal troops, was *held* insufficient to give a military commission jurisdiction of the case. But *held* that the mere fact of the appointing by the Executive of a "provisional governor" for an insurrectionary State in June, 1865, prior to the date of the proclamation (of April 2, 1866) declaring the war at an end in that State, and while the territory of the same still remained in military occupation, did not operate to oust military commissions of jurisdiction of criminal offenses committed within the State.†

[1] Dig. J. A. Gen., 507, par. 11. See, also, 14 Opin. Att.-Gen., 250, where this principle is applied to an Indian war. See, also, 5 *ibid.*, 58.

[2] Dig. J. A. Gen., 506, par. 10. Under the latest of these Acts, the "Reconstruction" Act of March 3, 1867, in sec. 3 of which the commanders of the military districts constituted thereby were empowered, in their discretion, "to organize military commissions," in lieu of the "local civil tribunals," for the trial and punishment of "all disturbers of the public peace and criminals,"‡ it was *held* by the Judge Advocate-General as follows:

That the military commissions convened under the Act would properly be governed, as to their form of procedure, by the rules and forms governing military commissions under the laws of war, while, as to their jurisdiction and power of punishment, they would in general properly be regulated by the local statutes governing the courts of which they were substitutes.

That, being substitutes for the State criminal courts, they were authorized to take cognizance of offenses committed (but not brought to trial) *before* the date of the Act, equally as of those committed *after* such date.

That cases of soldiers offending against the criminal law, whose offenses were not within the jurisdiction of a court-martial, might legally be brought to trial before military commissions convened under the Act.

That commissions ordered under this Act, being in lieu of the State tribunals, could not assume to take cognizance of a case within the jurisdiction of a court of the United States in operation in the district.

That sentences duly adjudged by commissions convened under this statute, and which had been duly and finally approved by the competent authority (see sec. 4 of the statute), might legally be executed prior to the passage of the Act admitting to representation in Congress the State in which the offense was committed; but that such sentences not carried into effect (or of which the execution had not been entered upon) at that date could not thereafter legally be enforced.§ And *held* generally that all proceedings of military commissions which remained pending or incomplete at such date became thereupon terminated. *Ibid.*, 506, par. 10.

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* As to the nature of the hostility which may properly bring Indians "within the description of public enemies," compare 13 Opins. Att.-Gen., 471. That a detached band of marauding Indians was not an "enemy" in the sense of the Act of March 3, 1849, (Sec. 3483, Rev. Sts.,) providing for the making good of damage sustained by the capture or destruction of certain property "by an enemy," was held by the Supreme Court in Stuart *vs.* United States, 18 Wallace, 84.

† See Belding *vs.* State, 25 Ark., 315. And compare 13 Opins. Att.-Gen., 65, 66; Coleman *vs.* Tennessee, 7 Otto, 516.

‡ The constitutionality of this Act and the legality of the institution under it of military commissions are affirmed by Att.-Gen. Hoar in 13 Opin., 59–67.

§ Compare United States *vs.* Tynen, 11 Wallace, 88, where it is held that "there can be no legal conviction, nor any valid judgment pronounced upon conviction, unless the law creating the offense be at the time in existence." And to a similar effect see United States *vs.* Finlay, 1 Ab. U. S. R., 364.

Procedure.—In view of the analogy in procedure prevailing between these bodies and courts-martial, it has been held by the Judge-Advocate General that military commissions would properly be sworn like general courts-martial; that the right of challenging their members should be afforded to the accused; that two-thirds of their members should concur in death sentences, and that the two-years limitation would properly be applied to prosecutions before them. None of these features, however, are made essential by statute.[1]

Sentences.—Except in a case of a spy, whose sentence must be death (Sec. 1343, Revised Statutes), the discretion of the military commission in the imposition of sentence is not in terms restricted or defined by the existing law. The sentence, however, should award a criminal pu nshment: a judgment of debt or damages, on conviction of a criminal offense, would be irregular, and properly disapproved. The punishments imposed by courts-martial, though sometimes inappropriate, are not therefore necessarily precluded. Where a military commission is acting practically as a substitute for a State criminal court, it should in general, in determining the proper measure of punishment to be inflicted, take into consideration the State statute law, if any, prescribing the penalty or penalties for the offense.[2]

Record; Approval and Execution.—The record of a military commission is similar, in all respects, to that kept by a general court-martial. The findings and sentence, being in the nature of recommendations merely, are not operative until they have been approved or adopted by the convening authority. In practice the proceedings are reviewed by the convening officer and, having been approved or confirmed, are carried into effect by the same authority.[3]

Jurisdiction.—The jurisdiction of the military commission is derived primarily and mainly from the law of war. That special authority has in some cases been devolved upon it by express legislation has already been noticed.[4]

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[1] Dig. J. A. Gen., 501, par. 3.

[2] *Ibid.*, 508, par. 1. See State *vs.* Stillman, 7 Cold., 341; G. O. 1, Dept. of the Missouri, 1862. Except where the death sentence was pronounced, the punishment adjudged by military commissions during the late war was, in the great majority of cases, an imprisonment for a certain term or "till the end of the war." Fines were sometimes imposed, and a sending beyond the lines of the U. S. forces was not infrequent. A confiscation of property was also occasionally adjudged. In many instances in lieu of any punishment it was directed or recommended by the commission that the accused be required to take an oath of allegiance or give a parole, and in some cases also to give a bond for future loyal behavior.

[3] Benét, 203; Ives, 278; II. Winthrop, 57.

[4] Dig. J. A. Gen., 501, par. 1. See, also, note 4, page 308, *ante*

CHAPTER XVII.

HABEAS CORPUS.

Purpose and Effect.—The nature and operation of the writ of habeas corpus have elsewhere been explained.[1] It is sufficient to say at this time that its purpose is to furnish a summary remedy for all cases in which the person of a citizen is subjected to unlawful restraint or imprisonment.[2] Both the Federal and State courts have power to issue the writ, each within the sphere of its constitutional jurisdiction, the former in a limited number of cases arising under the laws of the United States, the latter in cases arising under the common law, or the statutes of the State within which the court sits and from which its jurisdiction is derived. From the nature and comprehensive character of their jurisdiction the writ is issued by the State courts in a much greater number of cases than can possibly arise in the more restricted jurisdiction of the Federal courts.[3]

Jurisdiction of the Federal Courts.—The law confers power upon the Supreme Court and the several Circuit and District Courts of the United States to issue writs of habeas corpus; the several justices and judges of the said courts, within their respective jurisdictions, also have power to grant writs of habeas corpus for the purpose of inquiring into the cause of restraints upon liberty.[4]

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[1] Military Laws of the United States, paragraphs 282–297; Davis Elementary Law, pp. 49, 50.

[2] 3 Blackstone Com., 130; *Ex parte* Bollman, 4 Cranch, 95–97; *Ex parte* Yerger, 8 Wall., 95; *Ex parte* Watkins, 3 Pet., 202.

[3] The subject of conflicting jurisdiction, in respect to the issue of this writ by the State and Federal courts, will presently be explained (see, *post*, the title "Conflict of Jurisdiction)." It is sufficient to say at this place, in explanation of the above statement, that as the information upon which a court acts in directing the issue of the writ in a particular case is *ex parte* in character, and therefore incomplete, in that it does not fully set forth the authority by which the alleged restraint is imposed, it follows that either a State or Federal tribunal may, on application duly made, direct the issue of the writ in a case over which it may subsequently appear, from the return of the officer holding the prisoner, that the particular court was without jurisdiction. So soon, therefore, as such want of jurisdiction has been made to appear, it is the duty of the court to desist from the further prosecution of the inquiry and to remand the prisoner to the proper custody. See, also, Ableman *vs.* Booth, 21 How., 506; Tarble's Case, 13 Wall., 397; Robb *vs.* Connolly, 111 U. S., 624.

[4] Sections 751 and 752, Revised Statutes. Sec. 753, Revised Statutes, however, contains the requirement that "the writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or

"The purpose of the writ is to enable the court to inquire, first, if the petitioner is restrained of his liberty. If he is not, the court can do nothing but discharge the writ. If there is such restraint, the court can then inquire into the causes of it, and if the alleged cause is unlawful it must then discharge the petitioner. * * * In the case of a man in the military or naval service, where he is, whether as an officer or private, always more or less subject in his movements, by the very necessity of military rule and subordination, to the orders of his superior officer, it should be quite clear that some unusual restraint upon his liberty of personal movement exists to justify the issue of the writ; otherwise every order of the superior officer directing the movements of the subordinate, which necessarily to some extent controls his freedom of will, may be held to be a restraint of his liberty, and the party so ordered may seek relief from obedience by means of a writ of habeas corpus. Something more than moral restraint is necessary to make a case for habeas corpus. There must be actual confinement or the present means of enforcing it." [1]

Character of the Restraint.—The restraint arising in the military service, which may be inquired into by a resort to the habeas corpus, may consist in the actual arrest or confinement of an officer or enlisted man, or in the confinement of a citizen by the military authority. As the contract

decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify." The Act of March 27, 1868, (15 Stat. at Large, 44,) took from the Supreme Court jurisdiction to review, on appeal, the decision of a Circuit Court upon a writ of habeas corpus; and it has no jurisdiction to review such decisions on a writ of error. It may still issue its own writ of habeas corpus. *Ex parte Royall*, 112 U. S., 181; *Ex parte* Yerger, 8 Wall., 103.

The Supreme Court may issue the writ in virtue of its original jurisdiction only in cases affecting ambassadors, other public ministers, and consuls, or in those to which a State is a party. *Ex parte* Hung Hang, 108 U. S., 552. In the exercise of its appellate jurisdiction it may issue the writ for the purpose of reviewing the judicial decision of some inferior officer or court. *Ibid.*, 553; *Ex parte* Bollman and Swartwout, 4 Cr., 75; *Ex parte* Watkins, 7 Pet., 568; *Ex parte* Wells, 18 How., 307, 328; *Ex parte* Yerger, 8 Wall., 85; *Ex parte* Lange, 18 Wall., 163; *Ex parte* Parks 93 U. S., 18; *Ex parte* Virginia, 100 U. S, 339; *Ex parte* Siebold, 100 U. S., 371. Application to the Supreme Court for the issue of the writ must show that the case is within its jurisdiction. *In re* Milburn, 9 Peters, 704.

A justice of the Supreme Court may issue the writ in any part of the United States where he happens to be, and may make it returnable to himself, or may refer it to the court for determination. *Ex parte* Clarke, 100 U. S., 399, 403. The writ cannot be made to perform the function of a writ of error. *Ex parte* Virginia, 100 U. S., 339; *Ex parte* Reed, *ibid.*, 13, 23. The writ may be used in connection with the writ of certiorari to determine whether the court below acted with jurisdiction. *Ex parte* Lange, 18 Wall., 163; *Ex parte* Virginia, 100 U. S., 339; *Ex parte* Siebold, *ibid.*, 371. This section does not require that the law therein mentioned shall be by express Act of Congress. Any obligation fairly and properly inferable from the Constitution, or any duty of a United States officer to be derived from the general scope of his duties, is a "law" within the meaning of the statute. Cunningham *vs.* Neagle, 135 U. S., 1. See also, *Ex parte* Dorr, 3 How., 103; *Ex parte* Barnes, 1 Sprague, 133; *Ex parte* Bridges, 2 Woods, 428.

[1] Wales *vs.* Whitney, 114 U. S., 564, 571.

of enlistment imposes a certain restraint upon a party to its operation, the legality of an enlistment may, in a proper case, be made the subject of inquiry, as in the case of a minor who has enlisted without the consent of his parent or guardian.

Procedure.—The jurisdiction of the several Federal courts in respect to the issue of the writ is regulated by statute;[1] their procedure, however, has not been made the subject of statutory regulation, and the practice prevailing at the common law at the time of the adoption of the Constitution is still pursued.[2] The parties to the writ are the *petitioner*, in whose behalf the writ has issued, and the *respondent*, the officer to whom the writ is addressed and by whom the restraint has been imposed.

The writ may be granted in term time or by a justice or judge of a Federal court having jurisdiction to issue the writ, in vacation or at any time, and may be issued by a justice of the Supreme Court in any part of the country, wherever he may be.[3] The usual course of proceeding is for the court, on the application of the prisoner for a writ of habeas corpus, to issue the writ and, on its return, to hear and dispose of the case; but where the cause of imprisonment is fully shown by the petition, the court may without issuing the writ consider and determine whether, upon the grounds

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[1] See Sections 751, 752, and 753, Revised Statutes. Application for writ of habeas corpus shall be made to the court or justice or judge authorized to issue the same, by complaint in writing, signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known. The facts set forth in the complaint shall be verified by the oath of the person making the application. Section 754, Revised Statutes.

The court or justice or judge to whom such application is made shall forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto. The writ shall be directed to the person in whose custody the party is detained. Sec. 755, *ibid.*

Any person to whom such writ is directed shall make due return thereof within three days thereafter, unless the party be detained beyond the distance of twenty miles; and if beyond that distance and not beyond a distance of a hundred miles, within ten days; and if beyond the distance of a hundred miles, within twenty days. Sec. 756, *ibid.*

The person to whom the writ is directed shall certify to the court or justice or judge before whom it is returnable the true cause of the detention of such party. Sec. 757, *ibid.*

The person making the return shall at the same time bring the body of the party before the judge who granted the writ. Sec. 758, *ibid.*

When the writ is returned, a day shall be set for the hearing of the cause, not exceeding five days thereafter, unless the party petitioning requests a longer time. Sec. 759, *ibid.*

The petitioner or the party imprisoned or restrained may deny any of the facts set forth in the return, or may allege any other facts that may be material in the case. Said denials or allegation shall be under oath. The return and all suggestions made against it may be amended, by leave of the court or justice or judge, before or after the same are filed, so that thereby the material facts may be ascertained. Sec. 760, *ibid.*

The court or justice or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require. Sec. 761, *ibid.*

Appeals in habeas corpus proceedings are regulated by Sections 763–766 of the Revised Statutes.

[2] Hurd, Hab. Corp., 214; U. S. *vs.* Clarke, 100 U. S., 403.

[3] *Ibid.*

presented in the petition, the prisoner if brought before the court would be discharged.[1] Under the requirements of this section the writ, though a matter of right, does not issue as a matter of course, and may be refused if, upon the showing made in the petition, it appears that the petitioner if brought into court would be remanded.[2]

Return.—Where the writ issues from a Federal court of competent jurisdiction, it is the duty of the officer holding the prisoner in custody to produce the body of the prisoner, that is, to bring him into the presence of the court, and to make a return in writing, setting forth the reasons for the restraint or detention of the petitioner, submitting to the court the whole question of authority and discharge, and abiding by its decision and order in the case.[3]

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[1] *Ex parte* Milligan, 4 Wall., 2.

[2] *In re* King, 51 Fed. Rep. 434; *In re* Jordan, 49 *ibid.*, 238; *In re* Haskell, 52 *ibid.*, 795. Where a court-martial has jurisdiction of the person and of the subject-matter, and is competent to pass the sentence under which the prisoner is held, its proceedings cannot be collaterally impeached, and a writ of habeas corpus cannot be made to perform the function of a writ of error. *Ex parte* Reed, 100 U. S., 13, 23; *Ex parte* Kearney, 7 Wheat., 38; *Ex parte* Watkins, 3 Pet., 193; *Ex parte* Milligan, 4 Wall., 2; *Ex parte* Mason, 105 U. S., 696; *Ex parte* Curtis, 106 U. S., 371; *Ex parte* Carrl, *ibid.*, 521; *Ex parte* Bigelow, 113 U. S., 328; Smith *vs.* Whitney, 116 U. S., 167; U. S. *vs.* Grimley, 137 U. S., 147; Johnson *vs.* Sayre, 158 U. S., 109; *In re* Boyd, 49 F. R., 48. Where a medical director in the Navy, against whom charges had been preferred and in whose case a general court-martial had been ordered, was placed in arrest by the Secretary of the Navy, and notified to confine himself to the limits of the city of Washington, *held* that this constituted no such restraint of liberty as to sustain a writ of habeas corpus. Wales *vs.* Whitney, 114 U. S., 564. Where a person is in custody under process from a State court of original jurisdiction for an alleged offense against the laws of such State, and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, the Circuit Court has a discretion whether it will discharge him upon habeas corpus in advance of his trial in the court in which he is indicted; that discretion, however, to be subordinated to any special circumstances requiring immediate action. When the State court has finally acted upon the case, the circuit court has still a discretion whether, under all the circumstances, the accused, if convicted, shall be put to his writ of error from the highest court of the State, or whether it will proceed, by writ of habeas corpus, summarily to determine whether the prisoner is restrained of his liberty in violation of the Constitution of the United States. *Ex parte* Royall, 117 U. S., 241, 253; *Ex parte* Watkins, 3 Pet., 201; *Ex parte* Bridges, 22 Woods, 428; *Ex parte* Lange, 18 Wall., 163; *In re* King, 51 F. R., 434; *Ex parte* Hanson, 28 F. R., 127, 131; *In re* Jordan, 49 F. R., 238. Where a United States marshal, in custody for an act done in pursuance of a law of the United States, is brought before a Federal court by habeas corpus and discharged, he cannot afterwards be tried by the State court. Cunningham *vs.* Neagle, 135 U. S., 1.

[3] Dig. J. A. Gen., 435, par. 8. In a case therefore of a soldier or other person held in military custody, or by military authority, in which a writ of habeas corpus is issued by the *United States* judiciary,—a co-ordinate branch of the same sovereignty as that by which the party is restrained,—it is the duty of the officer to whom the writ is addressed to make thereto a full return of the facts and to bring into court the body of such party, submitting to the court the whole question of authority and discharge, and abiding by its decision and order in the case. *Ibid.*

The duty of an officer of the Army upon whom a writ of habeas corpus is served is prescribed in the following paragraphs of the Army Regulations of 1895:

Officers will make respectful returns in writing to all writs of habeas corpus served on them. When the writ is issued by a State authority, and the person held by the Army officer is a civilian who has been apprehended under a warrant of attachment to be taken before a court-martial to testify as a witness, the officer will not produce the body, but will by his return set forth fully the authority by which he holds the per-

Conflict of Jurisdiction between the State and Federal Courts.—It has been seen that the jurisdiction of the State and Federal courts in respect to the issue of the writ of habeas corpus is strictly defined and limited by statute, and that neither court may issue the writ in a case properly falling within the jurisdiction of the other. If such want of jurisdiction is apparent from the allegations of the petition, the writ should be denied. If, however, the petition appears upon its face to show jurisdiction, the writ issues; and if at a subsequent stage of the proceedings the want of jurisdiction appears, the case should be dismissed so soon as that fact becomes apparent.[1]

Subject to the paramount authority of the national Government, by its own tribunals, to inquire into the legality of custody of prisoners held by the United States courts or officers, the States may inquire into the grounds on which any person in their respective limits is restrained of his liberty.[2] But "a State court has no jurisdiction by habeas corpus to release a prisoner held by order of Federal court."[3] And a judicial officer of a State cannot, by means of a writ of habeas corpus, take and discharge a person held by or under color of authority of the United States. If it appear upon the return to a writ of habeas corpus that the person is detained under color of the authority of the United States, the State court has no further jurisdiction.[4]

Although "it is the duty of the marshal or other person holding him to make known by a proper return the authority under which he detains him, it is at the same time imperatively his duty to obey the process of the

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son, and allege that the State authority is without jurisdiction to issue the writ of habeas corpus, and ask to have the same dismissed. He will also exhibit to the court or officer issuing the writ of habeas corpus the warrant of attachment and the subpœna (and the proof of the service of the subpœna) on which the warrant of attachment was based, and also a certified copy of the order convening the court-martial before which he had been commanded to take the person. Par. 969, A. R. 1895.

Should a writ of habeas corpus issued by a State court or judge be served upon an Army officer commanding him to produce an enlisted man or show cause for his detention, the officer will decline to produce in court the body of the person named in the writ, but will make respectful return in writing to the effect that the man is a duly enlisted soldier of the United States, and that the Supreme Court of the United States has decided that a magistrate or court of a State has no jurisdiction in such a case. *Ibid.*, par. 970.

A writ of habeas corpus issued by a United States court or judge will be promptly complied with. The person alleged to be illegally restrained of his liberty will be taken before the court from which the writ has issued, and a return made setting forth the reasons for his restraint. The officer upon whom such a writ is served will at once report the fact of such service direct to the Adjutant-General of the Army by telegraph. *Ibid.*, par. 971.

The form of return to the writ will be found in the Appendix; see, also, the Manual for Courts-martial, pages 146–148.

If the service of the writ be prevented by military force, it will be ordered to be placed on the files of the court, to be served when practicable. *Ex parte* Winder, 2 Clifford, 89.

An order from a subordinate in the War Department to an officer not to obey the writ by the production of the body is no justification to the officer. *Ex parte* Field, 5 Blatchford C. C., 63

[1] *Ex parte* Sifford, 5 Amer. Law Reg. (O. S.), 659.

[2] Robb *vs.* Connolly, 111 U. S., 624.

[3] Ableman *vs.* Booth, 21 How., 506.

[4] Tarble's Case, 13 Wall., 397.

United States, to hold the prisoner in custody under it, and to refuse obedience to the mandate or process of any other government. And consequently it is his duty not to take the prisoner, nor suffer him to be taken, before a State judge or court upon a habeas corpus issued under State authority. No State judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or to require him to be brought before them. And if the authority of a State, in the form of a judicial process or otherwise, should attempt to control the marshal or other authorized officer or agent of the United States, in any respect in the custody of his prisoner, it would be his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of law against illegal interference. No judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it was issued, and an attempt to enforce it beyond these boundaries is nothing less than lawless violence."[1]

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[1] Ableman *vs.* Booth, 21 How., 506. We do not question the authority of the State court or judge who is authorized by the laws of the State to issue the writ of habeas corpus to issue it in any case where the party is imprisoned within its territorial limits, provided it does not appear, when the application is made, that the person imprisoned is in custody under the authority of the United States. The court or judge has a right to inquire in this mode of proceeding for what cause and by what authority the prisoner is confined within the territorial limits of the State sovereignty. And it is the duty of the marshal or other person having the custody of the prisoner to make known to the judge or court, by a proper return, the authority by which he holds him in custody. * * * But after the return is made, and the State judge or court judicially apprised that the party is in custody under the authority of the United States, they can proceed no further. *Ibid.*

A State judge has no jurisdiction to issue a writ of habeas corpus for a prisoner in custody of an officer of the United States if the fact of such custody is known to him before issuing the writ; and if such fact appears on the return to the writ, all further proceedings by him are void. And if the United States officer resist the enforcement of the State writ, and is imprisoned therefor, he will be discharged by the Federal court. *Ex parte* Sifford, 5 Am. Law Reg. (O. S.), 659. A military officer of the United States is not bound to produce the body of an enlisted soldier in answer to a writ of habeas corpus issued from a State court or judge. *In re* Neill, 8 Blatch., 166. The return of a military officer to a writ of habeas corpus need not be on oath. *In re* Neill, 8 Blatch., 165. The validity of the enlistment of a soldier cannot be inquired into by a State court by the issue of a writ of habeas corpus, and an officer of the Army may properly refuse to discharge an enlisted man in his command upon the order of a State court. *In re* Farrand, 1 Abbot, 140, 147.

But, independently, on the one hand, of any proclamation or act of the President suspending the privilege of the writ, or, on the other hand, of any proclamation revoking a previous suspension, and on constitutional grounds alone, *held* that no court or judge of any State could in any instance be authorized to discharge, on habeas corpus, a person, military or civil, held in military custody by the authority of the United States. And *held*, particularly, in regard to soldiers arrested or confined by the military authorities under a charge of or sentence for desertion, that their discharge upon any ground by writ of habeas corpus was wholly beyond the jurisdiction of any State tribunal. So *held* in regard to persons arrested by a provost-marshal as deserters for not responding to a draft in time of war. And further *held* (January, 1866) that no State court could have jurisdiction, on a proceeding for the discharge by writ of habeas corpus of an enlisted soldier, to pass upon the question of the legality of the soldier's enlistment, or to discharge him from his contract of enlistment on the ground of its invalidity by reason of minority, non-consent of parent, or other cause; the authority to discharge from

Suspension of the Privilege of the Writ of Habeas Corpus.—The Constitution provides that "the privilege of the writ of habeas corpus shall not be suspended unless, when in cases of rebellion or invasion, the public safety

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the restraint and obligation of the ordinary military status being considered to be governed by the same principle as that to discharge from an arrest or confinement under a military charge or sentence, or from the custody of a U. S. marshal under civil process of the United States.* Dig. J. A. Gen., 433, par. 3.

And *held* that a State court was not authorized to discharge on habeas corpus a civilian held by the authority of the United States as a convict under sentence of a military commission. *Ibid.*, 434, par. 4.

Where a writ of habeas corpus issued by a State court or judge, for the relief of a person held in arrest, confinement, or under enlistment by the military authorities is served upon a military officer, he is not required to comply with the direction of the writ to produce before the court the *body* of the person so held. It is sufficient for him merely to make return showing clearly that such person is held by the authority of the United States as a deserter, or under a contract of enlistment, or otherwise, as the case may be.† The State court, upon being thus apprised, will properly dismiss the writ. *Ibid.*, par. 5.

Where—prior to the decision of the U. S. Supreme Court in Tarble's Case—a State court, having issued a writ of habeas corpus in a case of a military prisoner, attempted to enforce a process of contempt against the officer in charge, who, though duly making a return showing that the party was detained by the authority of the United States, refused to produce his body in court—*held* that such attempt should be resisted by the officer, who should be supported in his resistance by such military force as might be necessary. So where a State court, after such a return, still assumed to proceed in the case and to order the discharge of the party—here a soldier in arrest as a deserter,—*held* that the execution of such order should be resisted and prevented by military force. *Ibid.*, 435, par. 6.

Where—prior to the decision in Tarble's Case—an officer undergoing, in a State penitentiary, a sentence duly imposed by a court-martial was discharged from his imprisonment by a State court and was at large, *advised* that he be forthwith rearrested and reconfined. So in a case of a soldier discharged from his enlistment on the ground of minority by a State court, *advised* that he be arrested by the military authorities and held to service. *Ibid.*, par. 7.

But in a case of a soldier or other person held in military custody, in which a writ of habeas corpus is issued by the United States judiciary—a co-ordinate branch of the same sovereignty as that by which the party is restrained,—it is the duty of the officer

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* Opposed to this view was the opinion of Atty.-Gen. Stanbery in Gormley's Case (October, 1867), 12 Opins. At.-Gen., 258. But in December, 1871, the ruling of the Judge-Advocate General in this class of cases was sustained by the United States Supreme Court in Tarble's Case, 13 Wallace, 397, in which the judgment of a State court which had ordered the discharge, on habeas corpus, of an enlisted soldier from "the custody of a recruiting officer," *i.e.*, from the obligation of his contract of enlistment, on the ground that he had enlisted when under eighteen years of age and without his father's consent, was reversed as an unconstitutional assumption of authority. In applying to the case the principle laid down in Ableman *vs.* Booth, 21 Howard, 506, the court, by Field, J., observes: "State judges and State courts, authorized by laws of their States to issue writs of habeas corpus, have undoubtedly a right to issue the writ in any case where a party is alleged to be illegally confined within their limits, unless it appears upon his application that he is confined under the authority, or claim and color of the authority, of the United States by an officer of that Government. If such fact appear upon the application, the writ should be refused. If it do not appear, the judge or court issuing the writ has a right to inquire into the cause of imprisonment, and ascertain by what authority the person is held within the limits of the State; and it is the duty of the marshal or other officer having custody of the prisoner to give, by a proper return, information in this respect. His return should be sufficient, in its detail of facts, to show distinctly that the imprisonment is under the authority, or claim and color of the authority, of the United States, and to exclude the suspicion of imposition or oppression on his part. And the process or orders under which the prisoner is held should be produced with the return and submitted to inspection, in order that the court or judge issuing the writ may see that the prisoner is held by the officer in good faith, under the authority, or claim and color of the authority, of the United States, and not under the mere pretense of having such authority. * * * The State judge or State court should proceed no further when it appears, from the application of the party or the return made, that the prisoner is held by an officer of the United States under what in truth purports to be the authority of the United States; that is, an authority the validity of which is to be determined by the Constitution and laws of the United States. If a party thus held be illegally imprisoned, it is for the courts or judicial officers of the United States, and those courts or officers alone, to grant him release." This decision put an end to a controversy of many years' standing, and swept away a mass of counter-rulings by the State courts, the majority of which had sustained the authority of the State judiciary in such cases.

† See citation in Tarble's Case in note *, *supra*.

may require it."[1] There has been great difference of opinion as to the interpretation of this provision of the Constitution. By some it has been held to justify the proclamation of martial law; by others it has been held that the grant of power is restricted to the precise contingency set forth in the Constitution.[2] There was also at one time considerable diversity of view as to the particular department of the Federal Government which was entrusted with the exercise of the power.[3] That the clause does not warrant

to whom the writ is addressed to make thereto a full return of the facts and to bring into court the body of such party, submitting to the court the whole question of authority and discharge, and abiding by its decision and order in the case. Dig. J. A. Gen., 435, par. 8.

Concurrent Jurisdiction.—Although what has been said above relates to conflicting jurisdiction, a case may arise in which both State and Federal courts would have concurrent jurisdiction to issue the writ and to discharge a prisoner from custody. Such a case would arise where a person is restrained of his liberty under some State process in violation of a law of the United States; and in such case it would be the duty of a State court or judge, in its action under the writ, to give effect to the law of the United States. For "upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof whenever those rights are involved in any suit or proceeding before them; for the judges of the State courts are required to take an oath to support that Constitution, and they are bound by it and the laws of the United States made in pursuance thereof, and all treaties made under their authority, as the supreme law of the land." Robb *vs.* Connolly, 111 U. S., 624, 637. "Subject, then, to the exclusive and paramount authority of the national Government, by its own judicial tribunals, to determine whether persons held in custody by authority of the courts of the United States, or by the commissioners of such courts, or by officers of the general government acting under its laws, are so held in conformity with law, the States have the right by their own courts or by the judges thereof to inquire into the grounds upon which any person, within their respective territorial limits is restrained of his liberty, and to discharge him if it be ascertained that such restraint is illegal; and this notwithstanding such illegality may arise from a violation of the Constitution or laws of the United States." *Ibid.*, 639.

[1] Constitution of the U. S., Art. I, Sec. 9, Clause 2.

[2] Pomeroy, Const. Law, § 707.

[3] In a proclamation of May 10, 1861, the President authorized the commander of the U. S. forces on the Florida coast if he found it necessary, "to suspend there the writ of habeas corpus." By G. O. 104, War Department, Aug. 13, 1862, the President suspended the privilege of the writ of habeas corpus in cases of persons liable to draft who should attempt to depart to a foreign country, or should absent themselves from the State or county of their residence, in anticipation of a draft to which they would be subject. By a proclamation of September 24, 1862, the President declared the privilege of the writ suspended in respect to all persons arrested or imprisoned "during the rebellion by any military authority," or under "sentence of any court-martial or military commission." These proclamations and orders were all based upon the theory that under Art. I, Sec. 9, par. 2, of the Constitution, or otherwise, the President alone, in the absence of any authority from Congress, was empowered to suspend the privilege of the writ. Dig. J. A. Gen., 431, par. 1.

But in the following year, by the Act of Congress of March 3, 1863, (12 Stat. at Large, 755,) it was provided "that during the present rebellion the President of the United States, whenever in his judgment the public safety may require it, is authorized to suspend the privilege of the writ of habeas corpus in any case throughout the United States or any part thereof;" Congress, by thus asserting the right in itself to authorize the suspension, implying that, in its opinion, the power to suspend did not reside in the President.* *Ibid.*

* The question whether the President was authorized, in his own discretion and independently of the sanction of Congress, to exercise this power was much discussed early in the late war. The fullest argument in favor of the existence of the power in the President is contained in Mr. Horace Binney's treatise on "The Privilege of the Writ of Habeas Corpus under the Constitution." And see, also, *Ex parte* Field, 5 Blatch., 63; Opinion of Att.-Gen. Bates in 10 Opins., 74. The weight of judicial authority, however, was the other way. See *Ex parte* Merryman, Taney, 246; McCall *vs.* McDowell, 1 Abbott U. S. R., 212; Griffin *vs.* Wilcox, 27 Ind., 383; *In re* Kemp, 16 Wisc., 359; *In re* Oliver, 17 *id.*, 681; *In re* Murphy, Woolworth, 141.

the proclamation of martial law has already been shown, since martial law results, not from legislation or from executive or judicial action, but from imperative necessity. It is also well settled that Congress alone has power to exercise the authority conferred upon the Federal Government by the clause above cited.[1]

How Suspended; Effects.—It will be observed that the Constitution confers authority upon Congress (in a certain condition of emergency, arising from rebellion or invasion) to suspend, not the writ itself, but the *privilege* of the writ; that is, to deny to an arrested person the remedy afforded by the writ in the class or classes of cases specified in the suspending statute. The writ issues in the usual form, and return is made in the usual manner. If the return shows the case to fall within the statute of suspension, release is denied and the prisoner is remanded to custody. A suspension of the privilege of the writ is thus seen to deprive an arrested person of the right to secure his release by a resort to the writ of habeas corpus. It confers no power to arrest, however, nor does it validate an arrest illegally made.[2]

[1] The suspension of the writ does not in the least affect the authority over arrests; the power to suspend does not enable Congress to allow, or the Executive to make, arrests without legal cause, or in an arbitrary or irregular manner; but merely enables the Government to detain a prisoner, arrested for good cause, for an indefinite time without trial or bail. Suspending the writ does not legalize seizures otherwise arbitrary, nor give any greater authority to the Executive than that of detaining suspected persons in custody to whom it would else be obliged to bring to a speedy trial or release on bail. Pomeroy Const. Law, § 708; *Ex parte* Milligan, 4 Wallace, 2, 115. Under the authority conferred by the Constitution, the privilege of the writ has once been suspended by Congress. The Act of March 3, 1863,* empowered the President to suspend the privilege of the writ in certain cases. The same enactment required the Secretaries of State and of War to furnish the judges of the several Circuit and District Courts with lists of the names of the persons arrested in their respective districts. If the grand juries met and adjourned without finding bills against such persons, the judges were to release them on their own recognizances. If within twenty days after the passage of the act, or within twenty days after their arrest, lists were not furnished, and the arrested persons were not indicted by the grand jury, the persons so held in arrest might petition the court, alleging under oath the facts; and the judges were required to examine into the cause of holding and, if it were found to be unlawful, to release them from custody.

[2] On September 15, 1863, and pursuant to the Act of March, 1863, above cited, the President issued a proclamation suspending the privilege of the writ generally, and "throughout the United States" in all cases "where, by the authority of the President of the United States, military, naval, and civil officers of the United States, or any of them, hold persons under their command or in their custody either as prisoners of war, spies, or aiders or abettors of the enemy, or officers, soldiers, or seamen enrolled or drafted or mustered or enlisted in or belonging to the land or naval forces of the United States, or as deserters therefrom, or otherwise amenable to military law, or the Rules and Articles of War, or the rules or regulations prescribed for the military or naval services by authority of the President of the United States, or for resisting a draft, or for any other offense against the military or naval service." In a case in which, by the operation of this last proclamation, the writ was suspended, *held* that any judge or court, whether of the United States or of a State, would be required to dismiss the writ, on being advised (in the manner and form indicated in the Act of March 3, 1863, s. 1) that the party sought to be relieved was "detained as a prisoner under the authority of the President." Dig. J. A. Gen., 431, par. 1.

By a proclamation of December 1, 1865, the President "revoked and annulled" the suspension (by proclamation of Sept. 15, 1863) of the privilege of the writ in certain States, including New York. *Held* that such revocation did not operate to authorize the discharge, by a court of this State, of a prisoner detained in military custody under color of the authority of the United States. *Ibid.*, 432, par. 2.

* 12 Stat. at Large, 755.

CHAPTER XVIII.

THE EMPLOYMENT OF MILITARY FORCE.

The War Powers of the United States.—The power to raise and support armies,[1] to maintain a navy,[2] and to declare war[3] is vested by the Constitution in the Congress of the United States; the power to command the establishments so created, and to carry on military operations in pursuance of such declaration is vested by that instrument[4] in the President as the constitutional commander-in-chief. It is also within the power of the Executive to recognize the existence of hostilities in advance of such formal declaration, as in the case of invasion or insurrection; and he may resort to such measures, with a view to resist or suppress such invasion or insurrection, as may seem to him best calculated to accomplish that purpose.[5] In the exercise of military command and in the conduct of military operations the President is not subject to legislative or judicial control.[6]

Powers of the President as Commander-in-Chief.—As commander-in-chief, the President is authorized to direct the movements of the land and naval forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country and subject it to the sovereignty and authority of the United States. But his conquests do not enlarge the boundaries of this Union, nor extend the operations of our institutions and laws beyond the limits before assigned to them by the legislative power.[7] The power of command and control reserved by the crown was placed by the Constitution in the hands of the President.[8]

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[1] Constitution of the United States, Article I, Sec. 8, Clause 12.

[2] *Ibid.*, Article I, Sec. 8, Clause 13.

[3] *Ibid.*, Article I, Sec. 8, Clause 11. War may be "declared" by a formal recognition of its existence as well as by a declaration in advance. Act of June 18, 1812 (2 Stat. at Large, 755); Talbot *vs.* Seaman, 1 Cranch, 28; Bas *vs.* Tingey, 4 Dall., 37; Talbot *vs.* Jansen, 3 Dall., 133; The Eliza, 4 Dall., 37; The Prize Cases, 2 Black, 635; Tyler *vs.* Defrees, 11 Wall., 331.

[4] Constitution, Article II, Sec. 2.

[5] The Prize Cases, 2 Black, 635, 668

[6] Mississippi *vs.* Johnson, 4 Wall., 475; State *vs.* Kennon, 7 Ohio St., 546.

[7] Fleming *vs.* Page, 9 How., 603, 615.

[8] Street *vs.* U. S., 24 Ct. Cls., 230; 25 *ibid.*, 515; 113 U. S., 299. The following sections of the Revised Statutes provide for calling forth the militia in case of invasion or rebellion: whenever the United States are invaded, or are in imminent danger of invasion from any foreign nation or Indian tribe, or of rebellion against the authority of

Subordination of the Military to the Civil Power.—In the preparation and adoption of the State and Federal Constitutions, it was the purpose of the people to secure that maintenance of civil order, based upon the recognition of individual rights, which is known to the common law as "the preservation of the peace." This is accomplished by the enactment and enforcement of such laws, both civil and criminal, as seemed to those who have enacted them best suited to accomplish that purpose. The agencies provided for the enforcement of those laws are exclusively civil in character, and such military institutions, in the nature of militia forces or permanent establishments, as have received constitutional recognition are maintained under such limitations and restrictions as are calculated to insure their strict subordination to the civil power.

Such military authority as is vested in the President or in the Governors of the several States may be exercised (1) in the support of the proper civil authorities in the execution of the laws, and (2) in the maintenance of order in districts in which, by reason of insurrection or rebellion, the civil authority has been wholly or partially displaced and is for the time unable to exercise its functions.[1]

The Execution of the Laws.—The power of the President to employ the military forces of the United States in the conduct of public war, as in resistance to invasion, or in the suppression of insurrection or rebellion, has already been described. The Constitution also vests in him the duty of executing the laws of the Union.[2] While the responsibility for their correct

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the Government of the United States, it shall be lawful for the President to call forth such number of the militia of the State or States most convenient to the place of danger, or scene of action, as he may deem necessary to repel such invasion or to suppress such rebellion, and to issue his orders for that purpose to such officers of the militia as he may think proper. Section 1642, Rev. Stat.

When the militia of more than one State is called into the actual service of the United States by the President, he shall apportion them among such States according to representative population. Sec. 1643, *ibid.*

The militia, when called into the actual service of the United States for the suppression of rebellion against and resistance to the laws of the United States, shall be subject to the same Rules and Articles of War as the regular troops of the United States. Sec. 1644, *ibid.*

[1] Luther *vs.* Borden, 7 How., 1.

The Act of February 28, 1795, (1 Stat. L., 424,) authorizing the President, under certain circumstances, to call out the militia is constitutional, and the President is the final judge of the emergency justifying such a call. Martin *vs.* Mott, 12 Wheat., 19. By this Act the power of deciding whether the exigency had arisen upon which the Government of the United States is bound to interfere is given to the President. He is to act upon the application of the legislature or of the Executive, and consequently he must determine what body of men constitute the legislature, and who is the governor, before he can act. The fact that both parties claim the right to the government cannot alter the case, for both cannot be entitled to it. If there is an armed conflict, like the one of which we are speaking, it is a case of domestic violence, and one of the parties must be in insurrection against the lawful government. And the President must of necessity decide which is the government and which party is unlawfully arrayed against it before he can perform the duty imposed upon him by the Act of Congress. Luther *vs.* Borden, 7 How., 1.

[2] Constitution, Art. II, Section 1.

execution rests upon the President, as the head of the executive branch of the Government, his duty in this regard is performed through agencies, called Executive Departments, which are placed at his disposal by law. The heads of these departments are the constitutional advisers of the President; they are known severally as cabinet officers and constitute, collectively, the cabinet or constitutional ministry. Each of these departments is composed of agents created by law, called public officers, who are entrusted with the specific execution of the laws of the United States. As has been seen, these agencies, save in the War and Navy Departments, are exclusively civil in character and are sufficient in ordinary times to the adequate enforcement of the enactments of Congress. At times, however, on account of civil disorder or by reason of opposition to the enforcement of particular statutes, the civil agencies above described are unable to enforce the laws, and in such cases Congress has, by appropriate legislation, empowered the President to employ the land and naval forces of the United States in support of the execution of the laws.[1] Such statutory authority exists in the following cases:

To Execute the Laws of the Union.[1]—The Federal Government "has the right to use physical force, in any part of the United States, to compel obedience to its laws, and to carry into effect the powers conferred upon it by the Constitution."[2] The entire strength of the nation may be used to enforce, in any part of the land, the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the national Government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arise, the Army of the nation and all its militia are at the service of the nation to compel obedience to its laws.[3]

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[1] Constitution, Art. I, Sec. 8, Clause, 15; Sections 1642–1644 and 5297–5300, Rev. Stat.

[2] *Ex parte* Siebold, 100 U. S., 371, 395.

[3] *In re* Debs, 158 U. S., 564, 582; *In re* Neagle, 135 U. S., 1; *Ex parte* Siebold, 100 U. S., 371, 395; U. S. *vs.* Kirby, 7 Wall., 482. The power to enforce its laws and to execute its functions in all places does not derogate from the power of the State to execute its laws at the same time and in the same places. The one does not exclude the other except where both cannot be executed at the same time. In that case the words of the Constitution itself show which is to yield; "this Constitution and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land."

Although no State could establish and maintain a permanent military government, yet it may use its military power to put down an armed insurrection too strong to be controlled by the civil authority. The State must determine for itself what degree of force the crisis demands. Luther *vs.* Borden, 7 How., 1. See, also, 16 Opin. Att.-Gen., 162.

The national Government has the right to use physical force in any part of the United States to compel obedience to its laws, and to carry into execution the powers conferred upon it by the Constitution. "We hold it to be an incontrovertible principle that the Government of the United States may by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it." *Ex parte* Siebold, 100 U. S., 371, 395; U. S. *vs.* Neagle, 135 U. S., 1, 60; Logan *vs.* U. S., 144 U. S., 263, 294.

Unlawful Obstructions, Assemblages, Combinations, etc.—Section 5298 of the Revised Statutes provides that "whenever, by reason of unlawful obstructions, combinations, or assemblages of persons, or rebellion against the authority of the Government of the United States, it shall become impracticable, in the judgment of the President, to enforce, by the ordinary course of judicial proceedings, the laws of the United States within any State or Territory, it shall be lawful for the President to call forth the militia of any or all the States, and to employ such parts of the land and naval forces of the United States as he may deem necessary to enforce the faithful execution of the laws of the United States, or to suppress such rebellion, in whatever State or Territory thereof the laws of the United States may be forcibly opposed, or the execution thereof forcibly obstructed."[1]

The important power conferred by this statute is in its nature a measure of precaution or prevention, and a resort to the authority thus conferred is calculated in a proper case to prevent disaffection or civil disorder from ripening into an insurrection or rebellion of such formidable proportions as to constitute a state of public war. The statute assumes that the laws are being efficiently executed whenever there is no obstruction to their enforcement which cannot be overcome by a resort to the ordinary agencies provided for that purpose, and the emergency contemplated in the statute exists whenever in the judgment of the President it becomes impracticable to enforce the laws of the United States by a resort to the agencies thus provided. Where, therefore, such enforcement has in his judgment become impracticable, a case may be said to have arisen under the statute, and the President may employ the public armed forces, including the militia of the several States, in removing or overcoming such forcible obstruction to the operation and enforcement of the laws.

Proclamation to Insurgents.—As a condition precedent to the employment of military force under the statute above cited, the President is

[1] Sec. 5298, Rev. Sts. Authority similar in kind but more extensive in its scope is conferred by Sec. 3 of the Act of April 20, 1871, (17 Stat. at Large, 14,) which is embodied in Sec. 5299, Rev. Sts., which provides that "whenever insurrection, domestic violence, unlawful combinations, or conspiracies in any State so obstructs or hinders the execution of the laws thereof and of the United States as to deprive any portion or class of the people of such State of any of the rights, privileges, or immunities, or protection, named in the Constitution and secured by the laws for the protection of such rights, privileges, or immunities, and the constituted authorities of such State are unable to protect or from any cause fail in or refuse protection of the people in such rights, such facts shall be deemed a denial by such State of the equal protection of the laws to which they are entitled under the Constitution of the United States; and in all such cases, or whenever any such insurrection, violence, unlawful combination or conspiracy opposes or obstructs the laws of the United States, or the due execution thereof, or impedes or obstructs the due course of justice under the same, it shall be lawful for the President, and it shall be his duty, to take such measures, by the employment of the militia or the land and naval forces of the United States, or of either, or by other means, as he may deem necessary, for the suppression of such insurrection, domestic violence, or combinations."

required forthwith, by proclamation, "to command the insurgents to disperse and retire peaceably to their respective abodes, within a limited time."[1] The form and contents of such proclamations have already been described;[2] it is essential, however, that such instruments shall contain a notification to the insurgents to disperse and retire to their homes within a limited time, which must be specifically set forth, both as to its commencement and duration, in the body of the proclamation.[3]

Employment of Force in Support of the Government of a State.—The Constitution contains the requirement that "the United States shall guarantee to every State in this Union a republican form of government."[4] It also imposes upon the Federal Government the duty, in a certain case, of supporting the lawful Government of a State in the exercise of its constitutional functions. The several States of the Union are regarded by the Constitution as sovereign States, save as to those powers which they are forbidden to exercise, or which are expressly vested in the United States by the terms of that instrument. Insurrection may therefore exist in a State, or the enforcement of its laws may be opposed or prevented by the existence of unlawful combinations; and the Government of such State may suppress such insurrection or overcome such opposition by a resort to any means within its power. With this exercise of power on the part of a State of the Union the Federal Government as such has nothing to do. It is only when the resistance encountered is so formidable in character, or great in amount, as to make the task of suppression impossible that the State in which it exists may call upon the United States to interpose.[5]

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[1] Sec. 5300, Rev. Sts

[2] See the chapter entitled MARTIAL LAW, *ante*.

[3] Under the statute above cited the time, which is by the terms of the enactment required to be limited, is in respect to its duration entirely within the discretion of the President, and would be determined in a particular case by the emergency of the occasion, and the necessity for prompt action to vindicate the supremacy of the law and ensure the restoration of order.

Riot Acts.—In accordance with the law of most of the States, what is called the Riot Act is required to be read to insurgents or rioters before any extraordinary force, either civil or military, can be employed against them. The Riot Act is an old English statute enacted about 1715, during the reign of George I., and the necessity for reading it arose from a provision that "if any persons to the number of twelve or more, being unlawfully, riotously, and tumultuously assembled together, shall to the number of twelve or more unlawfully, riotously, and tumultuously remain or continue together by the space of one hour after being commanded or requested by proclamation to disperse themselves, they shall be adjudged felons, and shall suffer death without benefit of clergy." The statute provides that proclamation shall be made openly and with loud voice in these words: "Our Sovereign Lord the King chargeth and commandeth all persons being assembled, immediately to disperse themselves, and peaceably to depart to their habitations or to their lawful business, upon the pains contained in the Act, made in the first year of King George, for preventing tumults and riotous assemblies. God save the King." Making this proclamation constitutes in England the "reading of the Riot Act." The same course may be pursued in this country, in those States in which the common law prevails, by a proclamation made in the name of the Commonwealth, State, or People, following in other respects the form above cited from the statute of George I., or by following the directions of the State statute on the subject, if any such there be. Law Notes, vol. i., p. 88.

[4] Constitution, Art. IV, Sec. 4, Clause 1.

[5] *Ibid.*, Art. IV, Sec. 4.

Form of Request.—The request, which must originate with the Governor of the State, or with the legislature if that body be in session,[1] is addressed to the President, who by the terms of the Constitution is compelled to accede to the request and to interfere in behalf of the lawfully constituted authorities of the State in which the demand originated.[2] The appeal is not in strictness a request for assistance, but an admission of a want of capacity on the part of the State to deal with an existing emergency, and such military operations as are undertaken by the United States in pursuance of such request are carried on under the direction of the President by the proper military authorities of the United States, and are entirely independent of State control.[3]

Employment of Military Force in Connection with Indian Affairs.—The laws of the United States impose upon the President certain duties in respect to the management of Indians and the control of Indian reservations. They also empower him, whenever in his opinion such a course becomes necessary, to make use of military force in the performance of the duties so imposed. It is proper to observe in this connection that all matters relating to Indians and Indian affairs are by statute committed to the exclusive custody of the Interior Department. The War Department as such, unless specially authorized by law or requested by the Department of the Interior, is without power to exercise control over Indian tribes or to interpose in the management of Indian reservations; and officers of the Army are in no way responsible for the behavior of Indians or for the control of Indian lands unless, by engaging in acts of hostility, they place themselves in the status of public enemies.[4]

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[1] Constitution, Art. IV, Sec. 4, Clause 1. See, also, Paschal's Annotated Constitution, p. 245.

[2] The proviso of the Constitution "when the legislature cannot be convened" may be said to mean when it is not in session, or cannot by the State law be assembled forthwith, or in time to provide for the emergency. When it is in session, or can legally and at once be called together, it will not be lawful for the President to employ the Army on the application merely of the Governor. Dig. J. A. Gen., 161, par. 2.

[3] A military force employed according to Art. IV, Sec. 4, of the Constitution, is to remain under the direction and orders of the President as commander-in-chief and his military subordinates: it cannot be placed under the direct orders or exclusive disposition of the Governor of the State. *Ibid.*, par. 3.

In all cases of civil disorders or domestic violence, it is the duty of the Army to preserve an attitude of indifference and inaction till ordered to act by the President, by the authority of the Constitution or of Secs. 2150, 5297, or 5298, Rev. Sts., or other public statute. An officer or soldier may indeed interfere to arrest a person in the act of committing a crime, or to prevent a breach of the peace in his presence, but this he does as a citizen and not in his military capacity. Any combined effort by the military, as such, to make arrests or otherwise prevent breaches of the peace or violations of law in civil cases, except by the order of the President or the requirement of a U. S. official authorized to require their services on a *posse comitatus*, must necessarily be illegal. In a case of civil disturbance in violation of the laws of a State a military commander cannot *volunteer* to intervene with his command without incurring a personal responsibility for his acts. In the absence of the requisite orders he may not even march or array his command for the purpose of exerting a moral effect or an effect *in terrorem;* such a demonstration, indeed, could only compromise the authority of the United States while insulting the sovereignty of the State. *Ibid.*, 164, par. 7.

[4] Section 2152, Revised Statutes, contains the requirement "that the superintendents,

Subject to such qualification, however, the military forces of the United States may be employed in such manner and under such regulations as the President may direct:

First. In the apprehension of every person who may be in the Indian country in violation of law; and in conveying him immediately from the Indian country, by the nearest convenient and safe route, to the civil authority of the Territory or judicial district in which such person shall be found, to be proceeded against in due course of law;

Second. In the examination and seizure of stores, packages, and boats, authorized by law;

Third. In preventing the introduction of persons and property into the Indian country contrary to law, which persons and property shall be proceeded against according to law;

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agents, and sub-agents shall endeavor to procure the arrest and trial of all Indians accused of committing any crime, offense, or misdemeanor, and of all other persons who may have committed crimes or offenses within any State or Territory and have fled into the Indian country, either by demanding the same of the chiefs of the proper tribe, or by such other means as the President may authorize. The President may direct the military force of the United States to be employed in the apprehension of such Indians, and also in preventing or terminating hostilities between any of the Indian tribes."

Active hostilities with Indians do not constitute a state of foreign war, the Indian tribes, even where distinct political communities, being subject to the sovereignty of the United States.* Warfare inaugurated by Indians is thus a species of domestic rebellion, but it is so far assimilated to foreign war that during its pendency and on its theatre the laws and usages which govern and apply to persons during the existence of a foreign war are to be recognized as in general prevailing and operative. The mere making of predatory incursions by parties of Indians with whose tribe no general hostilities have been inaugurated does not constitute an *Indian war*. Dig. J. A. Gen., 451, par. 1.

Held that the Cherokee Nation during the late war did not occupy the status of an insurrectionary State, and was not therefore included in the application of the statutes and proclamations which related to such States, but that its attitude from the date of its treaty with the Confederate Government of October 7, 1861, to its treaty with the United States of July 19, 1866, was that of an *ally* of the Confederacy to the extent that the individual members of the Nation who took part in hostilities against the United States became legally assimilated with the enemy. *Ibid.*, 452, par. 2.

Indians who, having occupied an attitude of hostility or *quasi* hostility toward the United States, have in good faith resumed and been admitted to friendly relations therewith, are entitled, as repentant wards, to the protection of the Government, and acts of violence committed against them as if they were enemies are not acts of legitimate warfare, but crimes. Thus where an officer in command of a regiment of volunteer cavalry made a sudden and violent attack upon a village of friendly Indians, (who, having been in a state of partial hostility, had returned to their allegiance and had in fact been recognized as entitled to protection by the military authorities,) and caused the massacre of several hundred persons, of whom the larger portion were women and children,†—*held* that his act was wholly unauthorized and criminal; and in view of the fact that by reason of the expiration of the term of his regiment he had been mustered out of the service before he could be brought to trial by court-martial,—*advised* that, as a vindication of the good name of the Army and the reputation of the Government, which this atrocious act had compromised, there be issued from the War Department a General Order setting forth briefly the circumstances of the crime, and so denouncing it as to discharge as far as possible the military administration from responsibility therefor. *Ibid.*, par. 3.

* See Worcester *vs.* Georgia, 9 Peters, 515.

† See this raid upon Cheyenne Indians in Colorado, known as the "Sandy Creek Massacre," described and denounced in the Report of the Congressional "Committee on the Conduct of the War," of May 4, 1865.

Fourth. And also in destroying and breaking up any distillery for manufacturing ardent spirits set up or continued within the Indian country.[1]

Removal of Intruders from Indian Reservations.—The law not only authorizes the removal of intruders from Indian reservations, but empowers the President to make use of military force in effecting such removals.[2] The employment of troops in the performance of this duty in no way resembles their use in military operations against an enemy. Intruders are given reasonable notice to quit, and upon the expiration of such notice may be removed or ejected by the use of sufficient force to accomplish that purpose. The employment of force in excess of such amount is not authorized.

Restriction upon the Detention of Arrested Persons.—The power conferred by Section 2150 of the Revised Statutes, above cited, is subject to

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[1] Sec. 2150, Revised Statutes.

[2] The Superintendent of Indian affairs and the Indian agents and sub-agents shall have authority to remove from the Indian country all persons found therein contrary to law; and the President is authorized to direct the military force to be employed in such removal. Sec. 2147, Rev. Stat.

If any person who has been removed from the Indian country shall thereafter at any time return or be found within the Indian country, he shall be liable to a penalty of one thousand dollars. Sec. 2148, *ibid.*

The Commissioner of Indian Affairs is authorized and required, with the approval of the Secretary of the Interior, to remove from any tribal reservation any person being therein without authority of law, or whose presence within the limits of the reservation may, in the judgment of the Commissioner, be detrimental to the peace and welfare of the Indians; and may employ for the purpose such force as may be necessary to enable the agent to effect the removal of such person. Sec. 2149, *ibid.*

Indian Country.—It will be observed that the statute above set forth applies to *Indian country*. This term has been defined by the Executive Departments and by the courts of the United States. It was held by the Judge-Advocate General in October, 1877, "that the term 'Indian country,' as employed in the statutes regulating trade and intercourse with the Indians (see, particularly, Ch. IV, Title XXVIII, Rev. Sts.) might properly be defined in general as including the following territory, viz.: Indian reservations occupied by Indian tribes; other districts so occupied to which the Indian title has not been extinguished; any districts not in other respects Indian country, over which the operation of those statutes may be extended by treaty or Act of Congress." * Dig. J. A. Gen., 450, par. 1.

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* See this opinion as adopted and incorporated in G. O. 97, Hdqrs. of Army, 1877; also, in the same connection, 14 Opins. Att.-Gen., 290; United States *vs.* Forty-three Gallons of Whiskey, 3 Otto, 188; Bates *vs.* Clark, 5 Id. 204; United States *vs.* Seveloff, 2 Sawyer, 311. That, in view of the Act of March 3, 1873, extending to it certain provisions of the Act of June 30, 1834, the Territory of Alaska is "Indian country" so far as concerns the introduction and disposition of spirituous liquor, and that persons violating such provisions may therefore be arrested by military force,—see *In re* Carr, 3 Sawyer, 316; also citation from same case in note to ALASKA, § 2, and 14 Opins. Att.-Gen., 327.

In view of the positive terms of Sec. 2140, Rev. Sts., an officer of the Army not only *may* but *should* "take and destroy any ardent spirits or wine found in the Indian country except such as may be introduced therein by the War Department." The section imposes this as a "duty" upon "any person in the service of the United States"—including, of course, military as well as civil officials. *Held*, however, that the authority given by the statute to destroy liquor brought into an Indian reservation did not authorize the destruction by the military of a building, the private property of a citizen, in which the liquor was found stored. Dig. J. A. Gen., 450, par. 2.

Under Sec. 2150, Rev. Sts., a military commander may be authorized and directed by the President to arrest by military force and deliver to the proper civil authorities for trial any white persons or Indians who may be in the Indian country engaged in furnishing liquor to Indians in violation of law; as also to prevent by military force the entry into such country of persons designing to introduce liquor therein contrary to law. *Held* that this authority to *prevent* was clearly an authority to *arrest*, where arrests were found necessary to restrain persons attempting to introduce liquor or other inhibited property. *Ibid.*, par. 3.

In view of the duty devolved by Sec. 2140, Rev. Sts., upon "any person in the service of the United States," to take and destroy spirituous liquors in the Indian country, *held* that a post commander in such country who seized and destroyed a quantity of such liquors introduced into such country without the authority of the Secretary of War, *but not found within the limits of his military command*, had not exceeded his powers. *Ibid.*, 451, par. 4.

considerable restrictions, and "no person apprehended by military force under the preceding section shall be detained longer than five days after arrest and before removal. All officers and soldiers who may have any such person in custody shall treat him with all the humanity which the circumstances will permit."[1]

Removal of Trespassers from the Public Lands.—In respect to the public lands, the United States stands in the same position as a private proprietor or owner of lands in fee simple, and as such may not only eject trespassers from such lands, but may resort to the ordinary remedies provided by law for the protection of real property from intrusion or spoliation.[2] In addition to the remedies above described, the President is expressly authorized by several statutes[3] to make use of such military force as he may judge necessary and proper to remove trespassers from the public lands, and to remove or destroy any unlawful enclosures of the same. As has been explained in respect to the removal of intruders from Indian reservations, the employment of force thus authorized is not in the nature of a warlike or military undertaking, but rather resembles the action of a sheriff or peace officer in the removal of a trespasser or in the execution of process of ejectment.

Enforcement of the Civil Rights Law; the Intercourse Acts; the Health Laws and the Elective Franchise, etc.—The President is also empowered, by several statutes, to employ such part of the land and naval forces as he may deem necessary to enforce the provisions of the Civil Rights Act; the Intercourse Laws; the laws respecting the enforcement of quarantine and health laws and in the protection of persons arrested with a view to their extradition. "No officer of the Army or Navy of the United States shall prescribe or fix, or attempt to prescribe or fix, by proclamation, order, or otherwise, the qualifications of voters in any State, or in any manner interfere with the freedom of any election in any State, or with the exercise of the free right of suffrage in any State."[4]

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[1] Section 2151, Revised Statutes.

[2] The provision of June 18, 1878, is not to be construed as interfering with the authority and duty of the President, to employ a necessary military force for the removal of trespassers from a military reservation; such employment not being, properly speaking, "for the purpose of executing the law," but a mere protecting, by the Executive Department, of public property in its military charge. Dig. J. A. Gen., 162, par. 6.

[3] Sec. 2460, Rev. Sts., Sec. 1, Act of March 3, 1807, (2 Stat. at Large, 445,) and February 25, 1885, (23 *ibid.*, 322.)

[4] Title XXIV, Rev. Sts.; Secs. 5301–5322, *ibid.*; Sec. 4792, *ibid*; Secs. 5275–5277, *ibid.*; Secs. 2003, 2004, *ibid.* Squatters and other trespassers and intruders may and should be expelled, by military force if necessary, from a military reservation.* But such persons when they have been suffered to own and occupy buildings on a reservation should be allowed reasonable time to remove them. If not removed after due notice the same should be removed by the military. Material abandoned on a reservation by a trespasser, on vacating, may lawfully be utilized by the commander for completing roads, walks, etc. Squatters on United States reservations may be forced therefrom by criminal pro-

* See G. O. 62 of 1869.

Suppression of Peonage in New Mexico.—Peonage is a term applied to a condition of involuntary servitude which existed in Mexico, to which under certain circumstances a debtor was reduced, by operation of law, until he had paid or worked out his debt.[1] The practice existed at one time in New Mexico, but, being opposed to the public policy of the United States, was suppressed by an enactment of Congress in 1867.[2] The statute which sup-

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ceedings had under Sec. 5388, Rev. Sts., or ejected by civil action. Dig. J. A. Gen., 516, par. 13.

Where squatters have made any considerable improvements upon a reservation, and their value has been duly estimated,—as by a board constituted by the department commander and presenting in its report all the evidence on the subject,—an award by the Secretary of War, acquiesced in by the claimant, may be sued upon in the Court of Claims, which (in the absence of evidence of fraud or mistake) will accept such award as conclusive.* *Ibid.*, par. 14.

The general principle of the authority to remove trespassers, their structures and property, from land of the United States embraced in a military reservation *held* specially applicable where the intrusion was for an injurious purpose, as where the object was to lay a sewer intended to discharge into a main sewer constructed by the United States upon and for the use of its own premises. In this instance, as the trespass was committed by the authorities of a municipality, *advised* that reasonable notice be given them to remove their property before resorting to military force for the purpose, and meantime that precautions be taken to prevent a connection between the proposed sewer and the sewers under the control of the United States. *Ibid.*, 517, par. 16.

Where certain persons had entered unlawfully upon a military reservation, and had proceeded to cultivate the soil of the same for their personal benefit and to lead off water, needed for the use of the garrison, in order to irrigate the ground so cultivated, *advised* that the commandant be instructed to give such persons reasonable notice to quit with their property, and if they did not comply, to remove them by military force beyond the limits of the reservation.† *Ibid.*, 513, par. 6.

The cutting of timber on a military reservation is an offense against the United States, made punishable by Sec. 5388, Rev. Sts., as amended by the Acts of June 4, 1888, and of March 3, 1875, c. 151. So grass cut on a reservation and removed as hay would be personal property of which the asportation would be larceny under the Act of March 3, 1875, c. 144. And persons coming upon a military reservation for the purpose of cutting wood or grass, or to plow up the soil, or commit other trespass, may be removed as intruders, and the post commander should not hesitate to resort to military force if necessary for the purpose. And he may of course prevent such trespassers from carrying off with them any property of the United States. *Ibid.*, 516, par. 15.

Held that the Act of March 3, 1875, "to protect ornamental and other trees on government reservations and on lands purchased by the United States, etc., which makes penal the unlawful cutting or injuring of such trees, was clearly not intended to, and did not, preclude the reasonable cutting of wood on military reservations, under the direction of the proper officer, for the supplying of the necessary fuel for the garrisons stationed thereon; the authority to establish a reservation, where in fact lawfully existing, being deemed to include an authority to efficiently maintain the same when established. *Ibid.*, 513, par. 4.

Held that the right to the "free and open exploration and purchase" of mineral lands, accorded to citizens, etc., by Sec. 2319, Rev. Sts., could not authorize an entry, for the purpose of prospecting for mines, upon a military reservation once duly defined and established by the President; the mineral lands intended by the statute being clearly such as are included within the "public lands" of the United States. *Ibid.*, par. 5.

[1] Anderson's Law Dict.; Act of March 2, 1867 (14 Stat. at Large, 546).

[2] The Act of March 2, 1867, provides that "the holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in the Territory of New Mexico, or in any other Territory or State of the United States; and

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* Maddux *vs.* U. S., 20 Ct. Cl. 198, 199.

† As to the authority to remove trespassers from military reservations, see 8 Opins. Att.-Gen., 268; 9 *id.*, 106, 476; G. O. 74, Hdqrs. of Army, 1869. That this authority is not deemed to be affected by the provision of sec. 15 of the Act of June 18, 1878, see Dig. J. A. Gen., 162, par. 6.

pressed peonage contained the requirement that "every person in the military and civil service in the Territory of New Mexico shall aid in the enforcement" of the section directing its abolition.[1]

The Neutrality Laws.—Neutrality is a status or relation occupied by a State toward other States or parts of States which are engaged in public war. The relation, from the nature of the case, presumes the existence of a state of war, and of belligerents who are participants therein, since in time of peace there can be no status of belligerency, and as a consequence no occasion for, or status of, neutrality. The neutrality laws of the United States, however, are so framed as not only to secure its neutrality during the existence of a state of public war, but to enable its friendly relations to be maintained with States in which disaffection or insurrection exists, but with which the United States is and desires to continue at peace. These statutes may therefore become operative before a state of public war has been declared or even acknowledged to exist.

Acts Forbidden.—It is the purpose of the neutrality laws of the United States to preserve its friendly relations with belligerents, by refraining from giving to either party any assistance in the prosecution of an existing war. To that end the neutrality laws, under appropriate penalties, forbid: (1) making the territory of the United States a recruiting-ground for either belligerent; (2) fitting out, arming, or equipping a military or naval expedition within its territory, for the purpose of carrying on hostile operations against a State with which the United States is at peace; and (3) augmenting the armament or equipment of such an expedition within its ports or territorial waters. With a view to the adequate enforcement of these statutes, the President is empowered to make use of such portions of the land or naval forces as he may deem necessary in preventing the departure of such expeditions, in taking possession of and detaining vessels, or in compelling the departure of such vessels as "by the laws of nations or the

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all acts, laws, resolutions orders, regulations, or usages of the Territory of New Mexico, or of any other Territory or State, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void." *

[1] Section 2 of the same Act required that "every person in the military or civil service in the Territory of New Mexico shall aid in the enforcement of the preceding section." † See, also, Sections 5526 and 5532, Revised Statutes.

Prior to the passage of the Act above cited, it was held by the Judge-Advocate General that "in view of the provision of the Act of July 17, 1862, that 'no person in the military service shall assume to decide upon the validity of the claim of any person to the service or labor of any other person, or surrender up any such person to the claimant, on pain of being dismissed from the service,' *held* that an officer of the Army stationed in New Mexico, who caused to be delivered to his former master there a fugitive peon, was liable to trial by court-martial, and, upon conviction, to dismissal." Dig. J. A. Gen., 585.

* Section 1990, Revised Statutes.
† Section 1991, *ibid.*

treaties of the United States ought not to remain within the United States."[1]

[1] For the neutrality laws, see §§ 5281–5291, Revised Statutes.

The Neutrality Act has been uniformly treated by the executive departments and by judges of the United States courts as embracing warlike enterprises set on foot in this country against a friendly power at peace with all the world. U. S. *vs.* Sullivan, 9 N. Y. Leg. Obs., 257.

The organization in one country or State of combinations to aid or abet rebellion in another, or in any other way to act on its political institutions, is a violation of national amity and comity, and an act of semi-hostile interference with the affairs of other peoples. . . . But there is no municipal law to forbid and punish such combinations either in the United States or Great Britain. Opin. Att.-Gen., 216.

The policy of this country is, and ever has been, a perfect neutrality and non-interference in the quarrels of other nations. 3 Opin. Att.-Gen., 739.

The Act of April 30, 1818, like that of June 5, 1794, was intended to secure, beyond all risk of violation, the neutrality and pacific policy which they consecrate as our fundamental law. *Ibid.*, 741.

The enlistment of seamen or others for marine service on Mexican steamers in New York, they not being Mexicans transiently within the United States, is a clear violation of Section 5282, and the persons enlisted, as well as the officers enlisting them, are liable to the penalties thereby incurred. 4 Opin. Att.-Gen., 336.

This section applies to foreign consuls raising troops in the United States for the military service of Great Britain. 7 *ibid.*, 367. It does not apply to those who go abroad for foreign enlistment, or to those who transport such persons. U. S. *vs.* Kazinski, 2 Sprague, 7. The enlistment must be made within the territory of the United States, and the section does not apply to one who goes abroad with intent there to enlist. *Ibid.* The words "soldier" and "enlist," as used in this section, are to be understood in their technical sense. *Ibid.*

To constitute an offense under Section 5283, the vessel must be fitted out and armed with the specific intent. U. S. *vs.* Skinner, 1 Brun. Coll. Cases. It is not necessary that the vessel should be armed or manned for the purpose of committing hostilities before she leaves the United States if it is the intention that she shall be so fitted subsequently (The City of Mexico, 28 F. R., 148), or if the separate parts of the expedition are to be united on the high seas. U. S. *vs.* The Mary N. Hogan, 18 Fed. Rep., 529, and 20 *ibid.*, 50.

The status of the insurgent party will be regarded by the courts as it is regarded by the political or executive departments of the United States at the time of the commission of the alleged offense. Gelston *vs.* Hoyt, 3 Wheat., 246, 324; U. S. *vs.* Palmer, *ibid.*, 610, 625; Kennett *vs.* Chambers, 14 How., 38; Wharton, Int. Law Dig., 551, 552; U. S. *vs.* Trumbull, 48 F. R., 99, 104. The word "people," as used in this section, "is one of the denominations applied by the Act of Congress to a foreign power." U. S. *vs.* Quincy, 6 Pet., 445.

I know of no law or regulation which forbids any person or government, whether the political designation be real or assumed, from purchasing arms from the citizens of the United States and shipping them at the risk of the purchaser. 10 Opin. Att.-Gen., 452. The sending of munitions of war from a neutral country to a belligerent port for sale as articles of commerce is unlawful only as subjecting such property to capture. The Santissima Trinidad, 7 Wheat., 283; The City of Mexico, 24 F. R., 924. It is the right of a belligerent to purchase goods and instruments of war in a neutral nation, but it may be denied by a law passed for such purpose. 10 Opin. Att.-Gen., 61.

The provisions of this section do not apply to a vessel which receives arms and munitions of war in this country as cargo merely, with intent to carry them to a party of insurgents in a foreign country, but not with the intent that they shall constitute any part of the fittings or furnishings of the vessel herself. U. S. *vs.* The Itata, 56 F. R., 608; U. S. *vs.* 2000 Cases of Rifles, *ibid.* A vessel is not liable to forfeiture under this section, nor is she liable to condemnation as piratical on the ground that she is in the employ of an insurgent party which has not been recognized by the United States as having belligerent rights. U. S. *vs.* The Itata, 56 F. R., 608; U. S. *vs.* Weed, 5 Wall., 62; The Watchful, 6 Wall., 91.

In the case of The Horsa (163 U. S., 632), decided on appeal in the Supreme Court of the United States on May 25, 1896, it was held "that any combination of men organized to go to Cuba to make war upon its government, provided with arms and ammunition, constitutes a military expedition. It is not necessary that the men shall be

Restriction upon the Use of Military Force.—The several grants of power to the Executive in connection with the use of military force are coupled with an important statutory restriction which makes it unlawful "to employ any part of the Army of the United States, as a *posse comitatus* or otherwise, for the purpose of executing the laws except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by Act of Congress."[1]

The duty of sheriffs, magistrates, coroners, and other civil officers in respect to the preservation of the peace is well known; it is an outgrowth of the common law and has been recognized by statute in most States of the Union. Whenever, in the opinion of the sheriff, the responsible conservator of the peace, such a course becomes necessary, he may summon to his assistance what is known as the *posse comitatus*, that is, the body of male citizens of the county above fifteen years of age, and may command them to aid him in the execution of process, in the preservation of the peace, and in the performance of other lawful duties requiring and involving the use of

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drilled, put in uniform, or prepared for efficient service, nor that they shall have been organized as or according to the tactics or rules which relate to what is known as infantry, cavalry, or artillery. It is sufficient that they shall have combined and organized here to go there and make war on a foreign government, and to have provided themselves with the means of doing so. Whether such provision, as by arming, etc., is necessary need not be decided in this case. Nor is it important that they intended to make war as an independent body or in connection with others. Where men go without such combination and organization to enlist as individuals in a foreign army, they do not constitute such military expedition, and the fact that the vessel carrying them might carry arms as merchandise would not be important." See, also, The Estrella, 4 Wh., 298; The Gran Para, 7 Wh., 471; The Santa Maria, 7 Wh., 490. The Monte Allegre, 7 Wh., 520; U. S. *vs.* Reyburn, 6 Pet., 352; U. S. *vs.* Quincy, 6 Pet., 445. The word "people," as used in Section 5283, Revised Statutes, covers any insurgent or insurrectionary body conducting hostilities, although its belligerency has not been recognized by the United States. The Three Friends, 166 U. S., 1.

The repair of Mexican war-steamers in the port of New York, together with the augmenting their force by adding to the number of their guns or by changing those originally on board for those of larger calibre, or by the addition of any equipment solely applicable to war, is a violation of Section 5285. But the repair of their bottoms or copper, etc., does not constitute any increase or augmentation of force within the meaning of the Act, and the steamers are not liable to seizure by any judicial process under it. 4 Opin. Att.-Gen., 336.

The taking on of a crew of American citizens, or of aliens domiciled in the United States, would constitute a violation of this section. The Alerta, 9 Cranch, 359.

When a party of insurgents already organized and carrying on war against the government of a foreign country send a vessel to procure arms and ammunition in the United States, the act of purchasing such arms and ammunition and placing them aboard the vessel is not within the scope of Section 5286, which prescribes a penalty for every person who, within the limits of the United States, begins or sets on foot or prepares or provides the means for any military expedition or enterprise "to be carried on from thence." Such expeditions and enterprises must originate within the jurisdiction of the United States, and the terms of the statute do not apply to an expedition originating within the territory of a foreign state. U. S. *vs.* Trumbull, 48 F. R., 99. For the liability of the officers of the ship, see U. S. *vs.* Rand, 17 Fed. Rep., 142.

The law (Section 5289, Revised Statutes) does not prohibit armed vessels belonging to citizens of the United States from sailing out of our ports; it only requires the owners to give security that such vessels shall not be employed by them to commit hostilities against foreign powers at peace with the United States. U. S. *vs.* Quincy, 5 Pet., 445.

[1] Sec. 15. Act of June 18, 1878 (20 Stat. at Large, 152).

physical force. The several marshals of the United States are similarly empowered to command the services of bystanders in the execution of process of the Federal courts and in the preservation of the Federal peace, that is, in the enforcement of the laws of the United States as distinguished from those of the several States.

Purpose of the Restriction.—It was the purpose of this restriction to prohibit the use of the troops of the United States, either individually or in organized bodies, as parts of the *posse comitatus*, State or Federal, by making their use unlawful for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by Act of Congress.[1]

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[1] Inasmuch as it was not expressly authorized by any Act of Congress that United States marshals should be empowered to summon the military to serve on a *posse comitatus* (but this was authorized only indirectly and impliedly by the provision of the Act of September 24, 1789, incorporated in Section 787 of the Revised Statutes),* the Army could not, under the existing law, legally act on the *posse comitatus* of a marshal or deputy marshal of the United States.† Dig. Opin. J. A. Gen., 162, par. 6.

In the absence of such an "unlawful combination" as is contemplated by Section 5298, Revised Statutes, the President would not be authorized to employ a military force to assist inspectors of customs in seizing smuggled property or arresting persons concerned in violations of the revenue laws, such an employment not being expressly authorized by any statute. *Ibid.*

Whenever a marshal or deputy marshal was prevented from making due service of judicial process, for the arrest of persons or otherwise, by the forcible resistance or opposition of an unlawful combination or assemblage of persons, the President was expressly authorized by Section 5298, Revised Statutes, to employ such part of the army as he might deem necessary to secure the due service of such process and execute the law; first, however, in any such case (as in any case arising under Sections 5297 and 5299) making proclamation as required by Section 5300. *Ibid.*

Notwithstanding the legislation of June 18, 1878, the President was authorized to employ the military to arrest and prevent persons engaging in introducing liquor into the Indian country contrary to law, as also to arrest persons being otherwise in the Indian country in violation of law,‡ or to make the arrest therein of Indians charged with the commission of crime, such employment being expressly authorized by Sections 2150 and 2152, Revised Statutes. *Ibid.*

The President was authorized by Section 2150, Revised Statutes, to remove by military force, after a reasonable notice to quit, certain persons commorant upon an Indian reservation contrary to the terms of a treaty between the United States and the tribe occupying the reservation, and who therefore were there "in violation of law" in the sense of that section. § *Ibid.*

The provision of June 18, 1878, was not to be construed as interfering with the authority and duty of the President to employ a necessary military force for the removal of trespassers from a military reservation, such employment not being, properly speaking, "for the purpose of executing the laws," but a mere protecting, by the executive

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* 6 Opin. Att.-Gen., 471; Letter of Attorney-General Evarts to the United States marshal for the Northern District of Florida, Attorney-General's Office, August 20, 1868; General Instructions to United States marshals from Attorney-General Taft, published in General Orders, 96, Headquarters of Army, 1876.

† See, to a similar effect, Opinion of the Attorney-General of October 10, 1878 (16 Opin., 162); also 19 Opin., 293.

‡ But note that, in view of the provisions of Section 2151, Revised Statutes, an officer of the Army who detains a person arrested under Section 2150 longer than five days before "conveying him to the civil authority," or subjects him when in arrest to unreasonably harsh treatment, renders himself liable to an action in damages for false imprisonment. *In re* Carr, 3 Sawyer, 316; Waters *vs.* Campbell, 5 *ibid.*, 17.

§ See 14 Opin. Att.-Gen., 451; 20 *ibid.*, 245; and note the proclamation of the President published in General Orders, 16, Headquarters of Army, 1880, relating to the intrusion of unauthorized persons upon the "Indian Territory" and declaring that the Army would be employed to effectuate their removal if necessary.

Use of Military Force in the Execution of the Law.—If time will admit, applications for the use of troops for such purposes must be forwarded, with statements of all material facts, for the consideration and action of the President; but in case of sudden and unexpected invasion, insurrection, or riot, endangering the public property of the United States, or in case of attempted or threatened robbery or interruption of the United States mails, or other equivalent emergency so imminent as to render it dangerous to await instructions requested through the speediest means of communication, an officer of the Army may take such action before the receipt of instructions as the circumstances of the case and the law under which he is acting may justify, and will promptly report his action and the circumstances requiring it to the Adjutant-General of the Army, by telegraph if possible, for the information of the President.[1]

In the enforcement of the laws troops are employed as a part of the military power of the United States, and act under the orders of the President as Commander-in-Chief. They cannot be directed to act under the orders of any civil officer. The commanding officers of troops so employed are directly responsible to their military superiors. Any unlawful or unauthorized act on their part would not be excusable on the ground of an order or request received by them from a marshal or any other civil officer.[2]

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department, of public property in its military charge.* Dig. Opin. J. A. Gen., 162, par. 6.

In the absence of any express provision contained in the acts authorizing the President to make reservations of forest lands (Acts of September 25 and October 1, 1890, and March 3, 1891, sec. 24), by which he is expressly empowered to use the army in execution of such statutes, *held* that the President would not be authorized to employ, as a posse comitatus or otherwise, the military forces to aid in enforcing the regulations established by the Secretary of the Interior for the care and management of such lands. Such employment, if permitted, would render the troops trespassers and liable to civil suits and prosecutions. *Ibid.*, 165, par. 9.

[1] Paragraph 489, Army Regulations of 1895. The following paragraphs of the Army Regulations of 1895 also contain instructions as to the manner in which troops shall be employed:

Officers of the Army will not permit troops under their command to be used to aid the civil authorities as a *posse comitatus*, or in execution of the laws, except as provided in the foregoing paragraph (paragraph 487). Par. 488, A. R. 1895.

[2] Par. 490, *Ibid.* Troops called into action against a mob forcibly resisting or obstructing the execution of the laws of the United States, or attempting to destroy property belonging to or under the protection of the United States, are governed by the general regulations of the Army and apply military tactics in respect to the manner in which they shall act to accomplish the desired end. It is purely a tactical question in what manner they shall use the weapons with which they are armed—whether by fire of musketry and artillery or by the use of bayonet and sabre, or by both, and at what stage of the operations each or either mode of attack shall be employed. This tactical question will be decided by the immediate commander of the troops, according to his judgment of the situation. The fire of troops should be withheld until timely warning has been given to the innocent who may be mingled with the mob. Troops must never fire into a crowd unless ordered by their commanding officer, except that single selected sharpshooters may shoot down individual rioters who have fired upon or thrown missiles at the troops. As a general rule the bayonet alone should be used against mixed

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* "Due caution should be observed, however, that in executing this duty there be no unnecessary or wanton harm done to persons or property." Opin. Att.-Gen., 476.

Duty of the Army to Refrain from Interference.—It has been seen that in all cases of civil disorders or domestic violence it is the duty of the Army to preserve an attitude of indifference and inaction till ordered to act by the President, by the authority of the Constitution or other public statute.[1]

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crowds in the first stages of a revolt. But as soon as sufficient warning has been given to enable the innocent to separate themselves from the guilty, the action of the troops should be governed solely by the tactical considerations involved in the duty they are ordered to perform. They should make their blows so effective as to promptly suppress all resistance to lawful authority, and should stop the destruction of life the moment lawless resistance has ceased. Punishment belongs not to the troops, but to the courts of justice. Par. 491, Army Regulations of 1895.

[1] Dig. J. A. Gen., 164, par. 7. An officer or soldier may, indeed, interfere to arrest a person in the act of committing a crime, or to prevent a breach of the peace in his presence, but this he does as a citizen and not in his military capacity. Any combined effort by the military, as such, to make arrests or otherwise prevent breaches of the peace or violations of law in civil cases, except by the order of the President, must necessarily be illegal. In a case of civil disturbance in violation of the laws of a State, a military commander cannot volunteer to intervene with his command without incurring a personal responsibility for his acts. In the absence of the requisite orders he may not even march or array his command for the purpose of exerting a moral effect or any effect *in terrorem;* such a demonstration, indeed, could only compromise the authority of the United States, while insulting the sovereignty of the State. *Ibid.*, 164, par. 7. See, also, General Orders, No. 26, Adjutant-General's Office, of 1894 (A. R., 487), for instructions as to the use of the military force in support of the civil authority.

CHAPTER XIX.

THE ARTICLES OF WAR.

History of the British Articles.—In the early history of military institutions in England, from which, as has been seen, our own military policy was in great part derived, military law existed only in time of war. When war broke out troops were raised as occasion required, and ordinances for their government, or, as they were afterwards called, *Articles of War*, were issued by the crown, with the advice of the constable, or of the peers, and other experienced persons; or were enacted by the commander-in-chief in pursuance of an authority for that purpose given in his commission from the crown.[1] These ordinances or articles, however, remained in force only during the service of the troops for whose government they were issued, and ceased to operate on the conclusion of peace. Military law in time of peace did not come into existence in statutory form till the passing of the first Mutiny Act in 1689.[2]

The system of governing troops on active service by Articles of War issued under the prerogative power of the crown, whether issued by the king himself, or by the commander-in-chiefs or other officers holding commissions from the crown, continued from the time of the Conquest till long after the passing of annual Mutiny Acts,[3] and did not actually cease till the prerogative power of issuing such articles was superseded, in 1803, by a corresponding statutory power.[4] Numerous copies of these Articles are in existence prepared and issued on the occasions of the various wars, both foreign and domestic, in which England has been involved from time to time since the period of the Norman Conquest.

The earliest complete code seems to have been the "Statutes, Ordinances, and Customs" of Richard II., issued by him to his army in the ninth year of his reign (1385), and probably on the occasion of the war with France.[5] Domestic dissensions gave occasion for the orders for the English army promulgated by Henry VII. before the battle of Stoke;[6] and in the

[1] II Grose, Military Antiquities, 58; see. also, *Commission* in Rymer's Fœdera.
[2] Sir Henry Thring, Manual of Military Law, pp. 7–18.
[3] Barweis *vs.* Keppel, 2 Wilson's Reports, 314.
[4] 43 Geo. III., ch. 20.
[5] II. Grose, Military Antiquities, 69. This code contained 26 Articles. The author does not mention the much more elaborate code of Henry V.
[6] *Ibid.*, 70.

Great Rebellion the king and the parliamentary leaders alike governed their armies by Articles of War. On the side of the crown, Articles or "Ordinances of War," as they were then called, were established by the Earl of Northumberland in 1639 for the regulation of the army of Charles I.; while in 1642 Lord Essex, the leader of the parliamentary forces, under authority given by an ordinance of the Lords and Commons, put forth Articles of War which were almost identical in language with the Royal Articles.[1] Articles of War were also issued by Charles II. in 1666,[2] when the French war was declared, and in 1672,[3] upon the outbreak of the Dutch war; and similar articles were issued by James II. in 1685 and 1686;[4] the former on the occasion of Monmouth's Rebellion.

The Duke of Albemarle's Articles (1666) and Prince Rupert's (1672)—more particularly the latter—were framed on the model of those of the Earls of Essex (1642) and Northumberland (1640), which were very much alike and in many respects resembled those of the Earl of Arundel (1639) the nearest preceding set in point of time. Of the Earl of Arundel's Code, twenty-three articles relate to subjects treated of in the Code of Gustavus Adolphus (1621);[5] and the language of the two codes is often sufficiently alike to suggest the probability that Arundel's Code owed some of its provisions to the Code of Gustavus Adolphus,[6] possibly to some extent through the British Code of 1625. Indeed, to the Code of Gustavus Adolphus, through intervening codes, we may perhaps even trace some of our own Articles of War now in force. At least it contains provisions corresponding—in some cases not unsuggestively—with the following Articles of our Code, viz.: Articles 17, 20, 21, 22, 26, 27, 38, 39, 41, 43, 46, 55, 56, and 62.[7]

The British Articles of War, although they remained substantially unchanged in matters essential to discipline, were frequently modified in respect to details; and new editions were issued from time to time, especially during the last half of the eighteenth century,[8] a period during which great wars were undertaken and large acquisitions of territory made throughout the world, involving as a consequence the employment of considerable military forces on foreign service. In evidence of this seven sets of

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[1] 1 Clode, Mil. Forces of the Crown, App. VI and VII.
[2] Known as the Duke of Abemarle's Articles.
[3] Known as Prince Rupert's Articles.
[4] Known as King James's Articles. A copy of this code may be consulted in II. Winthrop. App. V, pp. 26–37.
[5] This in itself would not, however, be in any respect conclusive of a connection between them, because military codes must from their very nature relate in general to the same matters of military discipline. J. A. G.
[6] For a complete copy of this important code see II. Winthrop, Mil. Law, App. III, pp. 8–23.
[7] Judge-Advocate General Lieber.
[8] Sets of Articles were issued in the years 1766, 1769, 1771, 1772, 1773, 1774, and 1775

Articles were issued between the years 1766 and 1775. Of these the Articles of 1774 were probably those from which our own Articles of 1775 and 1776 were obtained.[1]

[1] This view is sustained by the fact that in two places our Articles of 1775 and 1776 correspond more closely with the British Articles of 1774 than with those of 1765. Thus Article V of our code of 1775 was as follows:

"Any officer or soldier who shall begin, excite, cause, or join in any mutiny or sedition in the regiment, troop, or company to which he belongs, or in any other regiment, troop, or company of the Continental forces, either by land or sea, or in any part, post, detachment, or guard, on any pretense whatsoever, shall suffer such punishment as by a general court-martial shall be ordered."

The corresponding Article in the British code of 1774 was as follows:

"Any Officer or Soldier who shall begin, excite, cause, or join in any Mutiny or Sedition in the Regiment, Troop, or Company to which he belongs, or in any other Regiment, Troop, or Company, either of Our Land or Marine Forces, or in any other Party, Post, Detachment, or Guard, on any pretense whatsoever, shall suffer Death, or such other punishment as by a Court-martial shall be inflicted."

Whereas the Article in the code of 1765 was as follows:

"Any Officer or Soldier who shall begin, excite, cause, or join in any Mutiny or Sedition in the Troop, Company, or Regiment to which he belongs, or in any other Troop or Company in Our Service, or in any Party, Post, Detachment, or Guard, on any Pretense whatsoever, shall suffer Death, or such other Punishment as by a Court-martial shall be inflicted."

It will be noticed that our Article much more nearly corresponds with the British Article of 1774 than with that of 1765.

So the last Article of our code of 1776 was:

"All crimes not capital, and all disorders and neglects which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the above articles of war, are to be taken cognizance of by a general or regimental court-martial, according to the nature and degree of the offense, and be punished at their discretion."

The last Article of the British code of 1774 was:

"All Crimes not Capital, and all Disorders and Neglects which Officers and Soldiers may be guilty of to the Prejudice of good Order and Military Discipline, though not mentioned in the above Articles of War, are to be taken Cognizance of by a General or Regimental Court-martial, according to the Nature and Degree of the Offense, and be punished at their Discretion."

Whereas the corresponding Article in the code of 1765 was:

"All Crimes not Capital, and all Disorders or Neglects, which Officers and Soldiers may be guilty of, to the Prejudice of good Order and Military Discipline, though not mentioned in the above Articles of War, are to be taken Cognizance of by a Court-martial, and be punished at their Discretion." In the latter the regimental court-martial is not mentioned.

Our Articles of 1775 correspond more nearly with the British Articles of 1774 than with the Massachusetts Articles.*

John Adams, the chairman of the Committee of Congress charged with the preparation of the Articles of 1776, remarks in his autobigraphy, under date of August 13, 1776, when the draft of the proposed Articles was submitted to Congress: "The British Articles of War were accordingly reported and discussed in Congress by me, assisted by some others, and finally carried. They laid the foundation of a discipline which in time brought our troops to a capacity of contending with British veterans and a rivalry with the best troops of France." John Adams, Life and Autobiography, vol. iii. pp. 68, 69.

The Articles of June 30, 1775,† were repealed and replaced by those of September 20, 1776, and so remained in force but little over one year. For this reason the annotation of the Articles relates to the Code of September 20, 1776, which, save for the substitution of an amended code of court-martial procedure which was effected by the enactment of the Resolution of May 31, 1786, continued in force for nearly thirty years, when they were superseded by the Articles of April 10, 1806.‡

* Note by Judge-Advocate General Lieber. For a reprint of the Massachusetts Articles, see II. Winthrop, pp. 61–67.

† The Articles of 1775 will be found in American Archives (Fourth Series), vol. ii., p. 1855, and at page 65, Winthrop Military Law, vol. ii.

‡ 2 Stat. at Large, 259; 2 Winthrop, 98-111.

Origin and History of the American Articles of War.—The Articles of War in force in the armies of the United States were derived originally from the corresponding British Articles. As the colonial troops had served with the royal forces operating in America during the wars immediately preceding the outbreak of the War of the Revolution, and while so serving had been subject to the British Mutiny Act and Articles of War, they became as a consequence familiar with those Articles; and as their scope and application were fully understood they were adopted with some necessary modifications for the government and regulation of the Revolutionary Armies. When the Continental Congress met in Philadelphia in May, 1775, and undertook to provide an army, the Mutiny Act and Articles of War then in force in the British Army were resorted to, and the British Code of 1774 at that time in actual operation was, with some changes and omissions, enacted for the government of the colonial forces on June 30, 1775.[1] Additions were made in November, 1775,[2] which were repealed, however, by the Resolution of September 30, 1776,[3] and new Articles adopted which were themselves modified in some particulars by a Resolution of Congress dated April 14, 1777.[4] The section of the Articles of 1776 relating to military tribunals having been found inadequate and to some extent defective, was repealed and replaced by a new section, under the Resolution of Congress of May 31, 1786.[5]

The Act of September 29, 1789,[6] recognizing the existing military establishment, contained a provision to the effect that the troops so recognized should "be governed by the Rules and Articles of War which have been established by the United States in Congress assembled, or by such

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[1] I. Journals of Congress, 90.

[2] *Ibid.*

[3] II *Ibid.*, 343.

The revision of the Articles of 1775 was made at the suggestion of Gen. Washington, and the work of preparing a new code was entrusted to a committee of Congress composed of John Adams and Thomas Jefferson. The modifications suggested by General Washington were submitted to the committee in his behalf by Colonel Tudor, the Judge-Advocate of the Army. Adams, to whose endeavors the adoption of the Articles of 1776 is in great part due, says that he was in favor of adopting the British Articles *totidem verbis*. In his diary under date of September 20, 1776, he refers to the revision as "the system which he persuaded Jefferson to agree with him in reporting to Congress." He also speaks of the burden of advocating the passage of the Articles having been "thrown upon him, Jefferson having never spoken, and, such was the opposition, and so undigested were the notions of liberty prevalent among the majority of the members most zealously attached to the public cause, that to this day (January 7, 1805) I scarcely know how it was possible that these Articles could have been carried." John Adams, Life and Autobiography, vol. iii. pp. 83, 84.

[4] III. Journals of Congress, 108.

[5] XI. Journals of Congress, 107. The Articles of 1776 were also amended, in respect to the bringing of provisions into camp, the redress of wrongs, the appointment of general courts-martial, and the power of pardon and mitigation of sentences imposed by them, by the Resolution of Congress of April 14, 1777 (III. Journals of Congress, 108). The general or commander-in-chief was, by a similar Resolution of May 27, 1777, (III. *ibid.*, 166,) given power to pardon or mitigate any of the punishments authorized to be inflicted by the Rules and Articles of War.

[6] 1 U. S. Statutes at Large, 95.

Rules and Articles of War as may hereafter by law be established." In 1806 the existing Articles of War were re-enacted,[1] the arrangement by sections being dispensed with, and the Articles numbered in serial order from 1 to 101, and these Articles continued in force until the enactment of the existing Articles in 1874.[2]

THE ARTICLES OF WAR.

SECTION 1342. The Armies of the United States shall be governed by the following rules and articles. The word officer, as used therein, shall be understood to designate commissioned officers; the word soldier shall be understood to include non-commissioned officers, musicians, artificers, and privates, and other enlisted men, and the convictions mentioned therein shall be understood to be convictions by court-martial.

Rules of Interpretation.—In addition to the statutory rule above cited, it should be borne in mind that in applying the Articles of War to particular cases the well-established rule of interpretation of criminal statutes should be applied, and a case should not be treated as within the penal provisions of an Article unless it is quite clearly included by the words of description employed.[3]

It is well settled that the word "may," in a statute conferring power upon a public officer, is to be construed as equivalent to "must" or "shall" where the enactment imposes a public duty or makes provision for the benefit of individuals whose rights cannot be effectuated without the exercise of the power.[4] In the 58th Article, however, the opposite rule applies, and the word "shall," as used in the clause "shall be punishable," is construed as equivalent to "may."[5]

Limitations upon Punishment.—In addition to the restrictions upon the power to punish which are embodied in the Articles themselves, it is pro-

[1] 2 Statutes at Large, 259. Although the Articles of 1776 stood in considerable need of modification and revision, no such revision was authorized until 1806, nearly thirty years after their original adoption. Hamilton, in a letter to Secretary McHenry, speaks of their requiring amendment "in many particulars." He invites special attention to the obscurity which envelops the provisions of the existing Articles respecting the power to appoint general courts-martial, and suggests that the President be given "a discretionary authority to empower other officers than those described in the Articles of War to appoint courts-martial, under such conditions and with such limitations as he shall esteem advisable." Hamilton to McHenry, December 1799. V. Hamilton's Works, 392. See, also, report of the Secretary of War of January 5, 1800, transmitted to Congress by President John Adams on January 13, 1800. American State Papers, Mil. Affairs, vol. i. p. 133.

[2] Act of June 20, 1874 (18 Stat. at Large, 113).

[3] Dig. J. A. Gen., 711, par. 1. "Criminal statutes are inelastic, and cannot be made to embrace cases plainly without the letter though within the reason and policy of the law." State *vs.* Lovell, 23 Iowa, 304.

[4] Dig. J. A. Gen., 712, par. 2. See Minor *vs.* Mechs. Bk., 1 Peters, 46; Supervisors *vs.* United States, 4 Wallace, 435, and cases cited; also Fowler *vs.* Pirkins, 77 Ills., 271; Kans. P. R. R. Co. *vs.* Reynolds, 8 Kans., 628; People *vs.* Comrs. of Buffalo Co., 4 Neb., 150.

[5] Dig. J. A. Gen., 712, par. 2, note.

vided "that whenever, by any of the Articles of War for the government of the Army, the punishment on conviction of any military offense is left to the discretion of the court-martial, the punishment therefor shall not in time of peace be in excess of a limit which the President may prescribe.'

ARTICLE 1. *Every officer now in the Army of the United States shall, within six months from the passing of this Act, and every officer hereafter appointed shall, before he enters upon the duties of his office, subscribe these Rules and Articles.*

This provision appears for the first time as Article 1, Section 1, of the Articles of 1776, and is there restricted in its application to commissioned officers "who shall be retained in the service of the United States"; the term "retained" as here used being equivalent to "accepted" or "received into" the service of the United States as distinguished from that of the several States. The requirement appears as No. 1 of the Articles of 1806, but prescribes no form of certificate to be used, nor does it provide for the verification of the act by a civil magistrate or other public officer. As the Articles of War apply expressly to commissioned officers and enlisted men, and as military persons equally with civilians are presumed to be familiar with them, as a part of the law of the land, it is not easy to see what additional sanction is conferred by the formal recognition of their obligatory force which is implied by such signature. The provision, which is directory in character, operates, however, to strengthen the presumption of knowledge above referred to, and gives additional force to the requirement of the first or enacting clause of Section 1342, Revised Statutes.

ARTICLE 2. *These rules and articles shall be read to every enlisted man at the time of, or within six days after, his enlistment, and he shall thereupon take an oath or affirmation in the following form: "I, A. B., do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States, and the orders of the officers appointed over me, according to the Rules and Articles of War." This oath may be taken before any commissioned officer of the Army.*

This provision appears as Article 6 of the Prince Rupert Code; as Art. 1, Sec. 3, of the British Code of 1774; as Art. 1, Sec. 3, of the Articles of 1776; and as No. 10 of those of 1806. The oath of enlistment, which in its

[1] Act of September 27, 1890 (27 Stat. at Large, 491). This statute replaced a similar but less comprehensive enactment of October 1, 1890 (26 Stat. at Large, 648), which authorized the President to "prescribe specific penalties for such minor offenses as are now brought before garrison and regimental courts-martial."

Under the authority conferred by the Act of September 27, 1890, above cited, two Executive orders have been issued prescribing limits of punishment for offenses to which specific penalties are not attached in the Articles of War. See General Order No. 21, A. G. O. of 1891, as amended by the Executive order of March 20, 1895 (Manual for Courts-martial, pp. 53–63).

original form was one of fealty and allegiance to the sovereign, was administered by an officer of the Army until 1694, when by Act of Parliament[1] it was required to be administered by a civil magistrate; this to prevent impressments into the military service, and to protect the recruit from being entrapped into a serious contractual engagement without understanding its nature or the serious character of the undertaking.[2] This statute, which was enforced by appropriate penalties, continued in force until 1697, when it failed of re-enactment. The practice of attesting the engagement before a civil magistrate continued, however, and was recognized in the Mutiny Act of 1735;[3] it still continues in force.[4] The practice which existed in many parts of England of concluding a bargain by giving some earnest of it was adopted, in the case of enlistment, by the giving of a shilling, the acceptance of which rendered the man for some purposes a soldier. Under the existing Army Act the acceptance of the shilling has no such effect.[5] The attestation is still required to be performed by a civil magistrate; but the Articles of War as such having ceased to exist (being merged in the Army Act of 1881), are no longer required to be read to recruits. The conditions of service, however, are required to be explained to the recruit prior to his enlistment. The oath required in the British service is one primarily of allegiance and fealty to the sovereign, and the statute requiring its administration is regarded as being directory in character.[6] The enlistment oath is not held to create a change of status, as is now the case in the United States service,[7] and is imposed to give a greater sanction to the discharge of the soldier's duty [8]

The form of oath in use in the British Army, as embodied in the British Code of 1774, was with some necessary modifications adopted by the Congress in the Articles of 1776; the obligation being to "be true to the United States of America, and to serve them honestly and faithfully against all their enemies or opposers whatsoever," and "to observe and obey the orders of the Continental Congress, and the orders of the generals and officers set over him" by them. The English practice of requiring the oath of enlistment to be administered by a civil magistrate was incorporated in the Articles of 1776, and continued in force until August 3, 1861,[9] when by enactment of Congress the power to administer this oath was conferred upon all officers of the Army. The clause requiring obedience to be rendered to the orders of the officers

[1] 5 and 6 Wm. and Mary, ch. 15, sec. 2.
[2] Manual Mil. Law, 254.
[3] 8 Geo. II., ch. 2.
[4] Manual Mil. Law, 254.
[5] *Ibid.*
[6] I. Clode, Military Forces, 21; King *vs.* Witmoham, 2 Adol. and M., 650. See, also, Report of Royal Commissioners on Oaths, 1867.
[7] *In re* Grimley, 137 U. S., 147.
[8] I. Clode, Military Forces, 21.
[9] Sec. 11, Act of Aug. 3, 1861 (12 Stat. at Large, 289).

appointed "in accordance with the rules and Articles for the government of the armies of the United States" was added to the oath by the Act of April 10, 1806.[1]

ARTICLE 3. *Every officer who knowingly enlists or musters into the military service any minor over the age of sixteen years without the written consent of his parents or guardians, or any minor under the age of sixteen years, or any insane or intoxicated persons, or any deserter from the military or naval service of the United States, or any person who has been convicted of any infamous criminal offense shall upon conviction be dismissed from the service, or suffer such other punishment as a court-martial may direct.*

This provision, when taken in connection with Article 2, *supra*, regulates in part the subject of enlistments in the Army of the United States. It first appeared in statutory form as Section 6 of the Act of March 5, 1833,[2] and was incorporated without change as Article 3 in the revision of 1874.

Prohibited Enlistments.—In addition to the restrictions imposed by the above Article the following requirements of law must be observed in respect to enlistments: "No minor under the age of ~~sixteen~~ eighteen years, no insane or intoxicated person, no deserter from the military service of the United States, and no person who has been convicted of a felony shall be enlisted or mustered into the military service."[3]

"In time of peace no person (except an Indian) who is not a citizen of the United States, or who has not made legal declaration of his intention to become a citizen of the United States, or who cannot speak, read, and write the English language, or who is over ~~thirty~~ twenty-five years of age, shall be enlisted for the first enlistment in the Army."[4]

Enlistment of Minors; Consent of Parent or Guardian.—It is also provided by law that "no person under the age of twenty-one years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians: *provided*, that such minor has such parents or guardians entitled to his custody and control."[5]

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[1] 2 Stat. at Large, 259.
[2] 4 Stat. at Large, 647.
[3] Section 1118, Revised Statutes.
[4] Section 2, Act of August 1, 1894 (28 Stat. at Large, 215).
[5] Sec. 1117, R. S. Secs. 1116–1118, Rev. Sts., have always been regarded by the War Department as directory only, and not as necessarily making void such enlistments, but as rendering them voidable merely, at the option of the Government, which may waive in its discretion the objections involved. A person enlisted in derogation of these provisions may still be held to service with the same legality as any other soldier; and if arraigned for desertion or other military offense, a plea that his enlistment was void under these statutes and that he could not legally be subjected to the military jurisdiction would not be sustained. Dig. J. A. Gen., 391, par. 17. See, also, *ibid.*, 390, par. 16.

A recruiting officer would not be authorized (under Sec. 1118, Rev. Sts.) to enlist a person known to him to have been convicted of felony, although such person should produce a pardon. Pardon would not remove this ineligibility. *Ibid*, par. 18

A deserter who enlists and afterwards again deserts cannot, on being brought to trial for the second offense, defend on the ground that his enlistment was void, and that he is

Sections 1116, 1117, and 1118, Revised Statutes, providing that deserters, convicted felons, insane or intoxicated persons, and certain minors shall not be enlisted are regarded as directory only, and not as making necessarily void such enlistments, but as rendering them voidable merely, at the option of the Government. In cases of such enlistments, except of course where the party by reason of mental derangement or drunkenness was without the legal capacity to contract, the Government may elect to hold the soldier to service, subject to any application for discharge which may be addressed by himself or his parent, etc., either to the Secretary of War or to a United States court.[1]

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not therefore amenable to trial. A plea or defense to this effect should not be sustained by the court. Dig. J. A. Gen., 385, par. 3.

The enlistment in our army of a deserter from the *Navy* is not prohibited by any statute. Where, therefore, such an enlistment had been (unadvisedly) made, *held* that —although the proper disposition of the party would probably be to discharge him and turn him over to the naval authorities—the *contract* was certainly valid in law. *Ibid.*

There is no law or regulation affecting the validity of an enlistment made on a Sunday. *Ibid.*, 387, par. 8. See, also, Wolton *vs.* Gavin, 16 Q. B., 48.

[1] The provision of Section 1117, Revised Statutes, that "no person under the age of twenty-one years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians," is for the benefit of the parent or guardian, and gives no privilege to the minor, whose contract of enlistment is good so far as he is concerned. He cannot by his own act relieve himself from his obligations as a soldier or his liability to military control. *In re* Morrissey, 137 U. S., 157; *in re* Grimley, *ibid.*, 1147.

The enlistment contract of a minor is void when the recruit is under sixteen, with or without the consent of the parent. *In re* Lawler, 40 F. R., 233. It is not void, but voidable only, as to minors between sixteen and twenty-one. U. S. *vs.* Morrissey, 137 U. S., 157. It is not voidable at the instance of the minor. *Ibid.* It is voidable at the instance of the parent or guardian. Com. *vs.* Blake, 8 Phil., 523; Turner *vs.* Wright, 5 *ibid.*, 296; Menges *vs.* Camac, 1 Serg. & R., 87; Henderson *vs.* Wright, *ibid.*, 299; Seavey *vs.* Seymour, 3 Cliff., 439; *In re* Cosenow, 37 F. R., 668; *In re* Hearn, 32 *ibid.*, 141; *In re* Davison, 21 *ibid.*, 618; U. S. *vs.* Wagner, 24 *ibid.*, 135; *In re* Dohrendorf, 40 F. R., 148; *In re* Spencer, *ibid.*, 149; *In re* Lawler, *ibid.*, 233; *In re* Wall, 8 *ibid.*, 85.

A minor's contract of enlistment is voidable, not void, and is not so voidable at the instance of the minor. If after enlistment he commits an offense, is actually arrested, and in course of trial before the contract is duly avoided, he may be tried and punished. *In re* Wall, 8 Fed. Rep., 85. See, also, Barrett *vs.* Hopkins, 7 *ibid.*, 312; Dig. J. A. Gen., 389, par 13.

Where application is made for the discharge of soldiers from enlistment on the ground of minority, the Secretary of War is authorized to receive evidence upon and determine the question of actual age, though the party upon enlistment may have sworn or declared in writing that he was of full age; the provision of the Act of February 13, 1862, (12 Stat. at Large, 339,) that the statement as to age in the oath of enlistment shall be conclusive, being no longer in force. Dig. J. A. Gen., 386, par. 4. Under the existing law, however, the authority to discharge soldiers on account of minority, etc., is not reserved to the Secretary of War alone, but the United States courts are empowered to inquire into the validity of enlistments on habeas corpus, and thereupon to discharge enlisted persons in proper cases. *Ex parte* Schmeid, 1 Dillon, 587. *In re* McDonald, Lowell, 106; McConologue's Case, 107 Mass., 154. This power cannot legally be exercised by a State court. Tarble's case, 13 Wallace, 397. *Ibid.*

Where a soldier, otherwise subject to be discharged on account of minority, is held in arrest prior to trial, or under sentence, as a deserter, an application for his discharge by a parent entitled to claim his services (whether addressed to the Secretary of War or to a U. S. court) will not be favorably entertained.* In such a case the interest of the public in the administration of justice is paramount to the right of the parent, and requires that the party shall abide the legal consequences of his military offense before

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* Commonwealth *vs.* Gamble, 11 Sergt. & Rawle, 93; also McConologue's Case, 107 Mass., 170; In matter of Beswick, 25 How. Pr., 149; *Ex parte* Anderson, 16 Iowa, 599.

Enlistments, How Made.—Enlistments and re-enlistments in the Army are regulated in part by statute and in part by regulations framed in accordance therewith. "Recruits enlisting in the Army must be effective and able-bodied men, and between the ages of ~~sixteen~~ 15 and ~~thirty~~ 35 years at the time of their enlistment. This limitation as to age shall not apply to soldiers re-enlisting."[1]

Any male citizen of the United States, or person who has legally declared his intention to become a citizen, if above the age of twenty-one and under the age of thirty years, able-bodied, free from disease, of good character and temperate habits, may be enlisted under the restrictions contained in this Article. In regard to age or citizenship this regulation shall not apply to

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the question of the right of discharge be passed upon. And similarly *held* in a case of a soldier who, at the time of the application for his discharge on account of minority, was under sentence on conviction of embezzlement. Dig. J. A. Gen., 387, par. 6.

As has repeatedly been held, even a U. S. court has no jurisdiction to discharge a minor enlisted in contravention of Sec. 1117, Rev. Sts., who, at the date of the initiation of the proceedings, is held awaiting trial for desertion by a court-martial, or is under sentence of the same.* *Ibid.*, 391, par. 19.

By the practice of the War Department, the age of an alleged minor is generally required to be shown by the affidavits of both parents if living, or by the affidavit of the surviving parent or guardian, supported by the affidavits of at least two other respectable persons cognizant of the fact, or by an officially authenticated record of a church or court. If practicable the affidavits should be accompanied by the certificate of a judge of a U. S. or State court acquainted with the parties and vouching for the truth of the representations made. *Ibid.*, par. 20.

It is well established that a soldier cannot himself avoid his contract of enlistment on the ground of minority, and abandon at pleasure the military service. His release on this ground can be obtained only on application of a parent or guardian entitled to his services, and without whose consent he enlisted.† The application of the parent, whether made to the Secretary of War, or on habeas corpus, to a U. S. court, must be made before the soldier attains his majority and ratifies his contract.‡ *Ibid.*, 389, par. 12.

A minor cannot assume to discharge himself on the ground that his enlistment was illegal; he would attempt it at the risk of being treated as a deserter. *Ibid.*, 387, par. 5.

The enlistment of a minor without consent is not void, but is voidable merely, and only by the United States—which, on the fact of minority, etc., becoming known, may waive the objection and adopt and continue the enlistment, or terminate it at pleasure. If the minor *deserts*, he cannot take advantage of his own wrong and plead in defense on trial that the enlistment was void.§ Nor can he do so if on enlistment he purposely concealed his age and the enlistment was therefore fraudulent. That a soldier was a minor at enlistment does not affect his capacity to commit a military offense or the jurisdiction over him of a court-martial. Where a minor deserts he must abide, like any other soldier, the consequence of his criminal act, viz., arrest, trial, and sentence if convicted. And till the charge of desertion has been disposed of, or till the sentence has been undergone, not even his parent can procure his discharge. The right of the United States to hold him to the penalty of the infraction of his contract and of military discipline is paramount to the right of a parent to his services, and the parent cannot procure his release on habeas corpus while held in military custody awaiting trial or under sentence on conviction of desertion or other military offense. The law requiring consent of parent or guardian applies to an *Indian* minor enlisting in the Army. An Indian agent is not the *guardian* of an Indian under his charge, within the meaning of pars. 825 and 826, A. R., 1895. *Ibid.*, par. 13.

[1] Section 1116, Revised Statutes.

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* *In re* Davison, 21 Fed. Rep., 618; *In re* Zimmerman, 30 *ibid.*, 176; *In re* Cosenow, 37 *ibid.*, 668; *In re* Kaufman, 41 *ibid.*, 876.

† *In re* Hearn, 32 Fed. Rep., 148; U. S. *vs.* Gibbon, 24 *ibid.*, 135; *In re* Morrissey, 137 U. S., 157.

‡ *In re* Dohrendorf, 40 Fed. Rep., 148; *In re* Spencer, *id.*, 149.

§ *In re* Morrissey, 137 U. S., 157.

soldiers who have served honestly and faithfully a previous enlistment in the Army.[1]

Enlistment is a contract; but it is one of those contracts which change the status, and where that is changed no breach of contract destroys the new status or relieves from the obligations which its existence imposes. * * * By enlistment the citizen becomes a soldier. His relations to the State and the public are changed. He acquires a new status, with correlative rights and duties; and although he may violate his contract obligations, his status as a soldier is unchanged. He cannot of his own volition throw off the garments he has once put on, nor can he, the State not objecting, renounce his relations and destroy his status on the plea that if he had disclosed truthfully the facts the other party, the State, would not have entered into the new relations with him or permitted him to change his status.[2]

[1] Paragraph 823, Army Regulations of 1895. See, also, for other provisions of regulations in respect to enlistments, paragraphs 823–840, A. R. 1895.

[2] *In re* Grimley, 137 U. S., 147, 156. For the full text of this decision see G. O. 140, A. G. O., 1890.

Our law not defining enlistment, nor designating what proceeding or proceedings shall or may constitute an enlistment, it may be said in general, that any act or acts which indicate an undertaking, on the part of a person legally competent to do so, to render military service to the United States for the term required by existing law, and an acceptance of such service on the part of the Government, may ordinarily be regarded as legal evidence of a contract of enlistment between the parties, and as equivalent to a formal agreement where no such agreement has been had. The Forty-seventh Article of War practically makes the receipt of pay by a party as a soldier evidence of an enlistment on his part, estopping him from denying his military capacity when sought to be made amenable as a deserter. The continued rendering of service which is accepted may constitute an enlistment. But enlistments in our Army are now almost invariably evidenced by a formal writing and engagement under oath. (Dig. J. A. Gen., 384, par. 1.) See, also, *In re* Grimley, 137 U. S., 147; *In re* McDonald, 1 Lowell, 100; Tyler *vs.* Pomeroy, 8 Allen (Mass.), 480.

In addition to what has been said of the importance of the oath of enlistment, it is important that the oath should not be omitted, for the reason that the oath, as taken and subscribed by the party, constitutes the regular, and in some cases the only legal, written evidence that the personal act of enlisting has been completed by him. Dig. J. A. Gen., 19. par. 1.

A mere non-compliance with an Army regulation in making an enlistment does not *per se* affect the validity of the contract. Thus the fact that the recruiting officer has knowingly enlisted a married man, in derogation of par. 914 of the Regulations (of 1889), or that a married man has procured himself to be enlisted under a representation that he was unmarried, does not affect the validity of the enlistment. In such a case the President or Secretary of War may, in his discretion, forthwith discharge the soldier under the Fourth Article of War, or may hold him regularly to service for the term for which he has enlisted. Dig. J. A. Gen., 385, par. 2.

The statement in regard to age, incorporated in the printed blank which contains the form of oath prescribed by this Article, is no part whatever of the legal oath. *Ibid.*, 19, par. 2.

While a contract of enlistment may at any time be terminated by the Secretary of War by a summary discharge of the soldier under the authority of the Fourth Article, the Executive is not empowered to modify the material conditions of such contract while it remains in force.* Congress, however in the exercise of its power "to raise and support armies," and "to make rules for the government and regulation of the land forces," is authorized to increase or diminish the compensation of a soldier during his term of enlistment. Thus *held* that a contract of enlistment was not violated on the part of the United States by the reduction by Act of Congress, pending his enlistment, of the pay of a soldier from sixteen to thirteen dollars per month.† *Ibid.*, 387, par. 9.

Held, in view of the ruling of the courts on the subject, that certain volunter soldiers

* 15 Opin. Att.-Gen., 362. See last paragraph of notes on page 350.

† Dig. J. A. Gen., 388, par. 9, note 2.

Although the statutes do not expressly prescribe the method of enlistment, the requirement of the Article that "these rules and Articles shall be read to every enlisted man at the time of, or within six days after, his enlistment, and he shall *thereupon*, that is, at his enlistment, take an oath or affirmation in the following form, etc., make the oath so taken not only an essential part of the enlistment, but the final act on the part of the recruit which operates to complete and ratify the enlistment contract. Indeed, it has been held by the Supreme Court of the United States in a recent case that "the taking of the oath of allegiance is the pivotal fact which changes the status from that of the civilian to that of the soldier."[1]

Making Prohibited Enlistments.—The offense contemplated in this Article may be committed by any commissioned officer of the Army duly authorized to make enlistments or to muster troops into the military service, and may consist (1) in enlisting a minor over the age of sixteen years without the written consent of the proper parent or guardian; (2) in mustering such a person into the military service, the enlistment having already been consummated; (3) in enlisting or mustering a minor under the age of sixteen with or without parental consent. As enlistments are now conducted, the offense of enlisting a minor may be committed by any officer of the Army who has been duly authorized to make enlistments for the military establishment, and who enlists an unemancipated minor under the circumstances above set forth, or who knowingly enlists an insane person or one so much under the influence of intoxicating liquor as to be unable to appreciate or understand the importance of the act of enlistment, or a deserter from the military or naval service, or any person who has been convicted of an infamous criminal offense. The term deserter as used in the Article includes not only one who has been convicted of that offense by a general court-martial, but also one who, being absent in desertion, is a deserter in fact, and stands charged therewith on the rolls and returns of the command to which he belongs. An infamous offense is one which is declared to be infamous in the statute creating it, or has that quality conferred upon it by the nature of the punishment—imprisonment in a State prison or penitentiary—imposed, upon conviction, by a court-martial, or by a civil

enlisted in 1862, "for three years or during the war," could not legally be retained in the military service for a longer period than three years, though the war should not be terminated at the end of that time. Dig. J. A. Gen., 388, par. 10.

In the written form of enlistment, which, though not required by any law, is now in use in the recruiting service, the soldier on enlisting is made to "agree to accept from the United States such bounty, pay, rations, and clothing as are or may be established by law." The obligation here indicated, however, would exist independently of any specific agreement. *Ibid.*, 387, par. 9, note 2.

In an opinion of Sept. 1, 1877, it was held by the Attorney-General that the Secretary of War was not empowered to *suspend* the contract of enlistment of a soldier by allowing him to engage in a certain civil occupation for a time and then resume his military service under his enlistment, or otherwise to *vary* the terms of the contract, even with the consent of the soldier. 15 Opin. Att.-Gen., 362.

[1] See note 2, p. 349.

court of competent jurisdiction. Intoxication or insanity would in general be established by the testimony of witnesses who were present at the enlistment of the recruit; infamy by the production of the judgment of the tribunal before which the conviction was had.

Fraudulent Enlistment.—It is provided by a recent enactment of Congress that "fraudulent enlistment, and the receipt of any pay or allowance thereunder, is hereby declared a military offense and made punishable by court-martial, under the 62d Article of War."[1]

This offense, constituted and made punishable as a violation of Article 62 by the statute above cited, is committed "when an enlistment is procured by means of a willful misrepresentation in regard to a qualification or disqualification for enlistment, or by an intentional concealment of a disqualification which has had the effect of causing the enlistment of a man not qualified to be a soldier, and who but for such false representation or concealment would have been rejected."[2] The misrepresentation or concealment characterizing it must have induced the enlistment of the soldier, and must have related to a fact which if known would have caused his rejection. Where the offense consisted in his having concealed the fact that he had been discharged with a questionable character—viz., "very good except when intoxicated, then bad"—it has been held that such offense was chargeable as "fraudulent enlistment" provided the knowledge of this fact on the part of the recruiting officer would have prevented the enlistment.[3]

A fraudulently enlisting soldier may be disposed of in either of two ways; *viz.*, he may be brought to trial for his offense under the statute, or he may be discharged "without honor." If brought to trial and convicted and his sentence does not include dishonorable discharge (as it need not do under the executive orders prescribing a maximum punishment for this offense), *held* that the Government could not properly also summarily discharge him. While it might have resorted to either penalty, it would scarcely be just to subject the offender to both. A fraudulently enlisted man may, without trial, be summarily discharged with forfeiture of all pay and allowances, according to par. 1386, Army Regulations of 1895.[4]

A fraudulent enlistment is not void, but voidable only. The Government, on becoming cognizant of the fraud, may avoid the enlistment, or waive the objection and allow it to stand—in which latter case the accepted service is as legal as that of any other soldier. Where the fraudulent char-

[1] Sec. 3, Act of July 27, 1892 (27 Stat. at Large, 277).
[2] Circular No. 13, H. Q. A., 1892.
[3] Dig. J. A. Gen., 425, par. 1.
[4] *Ibid.*, par. 2. An enlisted man discharged for minority concealed at enlistment, or for other cause involving fraud on his part in the enlistment, is not entitled to pay and allowances, including those for travel, and will not receive final statements unless deposits or detained pay are due him, in which case final statements, containing only a list of his deposits or the amount of detained pay, will be furnished. Par. 1386, A. R. 1895. See, also, G. O. 42, A. G. O., 1894.

acter of an enlistment did not become known until after a part of it had been served, it has been held that while the same as to its unserved portion might legally then be avoided and terminated, yet as to the part served it was a valid contract, and the pay due for that part could not lawfully be stopped.[1]

ARTICLE 4. *No enlisted man duly sworn shall be discharged from the service without a discharge in writing, signed by a field-officer of the regiment to which he belongs, or by the commanding officer when no field-officer is present; and no discharge shall be given to any enlisted man before his term of service has expired, except by order of the President, the Secretary of War, the commanding officer of a department, or by sentence of a general court-martial.*

The corresponding requirement of the Prince Rupert Code[2] vested the power to discharge enlisted men in the captain of the company, subject to the approval of the regimental commander. From 1688 to 1783 a system of regimental recruiting prevailed, the recruits being raised in pursuance of a contract between the crown and the regimental commander. During this period the power to discharge was vested in the colonel, subject, however, to the condition that the discharged soldier should be replaced at the expense of the colonel or regimental fund.[3] Since the year 1783[4] enlistments in the British service have been made directly by the crown, and the corresponding power to discharge has been reserved to the crown; by whom it is exercised either directly or through certain military commanders duly authorized to act in its behalf.[5]

It is impossible to ascertain with any precision when the present practice, requiring the discharge to be signed by a field-officer of the regiment to which the discharged soldier belongs, was incorporated in the Articles of War. It appears in the British Articles of 1765 and 1774, and was adopted without change in the American Articles of 1776. In the revision of 1806 the following clause was added: "and no discharge shall be given * * * but by order of the President, the Secretary of War, the commanding officer of a department, or by sentence of a general court-martial."[6] The final clause of Article 2 of the Code of 1806, having been replaced by subsequent legislation,[7] was omitted from the revision of 1874.

As the enlistment-paper is the best evidence of the execution of his enlistment contract, the discharge, an official instrument formally executed in writing and delivered to the soldier,[8] operates not only to release him from

[1] Dig. J. A. Gen., 426, par. 8.
[2] Article 49.
[3] Manual Mil Law, 218. See, also, *ibid*, pp. 205–221, and II. Clode, Mil. Forces, etc., 20.
[4] 23 Geo. II., ch. 50, known as "Burke's Act."
[5] Man. Mil. Law, 219.
[6] Article 2, Act of April 10, 1806 (2 Stat. at Large, 359).
[7] 99th Article of War, sec. 5. Act of July 13, 1806 (14 Stat. at Large, 92).
[8] The formal *certificate of discharge*, furnished in blank by the Adjutant-General, is,

the obligations incurred at enlistment, but to furnish legal evidence of the fact of discharge, as well as of the circumstances—when the same are stated in the discharge certificate—under which the soldier was separated from the service.[1]

While no soldier can assume to discharge himself from the military service, he is yet, at the expiration of his contract of enlistment, entitled in general to be at once formally discharged by the proper authority.[2] In view, however, of the terms of the first clause of this Article, the discharge of a soldier actually takes effect, like a deed, only upon the delivery, actual or constructive, of the written certificate of discharge.[3]

A discharge cannot legally be given a soldier before the expiration of his term of service except as authorized in this Article; and no officer, other than the three designated, can exercise the authority, expressly devolved upon *them*, of discharging by order.[4]

Forms of Discharge.—This Article, in its second clause, specifies two kinds of discharge as authorized to be given to soldiers before their terms of enlistment have expired and which are quite distinct in their nature. The

when duly made out and signed (see Article of War 4), legal evidence of the fact of discharge, and of the circumstances therein stated under which it was given.* The certificate is not a *record*, and its statements are not conclusive upon the Government when contradicted by record or other better evidence. Dig. J. A. Gen., 358, par. 13.

The statement of "character" appended to the certificate is no part of the discharge. This description is devolved by par. 148, A. R. (1895), upon the commanding officer whose duty it may be to make out the discharge. The Army Regulations do not give to his superior any authority over the subject. *Ibid.*, 359, par. 18. The "final statements," a paper required by paragraph 141, Army Regulations of 1895, to be furnished with the discharge, constitutes no part of the discharge; the discharge is complete without them. *Ibid.*, 359, par. 17.

The discharge furnished to the soldier or for him takes effect, like a deed, upon delivery. The delivery should be personal unless, at its date, the soldier is in confinement awaiting trial or under sentence; in such case the delivery may be constructive, the certificate being committed to the commander of the company, post, etc., to be retained by him for the soldier until released from arrest or imprisonment, and then rendered to him personally. This is the recognized practice; the delivery to the commander being deemed tantamount to actual delivery. *Ibid.*, par. 14.

A soldier should not be furnished with his formal discharge on the day of the expiration of his term if he is then awaiting sentence of court-martial. No soldier in such a status can be *entitled* to his discharge till the result of his trial be published. *Ibid.*, 359. par 15.

[1] Dig. J. A. Gen., 21, par. 2. See Board of Comrs. *vs.* Mertz, 27 Ind., 103; Hanson *vs* S. Scituate, 115 Mass., 336; United States *vs.* Wright, 5 Philad., 296. For contents of discharge certificate see par. 148, Army Regulations of 1895, as amended by par. 1, General Orders, No. 10, A. G. O., 1897.

[2] See Justice Story's charge to the jury in United States *vs.* Travers, 2 Wheeler Cr. C., 509; also Prendergast, 42. See. also, Dig. J. A. Gen., 359, par. 17. "A soldier cannot discharge himself by simply leaving the service at the expiration of his term."

[3] Dig. J. A. Gen., 20, par. 1. Thus where a soldier's discharge was not received by him at his station—a hospital in the field—till at the end of three months after its date, *held* that it did not take effect till its receipt, and that the soldier was entitled to pay up to that time. *Ibid.* *Held* that there could be no legal delivery of a discharge to an insane soldier, or acceptance of such by him, and that the military authorities might properly revoke such a discharge and commit the soldier to the Government Hospital for the Insane, as directed by par. 469, A. R. of 1895.

[4] *Ibid.*, 21, par. 3.

* Hanson *vs.* S. Scituate, 115 Mass., 336; Bd. of Comrs. *vs.* Mertz, 27 Ind., 336; U. S. *vs.* Wright, 5 Philad., 296.

one is given by executive *order*, and the other by *sentence;* the one is a *rescinding of the contract* of the soldier, authorized to be resorted to whenever deemed desirable, at the discretion of the Secretary of War, etc., and is in law an *honorable discharge* or a *discharge without honor*, as the case may be; the other is a *punishment*, and therefore a *dishonorable* discharge. One of the officials named can, of his own authority, no more order a soldier to be, in terms, dishonorably discharged than can a court-martial adjudge a soldier to be honorably discharged.[1] Three other forms of discharge, by executive order, without honor, and by purchase, will presently be explained.

Any form of discharge other than such as is prescribed in the 4th Article of War is irregular and inoperative (unless indeed otherwise authorized by subsequent statute). Mere desertion does not operate as a discharge of a soldier; he may then be dropped from the rolls of his command, but he is in no sense discharged from the Army. Nor can an official publication, in orders, of a sentence of dishonorable discharge have the effect of discharging

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[1] Dig. J. A. Gen., 21, par. 3. A discharge, however, of the former class, though it cannot operate in law as a *dishonorable* discharge, may set forth on its face the reason why it was given and thus exhibit the history of the action taken. See, also, 3 Opin. Att.-Gen., 363.

Where a soldier, by making an alteration in his "descriptive list" so as to cause it to appear that his term of enlistment, which was in fact five years, was three years only, induced the regimental commander to give him an honorable discharge at the end of three years' service, *held*, upon the fraud being presently discovered, that the discharge might legally be revoked and the soldier be brought to trial by court-martial under the 62d Article of War. But where, by competent authority, according to the present 4th Article, an honorable discharge was given to a soldier who was at the time in arrest under charges, *held* that such discharge—no fraud being imputable to the soldier—was final and could not legally be revoked. Dig. J. A. Gen., 355, par. 2.

Where an officer of volunteers had been duly mustered out of service—a form of honorable discharge—and was thus a civilian, *held* that a revocation in orders of his muster-out and a substitution therefor of a dishonorable discharge would, in the absence of any fraud in the case, be wholly unauthorized and illegal. *Ibid.*, par. 1.

Where a soldier before the expiration of his term received a discharge in due form, under the 4th Article of War, though charges were then pending against him, the authority ordering the discharge not having been made aware of such charges, *held* that the discharge was *executed* and could not be revoked with a view to bringing the soldier to trial; that he had, by the discharge, duly become a civilian and was under the control of the military authorities no more than any other civilian. *Ibid.*, 359, par. 19.

Where a soldier was discharged in due and legal form, but under a misapprehension in regard to his actual status at the time, which, if understood, would have deferred action, *held* that the circumstance that the discharge was given under a *mistake of fact* did not invalidate it; that it had become duly executed and could not be recalled. *Ibid.*, 360, par. 20. See, also, *ibid.*, par. 21.

Held that an honorable discharge was simply a termination of the particular enlistment which the soldier was then serving; that it was a discharge only from that enlistment, and did not apply to or discharge from other prior unexpired enlistments, if any. Unlike a dishonorable discharge, an honorable discharge from one enlistment does not release the soldier from the consequences of a desertion committed under a prior enlistment. *Ibid.*, 360, par. 23.

Where a soldier was sentenced to a forfeiture of his pay for six months, but, soon after the approval of his sentence, was honorably discharged from the service (under Article 4), *held* that the discharge operated as a remission of the unexecuted part of the forfeiture, and that the same was not revived upon a re-enlistment. *Ibid.*, par. 24.

a soldier; there must still be a notice, *actual*, as by the delivery of the formal discharge certificate, or *constructive*, to effectuate such discharge.[1]

Honorable Discharge; Effects.—A soldier honorably discharged in the usual form, at the end of his term of enlistment, is no longer subject to military discipline or control. Having become a civilian, he is entitled to be restored at once, or as soon as the exigencies of the service will permit, to the rights and status of a citizen.[2]

Where an honorable discharge has once duly taken effect by the delivery of the formal certificate, it is final and cannot be revoked unless obtained by fraud.[3] But in such a case the revocation should be made within a reasonable time, otherwise the Government will be deemed to have waived the defect. A mere order for a discharge may of course be recalled or suspended at any time before it is executed by the delivery of the discharge ordered.[4]

An honorable discharge once duly made and delivered to a soldier is final as to his rights to pay, allowances, or bounty due at the date of its taking effect. He cannot thereafter be subjected to any of the consequences of a dishonorable discharge.[5]

Discharge by Executive Order.—Although the engagement of the soldier, under his contract of enlistment, is for a term certain, the Government is under no obligation to retain him in service to the end of the stipulated

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[1] Dig. J. A. Gen., 359, par. 17.

[2] Dig. J. A. Gen., 356, par. 6.

[3] See opinion of the Attorney-General in 16 Opins., 352, in which it was held that an honorable discharge obtained by gross falsehood and fraud was revocable by the Secretary of War.

[4] Dig. J. A. Gen., 355, par. 1.

[5] *Ibid.*, par. 3. The procedure in respect to discharge is prescribed in the following paragraph of the Army Regulations:

The cause of discharge and the soldier's age at date of enlistment will be stated in the body of the discharge certificate. His character will be accurately described at the bottom of the certificate, but if not sufficiently good to allow of his re-enlistment, the words "No objection to his re-enlistment is known to exist" will be erased. The words "Service honest and faithful" or "Service not honest and faithful," as the case may be, will be entered under "Remarks" in the military record on the back of the discharge certificate, and will also be noted on the final statements. The company commander will, before submitting the discharge certificate to the proper officer for signature, inform the soldier of the character he intends to give him. Should the soldier feel that injustice will be done him thereby, he may at once apply for redress to the post commander, who will immediately convene a board of officers to determine the facts in the case, and will briefly note the finding of the board, if approved by him, on the discharge certificate. But in all cases where the company commander deems a soldier's services unfaithful he should, whenever practicable, notify the soldier at least thirty days prior to discharge of the character which he intends to give, in order that the soldier may have ample opportunity to apply for and be heard before the board. In such cases the proceedings of the board, showing all the facts pertinent to the inquiry, with the views of the intermediate commanders indorsed thereon, will be transmitted for the consideration and action of the War Department. This board may be called upon the application of the post or company commander, and if by the former, the department commander shall appoint it. The character given by the company commander, also the character found by the board, will be noted on the muster-roll. The officer who prepares the discharge will state thereon whether the man is married or unmarried, the number of his minor children, and, if discharged from a re-enlistment, the number thereof. Par. 148, A. R. 1895; G. O. 10, A. G. O., 1897.

period, and, under the authority conferred by this Article, may "terminate at pleasure an enlistment without regard to the soldier."[1] It is essential to the discipline and efficiency of the military establishment that the Government should "not only have but should be able to exercise this power without question or controversy,"[2] and at its discretion.

A discharge given by the Secretary of War, under the authority conferred by this Article, operates to rescind the enlistment contract and to restore the soldier to the status of a civilian. Such a termination of the enlistment contract is, in respect to its legal effects, an honorable discharge, and carries with it the rights and privileges incident to that form of release from military service.[3]

Dishonorable Discharge. — A dishonorable discharge is a discharge expressly imposed as a punishment by sentence of a general court-martial. It is only in pursuance of such a sentence that a dishonorable discharge can be authorized, since, being a *punishment*, it cannot be prescribed by an order. In a case of this discharge, the word "dishonorably" is inserted before the word "discharged" in the certificate, and it is added that the discharge is given pursuant to the sentence of a certain general court-martial, specifying it by reference to the order by which it was constituted.[4]

An executed dishonorable discharge is an absolute expulsion from the Army, and as such operates not merely to terminate the particular enlistment, but to cover all previous unexecuted enlistments of the soldier, if any. A soldier sentenced to a dishonorable discharge, duly approved and executed, cannot be made amenable for a desertion committed under a prior enlistment.[5]

The discharge of a soldier dishonorably discharged under a sentence of

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[1] Dig. J. A. Gen., 392, par. 23.

[2] II. Clode, Mil. Forces, 40. "The safety of the realm may depend in some measure on the immediate discharge or dismissal of any man or regiment in arms, and equally that the cause of such dismissal should not at the time be disclosed by the responsible ministers of the crown." II. Clode, Mil. Forces, etc., 40. See, also, the case of The 5th Dragoon Guards, 2 Grose, Mil. Antiq., 231. The power was frequently exercised during the Indian Mutiny.

[3] Dig. J. A. Gen., 356, par. 6. Much less is he subject to be punished. In the late case of White *vs.* McDonough (3 Sawyer, 311), where a soldier whose term of enlistment expired while he was on a transport with a detachment was formally discharged, and subsequently, on account of an alleged breach of discipline, was ordered by his commanding officer to work in the coal-hole, the court say: "The conduct of the officer in command was arbitrary and unjustifiable either by law or military necessity."

[4] Dig. J. A. Gen., 361, par. 25. The punishment formerly awarded of drumming out of service involved a dishonorable discharge.

[5] *Ibid.*, par. 26. *Held* that a subsequent enlistment after a dishonorable discharge would not operate to revive any outstanding amenability of the soldier. This upon a principle of public policy and good faith, and because the acceptance into the service under the later enlistment is in the nature of a condonation. *Ibid.*, par. 27.

But the mere fact that at the time of the muster-out of his regiment a soldier was under arrest by the civil authorities for an alleged crime, which, however, was not followed by a trial and conviction, does not justify his being dishonorably discharged. If released without trial, the discharge should be honorable. *Ibid.*, par. 28. See the article, *post*, entitled *Discharge without honor*.

court-martial should be dated as of the day on which the approval of the sentence is officially published, or the order promulgating such approval is received, at the post where the soldier is held. It is to that date that he is to be paid, if pay is due him.[1]

Where a soldier has been legally sentenced to be dishonorably discharged, and such sentence has been duly executed, it is beyond the power of the Executive, whatever the merits of the case, to substitute an honorable in lieu of the dishonorable discharge. The latter having gone into effect cannot be undone; moreover the soldier, having been thereby wholly detached from the military service and made a civilian, cannot again be discharged from the service until he has been again enlisted into it.[2]

A sentence of dishonorable discharge (even when ignominious, as when accompanied by drumming out) entails *per se* no disability to re-enlist in the army; nor does it disqualify for civil employment under the United States.[3]

Discharge without Honor.—A third species of discharge, recently recognized, is "discharge without honor."[4] It is employed in cases where there has been no sentence adjudging a dishonorable discharge, but where the discharge awarded is induced by conduct or circumstances not honorable to the soldier—where his status is not one of real honor, as where he has been sentenced to a term of imprisonment in a penitentiary by a civil court. So where the soldier has mutilated himself in order to obtain a discharge, and it is deemed expedient to discharge him without bringing him to trial.[5]

The ground for this discharge as set forth in par. 151, Army Regulations of 1895,—disqualification for service, physically or in character, through his own fault,—is a disqualification resulting from the acts and habits of the soldier, and cannot fairly be established by previous convictions.[6]

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[1] Dig. J. A. Gen., 359, par. 16. A soldier dishonorably discharged loses his *retained* pay under Sec. 1281, Rev. Sts. (see par. 1369, A. R. 1895), and his *travel* pay under Sec. 1290, Rev. Sts. *Ibid.*, 361, par. 24.

[2] *Ibid.*, 358, par. 12.

[3] *Ibid.*, par. 11.

[4] The causes for and occasions upon which this form of discharge may be resorted to are set forth in Circular No. 15, H. Q. A., 1893, (paragraph 151, Army Regulations of 1895,) which contains the requirement that this form of discharge will be used in the following cases only:

(*a*) When a soldier is discharged without trial on account of fraudulent enlistment.

(*b*) When he is discharged without trial on account of having become disqualified for service, physically or in character, through his own fault.

(*c*) When the discharge is on account of imprisonment under sentence of a civil court.

(*d*) When at the time of the soldier's discharge, at or after the expiration of his term of enlistment, he is in confinement under the sentence of a court-martial which does not provide for honorable discharge. Circular 15, H. Q. A., May 11, 1893; par. 151, A. R. 1895.

(*e*) With forfeiture of retained pay on the approved finding of a board that he has not served honestly and faithfully.

(*f*) When discharge without honor is specially ordered by the Secretary of War for any other reason. Par. 151, A. R. 1895.

[5] Dig. J. A. Gen., 362, par. 30.

[6] Dig. J. A. Gen., 362, par. 31.

Discharge by Purchase.—Under authority conferred by statute[1] the President may, in his discretion, permit a soldier to purchase his discharge even if his service has not been faithful. This for the reason that the statute does not prescribe, as a condition to receiving its benefits, that the antecedent service shall have been "faithful."[2] The statute leaves it to the President, "in his discretion," to determine the amount to be paid for the discharge, the time of payment, etc., and indeed whether the purchase shall be permitted at all.[3] Discharge by purchase is a form of honorable discharge which is granted to enlisted men in accordance with the conditions, established by the President, and set forth in the Army Regulations.[4]

ARTICLE 5. *Any officer who knowingly musters as a soldier a person who is not a soldier shall be deemed guilty of knowingly making a false muster, and punished accordingly.*

This provision appears as No. 17 of the Articles of 1806, as Article 7, Section 4, of the British Code of 1774, and as Article 7, Section 4, of the American Articles of 1776. In the British Article, and in the corresponding provision of the American Code of 1776, its operation is restricted to the muster of a person "who is at other times accustomed to wear livery, or who does not actually do his duty as a soldier." In this form the clause is somewhat less comprehensive in its operation than that which is given to it in the Articles of 1806 and 1874.[5]

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[1] Section 4, Act of June 16, 1890 (26 State at Large, 157).

[2] Dig. J. A. Gen., 362, par. 32. *Held* that the summary discharges given during the late war for causes tainting their character were of this kind, although not known by the name of "discharges without honor" or by any other particular name. This discharge is sometimes given upon the remission of a sentence. See S. O. 169 of July 26, 1893. *Ibid.*, 361, par. 30.

Held, further, that the Act evidently contemplated soldiers as such, and that it did not apply to general-service clerks or messengers or to Indian scouts. *Ibid*, 362, par. 33.

[3] *Ibid*, par. 33 The statute specifically declares that the money when paid "shall be paid to a paymaster of the Army"; and, in view of this express provision, *held* that payments could not legally be made to post, regimental, company, or other commanders. The paymaster, a bonded official, is appointed to receive payment in the first instance and thereupon make the deposit directed in the Act. *Ibid.*

[4] In time of peace a soldier serving in the second year or first six months of the third year of his first enlistment may apply to the Adjutant-General of the Army through military channels for the privilege of purchasing his discharge, but such application will not be entertained unless based on satisfactory reasons fully set forth by the applicant and verified by the officer forwarding the application, nor unless accompanied by a statement of the soldier's immediate commanding officer showing the condition of his accounts. If such application be granted, the purchase-price will be entered on the final statements as an item due the United States. A soldier once discharged by purchase will not be granted that favor a second time. A soldier serving in a second or any other enlistment, but not receiving continuous service or re-enlisted pay, is not debarred from discharge by purchase. The price of purchase in the first month of the second year will be $120, and will be $5 less in each succeeding month of the period during which purchase may be authorized. Par. 144. A. R. 1895.

Soldiers discharged as provided in paragraphs 144 and 145 will not receive travel allowances. Par. 146, *ibid.*

[5] See Article 14, *post.*

ARTICLE 6. *Any officer who takes money or other thing, by way of gratification, on mustering any regiment, troop, battery, or company, or on signing muster-rolls, shall be dismissed from the service, and shall thereby be disabled to hold any office or employment in the service of the United States.*

This appears as Article 6, Section 4, of the British Code of 1774, as Article 6, Section 4, of the American Articles of 1776, and as No. 16 of the Articles of 1806. The British Article, in addition to displacement from office, subjected the offender to "such other penalty as, by the Act of Parliament, is inflicted"; the Articles of 1806 imposed the specific penalty of dismissal from office, with the added disqualification "to have or to hold any office or employment in the service of the United States."

The offense of taking money, etc., by way of gratification is complete whether the muster-rolls are true or false, and the offense may be committed in the muster of a command in respect to which there is no doubt of the presence of members or their fitness for service.

ARTICLE 7. *Every officer commanding a regiment, an independent troop, battery, or company, or a garrison shall, in the beginning of every month, transmit through the proper channels, to the Department of War, an exact return of the same, specifying the names of the officers then absent from their posts, with the reasons for and the time of their absence. And any officer who, through neglect or design, omits to send such returns shall, on conviction thereof, be punished as a court-martial may direct.*

This requirement appears as Article 2, Section 5, of the British Code of 1774, as Article 2, Section 5, of the American Articles of 1776, and as No. 19 of the Articles of 1806. The provision respecting the names of absent officers seems to have been intended to apply to the cases of officers "not residing" at their respective posts of duty, and required the reasons for and the duration of such periods of non-residence to be stated in the return. The Article applied only to troops stationed in South Britain, but similar returns of the state of the forces in North Britain and Ireland were required to be rendered by Article 3 of the same section.

The word "return," as used in this Article, has a somewhat less extensive meaning than is attached to the term in the 8th Article, presently to be discussed. It relates to what is known in the military service as a "return of strength," which is required to be furnished monthly to the Adjutant-General of the Army by the commanding officers of all garrisons and organizations composing the military establishment. As so used, the term relates to the strength or composition of a command, as distinguished from the returns of property and stores, presently to be described, the rendition of which is regulated by the 8th Article of War. The returns contemplated by this Article are always numerical; they are also nominal to the extent of requiring the lists of absent officers and enlisted men to be

entered thereon, "with the reasons for and the time of their absence." Other information respecting the state or efficiency of a military command, if desired by the War Department, may be embodied in such returns in pursuance of instructions conveyed to the Army by means of regulations, orders, and circulars.[1]

"It is the principal object of this Article to enforce the presence of officers with their corps, as well as to guard against absence in any case except on known, well-authenticated, and reported grounds. Hence it is that the returns are ordered to be made at quickly recurring intervals and in specific terms; and any failure, therefore, not only in making the returns but in their prompt transmission through the proper channels to the War Department, either through design or neglect, is liable to be punished on conviction, at the discretion of a general court-martial."[2]

ARTICLE 8. *Every officer who knowingly makes a false return to the Department of War, or to any of his superior officers authorized to call for such returns, of the state of the regiment, troop, or company, or garrison under his command, or of the arms, ammunition, clothing, or other stores thereunto belonging, shall on conviction thereof before a court-martial be cashiered.*

This provision appears as Article 1, Section 5, of the British Code of 1774; as Article 1, Section 4, of the American Articles of 1776, and as No. 18 of the Articles of 1806.

A *return* is a numerical statement of the strength and condition of a military command; or an itemized account required by law, regulations, or by existing orders, to be rendered by officers of the Army in relation to public funds, or articles of public property in their official possession. The former are called *returns of strength;* the latter *money accounts*, or *property returns.* Authorized transactions respecting the public money or property, in the nature of issues, transfers, payments, expenditures, and the like, are evidenced, and the returns and accounts are supported, by written records or memoranda called *vouchers.* Accountability for public money or property is a responsibility peculiar to officers as a class, and accounts and returns respecting the same are, as a rule, rendered by commissioned officers alone; ordnance sergeants and certain enlisted men of the Signal Department are required by statute to make returns of the public property in their possession when serving at posts at which no commissioned officers are present.

The returns contemplated by this Article are of a general nature, such as a superior officer is authorized to call for at any time and which an inferior is required to make.[3] They include the returns required to be made

[1] For instructions respecting the preparation and rendition of monthly returns, see paragraphs 789, 790, 792, 793, 794, and 796, Army Regulations of 1895.

[2] Samuels, 321.

[3] *Ibid.*, 320.

to the Adjutant-General under the 7th Article, and such returns or reports of the strength or composition of a military command as may be required from time to time by proper superior authority; together with such returns as are required by law to be rendered in respect to the several classes of public property specified in the Article. The amenability here referred to is in addition to that enforced by the Treasury Department and its accounting officers, in accordance with the terms of the Revised Statutes and the several enactments amendatory of the same.[1]

It is no matter in what the falsehood may consist,—whether in number or quality of the troops, of which they purport to be a true account, or of the arms, ammunition, clothing, or stores,—as circumstances of inefficiency might be equally prejudicial to the service with those of positive defect; or whether the deficiency arise from a fixed or occasional cause, as from the temporary absence of men, or arms, etc. It is the duty of every officer to return things as they are. The offense will be complete if the returns are not true, with the knowledge of those interested in making them, in any one particular represented. All military acts and operations must be undertaken on a confidence in such returns, and any deceit discovered in them, as it might affect any military plan, is visited with a severe and tangible punishment.[2]

The only inquiry that can arise under any charge founded on this Article is whether the returns in question are false or otherwise; and next, whether the party making the returns is apprised, at the time of making them, of their being false. On the latter branch of the inquiry it may be remarked that an officer is always presumed to know what from the duty of his office he is bound to know or ought to inform himself of. So that ignorance of the contents of the returns, subscribed by an officer, cannot be pleaded in excuse, for it was his business previously to inquire (as it will be in all cases where his signature is not merely formal) into the truth of the statements made in them.[3]

This Article refers only to returns made by certain commanders as such. It is only as commander of a regiment, company, or garrison that an officer can be made amenable to a charge under the Article; an officer not exercising one of these commands is not within its terms.[4]

ARTICLE 9. *All public stores taken from the enemy shall be secured for the service of the United States; and for neglect thereof the commanding officer shall be answerable.*

[1] The "returns" indicated in the Article can scarcely be said to include returns of *funds;* what is contemplated being mainly returns of the *personnel* or *matériel* of the command. A false return of a company fund would more properly be charged under another Article, as the 61st or 62d. Dig. J. A. Gen., 22. par. 3.

[2] Samuels, 320. An officer "knowingly makes a false return" under this Article who makes a return which he knows to be untrue in any material particular. *Ibid.*, par. 2.

[3] *Ibid.*, 320, 321.

[4] Dig. J. A. Gen., 22, par. 1. See G. C. M. O., 12, 19, War Dept., 1872.

This appears as Article 20, Section 14, of the British Code of 1774; as Article 20, Section 13, of the American Articles of 1776; and as No. 58 of the Articles of 1806. In the American Articles of 1776 and in the corresponding British Code of 1774 the commander-in-chief is made responsible for the execution of this statute; in the Articles of 1806 the responsibility is placed, somewhat less clearly, upon the "commanding officer."

This provision is in accordance with the principle of the law of nations and of war, that enemy's property duly captured in war becomes the property of the government or power by whose forces it is taken, and not that of the individuals who take it.[1] "Private persons cannot capture for their own benefit."[2] Military stores taken from the enemy, becoming upon capture the property of the United States, Congress, which by the Constitution[3] is exclusively vested with the power to dispose of the public property as well as to make rules concerning captures on land and water, can alone authorize the sale or transfer of the same. An officer or soldier of the Army who assumes of his own authority to appropriate such articles renders himself chargeable with a military offense.[4]

It is a general principle that captured property of an enemy with whom we are at war accrues to the United States. The application, however, of this principle during the late civil war was affected by the operation of certain Acts of Congress. Personal property, indeed, of the Confederate States, or of one of them, became on capture by the Federal forces the property *jure belli* of the United States. So the title to their real estate, occupied by the United States Army at some period of the war and held till its end, was completed in the United States by the subjection and dissolution of the hostile government, and became public property, subject to the disposition of Congress. But real estate of individual enemies (including private corporations), while subject to be sold, etc., under the Act of July 2, 1864, could not in general become vested in the United States except through the judgment of a competent court confiscating the same upon proceedings instituted under the Act of July 17, 1862.

As to the personal property of individuals, this (though in some instances made the subject of proceedings for confiscation) was mostly disposed of by and under the Act of March 12, 1863, known as the "Captured and Abandoned Property Act," by which such property (except munitions of war and other material used or intended to be used in prosecuting the war against

[1] Dig. J. A Gen., 22. United States *vs.* Klein, 13 Wallace, 136; Decatur *vs* United States, Devereux, 110; White *vs.* Red Chief, 1 Woods, 40; Branner *vs.* Felkner, 1 Heisk., 232; Worthy *vs.* Kinamon, 44 Ga., 299; Huff *vs.* Odom, 49 *id.*, 395; 13 Opins. Att.-Gen., 105; Hough, (Practice), 329, 330; G. O. 54, Hdqrs. of Army, Mexico, 1848; G. O. 21, War Dept., 1848; do. 64, 107. *Id.*, 1862. And see, also, Lamar *vs.* Browne, 2 Otto, 195, in regard to the same principle as illustrated by the Captured and Abandoned Property Act of March 12, 1863.

[2] Worthy *vs.* Kinamon, 44 Ga., 299.

[3] Art. 1, Sec. 8, par. 11; Sec. 3, par. 2.

[4] Dig. J. A. Gen., 22, par. 1. See, also, Sec. 5313, Rev. Sts.

the United States, and which were of course subject to seizure by the army and became on capture the property of the United States) was required to be collected, sold, and the proceeds paid into the Treasury, subject to the claims therefor of parties who should establish their ownership of the property and the fact that they had not "given aid or comfort to the rebellion."[1]

A loyal owner of property captured by the enemy during the war, and afterwards recaptured by the Federal forces, may have the same turned over to him by executive authority, where clearly identified as belonging to him, and should in general be allowed to receive it free from any charge in the nature of salvage.[2] In a case, however, in which extraordinary expense has been incurred in saving the property, which the owner should equitably pay or contribute to, the Secretary of War would not properly take action in the absence of specific authority from Congress.[3]

ARTICLE 10. *Every officer commanding a troop, battery, or company is charged with the arms, accoutrements, ammunition, clothing, or other military stores belonging to his command, and is accountable to his colonel in case of*

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[1] Dig. J. A. Gen., 212, par. 1. See, under this paragraph, United States *vs.* Padelford, 9 Wallace, 538; United States *vs.* Klein, 13 *id.*, 136; United States *vs.* Huckabee, 16 *id.*, 414; Haycraft *vs.* United States, 22 *id.*, 81; Lamar *vs.* Browne, 2 Otto, 187; Williams *vs.* Bruffy, 6 *id.*, 188; Young *vs.* United States, 7 *id.*, 60; Ford *vs.* Surget, *id.*, 594; Johnson *vs.* Dow, 10 *id.*, 158; Porte *vs.* United States, Devereux, 109; Winchester *vs.* United States, 14 Ct. Cl., 13; United States *vs.* A Tract of Land, 1 Woods, 475; Atkinson *vs.* Central Ga. Mfg. Co., 58 Ga., 227.

Held that the property of enemies, captured *jure belli* in a civil war, did not belong to the class of property indicated in Article 5 of the Amendments to the Constitution, the taking of which "for public use without just compensation" is prohibited. Dig. J. A. Gen., 213, par. 2.

Held that a claim by an individual for rent for the use and occupation by the United States of captured real estate for an alleged unreasonable period after the end of the war without commencing proceedings for confiscation could not be allowed by an executive officer or department, and that as such a claim would not be within the jurisdiction of the Court of Claims,* the same could be entertained only by Congress. *Ibid.*, par. 3.

The owner of property captured *jure belli* is not entitled to recover its value under the provisions of Sec. 3483, Rev. Sts., as being property *impressed* in the military service.† *Ibid.*, par. 4.

Held that a civilian into whose hands had come at the end of the late war certain captured personal property of the enemy was not entitled to convert it to his own use or to demand compensation as a condition of its surrender to the United States authorities. *Ibid.*, par. 6.

Sec. 218, Rev. Sts., in requiring the Secretary of War to collect, etc., "all such flags, standards, and colors as are taken by the army from the enemies of the United States," is believed to have reference to flags of the enemy. So, *advised*, that a flag of a Massachusetts regiment, captured by the enemy and retaken at the end of the war at Richmond, was not to be considered as one of the class placed by the statute under the charge of the Secretary of War, and might therefore properly be returned to the State or the regiment, if originally belonging to or furnished by the same. Otherwise if furnished by the United States: in such case the flag is property of the United States, disposable only by Congress. *Ibid.*, par. 7.

[2] Wilson *vs.* U. S., 4 Ct. Cls., 559.

[3] Dig. J. A. Gen., 213, par. 5.

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* See Sec. 1059, Rev. Sts.; Bishop *vs.* United States, 4 Ct. Cl., 448; Slawson *vs.* United States, 16 Wallace, 314.

† As to the distinction between capture and impressment, see 11 Opins. Att.-Gen., 378.

their being lost, spoiled, or damaged otherwise than by unavoidable accidents or on actual service.

This requirement appears as Article 5, Section 13, of the British Code of 1774, as Article 5, Section 12, of the American Articles of 1776, and as No. 40 of the Articles of 1806.

It is the purpose of this Article, taken in connection with the 15th, 16th, and 17th Articles of similar purport, to protect the public property and stores from waste or destruction, by establishing a disciplinary responsibility, in addition to the fiscal accountability which is enforced by the auditors of the treasury and the several chiefs of bureaus in the War Department.[1] It therefore fixes such disciplinary accountability, for the purposes set forth in this Article, in the commanding officer of the troop, battery, or company, who is, by its express terms, made responsible to his regimental commander for any loss, spoiling, or damage not due to "unavoidable accident," or which may occur elsewhere than "on actual service."

Save for the disciplinary responsibility contemplated by this Article, there is, under existing laws and regulations, no system of accountability to regimental commanders for property belonging to the United States. Returns for such property are made upon forms prescribed by the War Department, and are rendered to the chiefs of bureaus to which the property pertains. In consequence of an opinion rendered by the Attorney-General in 1871,[2] these returns were submitted to the auditor of the treasury for settlement under the general direction of the Secretary of War.[3] By subsequent legislation, however, this practice has been discontinued,[4] and the examination of property returns is now vested in the executive department to which the property pertains; and the heads of the several executive departments are "empowered to make and enforce regulations to carry out the provisions" of this enactment.[5]

Unavoidable Accidents are those which are unavoidable in the sense of *inevitable*, because effected or influenced by the uncontrollable operations of nature, or "such as result from human agency alone, but are unavoidable under the circumstances."[6]

The term does not apply to an accident which it is physically impossible, in the nature of things, to prevent, but to an accident not occasioned in any degree, remotely or indirectly, by the want of such care and skill as the law holds every man bound to exercise. An accident, on the other hand, is "avoidable" when the act which occasioned it was not called for by any

[1] See Samuels, 514.
[2] 13 Opin. Att.-Gen., 483.
[3] Scott, Digest Mil. Laws of the United States, par. 54, note 19.
[4] Act of March 1, 1894 (28 Stat. at Large, 47).
[5] Sec. 4, Act of March 1, 1894 (28 Stat. at Large, 47).
[6] Anderson's Law Dict.

duty, and the injury resulted from the want of that extraordinary care which the law reasonably requires of one doing such lawful act, or because the accident was the result of actual negligence or folly and might with reasonable care, adapted to the emergency, have been avoided.[1]

The words "actual service" as used in this Article relate to actual operations in the field; that is, to a state of military activity in which the operations against the enemy assume paramount importance, and the loss or damage results from acts of war done in the presence of the enemy or in the actual theatre of military operations.

ARTICLE 11. *Every officer commanding a regiment or an independent troop, battery, or company not in the field may, when actually quartered with such command, grant furloughs to the enlisted men, in such numbers and for such time as he shall deem consistent with the good of the service. Every officer commanding a regiment or an independent troop, battery, or company in the field may grant furloughs, not exceeding thirty days at one time, to five per centum of the enlisted men, for good conduct in the line of duty, but subject to the approval of the commander of the forces of which said enlisted men form a part. Every company officer of a regiment commanding any troop, battery, or company not in the field, or commanding in any garrison, fort, post, or barrack, may, in the absence of his field-officer, grant furloughs to the enlisted men, for a time not exceeding twenty days in six months, and not to more than two persons to be absent at the same time.*

This requirement appears as Article 2, Section 4, of the British Code of 1774, as Article 2, Section 4, of the American Articles of 1776, and as No. 12 of the Articles of 1806. The second clause of the Article is a re-enactment of Section 32 of the Act of March 3, 1863.[2] The final clause of the Article of 1806, permitting more than two persons to be absent at the same time "if some extraordinary emergency should require it," was omitted from the enactment of 1874.[3]

ARTICLE 12. *At every muster of a regiment, troop, battery, or company, the commanding officer thereof shall give to the mustering officer certificates, signed by himself, stating how long absent officers have been absent and the*

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[1] Anderson's Law Dict. No one is responsible for that which is merely the act of God or inevitable accident. But when human agency is combined with it, and neglect occurs in the employment of such agency, a liability for damages results from the neglect. Dygert *vs.* Bradley, 8 Wend., 473.

[2] Section 32, Act of March 3, 1863 (12 Stat. at Large, 736).

[3] The subject of furloughs to enlisted men is now in part governed by the requirements of paragraphs 106–112 of the Army Regulations of 1895. A right to a furlough at the end of three years' service, created by the Act of June 16, 1890, (26 Stat. at Large, 157,) ceased to be operative on August 1, 1897, when the statute * fixing the length of the term of enlistment at three years, in time of peace, went into effect.

* Sec. 2, Act of August 1, 1894 (28 Stat. at Large, 216).

reasons of their absence. And the commanding officer of every troop, battery, or company shall give like certificates, stating how long absent non-commissioned officers and private soldiers have been absent and the reasons of their absence. Such reasons and time of absence shall be inserted in the muster-rolls opposite the names of the respective absent officers and soldiers, and the certificates, together with the muster-rolls, shall be transmitted by the mustering officer to the Department of War, as speedily as the distance of the place and muster will admit.

This provision appears as Article 3, Section 4, of the British Code of 1774, as Article 3, Section 4, of the American Articles of 1776, and as No. 13 of the Articles of 1806. The final clause of the Article of 1776, requiring the muster-rolls and certificates to be transmitted to the Congress, was, in the corresponding Article of 1806, so modified as to require them to be transmitted to the War Department "as speedily as the distance of the place and muster will admit."

This Article regulates the contents of the certificates of absence, the time of their submission, and points out the person who is entitled to receive them; it also requires that certain data which they contain shall be entered upon the muster-rolls.

ARTICLE 13. *Every officer who signs a false certificate, relating to the absence or pay of an officer or soldier, shall be dismissed from the service.*

This appears as Article 4, Section 4, of the British Code of 1774, as Article 4, Section 4, of the American Articles of 1776, and as No. 14 of the Articles of 1806, in which the scope of the offense was intended to include false certificates in respect to the *pay* of officers and enlisted men. The nature and contents of the certificate contemplated are set forth in the preceding Article. The strictness of practice, in respect to musters, certificates of absence, and the like, indicated by this Article and others of similar purport, is coeval in its origin with the standing army in England, and had there become well established, as a matter of public policy, when the British Articles were adopted, with some modifications, for the regulation of the military establishment raised by the Congress for service during the War of the Revolution.[1]

ARTICLE 14. *Any officer who knowingly makes a false muster of man or horse, or who signs, or directs, or allows the signing of any muster-roll knowing the same to contain a false muster, shall, upon proof thereof, by*

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[1] It will not be a sufficient defense to a charge under this Article that the accused believed the certificate signed by him to be true, if it was false in fact.* But *held* that the mere signing, by an officer, of a voucher for his pay before the last day of the month for which it was due did not constitute an offense of the class intended to be made punishable by this Article.†

* Dig. J. A. Gen., 23; Samuel, 298; O'Brien, 302.
† *Ibid.* See. G. C. M. O. 28, War Department, 1882.

two witnesses, before a court-martial, be dismissed from the service, and shall thereby be disabled to hold any office or employment in the service of the United States.

This requirement appears as Article 5, Section 4, of the British Code of 1774, and of the American Articles of 1806. It was re-enacted without change as No. 15 of the Articles of 1806.

As the offense involves the falsification of an official document, it becomes necessary to a conviction under it to overcome the presumption of good faith which attends the execution of such instruments; the statute, therefore, contains a rule of evidence requiring the testimony of two witnesses as to the execution and character of the certificate, in order to warrant a conviction of the offense named in the Article.[1]

False Muster, etc.—Articles 5, 6, 12, 13, and 14 relate to the military offense known as "false muster," and to certain offenses connected therewith; for this reason they will be considered together.

Musters.—A *muster* is the periodical assembling of organized commands for review and personal inspection, with a view to the verification of their numbers and equipment, and the presence and identity of their individual members. In addition to the periodical musters above described, the law requires the muster of organized commands which enter the military service of the United States as such, in response to calls of the Executive upon the several States in time of war or public danger; a similar formality attends their discharge, and the rolls by which such muster-in and muster-out are

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[1] Prior to the inauguration of the public auditing system in England great abuses had existed in the matter of musters in both the military and naval establishments; this was especially true of the reigns of the last two sovereigns of the house of Stuart. During the reign of William and Mary a Parliamentary Commission was created to inquire into the subject. After a protracted investigation, in which a great mass of evidence was accumulated, a report was submitted to Parliament in which the existence of specific abuses was established. As a result the system of public audit was inaugurated which was intended to afford a remedy for the abuses complained of, and which was found to be so efficient in practice that it has been continued in existence to the present time.*

The early Mutiny Acts contained several clauses framed with the object of securing the integrity of the muster-rolls, but, notwithstanding these enactments, the Commons committee reported to the House in 1746 that the men granted by Parliament never were effective notwithstanding the allowances which had been made at different times to render them so. The colonel and officers had a strong pecuniary interest, which was nominally under the control of the commissaries on the staff of the army, whose commissions were purchasable, and hence the gratuities paid to these officers were the sequence to, if not the reward for, their evasion of duty. Either men were alleged to be absent, without certificate of existence, and the word of the regimental officer was accepted in lieu thereof, or tradesmen were dressed up in regimentals and passed as soldiers.† These Articles are thus seen to present the history of an endeavor to secure accurate and impartial musters, at regularly recurring intervals, of the troops composing the British military establishment. Such musters have, as a rule, been correctly made in the Army of the United States since its establishment; as is indicated by the relative infrequency of trials for the several offenses described and made punishable in the foregoing Articles.

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* Clode, Military Forces of the Crown, vol. i. pp. 112-124.
† *Ibid.*, vol. ii. p. 9.

accomplished are called *muster-in rolls*[1] and *muster-out rolls*[2] respectively. There may also be musters of individuals, as distinguished from commands, as is the case when an enlisted man executes a contract of enlistment or when, in time of war, an officer of volunteers is promoted from a lower to a higher grade.

Muster-rolls.—The written list or instrument in accordance with which the verification is made, and which constitutes the record of the transaction, is called a muster-roll; the purpose of which is to set forth a true and correct list or roll of the members of the command undergoing muster. These are prepared by the commanding officer of the company or other organization which is presented for muster, who is responsible for the correctness of the statements which they contain. Upon the rolls so prepared, when verified by the mustering officer, payments to the command are based. The verification or muster is conducted by an officer designated for the purpose in competent orders, who is known as the *mustering officer*.

Musters, How Made.—The muster of a command is generally, but not always, preceded by an inspection, with a view to determine its disciplinary condition, appearance, and military efficiency, but this is no part of the muster proper. When the presence of the members of a particular command or organization has been thus verified, together with that of their armament or equipment, if such articles be included in the muster, the muster-rolls are signed, and the fact of muster is certified to by the mustering officer. The muster-rolls as thus completed constitute the basis of all payments for the period covered by them, and also become the basis of subsequent issues of stores and supplies by the several staff departments of the Army.[3]

False Muster.—The offense of false muster, which is not described in the 14th Article of War, must be derived from the definition of the term

[1] The record of a formal muster-in is an official record, duly made by the proper officers pursuant to law, of an official act performed under the law. It is therefore, in the absence of fraud, conclusive evidence of the facts recorded, and no other evidence is admissible to show a different state of facts. Great uncertainty would ensue could such records be set aside by parole or other evidence. Dig. J. A. Gen., 525, par. 1.

A muster-in is not necessarily formal. A mere enrollment is not a muster in, and does not place the party in the military service. But taking up a man's name upon the rolls and accepting his services as a soldier is a constructive muster-in. *Ibid.*, par. 2.

[2] The muster-out is a formal discharge from the Army, making the soldier a civilian, and terminating all military authority and jurisdiction over him. The fact that the United States may (as by Sec. 1290, Rev. Sts.) provide transportation to their homes and subsistence *en route* for soldiers after muster-out does not continue them in the military service. (Sec. 4701, Rev. Sts., defines the period of service of soldiers with reference to the application of the pension laws, but not otherwise.) See, also, the 60th Article of War. *Ibid.*, 525.

[3] The requirement of Article 1, Section 4, of the British Code of 1774, that regimental and company commanders should prepare their commands for muster on notice given by the commissary of musters or one of his deputies, which appeared as Article 1, Section 4, of the American Articles of 1776, was omitted from the Articles of 1806 the office of commissary of musters having never existed in the Army of the United States. Musters in our service are made at regularly recurring intervals, and are conducted by officers detailed for that purpose by competent authority.

muster above given. It may be said to consist in general in any acquiescence, on the part of the mustering officer, in the false or fraudulent presentation or enumeration of any person or article of property persented for muster on the official muster-rolls. Under this head would fall the substitution before the mustering officer, in order that he may be entered on the muster-roll, "of one man or horse for another, whether such man or horse belong to the service or not; the presenting of either a second time, under a different description, at the same muster; the mustering of any person by a wrong name; or of any person as a soldier who in fact is not a soldier; or of returning officers or men present when they are in reality absent from the regiment, or of reporting them in the corps or company after they are deceased or have been discharged; or for representing as effective boys or others who, from youth or infirmity or some other disability, are declared, by the regulations of the service, as ineffective."[1]

ARTICLE 15. *Any officer who wilfully or through neglect suffers to be lost, spoiled, or damaged any military stores belonging to the United States shall make good the loss or damage, and be dismissed from the service.*

This provision appears as Article 1, Section 13, of the British Code of 1774, as Article 1, Section 12, of the American Articles of 1776, and as No. 36 of the Articles of 1806. This requirement is a re-enactment of the corresponding provision of the Articles of 1806 which applied to commissioned officers as a class and, in addition, to storekeepers and commissaries.[2] As storekeepers and commissaries are now commissioned officers, they are no longer referred to in the Article by title of office, being included within its scope in their character as commissioned officers of the Army. The Article recognizes both a *fiscal* and a *disciplinary* accountability; the former in its provision for the reimbursement of the United States for the damage or loss;[3] the other in the clause imposing the mandatory punishment of dismissal upon conviction of the offense.[4]

Nature of the Neglect, etc.—As willful neglect constitutes an essential element of the offense described in the statute, it is proper, at this point, to

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[1] Samuel, 301. "The substitution of one man or horse for another, that he may be entered on the muster-roll, whether such man or horse be or be not in the service; the presenting of either or both a second time under a different description at the same muster; the mustering any person under a wrong name; mustering officers or men present when in fact they are absent: mustering them in corps or company after they are deceased or discharged; representing as effective boys or others who, from youth infirmity or other disability, are, by regulations of service, ineffective—all these are so many cases of false musters, and have been so deemed by military courts." O'Brien, 88.

[2] This requirement appears as Article 1, Section 13, of the British Code of 1774, as Article 1, Section 12, of the American Articles of 1776, and as No. 36 of the Articles of 1806.

[3] See Sections 1303 and 1304, Revised Statutes.

[4] The requirement of Article 36 of the American Code of 1806 respecting the sale, embezzlement, or misapplication of military stores was omitted from the revision of 1874, possibly because of the more comprehensive provisions of the 60th Article, in which it is, in fact, merged.

determine the amount of negligence on the part of a commissioned officer of the Army which will constitute an offense under the Article. A neglect to constitute a crime, as it is declared by this Article, must have more, it is apprehended, than a negative quality about it; especially as it involves, in addition, the civil responsibility of the party to the amount of the loss occasioned by it. A neglect to induce such consequences may be supposed to partake somewhat of a positive nature, as, for instance, in the non-observance of special instructions or general regulations in reference to the custody or disposal of the things in charge; or in contempt of usage and custom of office, in the discharge of which the trust arises, in respect to the particular charge; or, when there are no instructions, regulations, or customs to guide the officer in the custody of the matter or thing entrusted to him, in a flagrant and gross omission of care, which is usually taken, in legal intendment, as an evidence of fraud. Any inferior degree of neglect, though implying an absence of a special and refined care, which more considerate or wary persons are in the habit of using in their own affairs, would not amount, it should seem, to that culpable or criminal negligence, so as to expose the party guilty of it to the multiplied penalties of the Article.[1]

Stoppages to Reimburse the United States.—The stoppages contemplated in this Article are also regulated in part by Sections 1303 and 1304 of the Revised Statutes, which provide that "the cost of repairs or damages done to arms, equipments, or implements shall be deducted from the pay of an officer or soldier in whose care or use the same were when such damages occurred, if said damages were occasioned by the abuse or negligence of said officer or soldier;"[2] and that "in case of deficiency of any article of military supplies, on final settlement of the accounts of any officer charged with the issue of the same, the value thereof shall be charged against the delinquent and deducted from his monthly pay, unless he shall show to the satisfaction of the Secretary of War, by one or more depositions setting forth the circumstances of the case, that said deficiency was not occasioned by any fault on his part. And in case of damage to any military supplies the value of such damage shall be charged against such officer and deducted from his monthly pay, unless he shall in like manner show that such damage was not occasioned by any fault on his part."[3]

Stoppages.—The term "stoppage" has already been defined.[4] It has also been seen that the pay of an officer or soldier cannot be subjected to stoppage except by the authority of a statute or regulation specifically authorizing the same, or of a sentence of court-martial imposing a forfeiture or fine as a punishment, or where the party has become indebted to the

[1] Samuel, 516.
[2] Section 1303, Revised Statutes.
[3] Section 1304 Revised Statutes.
[4] See the title *Forfeiture* in the chapter entitled PUNISHMENTS.

United States *on account*. In a case of supposed liability to stoppage resulting from a neglect or an act chargeable as a military offense, and as to which the facts are disputed, it is in general preferable to have the case investigated and the actual pecuniary liability, if any, fixed by a trial by court-martial. A superior is not authorized to stop against the pay of an inferior the value of property charged to have been *criminally* misappropriated.[1] Nor is it authorized to stop against the pay of an officer or soldier an amount of *personal* indebtedness, to another officer or soldier, even though such indebtedness may have grown out of the relations of the military service. Thus an officer's pay cannot legally be stopped, for example, with a view to the reimbursement of enlisted men who have deposited money with him for safe-keeping, and which he has failed to return when required, the officer being accountable for the same in a *personal* capacity only.[2]

It has been seen that pay forfeited by sentence of a court-martial is, in contemplation of law, returned from the appropriation for the support of the Army to the general treasury, and becomes public money, and, being in the treasury, cannot be withdrawn and restored to the party from whose pay it was taken by way of forfeiture without an act of appropriation, or other authority of Congress. A forfeiture thus executed cannot therefore be remitted, or restored by the pardoning power, whatever be the merits of the case.[3]

A stoppage is distinguished from a forfeiture or fine, and an executive stoppage, or stoppage by order, cannot be imposed for an *offense*. But under par. 1390, Army Regulations of 1895, it is entirely legal to stop against a soldier's pay an amount required to reimburse the United States for loss on account of damage done to public property, while at the same time bringing the soldier to trial by court-martial for the offense involved.[4]

Pay due an officer or soldier can legally be stopped only by reason of an accountability to the United States.[5] Thus it cannot be stopped to reimburse a hospital fund for money stolen, such fund, like a company fund, not being public money. It cannot legally be stopped, for example, to reimburse a telegraph company for moneys received by a sergeant of the then Signal Corps for transmitting private messages over its line, the same not being a line "operated by the United States" in the sense of the Act of March 3, 1883,[6] and the indebtedness of the sergeant being to the

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[1] Dig. J. A. Gen., 719, par. 1.
[2] *Ibid.*, 720, par. 2.
[3] *Ibid.*, 421, par. 14. Par. 268, A. R., 1895, requiring deductions to be made from the pay of soldiers in favor of "tradesmen," who, when "relieved from ordinary military duty," are authorized to make alter, or repair soldiers' uniforms, *held* to authorize stoppages not only for dues to tailors who are in the military service, but also for dues of civilian tailors. *Ibid.*, 720, par. 4. See, also, Circular 8, A. G. O., 1896.
[4] *Ibid.*, 720, par. 3.
[5] *Ibid.*, 721, par. 8; 16 Opin. Att.-Gen., 477.
[6] 22 Stat. at Large, 616.

telegraph company only, not to the United States. So *held* that it would not be legal to stop the pay of an officer for the amount of a local bounty alleged to have been neglected to be paid over by him to an enlisted volunteer on whose account it was received. An officer or soldier cannot legally be mulcted of any part of his pay for the satisfaction of a private claim.[1]

ARTICLE 16. *Any enlisted man who sells or willfully or through neglect wastes the ammunition delivered out to him shall be punished as a court-martial may direct.*

This provision appears as Article 2, Section 13, of the British Code of 1774, as Article 2, Section 12, of the American Articles of 1776, and as No. 37 of the Articles of 1806. Prior to the re-enactment of the Articles in 1874, only a regimental court-martial was authorized to take jurisdiction of the offense set forth in the statute. This Article applies expressly to enlisted men and, unlike Article 15, is entirely disciplinary in character; it is also much less extensive in its operation, being limited, by the express terms of the statute, to the sale or waste of ammunition only.

ARTICLE 17. *Any soldier who sells, or through neglect loses or spoils, his horse, arms, clothing, or accoutrements shall be punished as a court-martial may adjudge, subject to such limitation as may be prescribed by the President by virtue of the power vested in him.*[2]

This appears as No. 38 of the Articles of 1806, as Article 3, Section 13, of those of 1776, and as Article 3, Section 13, of the British Code of 1774. It was re-enacted in its present form by the Act of July 27, 1892.[3] Prior to such re-enactment the Article required an accused person upon conviction to undergo such weekly stoppages (not exceeding the half of his pay) as a court-martial "shall judge sufficient for repairing the loss or damage; and to suffer confinement or such other corporal punishment as his crime shall deserve." As the loss to the United States was not easily or definitely ascertainable, and as no form of corporal punishment except imprisonment

[1] Dig. J. A. Gen., 721, par. 8. A soldier who deserted from Jefferson Barracks surrendered at Chicago, where the sum of four dollars was expended by the United States for his meals before he could be returned to his station. *Held* that this sum, as substantially included within the item of "expense of apprehending deserter," specified in par. 1390, A. R. of 1895, was properly charged against him on the muster and pay rolls. *Ibid.*, par. 6.

The amount of the allowances of the witnesses, or other expense attending the trial, by court-martial, of a soldier, cannot legally be stopped against his pay, whatever the offense of which he may be convicted. *Ibid.*, par. 7.

Held that the Government was entitled to retain so much of a soldier's pay as would cover his indebtedness to it, even though the pay due consist in whole or in part of "detained" pay. (The punishment of detaining pay has now been abrogated by the recent G. O. 25 of 1894.) Dig. J. A. Gen., 720, par. 5.

Construing Sec. 1766, Rev. Sts., as applying only to bonded disbursing officers, *held* that a fine of one hundred dollars, imposed by a civil court upon a soldier for a violation of the postal laws, could not legally be stopped against his pay under that section. But, independently of this statute, the pay of an officer or soldier who is in arrears to the United States may always be legally withheld till the indebtedness is satisfied. *Ibid.*, 721, par. 9. See, also, *ibid.*, 353, par. 3.

[2] Act of July 27, 1892 (27 Stat. at Large, 277).

could lawfully be inflicted, the amendment above described was deemed necessary.

Like Article 16, this Article is quite independent of the regulations relating to boards of survey.[1] The latter pass upon questions of *pecuniary responsibility* for the loss, etc., of public property. The court-martial, under this Article, simply imposes *punishment*.[2]

The description, "his horse, arms, clothing," etc., refers to articles which are regularly issued to the soldier for his use in the service and with the safe-keeping of which he is charged. His property in them is qualified by the trust that he cannot dispose of them while he is in the military service, and can only use them for military purposes.[3] Improper dispositions of property in the charge and use of soldiers, other than those indicated in the Article, will in general properly be charged under Article 62.[4]

Only three offenses are made punishable by this Article: selling, through neglect losing, through neglect spoiling. Any other form of wrongful disposition should be made the subject of a charge under Article 60 or 62. The selling, losing, etc., of objects other than those mentioned in this Article should be charged under Article 62.[5]

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[1] See Article 60, Army Regulations of 1895; see, also, the article entitled *Boards of Survey* in the chapter entitled MILITARY BOARDS, ETC.

[2] Dig. J. A. Gen., 23, par 1. Where a trial is had, the proceedings of a board of survey, already ordered in the same case, will not be competent evidence to prove the fact of the loss, etc., charged. G. C. M. O. 45, Dept. of the Missouri, 1877; do. 15, Dept. of Texas, 1877.

The present 17th Article (as amended by the Act of July 27, 1892) does not authorize a stoppage or forfeiture of pay to reimburse the United States. The stoppage which was enjoined by the old form of the Article is dropped entirely from the present statute. This provides for punishment only—does not provide any means of reimbursing the appropriation out of which the lost, etc., property was paid for or of repairing the loss or damage as such. So *held* (April, 1893) that a sentence, upon a conviction under this Article, which adjudged a stoppage of pay "to reimburse the United States for the value of the clothing alienated" was unauthorized and inoperative. Dig. J. A. Gen., 25, par. 7.

Held (December, 1866) that the provisions of sec. 23, Act of March 3, 1863, prohibiting the sale, etc., of their arms, etc., by soldiers, and declaring that no right of property or possession should be acquired thereby, etc., were not limited in their operation to the period of the war, but were still in force,* and that an officer of the army would therefore be authorized to seize arms, etc., disposed of contrary to such prohibition, whenever and wherever found. But inasmuch as there have been sundry authorized sales of arms and other ordnance stores since the end of the war, *advised* that officers, before making seizures, should assure themselves that the parties in possession have not acquired title in a legal manner. *Ibid.*, 684.

[3] Dig. J. A. Gen., 23, par. 2. See next note. Compare ruling of reviewing officer in G. O. 35, Dept. of the East, 1869; and see also do. 31, Dept. of the South, 1877; G. C. M. O. 15, Dept. of Texas, 1880.

[4] *Ibid.*, 24, par. 3. "Unlawfully disposing of" (or "otherwise unlawfully disposing of") clothing, arms, etc., is not a proper form for the charge under this Article. A charge under this Article should not be expressed in the alternative—as that the accused "sold" or "through neglect lost." The selling, through neglect losing, and through neglect spoiling are distinct offenses and are to be so charged. *Ibid.*, par. 5.

[5] *Ibid.*, par. 4. *Held* that a selling or losing of the following articles was not punish-

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* See these provisions as now incorporated in the Revised Statutes, in Sections 1242 and 3748. The further provision of the original Act making punishable with fine and imprisonment persons purchasing from soldiers their arms, equipments, clothing, etc., has not been retained in the Rev. Sts.

Clothing issued and charged to a soldier is not now (as it was formerly) regarded as remaining the property of the United States. It is now considered as becoming, upon issue, the property of the soldier, although his use of it is, for purposes of discipline, qualified and restricted. Thus he commits a military offense by disposing of it as specified in this Article, though the United States may suffer no loss.[1]

ARTICLE 18. *Any officer commanding in any garrison, fort, or barracks of the United States who, for his private advantage, lays any duty or imposition upon, or is interested in, the sale of any victuals, liquors, or other necessaries of life brought into such garrison, fort, or barracks for the use of the soldiers, shall be dismissed from the service.*

The 57th Article of the Prince Rupert Code, which provided that "no officer or souldier shall be a victualler in the Army without consent and allowance of Our General, or of the officer in chief of the regiment, upon pain of being punished at discretion," would seem to indicate that the practice which is prohibited in the 18th Article had, at one time, been authorized in the British service, with the sanction or approval of competent superior authority. The present Article, which was adopted without substantial change from the corresponding British Article, first appeared as Article 4, Section 8, of the American Articles of 1776, and was re-enacted as No. 31 of the Articles of 1806.

It is the purpose of this Article to insure the supply of provisions and other supplies to soldiers free from all unauthorized taxation and from the influence of officers in command of the military posts and stations of the United States. "The letting out of houses to sutlers at an exorbitant price, or the connivance at the act in others, or the laying of any duty or imposition on victuals, etc., brought into garrison, for the private advantage of the governor or commanding officer, are offenses of so clear and definite a character as not to demand any illustration. But the remaining offense—the being interested in the sale of victuals or merchandise, etc.—is not so perspicuous or so easily discernible as the others immediately preceding. The interest here intended is not only a direct interest, such as a proprietorship or part proprietorship in the articles sold, but a collateral, indirect, and even very remote interest in the objects of sale."[2]

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able under Article 17, viz.: sheets, pillows, pillow-cases, mattress-covers, shelter-tent, barrack-bag, greatcoat-strap, tin cup, spoon, knife, fork, meat-ration can, cartridges. Dig. J. A. Gen., 24, par. 4.

Of such unlawful disposition of public property the pawning of a revolver is an example. G. C. M. O. 77, Dept. of the Missouri, 1874. So the gambling away of clothing. G. C. M. O. 41. Dept. of Texas, 1873. So the spoiling by a bugler of his bugle. G. C. M. O. 36, War Dept., 1876.

[1] Dig. J. A. Gen., 24, par. 6.

[2] Samuel, 445–447. "It was so determined by a general court-martial held at Cawnpore, in the East Indies, in 1811, on the trial of Lieutenant-Colonel H. G. Wade, of his Majesty's 8th Light Dragoons, on the express charge of having violated this Article in having exacted and received from Daniel Clarke, licensed sutler in the cantonments at

The offense here described is a form of extortion which may be defined as a crime committed by an officer of the law who, under color of his office, unlawfully and corruptly takes any money, or thing of value that is not due him, or more than is due, or before it is due. The officer must unlawfully and corruptly receive such money or article of value for his own benefit or advantage.[1] The money so obtained, having been received and held without authority of law, cannot become the property of its possessor; the lawful title thereto continuing in the person from whom it was extorted. The law, therefore, creates an obligation to refund money so illegally paid, the obligation to repay accruing at the date of the extorsive payment.[2]

ARTICLE 19. *Any officer who uses contemptuous or disrespectful words against the President, the Vice-President, the Congress of the United States, or the chief magistrate or legislature of any of the United States in which he is quartered shall be dismissed from the service, or otherwise punished as a court-martial may direct. Any soldier who so offends shall be punished as a court-martial may direct.*

This appears as No. 5 of the Articles of 1806, as Article 1, Section 2, of those of 1776, and as Article 1, Section 2, of the British Code of 1774. In the British Article the offense is made to consist in the "use of traitorous or disrespectful words against our Royal Person or any of our Royal Family." As there was no executive head to the Government under the Revolutionary Congress, or to that under the Articles of Confederation, the offense, in the Articles of 1776, was made to consist in the use of such words against "the authority of the United States in Congress assembled, or the legislature of any of the United States in which the offender may be quar-

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Cawnpore, * * * two bribes of one hundred rupees each, * * * in consideration of his having allowed the said Clarke to sell spirituous liquors in the lines of the corps under his command. The court pronounced the accused guilty of the circumstances charged, and sentenced him to be cashiered. The interest of the officer was, in this instance, so remote, and so trivial in itself, being in its utmost value short of twenty-five pounds, that it could not be supposed to have operated in any oppressive degree on the sale of the liquors to the soldiery, as the sum exacted from the sutler might be repaid to him, in the course of his dealings, by the imposition of so slight an addition on the articles retailed as to be scarcely perceptible to the consumer. But the *quantum*, or relation of the interest, is not so much an ingredient of the offense as the having any interest at all engaged, which may set the officer's private advantage at variance with his public duty. In this view the most trifling amount capable of being traced to the pocket of him who takes it may be an equal inducement to criminal connivance with the highest conceivable bribe, which is not to be weighed in the scale or estimation of the giver, or of any third party, but of the receiver alone; it is the wages of sin, and of his own settling." *Ibid.*

[1] U. S *vs.* Deaver, 14 Fed. Rep., 595; Com. *vs.* Wheatley, 6 Cow., 661; Com. *vs.* Mitchell, 3 Bush, 25; Com. *vs.* Bagley, 7 Pick., 246.

[2] U. S. *vs.* Bank of Washington, 6 Pet., 19. Section 5481 of the Revised Statutes contains the general provision of law upon this subject, which, as will be seen, is somewhat more extensive in its scope than the 18th Article of War: "Every officer of the United States who is guilty of extortion under color of his office shall be punished by a fine of not more than five hundred dollars, or by imprisonment not more than one year, except those officers or agents of the United States otherwise differently and specially provided for in subsequent sections of this chapter."

tered." The words "the President, the Vice-President" were added to the Article in the revision of 1806.

When a trial of an officer or soldier has been resorted to under this Article, it has usually been on account of the use of "contemptuous or disrespectful words against the President," or the government mainly as represented by the President. The deliberate employment of denunciatory or contumelious language in regard to the President, whether spoken in public, or published or conveyed in a communication designed to be made public, has in repeated cases been made the subject of charges and trial under this Article;[1] and where taking the form of a hostile arraignment, by an officer, of the President or his administration for the measures adopted in carrying on the late war—a juncture when a peculiar obedience and deference were due on the part of the subordinate to the President as executive and commander-in-chief—was in general punished by a sentence of dismissal. On the other hand, it has been held that adverse criticisms of the acts of the President, occurring in political discussions, and which, though characterized by intemperate language, were not apparently intended to be disrespectful to the President personally or to his office, or to excite animosity against him, were not in general to be regarded as properly exposing officers or soldiers to trial under this Article. To seek indeed for ground of offense in such discussions would ordinarily be inquisitorial and beneath the dignity of the Government.[2]

ARTICLE 20. *Any officer or soldier who behaves himself with disrespect toward his commanding officer shall be punished as a court-martial may direct.*

This requirement appears in somewhat less comprehensive terms as Article 11 of the Prince Rupert Code, where it is provided that "if any officer or souldier shall behave himself disrespectfully towards Our General, Lieutenant General, or other Chief Commander of the Army, or speaks words tending to his harm or dishonour, he shall be punished, according to the nature and quality of his offense, by the judgment of Our General Court-Martial." The provision appears as Article 2, Section 2, of the British Code of 1774, and as Article 2, Section 2, of the American Articles of 1776. In the British Article of 1774 the offense may be committed by "any officer or soldier who shall behave himself with contempt or disrespect towards the general or other commander in chief of Our Forces"; in the American Article of 1776, however, the offense is committed by "any officer or soldier who may behave himself with contempt or disrespect

[1] Dig. J. A. Gen., 25, par. 1. See cases in G. C. M. O. 43, War Dept., 1863; G. O. 171, Army of the Potomac, 1862; do. 23, *id.*, 1863; do. 52, Middle Dept., 1863; do. 119, Dept. of the Ohio, 1863; do. 33, Dept. of the Gulf, 1863; do. 68, Dept. of Washington, 1864; do. 86, Northern Dept., 1864; do. 1, *id.*, 1865; do. 29, Dept. of No. Car., 1865.

[2] Dig. J. A. Gen., 25, par. 1.

towards the General or other Commander-in-Chief of the forces of the United States." In the 6th of the Articles of 1806 the scope of the offense is no longer restricted to the commander-in-chief, but is extended so as to include the commanding officer of the accused. In the re-enactment of 1874 the offense is made to consist in "disrespect" only.

The offense here made punishable is characterized in general terms and is not specifically defined in the Articles of War. It may consist in either behavior, acts, or utterances which are explicitly set forth in the charges and specifications, and which must be established in evidence by the testimony of witnesses.[1] It must be shown in evidence under the charge that the officer offended against was the "commanding officer" of the accused.[2] The commanding officer of an officer or soldier, in the sense of this Article, is properly the superior who is authorized to require obedience to his orders from such officer or soldier, at least for the time being.[3]

It is for the court to determine from the evidence submitted whether the acts, utterances, or conduct so established constitute disrespect toward the commanding officer within the meaning of the Article. It will be observed that no specific intent is alleged in the Article as essential to constitute the offense; it is therefore not necessary to a conviction under it that the disrespectful conduct charged in a particular case should have been due to deliberate design. A want of civility is equally punishable with an act of premeditated disrespect.

It is the purpose of the Article, therefore, to insure respect for the person and office of the individual standing, in respect to the accused, in the relation of commanding officer; and to protect him from such acts, utterances, or behavior, whether arising from rudeness of manner, want of civility, or deliberate design, as are in themselves disrespectful, or are calculated to lessen the reputation of such commander, or to affect injuriously the dignity attaching to his rank or station in the military service.

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[1] The disrespect here indicated may consist in acts or words;* and the particular acts or words relied upon as constituting the offense should properly be set forth in substance in the specification.† Dig. J. A. Gen., 26, par. 1.

[2] G. O. 53, Dept. of Dakota, 1871.

[3] Dig. J. A. Gen., 26, par. 1. Thus where a battalion was temporarily detached from a regiment and placed under the orders of the commander of a portion of the Army distinct from that in which the main part of the regiment was included, *held* that it was the commander of this portion who was the commanding officer of the detachment; and that the use by an officer of such detachment of disrespectful language in reference to the regimental commander (who had remained with and in command of the main body of the regiment) was properly chargeable not under this Article, but rather under the 62d. *Ibid.*

Held that disrespectful language used in regard to his captain by a soldier, when detached from his company and serving at a hospital, to the surgeon in charge of which he had been ordered to report for duty, was an offense cognizable by court-martial, not under this Article, but under Article 62. *Ibid.*, par. 2.

* G. O. 44, Dept. of Dakota, 1872. And see G. C. M. O. 28, War Dept., 1875; G. O. 47, Dept. of the Platte, 1870.

† G. C. M. O. 35, Dept. of the Missouri, 1872.

ARTICLE 21. *Any officer or soldier who, on any pretense whatsoever, strikes his superior officer, or draws or lifts up any weapon, or offers any violence against him, being in the execution of his office, or disobeys any lawful command of his superior officer, shall suffer death, or such other punishment as a court-martial may direct.*

This Article, embodying as it does the most important principle known to military law, seems to have been derived, in its present form, from Article 16 of the Prince Rupert Code in the shape of a requirement that "if any inferiour Officer or Souldier shall refuse to obey his superiour officer, or shall quarrell with him, he shall be cashiered, or suffer such punishment as a Court-Martial shall think fit. But if any Souldier shall presume to resist any Officer in the execution of his office, or shall strike, or lift up his hand to strike, or shall draw, or offer to draw, or lift up any weapon against his superiour officer, upon any pretense whatsoever, he shall suffer death, or other condign punishment, as Our General Court-Martial shall think fit." This requirement was substantially repeated in successive Articles of War until 1717, when, on account of its extreme importance to discipline, it was embodied for the first time in the Mutiny Act, in a provision imposing the penalty of death upon any officer or soldier who should refuse "to obey the military orders of his superior officer"; no limitation being placed, however, upon the legality of the orders.[1] In this form the bill was opposed in Parliament, and a protest against its passage was ordered to be entered upon the Journal of the House of Lords.[2] From the year 1718 to the year 1749 the enactment ran thus: "any lawful command of his superior officer"; but these words gave rise to controversy, and in 1733 were used as an argument against the increase of the standing army.[3] In the year 1749 the words were altered so as to appear as they have stood in each of the successive Mutiny Acts or Articles of War that were enacted or promulgated between that date and the date of the permanent Army Discipline Act of 1879.[4] In the re-enactment of that statute in 1881 the provision appears in the following form: "Every person subject to military law who strikes or uses or offers any violence to his superior officer, being in the execution of his office, or who disobeys, in such manner as to show a willful defiance of authority, any

[1] I. Clode, Military Forces of the Crown, 155; 3 Geo. I., ch. 2, sec. 1.
[2] *Ibid.*, 155.
[3] *Ibid.*, 156.
[4] "This limitation, which must always have been the implied intention of the law, was expressed by the insertion of the word 'lawful' in the Mutiny Act of 1718, and has obviated any misunderstanding of its true meaning in this respect. But the wording of the Mutiny Act and the corresponding Article, as thus altered, 'refuse to obey any lawful command,' left room for a question whether they extended to disobedience, unaccompanied by an express refusal; and this was again altered in 1749 to the existing form, 'disobey the lawful command.' This extends to every act of direct disobedience, whether active or passive, but the capital offense is not complete by mere neglect or forgetfulness. There must be an intentional disobedience or defiance of authority, although not necessarily expressed in words." Simmons, § 178.

lawful command given personally by his superior officer in the execution of his office, whether the same is given orally or in writing, or by signal or otherwise, shall, on conviction by court-martial, be liable to suffer death, or such less punishment as is in this Act mentioned."[1]

The provision appears as Article 5, Section 2, of the American Articles of 1776, being adopted without change from the corresponding Article then in force in the British service.[2] It was enacted as No. 9 of the Articles of 1806, and was re-enacted in the same form in the Articles of 1874.

Orders; Nature and Character.—Orders are authoritative directions in respect to the military service issuing from a competent military superior, which constitute obligatory rules of conduct for all military persons under the command of the officer from whom they proceed.[3]

Form.—If, as will presently be shown, an order be lawful and within the authority and discretion of the commander by whom it is issued, its form is a matter of but minor importance. Orders may therefore be given or communicated either orally or in writing; they may take the shape of formal official utterances, and may be issued in regular numbered series; or they may appear in the form of circulars or memoranda, or as letters of instruction addressed to the person whose conduct is to be affected by them. *General Orders* are those containing directions or information which affect the entire command of the authority from which they emanate;[4] *Special Orders* are such as concern individuals or which relate to matters which need not be made known to the entire command.[5] Their binding effect is the same in either case.

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[1] Manual of Military Law, 334, 335.

[2] Article 5, Sec. 2, British Code of 1774.

[3] *Orders* properly so called are in general addressed to, and are intended to regulate the conduct of, all military persons under the command or control of the superior from which they emanate, or to affect a considerable number of such persons; *instructions* are directions of similar origin which are intended to govern the actions of the individuals to whom they are addressed. Landram *vs.* U. S., 16 Ct. Cls., 74. Their obligatory character, however, is the same in either case.

[4] General orders announce the time and place of issues and payments, hours for roll-calls and duties, police regulations and prohibitions, returns to be made and their forms, laws and regulations for the Army, promotions and appointments, eulogies or censures, the results of trial by general courts-martial in all cases of officers or of enlisted men involving matters of general interest and importance, and generally whatever it may be important to publish to the whole command. Orders eulogizing the conduct of living officers will not be issued except in cases of gallantry in action or performance of specially hazardous service. Par 771, Army Reg. 1895.

[5] Special orders are such as concern individuals or relate to matters that need not be made known to the whole command. Par. 772, *ibid.*

General and special orders are numbered in separate series, each beginning with the calendar year or at the time of the establishment of the headquarters. Orders issued by commanders of battalions, companies, or small detachments are simply denominated "orders," and are numbered in a single series, beginning with the year. Circulars issued from any headquarters are numbered in a separate series. Par. 770, *ibid.*

An order will state at its head the source from which it emanates, its number, date, and place of issue, and at its foot the name of the commander by whose authority it is issued. It may be put in the form of a letter addressed to the individual concerned through the proper channel. Par. 774, *ibid.*

Orders for any body of troops will be addressed to its commander. They will be

Essential Elements.—As disobedience of lawful orders constitutes one of the most serious offenses known to military law, it is important to know what constitutes a lawful order within the meaning of the Article; it is also important to know when orders, as such, become operative; that is, when they acquire such binding force as to confer upon a failure in respect to obedience the character of a military offense. When an order is given to an officer or soldier by a proper military superior,[1] the subordinate is not permitted to question either its propriety or expediency; still less is its legality a matter which is submitted to him for quasi-judicial determination.[2] The Articles of War, which he has voluntarily accepted as a rule of official conduct, require of the inferior instant and exact obedience to the orders of his military superior; the presumptions of regularity and good faith which

executed by the commander present, and will be published and copies distributed by him when necessary. Par. 775, Army Regulations 1895.

Orders and instructions will be transmitted through intermediate commanders in order of rank, except when they are of such character that the commanders have no power to modify or suspend them. In such cases the orders or instructions will be sent direct to the officer by whom they are to be executed, copies being furnished to the intermediate commanders. Par. 777, *ibid.*

Printed orders are generally distributed direct to posts by the headquarters from which issued. Files of such orders will be kept by each regiment and company and at each military post, and will be turned over by a commander when relieved to his successor. If general orders in regular succession are not received within a reasonable time, commanding officers will report missing numbers to the proper headquarters. Par. 778, *ibid.*

In camp or garrison, orders that affect a command will, as a rule, be read to the troops at the first regular parade after they are received. In the field, when orderly hours cannot be observed, they will be sent direct to the troops, or commanders of regiments or corps will be informed when to send to headquarters for them, or during a halt orders will be read to troops without waiting for the regular parades. Par. 779, *ibid.*

General or special orders relating to the Army issued from the War Department by the Secretary of War, or by his direction, are to be presumed to be made by the authority of the President, and to be viewed as his orders equally as if he had subscribed the same. Dig. J. A. Gen., 544, par. 1.

[1] The term *officer* ("superior officer") in this as in other Articles of War means commissioned officer.* So *held* that the disobedience by a cadet private of the Military Academy of an order of a cadet lieutenant of his company was not chargeable under this Article, but was an offense under Article 62. *Ibid.*, 30, par. 17.

The "superior officer," in the sense of this Article, need not necessarily have been the *commanding* officer of the accused at the time of the offense. The Article is thus broader than Art. 20, which relates only to an offense against a "commanding officer." *Ibid.*, 27, par. 4.

Where an inferior officer was charged with having disobeyed an order given him on the spot by a superior officer, *held* that it should be made to appear in proof that the latter, if not personally known to the accused to be his superior officer, was recognizable as such by his uniform or otherwise. *Ibid.*, par. 5.

[2] In the Cedarquist Case the Judge Advocate-General said: "There can be no more dangerous principle in the government of the Army than that each soldier should determine for himself whether an order requiring a military duty to be performed is necessary or in accordance with orders, regulations, decision circulars, or custom, and that he may disobey the order if, in his judgment (taking, of course, all risks in case his judgment should be erroneous), it should not be necessary or should be at variance with orders, regulations, decision circulars, or custom. It is his duty to obey such order first, and if he should be aggrieved thereby he can seek redress afterwards."

* See the provision introductory to the Articles of War of Sec. 1342, Rev. Sts., in which it is specified that "the word *officer* as used therein shall be understood to designate commissioned officers."

attend public officers in the performance of their duties apply to the orders of a superior with precisely the same force as to his other official acts. A lawful order may therefore be defined as a command issued by a military superior to a person under his command, requiring an act to be done which is permitted, sanctioned, or justified by the law of the land. All directions or instructions in respect to the military service which are issued in pursuance of statutes, regulations, or the command of superior authority, or which are in execution or furtherance of the same, are lawful orders, and as such are entitled to prompt obedience. If a question arises in respect to their legality, and the order is not on its face clearly and obviously in contravention of law, it is the duty of the inferior to resolve such doubt in favor of obedience, relying for justification upon the forms of the order so received and obeyed.[1] Except in the solitary instance where the illegality of an order is glaringly apparent on the face of it, a military subordinate is compelled to a complete and undeviating obedience to the very letter of the command received.[2] No other obligation must be put in competition with

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[1] Under a charge of disobedience of the order of a superior officer in violation of this Article, it should be alleged, and should appear from the evidence introduced, that the order or "command" was "lawful." An officer or soldier is not punishable under this Article for disobeying an *unlawful* order. But the order of a proper superior is to be presumed to be lawful, and should be obeyed where it is not clearly and obviously in contravention of law.

To justify, from a military point of view, a military inferior in disobeying the order of a superior, the order must be one requiring something to be done which is palpably a breach of law and a crime or an injury to a third person, or something of a serious character (not involving important consequences only) which, if done, would not be susceptible of being righted. An order requiring the performance of a military duty cannot be disobeyed with impunity unless it has one of these characters.

Unless the illegality is unquestionable he should obey first and seek redress, if entitled to any, afterwards. A military inferior in refusing or failing to comply with the order of a superior on the ground that the same is, in his opinion, unlawful, does so of course on his own personal responsibility and at his own risk. Dig. J. A. Gen., 27, par. 7.

Where an officer respectfully declined to comply with the direction of his superior to sign the certificate to a report of target-firing on the ground that the facts set forth in such certificate were not within his knowledge, he having been stationed at the butt, where he was not in a position to be informed as to such facts, *held* that he was not amenable to a charge of disobedience of orders under this Article. *Ibid.*, 30, par. 16. See, also, *ibid.*, 29, pars. 12, 14, and 15.

Held that a member of a post band who refused (respectfully) to obey an order of the post commander directing the band to play in a town in the neighborhood of the post for the pleasure of the inhabitants was not chargeable with a military offense, such an order not being a "lawful command" in the sense of this Article. So *held* that a soldier was not chargeable with "disobedience of orders" in not complying with an order forbidding him to contract marriage; and similarly *held* of a refusal by a soldier to comply with an order (in violation of Sec. 1232, Rev. Stat.) to act as an officer's servant. So where a soldier was convicted of a disobedience of orders in refusing to assist in building a private stable for an officer, the finding was disapproved on the ground that such an order was not a lawful one. G. C. M. O. 130, Dept. of Dakota, 1879. *Ibid.*, 28, par. 8.

[2] Samuel, 287. The most important consequences may often rest on the precise, mechanical execution of an order which in appearance to the military inferior may have a substantive and a sole object in view, while in the design of the commander it may be combined with a vast and various machinery, and a deviation from it, even with the best intentions and the best success, separately considered, might defeat the grand end of the meditated enterprise. Hence it is scarcely impossible to imagine a case when

this; neither parental authority,[1] nor religious scruples,[2] nor personal safety,[3] nor pecuniary advantages from other service. All the duties of his life are, according to the theory of military obedience, absorbed in that one duty of obeying the command of the officers set over him.[4]

When Operative.—It is a well-known principle that all persons are presumed to know the law of the State within which they live or in which they are temporarily domiciled; a similar rule prevails as to knowledge of the orders of a military commander which have been duly promulgated to his command. It may therefore be said that an order affecting a military person becomes operative as to such person when he has received military notice of its existence and contents; that is, if the order be general in character, it becomes operative when it has been formally promulgated to the command to which it pertains; if it be special or individual in its operation, it becomes effective when it has been served upon, or received, by such person through the usual military channels.[5]

The notice of the order, to affect the officer, should thus be a *personal* notice, actual or constructive, and it should be an *official* notice. Personal information of the same given to him by another officer or person not specifically authorized or required by his duty to communicate it will not in general be legally sufficient; nor, on the other hand, will the mere official publication of the same at the headquarters of the Army or of a department, without his being himself personally advised of the same, be sufficient to give effect to the order.[6]

Disobedience of Orders.—The offense of disobedience of orders contemplated by this Article consists in a refusal or neglect to comply with a

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a subordinate officer would be at liberty to depart from the positive command of his superior. Samuel, 287.

[1] Rex *vs.* Rotherfield, 1 Bar. & Cres., 350.

[2] Captain Atchison's Case, 88 H. D. ( ), 319; 24 *ibid.* (2), 299; and 25 *ibid.*, 351, 421.

[3] Sutton *vs.* Johnstone, 1 Term Rep., 548. See, also, *In re* Grimley, 137 U. S., 153; U. S. *vs.* Clarke, 3 Fed. Rep., 713.

[4] II. Clode, Mil. Forces, etc., 37.

[5] No precise rule can be laid down as to *when* a military order affecting the status, pay, rights, or duties of an officer can be said to become operative as regards himself. A general principle, analogous to that of the law of *notice*, should ordinarily be applied to the cases, and the order be treated as not legally taking effect until the officer is personally officially notified of the same. In the absence of an actual personal delivery to or receipt by him of the order or an official copy, the fact of the promulgation or receipt of the same at his proper military station will in general be presumed to have given him official notice of its contents—a presumption, however, liable to be rebutted by proof that, without any fault or negligence of his own, knowledge of the same was never actually brought home to him,—as where, for example, he was at the time absent on leave, or ill at a distant hospital, or a prisoner in the hands of the enemy, and therefore was not notified in fact. Dig. J. A. Gen., 545, par. 2.

[6] Where indeed the officer fails to receive personal official notice by reason of some fault or neglect of his own, as because of his having absented himself without authority from his station when the order arrived, or because, being on detached service, he has not duly advised the Adjutant-General of his address as required by par. 805, Army Regulations, he will not be permitted to take advantage of his own wrong, and the receipt of the order, at his proper station, or last reported station, will be held to operate as due and effectual, or *constructive*, notice. *Ibid.*

specific order to do or not to do a particular thing. A mere failure to perform a routine duty is properly charged under Article 62.[1] Where an officer neglected fully to perform his duty under general instructions given him in regard to the conduct of an expedition against Indians, *held* that his offense was properly chargeable not under the 21st but under the 62d Article.[2] A breach of an army regulation imposing a duty upon an officer or soldier is in general chargeable as "conduct to the prejudice of good order and military discipline," and punishable under Article 62.[3]

A non-compliance by a soldier with an order emanating from a non-commissioned officer is not an offense under this Article, but one to be charged in general under the 62d.[4]

An officer or soldier on leave of absence cannot in general be made liable to a charge of disobedience of orders, except, indeed, where required by a positive order, issued on account of a public emergency, to return before his leave has expired, and he has failed to comply with such requirement.[5]

Character of the Disobedience.—Disobedience may be either *negative* or *positive*. It may consist in the non-observance or neglect of what is enjoined in the orders of a superior issued or published long anteriorly to the commission of the act of disobedience, such as general regulations laid down by proper authority for the conduct of officers or soldiers in a particular regiment, or standing orders to be observed throughout the army; or it may consist in the refusal or resistance of commands instantly and presently given, and directed to be obeyed with promptitude. In the *first*, the orders might be of no immediate urgency or of no great importance, and the disobedience to them might arise out of simple negligence or, possibly, a momentary forgetfulness of the existence of the particular orders, or out of a sudden, unguarded, or unperceived lapse into crime; in none of these cases is there implied any bold or wanton defiance of authority, or any more serious offense than is provided against in the 62d Article, and which is regarded as a military misdemeanor only, under the description of a neglect "to the prejudice of good order and military discipline" to be punished at the discretion of a court-martial.[6]

In the *second*, the absolute resistance of or refusal of obedience to a present and urgent command, conveyed either orally or in writing, by the non-compliance with which some immediate act, necessary to be done, might be impeded or defeated, as high an offense is discoverable as can well be contemplated by the military mind; inasmuch as the principle which it

[1] See G. C. M O. 26, A. G. O., 1872; do. 7, Department of Texas, 1874; *ibid.*, 24, Fifth Mil. Dist., 1868.
[2] Dig. J. A. Gen., 28, par. 9.
[3] *Ibid.*, 168, par. 5.
[4] *Ibid.*, 27, par. 6.
[5] *Ibid.*, 29, par. 10.
[6] Samuel, 285.

holds out, if encouraged or not suppressed by some heavy penalty, would forbid or preclude a reliance on the execution of any military measure. Prompt, ready, unhesitating obedience, in soldiers, to those who are set over them is so necessary to the safety of the military state, and to the success of every military achievement, that it would be pernicious to have it understood that military disobedience in any instance may go unquestioned.[1]

It is this *positive* disobedience, therefore, evincing a refractory spirit in the inferior, an active opposition to the commands of a superior, against which it must be supposed that the severe penalty of the Article is principally directed. This highly criminal disobedience may arise either out of the refusal of the officer or soldier to act as he is ordered; to march, for instance, whither he is bidden, or to desist from any act or purpose which he is prohibited by a direct command from pursuing; for it would, in many circumstances which may be easily imagined, be as dangerous to persist in a forbidden course as to decline or recede from one that is commanded. Whether the orders of the superior enjoin an active or passive conduct, the officer or soldier subject to them is equally obliged to obey. Otherwise every military operation or enterprise would be made to depend, not on the prudence or counsel of the commander, but the will or caprice of the soldiery, either for the furtherance or obstruction of its object.[2]

It is not to be understood that the construction placed upon negative disobedience by courts-martial is such as to make such an offense one of minor consequence. It will be observed that the Article itself makes no distinction between one act of disobedience and another;—whether any is to be made, indeed, will depend upon the view which a court-martial may take of the circumstances submitted to it;—"wherever it is made, it will be, not in relaxation of the principle of military obedience inculcated by the Article, but in the exercise of a discretion lawfully resident in the court to mitigate, according to circumstances, the rigor and severity of the law."[3]

Specific Character of the Mandate.—"It must be presumed that the disobedience of orders contemplated by the Article is a positive and willful disobedience of an order specially or directly given to the accused, and not a mere neglect or omission of general duty" required by regulations or general orders (which, as will presently be seen, is an offense chargeable under the 62d Article), "unless he be specially directed to perform such duty in the instance alleged";[4] in which case such special direction, given by a competent superior, operates to convert the requirement of regulations or orders

[1] Samuel, 285.* [2] *Ibid.*, 286. [3] *Ibid.* [4] O'Brien, 84.

* On January 20, 1798, Thomas, Lord Camelford, shot down Lieut. Peterson of the ship Perdrix "for very extraordinary and manifest disobedience to his lawful orders, and for arming the ship's company to resist the same." For this he was honorably acquitted by a naval court-martial on the 20th of January following. A naval court-martial gave a similar acquittal, on September 27, 1775, to an officer charged with shooting down one of four sailors leaving the ship as deserters. Clode, Mil. Law, 180, note.

into a specific order to the accused, and to give to his failure to obey such direction the character of disobedience of a positive order.

Channels of Communication.—"In a charge of disobedience of orders it is requisite to show that the communication, verbal or written, from the superior to the inferior was actually and truly an order. An order is a positive direction to do or not to do some act. It may be conditional, that is, it may be a positive direction to do or refrain from doing some act under certain circumstances or if certain things should occur. The form in which this order is given by the superior is immaterial, provided it does convey to the accused a positive direction. It has been decided, in the case of orders, that an official communication made to the accused by any commissioned officer stating that the superior directs him to do so and so is an order; the accused being bound to presume that the commissioned officer speaks truly. All that is required is that the agent communicating the orders should state that he does so by the order, or by the direction or request, of the superior; or that he should make known to the accused that, in the case in question, he is acting not in his own name but in the name of the superior."[1]

Presumption of Knowledge.—An order will always be presumed to have been "made known to the accused if it has been published in the usual manner, as on parade, etc. In such cases it would be difficult for the accused to rebut this presumption, as it is the duty of every officer to acquaint himself with such orders. If the order has not been published in the customary manner, it is requisite to show in some other manner that the order was really made known to the accused, or at least to raise such a presumption of this fact as to throw the burden of disproof on the prisoner. The presumption generally being that orders were communicated, and that a superior on duty was known to be so, it requires no great amount of evidence to throw the burden of disproof on the accused in such instances. As a general rule, an order will also be presumed to be legal, and proof on this point is seldom required, though of course the court in making its finding is absolutely bound to consider this question, whether raised or waived in the course of the trial."[2]

Obedience to Orders as a Defense.—To determine how far obedience to orders may be pleaded in defense, it is necessary first to understand the military duty of obedience. "The Article enjoins obedience to the 'lawful' order of a superior. The order of a proper superior is *presumed* to be lawful, and should be obeyed where it is not clearly and obviously in contravention of law," for, as will presently be seen, an inferior will not in

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[1] O'Brien, 84, 85. "A staff officer has, except by assignment, no right to give a military order to an officer of the line; if he should do so without stating that he did so in the name of a superior to the line officer, such order would be invalid." O'Brien, 85. See, also, Winthrop, Mil. Law, 814-820.

[2] O'Brien 83, 85; Winthrop, 814-820.

general be held liable by a court-martial for an injurious consequence of his execution of the order of a superior,[1] unless the same was palpably illegal on its face. Unless, therefore, the illegality of the order is unquestionable, the subordinate should obey first and seek redress, if entitled to any, afterwards.[2]

"To justify, from a military point of view, a military inferior in disobeying the order of a superior, the order must be one requiring something to be done which is palpably a breach of law and a crime or an injury to a third person, or is of a serious character (not involving unimportant consequences only) and if done would not be susceptible of being righted. An order requiring the performance of a *military* duty or act cannot be disobeyed with impunity unless it has one of these characters. And a military inferior in refusing or failing to comply with the order of a superior on the ground that the same is, in his opinion, unlawful, does so, of course, on his own personal responsibility and at his own risk."[3]

An act done in the execution of a military order may give rise to a question of *military* responsibility, which will properly be determined by a

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[1] See the provision introductory to the Articles of War of Sec. 1342, Rev. Sts., in which it is specified that "the word *officer*, as used therein, shall be understood to designate commissioned officers." A non-compliance by a soldier with an order emanating from a non-commissioned officer is not an offense under this Article, but one to be charged in general under the 62d. Article. Dig. J. A. Gen., 27, par. 6.

The "superior officer" in the sense of this Article need not necessarily have been the commanding officer of the accused at the time of the offense. The Article is thus broader than Article 20, which relates only to an offense against a "commanding officer." *Ibid.*, par. 4.

Where an inferior officer was charged with having disobeyed an order given him on the spot by a superior officer, *held* that it should be made to appear in proof that the latter, if not personally known to the accused to be his superior officer, was recognizable as such by his uniform or otherwise. *Ibid.*, par. 5.

[2] *Ibid.*, par. 7. "The first duty of a soldier is obedience, and without this there can be neither discipline nor efficiency in an army." McCall *vs.* McDowell, 15 Fed. Cas., 1235.

"To insure efficiency an army must be to a certain extent a despotism. Each officer * * * is invested with an arbitrary power over those beneath him, and the soldier who enlists in the army waives in some particulars his rights as a civilian, surrenders his personal liberty during the term of his enlistment, and consents to come and go at the will of his superior officers. He agrees to become amenable to the military courts, to be disciplined for offenses unknown to the civil law, to relinquish his right of trial by jury, and to receive punishments which to the civilian seem out of all proportion to the magnitude of the offense." U. S. *vs.* Clarke, 3 Fed. Rep., 713—Brown, J.

"An army is not a deliberative body; it is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier. Vigor and efficiency on the part of the officer and confidence among the soldiers in one another are impaired if any question be left open as to their attitude to each other." *In re* Grimley, 137 U. S., 153.

[3] J. A. General. In the Cedarquist Case it was held by the Judge-Advocate General that "there could be no more dangerous principle in the government of the Army than that each soldier should determine for himself whether an order requiring a military duty to be performed is necessary or in accordance with orders, regulations, decision circulars, or custom, and may disobey the order if, in his judgment (taking, of course, all risks in case his judgment should be erroneous), it should not be necessary or should be at variance with orders, regulations, decision circulars, or custom. It is his duty to obey such order first, and if he should be aggrieved thereby he can seek redress afterwards." *Ibid.*

court-martial; or to a question of *civil* responsibility, which will be determined by an appropriate *civil tribunal.* In the former case "the order of a commanding officer will in general constitute a sufficient authority for acts regularly done by an inferior in compliance with the same,"[1] and such an order may properly be pleaded in the trial, by court-martial, of an offense growing out of such obedience to the lawful order of a proper military superior. And when so pleaded before such a tribunal it will constitute a complete defense.

Where, however, the order of the superior is a palpably illegal order, the inferior cannot justify under it;[2] and if brought to trial by court-martial or sued in damages for an act done by him in obedience thereto, the order will be admissible only in extenuation of the offense.[3]

Obedience to Military Orders as a Defense in a Civil Trial.—As to the extent to which obedience to orders may be pleaded in defense to a civil action, or in a criminal trial before a civil court, the authorities are less clear. If the law vests certain statutory powers in a military superior, and requires such orders to be obeyed by the infliction of a heavy penalty in the event of their disobedience, it would seem that the obedience so required by law should constitute a sufficient defense in a trial, civil or criminal, growing out of an act connected with such obedience. Such, however, is not generally or even frequently the case.[4]

Striking Superior Officer, etc.—The offense contemplated in the Article consists in the infliction of any bodily injury, however slight, upon the person of a military superior, such superior being a commissioned officer; or in an attempt to inflict such injury, as evidenced by the drawing or lifting up any weapon, or by any offer of violence, whatever its nature or character,

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[1] Dig. J. A. Gen., 547, par. 6.

[2] *Ibid.* See, on this subject, Harmony *vs.* Mitchell, 1 Blatch., 549, and 13 Howard, 421; Durand *vs.* Hollins, 4 Blatch., 451; Holmes *vs.* Sheridan, 1 Dillon, 357; McCall *vs.* McDowell, Deady, 233, and 1 Ab. U. S. R., 212; Clay *vs.* United States, Devereux, 25; United States *vs.* Carr, 1 Woods, 480; Bates *vs.* Clark, 5 Otto, 204; Ford *vs.* Surget, 7 Otto, 594; Skeen *vs.* Monkheimer, 21 Ind., 1; Griffin *vs.* Wilcox, *id.*, 391; Riggs *vs.* State, 3 Cold., 851; State *vs.* Sparks, 27 Texas, 632; Keighly *vs.* Bell, 4 Fost. & Fin., 805; Dawkins *vs.* Rokeby, *id.*, 831. The law is the same although the order to the inferior may emanate directly from the President. See Eifort *vs.* Bevins, 1 Bush, 460.

[3] *Ibid.* See, also, State *vs.* Sparks, *ante;* McCall *vs.* McDowell, *ante;* Milligan *vs.* Hovey, 3 Bissell, 13; Beckwith *vs.* Bean, 8 Otto, 266. "How far the orders of a superior officer are a justification to his inferior who acts on them I do not undertake to decide. With regard to Englishmen in England questions have been raised. I believe the better opinion to be that an officer or soldier acting upon the orders of his superior, not being plainly illegal, is justified; but if they be plainly illegal, he is not justified." Mr. Justice Willes, in Keightley *vs.* Bell, 4 Fost. & Fin., 763.

[4] II. Winthrop, 135. The civil responsibility is another matter. Civil courts have sometimes made allowance for the requirements of military discipline; but if they should not, the military obligation would remain unimpaired. The soldier, in entering the service, has voluntarily submitted himself to this double and possibly conflicting liability. The evil of an undisciplined soldiery would be far greater than the injustice (apparent rather than actual) of this principle. Opin. J. A. Gen.

attended by such circumstances as denote at the time an intention to inflict injury, coupled with a present ability to carry the intention into effect.[1] Threats operate to aggravate an offense of assault with which they are associated or of which they form an essential part.[2] Mere abusive words, however, not accompanied by such acts, do not constitute an offense within the meaning of the Article; nor can an act in defense of one's self, wife, child, servant, or property, nor an act of obedience to legal process or military order.[3]

To justify a conviction of the capital offense of offering violence against a superior officer, it should be made to appear in evidence that the accused knew or believed that the person assaulted was in fact an officer in the Army and was his "superior" in rank.[4]

Being in the Execution of His Office.—It is an essential element of this offense that the officer against whom the violence is directed should not only be superior in rank to the accused, but that he should be in the execution of his office. Under a charge, therefore, of offering violence to a superior officer, in violence of this Article, it should be alleged and proved that the officer assaulted was, at the time, "in the execution of his office."[5] The phrase "being in the execution of his office" is in general synonymous with "being in the performance of military duty," and describes the status of a superior officer who is engaged in the execution of the duties pertaining to his station or office in the military establishment. While such officer is, in a majority of cases, placed upon duty, or engages in its performance, in pursuance of orders from superior authority, or by the operation of regulations or existing orders, he may place himself upon duty, and so fulfill the condition of "being in the execution of his office"; as where he orders an enlisted man absent without authority to return to his station, or directs a soldier under the influence of liquor to repair to his quarters, or attempts to arrest an inferior who is engaged in the commission of a crime. If the offense be in the nature of a mutiny or sedition, or a fray or disorder merely, the law places the superior on duty and at the same time prescribes

[1] Travers *vs.* State, 43 Ala., 536; Hays *vs.* People, 1 Hill (N. Y.), 352, 353; Smith *vs.* State, 32 Tex., 593; Smith *vs.* State, 39 Miss., 521; State *vs.* Benedict, 11 Vt., 236; State *vs.* Myers, 19 Iowa, 517. To constitute an offense under the clause relating to violence, it is not necessary that there be an actual battery or striking; the drawing or lifting of the hand, or any weapon or instrument with which violence may be inflicted, and any assault or mere offer of physical violence, are equally prohibited, being as injurious to discipline as if there had been a use of force resulting in serious bodily harm.

[2] Crow *vs.* State, 41 Tex., 468; Keefe *vs.* State, 19 Ark., 190; State *vs.* Hampton, 63 N. C., 13; People *vs.* Yslas, 27 Cal., 630.

[3] Anderson Law Dict.

[4] Dig. J. A. Gen., 27, par. 1. See, also, General Orders, No. 34, Dept. of Virginia, 1863.

[5] *Ibid.*, par. 2. *Held* that in charging a striking or doing of violence to a superior officer under this Article, in a case where the assault was fatal, it was allowable to add in the specification "thereby causing his death," as indicating the measure of violence employed. *Ibid.*, par. 3.

a rule for his guidance in the suppression of the mutiny or the restoration of order.

Drawing and Lifting up any Weapon; Offering Violence.—The words used to describe the offense set forth in the second clause of the Article, "draws or lifts up any weapon, or offers any violence against him," import what is known as an "assault" at common law, which may be defined as an unlawful attempt to do injury to the person of another, coupled with the capacity or ability to inflict the injury at the instant when the violence is offered. The clause relating to the drawing or lifting up of a weapon, while evidently referring to an attempt to do violence with the weapons ordinarily used in the military service, is sufficiently comprehensive to include any weapon whatever with which physical injury can be inflicted. The clause respecting offers of violence is still more comprehensive and includes not only any attempt to inflict bodily injury, but also all forms of personal interference with the movements of the superior, and all attempts to constrain him, or to interfere with his freedom of motion or action. If abusive or threatening language accompany any of the acts or attempts above described, such language not only constitutes an essential part of the offense charged, but will in general be regarded as adding materially to its gravity.

Threatening and Menacing Language, When Chargeable.—While it is well settled that merely abusive or insulting language does not constitute an offense within the meaning of the Article, if such language be highly threatening or menacing in character, and be coupled with a present capacity to carry the threats into effect, it will, if accompanied by acts indicative of such intention, constitute an "offer of violence," and as such will be chargeable under the Article.

ARTICLE 22. *Any officer or soldier who begins, excites, causes, or joins in any mutiny or sedition, in any troop, battery, company, party, post, detachment, or guard, shall suffer death, or such other punishment as a court-martial may direct.*

Prince Rupert's Code contains no description of or allusion to the specific offense of mutiny, although in the 14th Article of that Code what are called "mutinous meetings" are prohibited under severe penalties. The 13th of the Articles of James II. provides that "no man shall presume so far as to raise or cause the least mutiny or sedition in the army upon pain of death, or such other punishment as a court-martial may think fit."

Although a penalty was prescribed for the offense in the Mutiny Act, mutiny is not defined in that statute; nor is a definition to be found in the British Articles of War, in which the provision respecting the offense continued to appear notwithstanding its annual re-enactment in the Mutiny Act. The Article appears in substantially its present form as Article 3, Section 2, of the British Code of 1774, as Article 3, Section 2, of the American Articles of 1776, and as No. 7 of the Articles of 1806.

Mutiny at military law may therefore be defined to be an unlawful opposing or resisting of lawful military authority,[1] with intent to subvert the same, or to nullify or neutralize it for the time.[2] It is this intent which distinguishes mutiny from other offenses, and especially from those with which, to the embarrassment of the student, it has frequently been confused, viz., those punishable by the 21st Article, as also those which, under the name of "mutinous conduct," are merely forms of violation of Article 62. The offenses made punishable by this Article are not necessarily "aggregate" or joint offenses;[3] among them is the beginning or causing of a mutiny, which may be committed by a single person. In general, however, the offense here charged will be a concerted proceeding; the concert itself going far to establish the intent necessary to the legal crime.[4] Sedition consists in the raising of a commotion or disturbance with a view to create a mutiny or to incite revolt against military authority.

To charge as a capital offense under this Article a mere act of insubordination or disorderly conduct on the part of an individual soldier or officer,

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[1] The offense is not defined in Section 5359 of the Revised Statutes or in the Naval Articles of War.

[2] Compare the definition and description of the offense of mutiny or revolt, in United States *vs.* Smith, 1 Mason, 147; United States *vs.* Haines, 5 *id.*, 276; United States *vs.* Kelly, 4 Wash., 528; United States *vs.* Thompson, 1 Sumner, 171; United States *vs.* Borden, 1 Sprague, 376.

[3] Samuel, 254, 257; G. O. 77, War Dept., 1837; do. 10, Dept. of the Missouri, 1863.

[4] Dig. J. A. Gen., 30, par. 1. Soldiers cannot properly be charged with the offense of joining in a mutiny under this Article where their act consists in refusing, in combination, to comply with an unlawful order. Thus where a detachment of volunteer soldiers who, under and by virtue of Acts of Congress specially authorizing the enlistment of volunteers for the purpose of the suppression of the rebellion, and with the full understanding on their part and that of the officers by whom they were mustered into the service that they were to be employed solely for this purpose, entered into enlistments expressed in terms to be for the war, and after doing faithful service during the war, and just before the legal end of the war, but when it was practically terminated, and when the volunteer organizations were being mustered out as no longer required for the prosecution of the war, were ordered to march to the plains, and to a region far distant from the theatre of the late war, and engage in fighting Indians wholly unconnected as allies or otherwise with the recent enemy, and thereupon refused together to comply with such orders, *held* that they were not chargeable with mutiny. While by the strict letter of their contracts they were subject to be employed upon any military service up to the last day of their terms of enlistment, the public acts and history of the time made it perfectly clear that this enlistment was entered into for the particular purpose and in contemplation of the particular service above indicated, and to treat the parties as bound to another and distinct service, and liable to capital punishment if they refused to perform it, was technical, unjust, and in substance illegal. *Ibid.*, 31, par. 3.

In a case where a brief mutiny among certain soldiers of a colored regiment was clearly provoked by inexcusable violence on the part of their officer, the outbreak not having been premeditated, and the men having been prior thereto subordinate and well conducted, *advised* that a sentence of death imposed by a court-martial upon one of the alleged mutineers should be mitigated and the officer himself brought to trial. Similarly *advised* in the cases of sentences of long terms of imprisonment imposed upon sundry colored soldiers who, without previous purpose of revolt, had been provoked into momentary mutinous conduct by the recklessness of their officer in firing upon them and wounding several in order to suppress certain insubordination which might apparently have been quelled by ordinary methods. *Ibid.*, 32, par. 4.

unaccompanied by the intent above indicated, is irregular and improper.[1] Such an act should in general be charged under Article 20, 21, or 62.[2]

Seeing by how slight means the greatest mischief may be engendered, by the rapid spread of an infectious spirit in large and constantly embodied numbers, the policy of the Articles respecting mutiny[3] is "to beat down and repress, in the beginning, the first act or speech that may lead or have a tendency to lead to a fatal consequence. This Article therefore makes it a capital offense in any officer, non-commissioned officer, or soldier (capable, however, of mitigation, under the circumstances of the case) who shall begin, excite, cause, or join in any mutiny or sedition; rendering him who shall *lead* or *follow*, in the circumstances constituting the offense, or who shall take any part in it, either in its incipient state or when it shall be complete, equally liable to the heaviest punishment."

ARTICLE 23. *Any officer or soldier who, being present at any mutiny or sedition, does not use his utmost endeavor to suppress the same, or, having knowledge of any intended mutiny or sedition, does not without delay give information thereof to his commanding officer, shall suffer death, or such other punishment as a court-martial may direct.*

Article 15 of the Prince Rupert Code contains the following requirement: "No Officer or Souldier shall use any words tending to sedition, mutiny or uproar, upon pain of suffering such punishment as shall be inflicted upon him by a Court-Martial. And whoever shall hear any mutinous or seditious words spoken, and shall not with all possible speed reveal the same to his superior Officers or Commanders, shall be punished as a Court-martial shall think fit." This is repeated in substance as Article 14 of the King James Code of 1672, and was embodied in subsequent codes until that of 1774, in which it appears, in about its present form, as Article 4, Section 2. It was embodied as Article 4, Section 2, in the American Articles of 1776, and as No. 8 of the Articles of 1806.

Duty of Suppression.—This provision, extending the policy set forth in the preceding Article, makes it a military offense for any officer or non-commissioned officer to stand by whilst any mutiny or sedition is in the act of being committed and not use his utmost endeavor to suppress it.[4] The duty

[1] Dig. J. A. Gen., 31, par. 1. See also, G. O. 7, War Dept., 1848; do. 115, Dept. of Washington, 1865; G. C M. O. 73, Dept. of the Missouri, 1873; United States *vs.* Smith, 1 Mason, 147; United States *vs.* Kelly, 4 Wash., 528; United States *vs.* Thompson, 1 Sumner, 171.

[2] Dig. J. A. Gen., 30, par. 1. Where a body of soldiers, under the reasonable but erroneous belief that their legal term of service had fully expired, quietly stacked their arms and refused to fall in and march when ordered to do so by their commanding officer, and having been brought to trial on a charge of mutiny, were found by the court not guilty of that charge but guilty only of "conduct to the prejudice of good order and military discipline," and were moderately sentenced, *advised* that this was, on the whole, a wise judgment, and would properly be approved by the reviewing authority. *Ibid.*, 31, par. 2.

[3] Articles 22, 23, and 24.

[4] Samuel, 258.

or suppression, in any case, is measured by the rank and authority of the several military persons in whose presence acts of mutiny or sedition are taking place, and each person, within the scope of his authority and office, is obliged, by the terms of the Article, to use his utmost endeavor to suppress the same.

Failure to Give Information; Misprision.—The last clause of the Article, requiring disclosure of any intended mutiny or sedition, creates an offense of negative misprision on the part of any military person who, having knowledge of any intended mutiny or sedition, does not without delay give information thereof to his commanding officer. What constitutes the "utmost endeavor," and what degree of diligence in giving information of the existence of an intended mutiny, are circumstances to be determined by the court from the evidence submitted in a particular case. It is not, "in such cases, the question what might be achieved by an effort of some fortunate and happy genius, but what must be done and what all must know, and be taken to be competent to do, by the exertion of the common power of an ordinary mind, in the plain path of its duty, under those direct and honest impressions of which none can be supposed insensible."[1]

There is and must be, in these cases, a discretion vested in the court; and as the safety of every member of the court, as well as of the accused, must consist in the due exercise of it, there cannot be any unreasonable fear that it will at any time be abused.[2]

Use of Force in the Suppression of Mutiny.—Mutiny has been seen to consist in a revolt against, or in forcible resistance or opposition to, constituted military authority. By the express terms of the 23d Article it is made the duty of every officer or soldier who is "present at any mutiny or sedition to use his utmost endeavor to suppress the same." The duty of suppression so imposed is instant and immediate, and will require the officer upon whom it devolves to oppose force with force in the suppression of the mutiny and the restoration of order. The force contemplated in the Article, however, is not that due to a personal exercise of physical strength on the part of the officer. The force to be employed should in general consist of members of the guard, or of inferior officers or enlisted men, summoned by the superior and acting under his orders; for in no other way can he assure himself that the precise amount of force—and no more—is being employed to accomplish the purpose.

Amount of Force.—The force to be employed in quelling an affray or maintaining the peace is such only, in kind or amount, as is necessary to restore order and to secure and subdue the offenders. It does not consist in repeated blows inflicted by way of punishment for past deeds, but must be preventive in character, and must not exceed the strict necessity of the case

[1] Samuel, 261. [2] *Ibid.*, 260.

requiring such acts of prevention. No officer has authority, in any case, to inflict punishment for past acts or offenses of any kind. Nor can an officer so situated make use of personal violence toward an inferior officer or soldier, save in a case of imperious and urgent necessity which will not admit of delay—as in self-defense or to prevent the commission of a crime—or where the proper assistance in the way of armed force is not available or cannot be relied upon, and the occasion is one demanding instant action on the part of the officer responsible for the restoration of order and the maintenance of discipline.[1]

ARTICLE 24. *All officers, of what condition soever, have power to part and quell all quarrels, frays, and disorders, whether among persons belonging to his own or to another corps, regiment, troop, battery, or company, and to order officers into arrest, and non-commissioned officers and soldiers into confinement, who take part in the same, until their proper superior officer is acquainted therewith. And whosoever, being so ordered, refuses to obey such officer or non-commissioned officer, or draws a weapon upon him, shall be punished as a court-martial may direct.*

This requirement, in the earlier British codes, appears in connection with the provisions respecting duels and the sending of challenges. Quarrels, frays, disorders, and the like are acts in themselves highly obnoxious to discipline, but less serious as military offenses than mutiny or sedition. In its present form the provision appears as Article 4, Section 7, of the British Code of 1774, as Article 4, Section 7, of the American Articles of 1776, and as No. 27 of the Articles of 1806; it appears first in connection with the provisions respecting mutiny in the Articles of 1874.

The first clause of the present Article is a modification of the statutory rule of interpretation in respect to the meaning of the word "officer," as used in the Articles of War, which is contained in Section 1342 of the Revised Statutes. The term "officer," as used in this Article, being coupled with the words "of what condition soever" is held to include within its scope all classes of officers, commissioned and non-commissioned, each of whom is required to take appropriate action in a case of disturbance or disorder such as is contemplated in the last clause of the Article.[2]

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[1] See General Orders No. 53, A. G. O., of 1852: G. O. Nos. 2, 4, and 68, *ibid.*, of 1853. "It is a direct violation of law and duty for an officer to strike or offer other violence to the person of a soldier except when absolutely necessary to quell mutinous conduct." G. O. 68, A. G. O., 1853. "The only case in which personal violence can be justified is that where extreme necessity requires it, in self-defense, to prevent instant and immediate danger." G. O. 2, A. G. O., 1853.

[2] It is a principle of the common law that any bystander may and should arrest an affrayer. 1 Hawkins P. C., c. 63, s. 11; Timothy *vs.* Simpson, 1 C. M. & R 762, 765; Philips *vs.* Trull, 11 Johns., 487. And that an officer or soldier, by entering the military service, does not cease to be a citizen, and as a citizen is authorized and bound to put a stop to a breach of the peace committed in his presence, has been specifically held by the authorities. Burdett *vs.* Abbott, 4 Taunt., 449; Bowyer, Com. on Const. L. of Eng., 499; Simmons, §§ 1096–1100. This Article is thus an application of an

As military discipline consists in the quiet and orderly performance of military duties, all departures from such quiet performance, whether in the nature of strife or disorder, are equally obnoxious to good discipline as tending to disturb the orderly conduct of a march, or to interrupt the peace and quiet of the camp or garrison. The 24th Article relates to disturbances or other infractions of good order less serious in importance than sedition or mutiny, and not only requires, but in express terms empowers, certain classes of officers to quell or put an end to the same, and to command such assistance as may be necessary to accomplish that purpose. The duty required in the Article comes into being upon the occurrence of the disorder, or upon the receipt of knowledge of its existence, and ceases to exist only when the disturbance has ceased to exist or the proper superior officer has been "acquainted therewith." An officer or non-commissioned officer who has undertaken the execution of the duty defined in the statute should, after such notification, if inferior in rank to the commanding officer, forthwith place himself under his orders pending the suppression of the existing disorder.[1]

ARTICLE 25. *No officer or soldier shall use any reproachful or provoking speeches or gestures to another. Any officer who so offends shall be put in arrest. Any soldier who so offends shall be confined, and required to ask pardon of the party offended in the presence of his commanding officer.*

ARTICLE 26. *No officer or soldier shall send a challenge to another officer or soldier to fight a duel, or accept a challenge so sent. Any officer who so offends shall be dismissed from the service. Any soldier who so offends shall suffer such corporal punishment as a court-martial may direct.*

ARTICLE 27. *Any officer or non-commissioned officer commanding a guard who knowingly and willingly suffers any person to go forth to fight a duel shall be punished as a challenger; and all seconds or promoters of duels, and carriers of challenges to fight duels, shall be deemed principals, and punished accordingly. It shall be the duty of any officer commanding*

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established common-law doctrine to the relations of the military service. See its application illustrated in the following General Orders: G. O. 4, War Dept., 1843; do. 63, Dept. of the Tennessee, 1863; do. 104, Dept of the Missouri, 1863; do. 52, Dept. of the South, 1871; do. 92, *id.*, 1872. Dig. J. A. Gen., 32, note 2.

[1] It is a significant fact, serving to bring prominently into view the essential difference between military and civil jurisprudence, that the words used to define the offenses created by this Article are either not known to the common law or are but partially interpreted in that system of jurisprudence. To constitute a *quarrel*, actual violence is not necessary, and the act may consist in mere abusive, violent, or angry words participated in by two or more persons. If actual violence be used, the offense becomes an *affray*, which may be defined as "the fighting of two or more persons in some public place, to the terror of the public." It is essential to the offense of participating in an affray that the fighting should be without premeditation; if there be such premeditation or concerted action, the offense partakes of the character of a *riot*. *Disorder* is an offense peculiarly obnoxious to military discipline, and may consist in an actual disturbance or interruption of discipline, or in conduct calculated to disturb the quiet and orderly performance of military duty in a camp or garrison.

an army, regiment, troop, battery, company, post, or detachment who knows or has reason to believe that a challenge has been given or accepted by any officer or enlisted man under his command immediately to arrest the offender and bring him to trial.

ARTICLE 28. *Any officer or soldier who upbraids another officer or soldier for refusing a challenge shall himself be punished as a challenger; and all officers and soldiers are hereby discharged from any disgrace or opinion of disadvantage which might arise from their having refused to accept challenges, as they will only have acted in obedience to the law and have done their duty as good soldiers, who subject themselves to discipline.*

The 25th, 26th, 27th, and 28th Articles, having a common history and purpose, will be consider together. All codes of military discipline subsequent to the introduction of the standing army in England have contained provisions calculated to repress, and eventually to suppress, the practice of duelling. In Article 36 of the Prince Rupert Code "reproachful or provoking speeches or acts" are prohibited, as are "challenges to fight duels"; and it is declared to be a military offense for an officer or soldier to "upbraid another for refusing a challenge." Duelling is expressly prohibited, and officers commanding guards are forbidden to "suffer either soldiers or officers to go forth to a duel or private fight." Finally, "in all cases of duels the seconds shall be taken as principals and punished accordingly." The several requirements of the Articles of 1874 relating to this subject can be traced without difficulty through the King James Articles of 1686 to the comprehensive provisions of the Prince Rupert Code above cited. It is proper to remark, however, that in the American Articles, as in the English codes of the eighteenth century, duelling, as such, is not expressly prohibited,[1] the provisions respecting challenges, promoters, and the like being in the nature of measures of prevention. The British Articles in respect to this subject underwent considerable modification in 1844, when duelling, as such, was expressly prohibited; as so modified the Articles were embodied in the permanent Army Discipline Act of 1881.

Reproachful Speeches, Gestures, etc.—The obvious intent of this provision would seem to be to check by direct and prompt means, which the Article favors, the earliest manifestation of a spirit or disposition to quarrel, by subjecting the offender, without any formal charge, to immediate arrest or imprisonment; and to make such honorable atonement for the provocation as the case appears to require in the presence of his commanding officer. The course of this summary remedy is peculiarly well adapted to affronts publicly offered, which the Article has especially in view.[2]

[1] It may be noted that our Articles of War, unlike the British, fail to make engaging in a duel punishable, as a specific military offense. Such an act, therefore, would, as such, be in general chargeable only under Article 62. Dig. J. A. Gen., 33, par. 1.

[2] Samuel, 351.

The 25th Article confers no jurisdiction or power to punish on courts-martial, but merely authorizes the taking of certain measures of *prevention and restraint* by commanding officers; i.e., measures preventive of serious disorders such as are indicated in the two following Articles relating to duels.[1] If the use of reproachful speeches constitutes a military offense, the wrongful act or conduct would constitute a violation of the 62d Article of War, and should be charged as such.

The arrest contemplated in this Article, like that authorized in Article 65, is imposed by the commanding officer, who is empowered by a later clause to confine an enlisted man for the same offense, and to require him "to ask pardon of the party offended" in his presence. The power conferred is clearly in the nature of a precautionary measure, and, though not in terms subject to the restrictions contained in the 70th and 71st Articles, would not authorize a commanding officer to prolong an arrest indefinitely or after the occasion for its exercise had passed away.[2]

Challenges.—The 26th Article contains the requirement that "no officer or soldier shall send a challenge to another officer or soldier to fight a duel or accept a challenge so sent."

It is the object of this as of the other Articles now under consideration to check or resist any direct or indirect approach to duelling in every one of its stages. To bring the party within the scope of the Article, it is not material whether the challenge be accepted or not; it is enough if it be given or sent.[3]

To establish that a challenge was sent, there must appear to have been communicated by one party to the other a deliberate invitation in terms or in substance to engage in a personal combat with deadly weapons, with a view of obtaining satisfaction for wounded honor.[4] The expression merely of a willingness to fight, or the use simply of language of hostility or defiance, will not amount to a challenge. On the other hand, though the language employed be couched in ambiguous terms, with a view to the evasion of the legal consequences, yet if the intention to invite to a duel is reasonably to be implied,—and ordinarily, notwithstanding the stilted and obscure verbiage employed, this intent is quite transparent,—a challenge will be deemed to have been given. And the intention of the message, where

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[1] Dig. J. A Gen., 33.

[2] In the British service this Article has been construed in connection with the 23d Article, which confers upon "all officers, of what condition soever," power to part and quell quarrels, frays, and disorders. The Article proceeds upon the theory that the speeches and gestures to which it relates are open and notorious, and, as such, calling for immediate interference. Any military officer standing by, as well as the person offended, would be authorized to make the arrest, for such power is given to officers of every description to quell all quarrels and frays; and as the speeches and gestures in question are regarded by this Article as having a tendency to those consequences and are therefore interdicted, they appear to authorize the same interference. Samuel, 351.

[3] Compare Samuel, 383.

[4] Compare the definition in 2 Wharton Cr. L., §§ 2674–2679.

doubtful upon its face, may be illustrated in evidence by proof of the circumstances under which it was sent, and especially of the previous relations of the parties, the contents of other communications between them on the same subject, etc.[1] And technical words in an alleged challenge may be explained by a reference to the so-called duelling code.[2]

Challenges, How Determined.—It is for the court to determine whether the communication set forth in the charges and established in evidence constitutes a challenge within the meaning of the Article. "No general description can be laid down of the precise words which amount to a challenge; for there is no particular phraseology, no set form, necessary to it or by which it can be known. Whether there be an actual summons to the field either through the principal or second, or such a defiance thrown out as shall appear a direct invitation to it, though it cast the burden of acting in all the incidents leading up to the combat on the other party, it may equally be held in the nature and degree of a challenge." "It is not requisite that there should be a formal invitation to fight; but a mere hint or suggestion that one of the parties is prepared for it has been held by a court-martial to be tantamount to a challenge. In this view it is as much an offense to use words or insinuations that indicate a disposition to fight, and which may act as a provocative and defiance to another to meet such disposition, as if the most unequivocal challenge had been given."[3]

As the offense is in its nature a private one, there cannot be expected in many instances any abundant evidence of it. The court will therefore have to govern itself not so much by the quantity as by the quality of the proof.[4]

Permitting Persons to Go Forth to Fight Duels.—The first clause of the 27th Article makes it a military offense for "an officer or non-commissioned officer commanding a guard knowingly and willingly" to suffer any person to go forth to fight a duel. The gravity of the offense so created is measured by the penalty which is required to be imposed upon conviction, which is declared to be the same as that involved in the offense of being a challenger. The essence of the offense is the non-exertion of a present power to prevent a known unlawful purpose. As it is the knowledge of the intention of the parties going forth, and the non-resistance of it, which makes the crime, the existence of such knowledge must be clearly evidenced before the

[1] On the general subject of challenges, and the question what constitutes a challenge, see the principal cases of the sending of challenges in our service as published in G. O. 64, A. G. O., 1827; do. 39, 41, *id.*, 1835; do. 2, War Dept., 1858; do. 330, *id.*, 1863; do. 11, Army of the Potomac, 1861; do. 46, Dept. of the Gulf, 1863; do. 223, Dept. of the Missouri, 1864; do. 130, *id.*, 1872; do. 33, Dept. and Army of the Tennessee, 1864. And compare Commonwealth *vs.* Levy, 2 Wheeler Cr. C., 245; do. *vs.* Tibbs, 1 Dana, 524; do. *vs.* Hart, 6 J. J. Marsh., 119; State *vs.* Taylor, 1 So. Ca., 108; do. *vs.* Strickland, 2 Nott & McCord, 181; Ivey *vs.* State, 12 Ala., 277; Aulger *vs.* People, 34 Ills., 486, 2 Bishop Cr. L., § 314; Samuel, 384–387.

[2] Dig. J. A. Gen., 33; State *vs.* Gibbons, 1 South, 51.

[3] Samuel, 384.

[4] *Ibid.*, 385.

court-martial before a conviction can be had.[1] The somewhat comprehensive language used in the clause requiring the commander of a guard to prevent "any person" from going forth to fight a duel has never received executive interpretation, but has always been construed to apply to military persons only; the movements of civil persons not being subject to military regulation or control.

The second clause of the 27th Article makes "all seconds or promoters of duels, and carriers of challenges to fight duels," principals, and imposes upon the several offenses thus described the character of principal offenses, and requires the same penalty to be imposed in the event of conviction. By *seconds* are intended those who accompany the principals, on one side or the other, to the ground on which the duel is to be fought, regulating the terms of it, prescribing the course of proceeding, and seeing that they are strictly observed on both sides. They are commonly denominated, sometimes with no visible discrimination, the *friends* of the respective parties.[2] It may not be so easy to assign a precise meaning to the term "promoters," who are included in the same line with seconds and carriers of challenges. Such terms, it is presumed, applies to parties who, whether concerned or not in the matter of dispute, take any share in urging or provoking those implicated in it to send to one or the other a defiance to the field.[3]

Duty of Commanding Officers.—The last clause of the 27th Article makes it the duty of "any officer commanding an army, regiment, troop, battery, company, post, or detachment who knows or has reason to believe that a challenge has been given or accepted by any officer or enlisted man under his command immediately to arrest the offender and bring him to trial."

This clause is directory in character and imposes a special responsibility upon the commanding officers of the several units of organization above named in the matter of preventing hostile meetings, and of bringing the parties to them to a speedy trial. This clause also, when taken in connection with the 28th Article, clearly defines the policy of the Government in respect to the practice of duelling, confers upon the measures of prevention already described an additional sanction, and removes any doubt that may have arisen in the mind of a military commander as to his duty in the case.

ARTICLE 29. *Any officer who thinks himself wronged by the commanding officer of his regiment, and, upon due application to such commander, is refused redress, may complain to the general commanding in the State or Territory where such regiment is stationed. The general shall examine into said complaint and take proper measures for redressing the wrong complained of; and he shall as soon as possible transmit to the Department of War a true statement of such complaint, with the proceedings had thereon.*

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[1] Samuel, 388. [2] *Ibid.*, 390. [3] *Ibid.*, 394.

This provision can be traced through the King James Articles of 1672 to Article 68 of the Prince Rupert Code, which contains the requirement that "if any Inferiour Officer, either of horse or foot, be wronged by his Officer, he may complain to his Colonel, or other Superiour Officer of the Regiment, who is to redress the same, upon due proof made of the wrong done him; but if he fail therein, the party grieved is to apply to the General officer for redress; and if the accusation be false, the complainant is to be punished at the discretion of a Court-Martial." In the British Articles of 1774, from which our own Articles were adopted, this provision appears as Article 1 of Section 12. The last clause, however, requiring the complainant to be punished by a court-martial in the event of his accusation being found to be false, is omitted. To insure a full hearing in appeal, the British Articles of 1774 permit the complainant, if redress be denied him by his regimental commander, to appeal to the general commanding-in-chief, "who is hereby required to examine into the said complaint; and, either by himself, or by Our Secretary at War, to make his report to Us thereupon, in order to receive Our further Directions." As there was no executive head to the Government under the Continental Congress, nor to that under the Articles of Confederation, the appeal above described was to be taken to the general commanding-in-chief the forces of the United States, who was "required to examine into the said complaint and, either by himself or the Board of War, to make report to Congress thereupon, in order to receive further directions."[1] The right of appeal thus created by the British Code and recognized by the American Articles of 1776 was considerably restricted in the Articles of 1806, since it was required to be submitted, not to the general commanding the Army, but "to the general commanding in the State or Territory where the regiment of the complainant was stationed."[2]

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[1] It will be observed that this Article does not in terms require the general commanding-in-chief to take steps to redress the wrong. For that reason the requirement was repealed by a Resolution of Congress of April 14, 1777, and replaced by a new Article requiring the commanding general to "take measures to redress the wrong" and report the case to Congress.

[2] It is proper to remark, in this connection, that if, as between persons subject to military discipline, that is, "between comrades, actions of assault or battery had been encouraged by the common law, such cases might have been abundant, and if actions for torts, as false imprisonment, slander, libel, had been entertained, the discipline of the Army would long since have been destroyed. From the earliest period, therefore, the Articles of War have provided that all these offenses should be referred to and decided by the officers in superior command, an ultimate appeal being given to the sovereign, as the head of the military profession; and unless the Army is to degenerate in its character, that rule must, on the grounds of public policy, be strictly adhered to. To take the Army out of the control of the crown, by giving jurisdiction to the common-law tribunals for the redress of professional grievances, would, in the opinion of the judges themselves, be in the highest degree inexpedient, and hence these courts have uniformly, and especially in recent instances, declined to entertain such complaints." II. Clode, Mil. Forces, 150; Keightley *vs.* Bell, 4 Fos. & Fin., 798; Dawkins *vs.* Rokeby, *ibid.*, 833; Freer *vs.* Marshall, *ibid.*, 485. See, also, Wilkes *vs.* Dinsman, 7 How., 89; Smith *vs.* Whitney, 116 U. S., 167; Wales *vs.* Whitney, 114 U. S., 564.

In this form it was re-enacted in the Articles of 1874. The procedure under the Article has already been explained.[1]

ARTICLE 30. *Any soldier who thinks himself wronged by any officer may complain to the commanding officer of his regiment, who shall summon a regimental court-martial for the doing of justice to the complainant. Either party may appeal from such regimental court-martial to a general court-martial; but if, upon such second hearing, the appeal appears to be groundless and vexatious, the party appealing shall be punished at the discretion of said general court-martial.*

A right similar in its scope and operation to that provided by this Article for the redress of wrongs in behalf of enlisted men may be traced to Article 62 of the Prince Rupert Code, which provided that "all controversies, either between Souldiers and their Captains or other Officers, or between Souldiers and Souldiers, relating to their military capacities, shall be summarily heard and determined at the next court-martial of the regiment." Article 69 of the same code contains the requirement that "if a Souldier shall be wronged, and shall not appeal to the Court, but take his own satisfaction for it, he shall be punished by the Judgment of a Court-Martial." Article 2, Section 12, of the British Code of 1774 restricts the Article in its operation to the case of an "inferior officer or soldier who shall think himself wronged by his Captain, or other Officer commanding the Troop or Company to which he belongs," and in this form the provision was embodied in the American Articles of 1776. In the Articles of 1806 the scope of the remedial provision of the Article was extended to a wrong done to an inferior officer or soldier by his captain or *any other officer*. The corresponding Article of 1874, by the omission of the words "his captain" from the Article of 1806, extends the remedy to a wrong done to an enlisted man by any commissioned officer of the Army. The successive modifications in verbiage which the Article has undergone have not operated, however, to extend its scope in respect to the character of wrongs to which it is intended to provide a remedy; the wrongs properly subject to redress thereunder being those of a fiscal or administrative character, and not such as are breaches of discipline which are remediable only by a trial before an appropriate military tribunal.[1]

This Article is not inconsistent with Article 83, which prohibits regimental courts from trying commissioned officers. It does not contemplate or provide for a *trial* of an officer as an *accused*, but simply an investigation and adjustment of some matter in dispute—as, for example, a question of accountability for public property, of right to pay or to an allowance, of relief from a stoppage, etc. The regimental court does not really act as a court, but as a board, and the "appeal" authorized is practically from one

[1] See the chapter entitled THE REDRESS OF WRONGS.

board to another. But though the regimental court has no power to find "guilty" or "not guilty," or to sentence, it should come to some definite opinion or conclusion—one sufficiently specific to allow of its being intelligently reviewed by the general court if desired.[1]

There are two manifest and unqualified limitations to the province of the regimental court under this Article, viz.: 1. It cannot usurp the place of a court of inquiry; 2. It can take no cognizance of matters which it would be beyond the power of the regimental commander to redress. When the matter is beyond the reach of this commander it is beyond the jurisdiction of this court. If it involve a question of irregular details, excessive work or duty, wrongful stoppages of pay, or the like, a regimental court under this Article may be resorted to for the correction of the wrong. Otherwise when the case is one of a wrong such as can be righted only by the *punishment* of the officer.[2]

ARTICLE 31. *Any officer or soldier who lies out of his quarters, garrison, or camp without leave from his superior officer shall be punished as a court-martial may direct.*

Article 29 of the Prince Rupert Code contained the requirement that "no officer shall lye out all night from the Camp or Garrison, without his Superior Officers leave obtained for the same, upon pain of being punished for it as a Court-Martial shall think fit." The provision appears in substantially its present form, applying to enlisted men as well as to commissioned officers, as Article 2, Section 14, of the British Codes of 1765 and 1774, as Article 2, Section 13, of the American Articles of 1776, and as No. 42 of the Articles of 1806.

This Article, although it creates a military offense, is in its nature rather a police regulation than a criminal statute, and is calculated to secure the constant presence and readiness for duty of the officers and enlisted men composing a military command. Although prosecutions under this Article are infrequent, the necessity of its existence is evidenced by the fact that it

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[1] Dig. J. A. Gen., 35, par. 1.

[2] *Ibid.*, 36, par. 6. The "regimental court-martial" under the 30th Article of War cannot be used as a substitute for a general court-martial or court of inquiry, for it cannot try an officer nor make an investigation for the purpose of determining whether he shall be brought to trial. When, if the soldier's complaint should be sustained, the only redress would be a reprimand to the officer, the matter would not be within the jurisdiction of this court. It can only investigate such matters as are susceptible of redress by the doing of justice to the complainant; that is, when in some way he can be set right by putting a stop to the wrongful condition which the officer has caused to exist. Erroneous stoppages of pay, irregularity of detail, the apparent requirement of more labor than from other soldiers, and the like, might in this way be investigated and the wrongful condition put an end to. The court will in such cases record the evidence and its conclusions of fact, and recommend the action to be taken. The members of the court (and the judge-advocate) will be sworn faithfully to perform their duties as members (and judge-advocate) of the court, and the proceedings will be recorded, as nearly as practicable, in the same manner as the proceedings of ordinary courts-martial. Manual for Courts-martial, p. 89, note.

is to be found in almost every military code, ancient and modern.[1] It appears as the first clause of Article 29 of the Prince Rupert Code, as Article 2, Section 14, of the British Code of 1774, as Article 2, Section 13, of the American Articles of 1776, and as No. 42 of the Articles of 1806.

ARTICLE 32. *Any soldier who absents himself from his troop, battery, company, or detachment without leave from his commanding officer shall be punished as a court-martial may direct.*[2]

This requirement does not appear as such in the Prince Rupert Code, although certain forms of unauthorized absence, especially when committed by commissioned officers, are there made punishable. The provision appears as Article 2, Section 6, of the British Codes of 1765 and 1774, as Article 2, Section 6, of the American Articles of 1776, and as No. 21 of the Articles of 1806. In the codes prior to that of 1874 the absence contemplated in the Article was to be from the troop or company of the soldier, or "from any detachment with which he may be commanded"; this clause was omitted from the revision of the Articles in 1874.

The offense of unauthorized absence here defined closely resembles in its essential incidents the more serious offense of desertion, from which it differs only in respect to the intent; an intent not to return giving to an unauthorized absence the character of desertion, while the absence of such an intent suffices to reduce a charge of desertion to the minor included offense of absence without leave.[3] The absence of an enlisted man from his troop, battery, company, or detachment, no matter what the cause or duration of such absence, without the leave of his commanding officer is, and is declared by this Article to be, a punishable offense. To constitute the offense of absence without leave, however, no specific intent is necessary, the essential incidents of the offense being set forth in the statute which creates it.

Nothing can justify the absence of a soldier from the place assigned him but the leave or command of his commanding officer specifically or generally given, and which the accused in all cases will be bounden to prove. But circumstances not amounting to a complete justification may in many instances palliate the absence of the party. It has been seen that an absence, though originally authorized, may, if unduly prolonged, acquire the character of an unauthorized absence; yet the absentee will be at liberty to account, by probable circumstances, for the excess of his stay beyond the term allowed him; as, for example, that it was caused by involuntary detention from some uncontrollable power, or by inability through sickness, verified or not, as the case may be, by a proper medical certificate, or by an extension of the furlough by competent military authority, or to detention at the hands of the civil authority.[3]

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[1] Samuel, 544. [2] Dig. J. A. Gen., 345, par. 18. [3] Samuel, 338.

The offense of absence without leave may be committed by a commissioned officer as well as by an enlisted man; in the former case, however, it is chargeable under the 62d Article of War.

Absence without leave may also consist in an act of omission as well as in one of commission. Where an officer detailed to command an escort of prisoners and to deliver them at a certain place neglected, upon this service being performed, to return with reasonable diligence to his proper station, *held* that he was chargeable with absence without leave, it being the duty of an officer to return promptly from such a service without further orders.[1]

An unauthorized absence from quarters only, unaccompanied with absence from the post or company, is not a technical absence without leave in violation of this Article, but an offense under Article 62.[2]

If, on returning to his station after an unauthorized absence, an officer or soldier is placed upon or allowed to perform full duty by his proper commander, such action, by the custom of the service, operates in general as a waiver of the charge of absence without leave, and may ordinarily be pleaded as a good defense in the event of a trial.[3]

Stoppages, etc.—An enlisted man who has absented himself from his post or company without authority is subjected to the forfeiture of pay and allowances prescribed by the Army Regulations[4] although not brought to trial for his absence as an offense. The forfeiture is a stoppage by operation of law irrespective of any punishment that may be imposed, and whether any be imposed or not. Thus a soldier acquitted under a charge of desertion is acquitted of the absence without leave involved in the charge, and cannot be *punished* therefor; but if he has been absent without leave *in fact*, he incurs the forfeiture specified in the regulation. And a soldier brought to trial for, and convicted of, an absence without leave is subject to the forfeiture, though none be adjudged in the sentence. Otherwise, however, if the findings be *disapproved* as not sustained by the testimony.[5]

Making Good Time Lost.—Although, for the reason above stated, an enlisted man forfeits all pay which accrues during his absence without leave, the obligation to make good the time lost is not a statutory consequence of the offense, as is the case in desertion.[6] An absentee without leave, there-

[1] Dig J. A. Gen., 140, par. 1. See, as to the general rule on this subject, G. O. 82, Hdqrs. of Army, 1866; also par. 54, A. R. of 1895.

[2] *Ibid.*, 36.

[3] *Ibid.*, 140, par. 2.

[4] Paragraph 133, Army Regulations of 1895.

[5] Dig. J. A. Gen., 140, par. 3. But the stoppages incurred under paragraphs 126 and 127, A. R. of 1895, are enforced only upon a conviction by court-martial.

The forfeiture specified in par. 133, A. R. of 1895, should not be enforced for absences of less than one day, but the soldier should be left to be punished by sentence of summary court. Thus where the unauthorized absence was for but seven and a half hours, a forfeiture of a day's pay would deprive the soldier of pay for sixteen and a half hours which he had actually earned. *Held*, therefore, that a stoppage of one day's pay in such a case was not warranted. Dig. J. A. Gen., 141, par. 4.

[6] *Ibid.*, 43, par. 8.

fore, though not entitled to pay during his unauthorized absence, will only be required to make good the time lost upon conviction of the offense before a court-martial of competent jurisdiction.[1]

Absence without Leave on the Part of Commissioned Officers.—It will be observed that the operation of the Article is restricted, by its express terms, to cases of unauthorized absence on the part of enlisted men. It is none the less an offense against discipline for a commissioned officer to absent himself without the specific or general permission of his commanding officer. An offense of unauthorized absence committed by a commissioned officer would be chargeable under the 62d Article of War, and, in addition to the punishment imposed for such absence by sentence of the court-martial, an officer so offending would, by the operation of law, be required to "forfeit all pay during such absence unless the absence be excused as unavoidable."[2]

ARTICLE 33. *Any officer or soldier who fails, except when prevented by sickness or other necessity, to repair at the fixed time to the place of parade, exercise, or other rendezvous appointed by his commanding officer, or goes from the same, without leave from his commanding officer, before he is dismissed or relieved, shall be punished as a court-martial may direct.*[3]

This provision appears as Article 4, Section 14, of the British Code of 1774, as Article 4, Section 13, of the American Articles of 1776, and as No. 44 of the Articles of 1806. Absence from guard without leave in time of war was reckoned among the number of capital offenses in the war statutes of Henry V. In the statutes of Henry VIII. the offense is treated with some abatement of the rigor of the preceding ordinance, though seemingly with severity, the offender's body being thereby made liable "to be imprisoned, and his person and goods to stand at the king's pleasure."[3] The corresponding provision of the Prince Rupert Code, from which the Article in its present form is derived, contains the requirement that "when warning is given for setting the watch, by beat of drum or the sound of the trumpet or fife, if any Souldier shall absent himself without reasonable cause, he shall be punished by riding a wooden horse, or otherwise, at the discretion of the Commander. And whatever Souldier shall fail, at the beating of a drum, or the sound of a trumpet or fife, or upon an alarm given, to repair to his Colours, with his arms decently kept and well fix'd (unless there be an evident necessity to hinder him from the same), he shall either be clap'd in Irons for it, or suffer such other punishment as a Court-Martial shall think fit."[4]

Nature of the Offense.—This Article, although it sets forth a distinct military offense which may be committed by any officer or enlisted man who fails to conform to its terms, has especial application to the case of a command which is provided with shelter, generally in time of war, by quartering

[1] Paragraph 133, Army Regulations of 1895.
[2] Section 1265, Revised Statutes.
[3] Samuel, 548.
[4] See page 572, *post*.

its members upon the inhabitants of a city or town. As the troops constituting a company are or may be billeted in several houses or buildings situated at some little distance apart, a place of rendezvous is appointed, and the members of the company are notified of the location of the same at the time of the assignment or billeting. At all formations the members of the command are required, in obedience to such notification, to appear at the place of rendezvous thus indicated, and a failure so to appear after due notification will constitute an offense under the Article.

As the troops of a command which has been billeted in the manner above described are not under the same close observation and control as when collected in camps or barracks, it is also an offense within the meaning of the Article for an officer or enlisted man, having appeared at the appointed rendezvous, to leave it without leave from his commanding officer.

ARTICLE 34. *Any soldier who is found one mile from camp without leave in writing from his commanding officer shall be punished as a court-martial may direct.*

This has been an express military regulation since the time of Charles I., but was formerly enforced with a much heavier punishment than at present; namely, with death.[1] The provision can be traced from Article 19 of the Prince Rupert Code through Article 1, Section 14, of the British Code of 1774, and Article 1, Section 13, of the American Articles of 1776, to No. 43 of the Articles of 1806, which was re-enacted without change in the Articles of 1874. Under the peculiar conditions of administration, supply, and discipline which have always prevailed in the English military service, one mile has come into use as a convenient space within the circumference of which about a camp are usually to be found all the necessaries with which a soldier may have to supply himself. On some occasions within the last-mentioned reign the distance was narrowed to half a mile.[1] But though this is the prescribed limit beyond which soldiers cannot pass without special permission, it does not follow that they may not be guilty of a military offense in being found at a less distance from the camp than the point described in the Article; since it is clear that no one has a right at any time to leave his place, or the ordinarily fixed bounds, without leave from his officer. But even leave from an officer will not be sufficient to save the party from the peril of this Article, unless it be in writing.[2]

ARTICLE 35. *Any soldier who fails to retire to his quarters or tent at the beating of retreat shall be punished according to the nature of his offense.*

This Article, which, like the 31st, partakes of the character of a police regulation, appears as Article 3, Section 14, of the British Code of 1774, as Article 7, Section 13, of the American Articles of 1776, and as No. 35 of the Articles of 1806. It is its purpose to secure the regular and orderly

[1] Samuel, 542. [2] *Ibid.*, 543.

return of enlisted men to the posts or places which they are to occupy for the night, with a view of keeping the forces together and in a constant state of readiness to act upon an occasion of emergency.[1]

ARTICLE 36. *No soldier belonging to any regiment, troop, battery, or company shall hire another to do his duty for him, or be excused from duty, except in cases of sickness, disability, or leave of absence. Every such soldier found guilty of hiring his duty, and the person so hired to do another's duty, shall be punished as a court-martial may direct.*

ARTICLE 37. *Every non-commissioned officer who connives at such hiring of duty shall be reduced. Every officer who knows and allows such practices shall be punished as a court-martial may direct.*

That the evil for which the above Articles were intended to provide a remedy did not exist in the last half of the seventeenth century is evidenced by the fact that Article 50 of the Prince Rupert Code expressly permits the duty of one soldier to be performed by another in "case of sickness and disability or other necessary cause," in which event the captain is authorized to "dispense with his absence without causing him to find another to serve in his stead." This requirement was repeated in the Articles issued by King James in 1672.

The Articles above cited appear in their present form as Articles 7 and 8, Section 14, of the British Code of 1774, as Articles 7 and 8, Section 13, of the American Articles of 1776, and as Nos. 47 and 48 of the Articles of 1806. They were adopted originally with a view to put an end to a practice which prevailed in commands stationed in the vicinity of the city of London of permitting soldiers to engage themselves as laborers on the Thames or in the yards or wharves on its banks. The practice seems to have been approved by the commanding officers of the troops, who received a percentage of the absentee's pay for services rendered. The abuse finally became so flagrant, and so injurious to discipline, as to cause the provisions above cited to be incorporated in the Articles of War.[2]

The Articles define an offense of hiring duty, which may be committed by the enlisted men who are parties to the contract of hiring or who connive at its execution. Its subject-matter being prohibited by law, the contract itself is without obligatory force, and cannot, for that reason, be made the subject of an action at law. The clause of the statute forbidding enlisted men to be excused from duty "except in cases of sickness, disability, or leave of absence" is directory in character, and applies to the officers who, from the nature of their office or employment, are authorized by law, regulations, or existing orders to excuse enlisted men from the performance of military duty.

ARTICLE 38. *Any officer who is found drunk on his guard, party, or other duty shall be dismissed from the service. Any soldier who so offends*

[1] Samuel, 545. [2] *Ibid.*, 549.

shall suffer such punishment as a court-martial may direct. No court-martial shall sentence any soldier to be branded, marked, or tattooed.

This appears as Article 5, Section 14, of the British Code of 1774, as Article 5, Section 13, of the American Articles of 1776, and as No. 45 of the Articles of 1806. The Articles of 1774, 1776, and 1806 contained a provision that the sentence imposed upon an enlisted man for the offense of drunkenness on duty should consist of "corporal" punishment. Although the most usual form of corporal punishment, that of flogging, had been abolished by the Act of August 5, 1861,[1] the word "corporal" appeared in the revision of the Articles in 1874, and was held to apply to any form of punishment authorized by custom of service which involved personal restraint, hardship, or inconvenience, as distinguished from a merely pecuniary penalty, in the nature of a fine or forfeiture of pay. By subsequent enactments,[2] however, the word "corporal" was stricken from the Article, and a new and additional restriction imposed in the form of a requirement that "no court-martial shall sentence any soldier to be branded, marked, or tattooed."

Meaning of Term Duty.—The penalties declared by the Article attach not to drunkenness *per se*, but as it may be connected with the discharge of some important duty, for the due execution of which it is supposed to render the party affected by it not only unfit but a dangerous instrument to all around him.[3] In the American Articles of 1776, and in the British Code from which they were derived, the offense consisted in being found drunk on "a guard, party, or other duty *under arms*." Although the words "under arms" were omitted from the revision of the Articles in 1806, no change was made by courts-martial in their application of the statute to cases referred to them for trial until 1853, when, in the case of a commissioned officer tried for a violation of this Article and found "not guilty," but "guilty of being drunk in the actual execution of his office," it was decided by the Secretary of War that the effect of the omission of the words "under arms" in the revision of 1806 had been to remove one statutory restriction from the operation of the Article without introducing a new one, and that the terms of the Article applied to *all* occasions of duty, and was not limited to duties performed by the roster, or by detail, but was applicable not only to occasions of duty in which the entire command participated, but to the case of guards, parties, and the like, composed of details from the several units of which the command was composed.

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[1] 12 Statutes at Large, 317.

[2] Acts of February 18, 1875, (18 Stat. at Large, 318,) February 27, 1877, (19 *ibid.*, 244,) and June 6, 1872, (sec. 2,) (17 *ibid.*, 261). The enactment last cited formally amended Article 45 of the Code of 1806, and the insertion of the word "corporal" in the revision of 1874 was for that reason erroneous.

[3] Samuel, 551. Note the emphatic order of the President in regard to violations of this Article published in G. O. 104, Hdqrs. of Army, 1877.

On Duty; Off Duty.—The words "on duty," as used in the 32d Article, have also received an authoritative interpretation. As applied to the commanding officer of a post, or of an organization, or detachment in the field, the senior officer present, in the actual exercise of command, is constantly on duty;[1] the term being here used in contradistinction to "on leave." In the case of other officers, or of enlisted men, the term "on duty" has been held to relate to the performance of duties of routine or detail, in garrison or in the field; the words "off duty," in respect to such persons, relating to such periods or occasions when, no duty being required of them by orders or regulations, officers and men are said to occupy that status of leisure known to the service as being "off duty."[2]

Nature of Intoxicant.—It is immaterial whether the drunkenness be voluntarily induced by spirituous liquor or by opium or other intoxicating drug; in either case the offense may be equally complete.[3]

The drunkenness need not be such as totally to incapacitate the party for the duty; it is sufficient if it be such as materially to impair the full and free use of his mental or physical abilities.[4] It is not a sufficient defense to a charge of drunkenness on duty to show that the accused, though under the influence of liquor, contrived to get through and somehow perform the duty.[5]

Drunkenness as an Offense.—Drunkenness not on duty, or when off duty, when amounting to a "disorder," should be charged under Article 62, unless (in a case of an officer) committed under such circumstances as to constitute an offense under Article 61.[6] So, too, an officer or enlisted man

[1] A post commander, while present and exercising command as such, is deemed to be at all times on duty in the sense of this Article, and thus liable to a charge under the same if he become drunk at the post. Dig. J. A. Gen., 37, par. 5.

A medical officer of a post, where there are constantly sick persons under his charge who may at any moment require his attendance, may, generally speaking, be deemed to be "on duty," in the sense of the Article, during the whole day, and not merely during the hours regularly occupied by sick-call, visiting the sick, or attending hospital. If found drunk at any other hour, he may in general be charged with an offense under this Article. *Ibid.*, par. 6.

[2] That the Article is not limited in its application to mere duties of detail, but embraces all descriptions and occasions of duty, see the interpretation of the same as declared in G. O. 7, War Dept., 1856, and affirmed in G. O. 5, *id.*, 1857. The case in the latter order, indeed, was a case of drunkenness while on duty as a post commander. See another case of the same character in G. C. M. O. 21, Dept. of the Missouri, 1870, and the remarks of Maj.-Gen. Schofield thereon, and compare G. C. M. O. 9, War Dept., 1875. *Ibid.*, par. 5, note.

[3] Dig. J. A. Gen., 38, par. 8. See, also, Simmons, § 157; Hough, Precedents, 208; James, Precedents, 60.

[4] See G. C. M. O. 33, War Dept., 1875; also do. 21, Dept. of the Missouri, 1870; G. O. 53, 98, Army of the Potomac, 1862; do. 48, Dept. of Va. & No. Ca., 1864; do. 33, Dept. of the Platte, 1871.

[5] Dig. J. A. Gen., 38, par. 7. A finding, under a charge of a violation of this Article, of not guilty of being "found drunk," but guilty of being "found under the influence of liquor" (or by which the latter words are *substituted* in the specification for the former) recommended to be *disapproved* as making a distinction too fine for a practical administration of justice, and establishing a precedent which must tend to defeat the purpose of the Article.* *Ibid.*

[6] *Ibid.*, par. 9. An officer reporting in person drunk upon his arrival at a post, to the commander of which he had been ordered to report, *held* chargeable under this

* Compare G. C. M. O. 33, War Department, 1875.

who appears at a formation for duty so much under the influence of liquor as to be incapable of its due and proper performance, and is thereby prevented from entering upon the particular duty in question, is properly chargeable with an offense under the 62d Article.[1]

While it is, in itself, an offense knowingly to allow an officer or soldier to go on duty when under the influence of intoxicating liquor, yet if he is placed on duty while partially under this influence, but without the fact being detected, and his drunkenness continues and is discovered while he remains upon the duty, he is strictly amenable under this Article, which prescribes, not that the party shall *become* drunk, but that he shall be "*found drunk*" on duty.[2]

Punishment.—No punishment except dismissal can legally be imposed upon an officer on a conviction of the offense made punishable by this Article. A sentence imposing, with dismissal, any further punishment, as imprisonment or forfeiture of pay, is, as to such additional penalty, unauthorized and inoperative, and should so far be disapproved.[3]

Since the provision requiring corporal punishment to be imposed upon enlisted men for violations of this Article have been abolished by statute, sentences in such cases have been discretionary with the court, subject, however, to the requirements of the President's order establishing limits of punishment for enlisted men of the Army.

ARTICLE 39. *Any sentinel who is found sleeping upon his post, or who leaves it before he is regularly relieved, shall suffer death, or such other punishment as a court-martial may direct.*

Article 34 of the Prince Rupert Code contained the following requirement: "A Centinel who is found sleeping in any Post, Garrison, Trench, or the like (while he should be upon his duty) shall suffer death, or such other punishment as Our General Court-Martial shall, by their sentence, inflict for the same." "And if a Centinel or Perdue shall forsake his place, before he be relieved or drawn off, or upon discovery of an Enemy shall not give warning to his quarters according to direction, he shall suffer death, or such other punishment as Our General Court-Martial shall think fit." This

Article. And so *held* of an officer reporting when drunk to the post commander for orders as officer of the day, after having been duly detailed as such. Dig. J. A. Gen., 37, par. 3.

But where an officer, after being specially ordered to remain with his company, absented himself from it and from his duty, and while thus absent became and was found drunk, *held* that he was not strictly chargeable with drunkenness on duty under this Article, but was properly chargeable with disobedience of orders and unauthorized absence, aggravated by drunkenness. *Ibid.*, par. 4.

[1] A charge of drunkenness on duty (drill) *held* not sustained where the party was found drunk, not at or during the drill, but at the hour appointed for the drill, which, however, by reason of his drunkenness, he did not enter upon or attend. The charge should properly have been laid under Article 62. *Ibid.*, 37, par. 2.

[2] Dig. J. A. Gen., 86, par. 1. *Held* that a soldier found drunk when on duty was properly convicted under this Article, though his drunkenness actually commenced before he went on the duty; his condition not being perceived till some time after he had entered upon the same. *Ibid.*

[3] *Ibid.*, 38, par. 10.

provision, which was repeated in the 32d of the King James Articles of 1686, appears in its present form as Article 6, Section 14, of the British Code of 1774, as Article 6, Section 13, of the American Articles of 1776, and as No. 46 of the Articles of 1806.

"The safety of an army always depends upon the due vigilance of sentinels, who are required to watch that others may sleep, whereby the camp may be seasonably refreshed from the daily labors of the field. But the requisite rest for this salutary purpose could not be freely enjoyed unless there should be a perfect confidence in the watchfulness of those who are assigned as the guardians of the repose and quiet of the camp. Hence penalties of the heaviest kind have been resorted to for punishing negligences and the more active faults that have the tendency to lessen the assurance that ought to be felt in the fidelity of sentinels. When it is considered what important interests are committed in time of hostilities to their charge, and how these may be injured or affected by willful absence or inattention, it is not unnatural that these crimes should have been, in all ages and in almost all countries, regarded as capital offenses."[1] They have been so regarded by our own Articles and by those prevailing in the British service from which our own were derived.

To prevent soldiers when performing the duty of sentinels from falling into indulgences that might dispose them to or surprise them into sleep, it was a part of the older military regulations that soldiers should not *sit down* upon their watch, upon pain of imprisonment. The Romans had a rule to the same effect, ordering that soldiers should *stand* or *walk* during the continuance of their duty; and modern generals have enjoined a similar practice to be observed in the armies which they have commanded.[2]

It is no defense to a charge of "sleeping on post" that the accused had been previously overtasked by excessive guard-duty;[3] or that an imperfect discipline prevailed in the command and similar offenses had been allowed to pass without notice;[4] or that the accused was irregularly or informally posted as a sentinel.[5] Evidence of such circumstances, however, may in general be received in extenuation of the offense, or, after sentence, may form the basis for a mitigation or partial remission of the punishment.[6] An officer who places or continues a soldier on duty as a sentinel when, from excessive fatigue, infirmity, or other disability, he is incompetent to perform the important duties of such a position will ordinarily render himself liable to charges.[7]

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[1] Samuel, 557.
[2] *Ibid.*, 558.
[3] See G. O. 74, Army of the Potomac, 1862; also G. O. cited in note 5, *post*.
[4] G. O. 74, Army of the Potomac, 1862.
[5] G. O. 10, Middle Mil. Dept., 1865; do. 166, Dept. of the South, 1864.
[6] See G. O. 10, 63, Dept. of Va. & No. Ca., 1863; do. 2, Northern Dept., 1865; do. 67, Dept. of Washington, 1866; do. 9, Dept. of the South, 1870; G. C. M. O. 44, Dept. of Texas, 1875.
[7] Dig. J. A. Gen., 39. See G. O. 15, Army of the Potomac, 1861; do. 62, Dept. of

Respect for Sentinels.—Respect for the person and office of a sentinel is as strictly enjoined by military law as that required to be paid to an officer.[1] As it is expressed in the Guard Regulations, "all persons of whatever rank in the service are required to observe respect toward sentinels."[2] Invested as the private soldier frequently is, while on his post, with a grave responsibility, it is proper that he should be fully protected in the discharge of his duty. To permit any one, of whatever rank, to molest or interfere with him while thus employed, without becoming liable to a severe penalty, would obviously establish a precedent highly prejudicial to the interests of the service.[3]

Duty of Sentinels.—A sentinel, in respect to the duties with which he is charged, represents the superior military authority of the command to which he belongs,[4] and whose orders he is required to enforce on or in the vicinity of his post. As such he is entitled to the respect and obedience of all persons who come within the scope of operation of the orders which he is required to carry into effect.

Over military persons the authority of the sentinel is absolute, and disobedience of his orders on the part of such persons constitutes a most serious military offense, and, being prejudicial in the highest degree to the interests of discipline, is punishable under the 62d Article of War.[5] Over prisoners committed to his charge the authority of the sentinel is derived in part from analogy to the function of the jailer at common law, and in part from the laws, regulations, and customs of service which create and regulate the duties and responsibilities of sentinels in charge of prisoners. If, therefore, a prisoner in his custody attempts to escape, it is the duty of the sentinel to use his utmost endeavor to prevent such escape, and he may not only use force for that purpose, but may resort to every means in his power

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Va. & No. Ca., 1863; G. C. M. O. 59, Dept. of Texas, 1872; do. 80, Dept. of the Missouri, 1875; Dig. J. A. Gen., 39.

[1] Dig. J. A. Gen., 703.

[2] Paragraph 813, Manual of Guard Duty.

[3] Dig. J. A. Gen., 703 So where, in time of war, a lieutenant ordered a soldier of his regiment who had been placed on duty as a sentry by superior authority to feed and take care of his horse, and, upon the latter respectfully declining to leave his post for the purpose, assailed him with abusive language, *held* that a sentence of dismissal imposed by a court-martial upon such officer, on his conviction of this offense, was fully justified by the requirements of military discipline. *Ibid.*

[4] "I consider a sentry," wrote the Duke of Wellington, "as a depository of the public authority at his station, and that all men, however high their rank, are bound to obey the orders he has to give them." Clode, Mil. Law, 98.

[5] Over persons subject to the Mutiny Act the sentry or guard must exercise that control which his own duty under the Articles requires from him and would justify, as every sentinel is posted in the camp or garrison with definite orders, which proceed from the highest military authority therein. These are assumed to be lawful orders, within the meaning of the 38th Article of War, and are binding upon all within the camp or garrison, and therefore are such as the sentry is bound to enforce. Disobedience either in the sentry or other such offender would subject both to punishment. If, therefore, any person subject to the Articles of War disobeys these orders, the sentry, or rather the officer of the guard upon the warning of the sentry, has authority to place the offender in confinement. II. Clode, Mil. Forces, 474.

to frustrate such attempt. It is his duty first, however, to call upon the prisoner to halt, and in the use of force he is governed by the same restrictions which apply to officers of the law in a similar case.[1]

[1] The case of the United States against Clark (31 Fed. Rep., 710) is pertinent as bearing upon the point under discussion. One Stone, a private soldier in the Army, had been tried by a general court-martial and sentenced to dishonorable discharge, and to confinement in the military prison for two years, and at the time of the occurrence was confined in the post guard-house at Fort Wayne, Michigan, awaiting execution of sentence. He attempted to escape from the guard at the formation at retreat, and was fired upon by the sergeant of the guard, Clark, with a view to prevent his escape, but received a mortal wound from the results of which he died the same evening. The case was heard by Judge Brown of the United States Circuit Court, sitting as a committing magistrate. The case reduced itself to the naked legal proposition as to whether the prisoner, Clark, was excused in law in killing the deceased.

Stone's "crime was one unknown to the common law, and the technical definitions of that law are manifestly inappropriate to cases which are not contemplated in the discussion of common-law writers upon the subject. We are bound to take a broader view, and to measure the rights and liabilities of the prisoner by the exigencies of the military service and the circumstances of the particular case. It would be particularly unwise for the civil courts to lay down general principles of law which would tend to impair the efficiency of the military arm, or which would seem to justify or condone conduct prejudicial to good order and military discipline. An army is a necessity—perhaps I ought to say an unfortunate necessity—under every system of government, and no civilized State in modern times has been able to dispense with one. To insure efficiency an army must be, to a certain extent, a despotism: each officer, from the general to the corporal, is invested with an arbitrary power over those beneath him, and the soldier who enlists in the army waives, in some particulars, his rights as a civilian, surrenders his personal liberty during the term of his enlistment, and consents to come and go at the will of his superior officers. He agrees to become amenable to the military courts, to be disciplined for offenses unknown to the civil law, to relinquish his right to trial by jury, and to receive punishments which to the civilian seem out of all proportion to the magnitude of the offense."

"While the punishment in Stone's case seems to the civilian quite disproportionate to the character of his offense as charged in the specification, which was no more than the utterance of a malicious falsehood when gauged by the penalties attached by Congress to the several offenses contained in the Articles of War, it does not seem so excessive; at any rate it was the lawful judgment of a court having jurisdiction of his case, and it was his duty to abide by it, or pursue his remedy in the method provided by law. In seeking to escape, the deceased was undoubtedly guilty of other conduct prejudicial to good order and military discipline, and was liable to such further punishment as a court-martial might inflict. In suffering him to escape, the prisoner became liable to Article 69, and, failing to use his utmost endeavor to prevent it, was himself subject to such punishment as a court-martial might direct. Did he exceed his authority in using his musket?"

The defense having urged that the finding of a court of inquiry, which had investigated the case of Sergeant Clark and exonerated him from blame on the ground that the shooting was done in the performance of military duty, was a complete bar to a prosecution, it was held by the court that such finding constituted no bar to a civil prosecution. The court then went on to say: "At the same time, I think that weight should be given, and in a case of this kind great weight, to the finding, as an expression of the opinion of the military court of the magnitude of Stone's offense, and of the necessity of using a musket to prevent his escape. I am the more impressed with this view from the difficulty of applying common-law principles to a case of this description. There is a singular and almost total absence of authority upon the subject of the power of a military guard in time of peace. But, considering the nature of military government, and the necessity of maintaining good order and discipline in a camp, I should be loath to say that life might not be taken in suppressing conduct prejudicial to such discipline."

After citing the cases of McCall *vs.* McDowell (1 Abb. 212, 218), U. S. *vs.* Carr (1 Woods, 484), Wilkes *vs.* Dinsman (7 How., 89), the case of Riggs *vs.* State (3 Cold., 85) was referred to. "Riggs was a private soldier who had been convicted of murder in killing a man while acting under the orders of his superior officer. The court held

In respect to persons not subject to military law the powers and duties of sentinels are less clear. In the execution of the orders with which he is charged by superior authority he is entitled to the respect and obedience of all persons within the scope of operation of the orders which he has received. In the enforcement of such orders he is or may be compelled to resort to forcible measures: first, to prevent ingress or trespass, in which case he is clearly entitled to use the same amount of force that a private person would be authorized to use in resisting a trespass, or in the defense of his property from violent entry; second, in the strict performance of his duty he may be assaulted, or opposed in the proper execution of his orders; in such case he may overcome such resistance by the use of so much force as is necessary for that purpose, and no more. Under the same limitations as to the kind and amount of force used, a sentinel may oppose or resist the escape of a prisoner who has been committed to his charge.[1]

ARTICLE 40. *Any officer or soldier who quits his guard, platoon, or division without leave from his superior officer, except in a case of urgent necessity, shall be punished as a court-martial may direct.*

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that an order illegal in itself, and not justifiable by the rules and usages of war, so that a man of ordinary sense and understanding would know, when he heard it read and given, that the order was illegal, would afford the private no protection for a crime under such order; but that an order given by an officer to his private which does not expressly and clearly show on its face, or the body thereof, its own illegality the soldier would be bound to obey, and such order would be a protection to him. I have no doubt that the same principle would apply to the acts of a subordinate officer performed in compliance with his supposed duty as a soldier; and unless the act were manifestly beyond the scope of his authority, or, in the words used in the above case, were such that a man of ordinary sense and understanding would know that it was illegal, that it would be a protection to him if he acted in good faith and without malice. As there is no reason to suppose that Clark was not doing what he conceived was his duty, and the act was not so clearly illegal that a reasonable man might not suppose it to be legal—indeed I incline to the opinion that it was legal,—and as there was an entire absence of malice, I think he ought to be discharged."

But even if this case were decided upon common-law principles the result would not be different. By the statutes of the State in which the homicide was committed, a felony is defined to be any crime punishable by imprisonment in the state prison. Stone had been convicted of a military offense, and sentenced to hard labor in the military prison for two years, and, so far as the analogies of the common law are applicable at all, he must be considered, in a case of this kind, as having been convicted of felony.

"It may be said that it is a question for a jury in each case whether the prisoner was justified by the circumstances in making use of his musket; and if this were a jury trial, I should submit that question to them; but as I am bound to find as a matter of fact that there is reasonable cause to believe the defendant guilty not merely of a homicide, but of a felonious homicide, and as I would, acting in another capacity, set aside a conviction if a verdict of guilty were rendered, I shall assume the responsibility of directing his discharge." U. S. *vs.* Clark, 31, Fed Rep., 710.

[1] In charging the jury in the case of the United States *vs.* Carr, Mr. Justice Woods instructed them to "inquire whether, at the moment he fired his piece at the deceased (a prisoner attempting to escape from the guard), with his surroundings at the time, the accused had reasonable ground to believe, and did believe, that the killing or serious wounding of the deceased was necessary to the suppression of a mutiny then and there existing, or of a disorder which speedily threatened to ripen into a mutiny. If he had reasonable ground so to believe, and did so believe, then the killing was not unlawful. * * * But it must be understood that the law will not require an officer charged with the order and discipline of a camp or fort to weigh with scrupulous nicety the amount of force necessary to suppress disorder. The exercise of a reasonable discretion is all that is required." U. S. *vs.* Carr, 1 Woods, 484.

This requirement appears as Article 10, Section 14, of the British Code of 1774, as Article 10, Section 13, of the American Articles of 1776, and as No. 50 of the Articles of 1806. The word "guard," which did not appear in the Articles of 1774 or in the American Code of 1776, appeared for the first time in the Articles of 1806. Save that the offense becomes more serious when committed by a member of a guard, as is indicated by the maximum penalty which may be imposed upon conviction, it is similar in its essential elements to the offense of leaving the place of parade, exercise, etc., without leave from a commanding officer, which is defined in the 33d Article, and which has been discussed in connection therewith.[1]

ARTICLE 41. *Any officer who, by any means whatsoever, occasions false alarms in camp, garrison, or quarters shall suffer death, or such other punishment as a court-martial may direct.*

In the war statutes of Richard II. it is declared to be a heavy offense to spread false alarms, and the provisions of those statutes have been continued in several succeeding regulations of the same description. Under the title of "disturbances and public cries," a punishment, according to the custom of the times, is awarded by the war articles of Henry V. against any one, of what condition, nation, and degree or dignity soever, who shall dare to make any clamor or disturbances by which the army may be disturbed. There are similar regulations which were in force during the reign of Henry VIII.[2]

In the ordinance of the Earl of Northumberland, issued during the reign of Charles I., there are two Articles comprehending most of the offenses included in the present Article: 1. "No man shall give a false alarm, or discharge a piece in the night, or make any noise, without a lawful cause, upon pain of death." 2. "No man shall presume to draw a sword without order, after the watch is set, upon pain of death."[3] In Article 30 of the Prince Rupert Code the above requirement appears in the following form: "No Souldier shall presume to make any alarm in the quarter, by shooting off his musquet in the night, after the watch is set, unless it be at an Enemy, upon pain of suffering such punishment as a Court-Martial shall think fit." The provision appears in its present form as Article 9, Section 14, of the British Code of 1774, as Article 9, Section 13, of the American Articles of 1776, and as No. 49 of the Articles of 1806. The British Articles of 1774 authorized the penalty of death to be imposed only upon conviction of the offense when serving in "foreign parts"; in Great Britain and Ireland, and in the Channel Islands, the punishment was discretionary with the court-martial.

The mischiefs which the Article is intended to prevent are, first, the disturbance of the quiet of the camp or quarters, whereby the troops might be deprived of that seasonable refreshment from sleep which nature and the

[1] See Article 33, *supra*. [2] Samuel, 574. [3] *Ibid.*, 575.

fatigues of war render requisite; and secondly, the harassing and vexing of the soldiers by unfounded alarms, as a consequence of which there might be a failure to give due heed to a genuine signal of alarm sounded upon a proper occasion, and in obedience to which their prompt and immediate services would be demanded.[1]

ARTICLE 42. *Any officer or soldier who misbehaves himself before the enemy, runs away, or shamefully abandons any fort, post, or guard which he is commanded to defend, or speaks words inducing others to do the like, or casts away his arms or ammunition, or quits his post or colors to plunder or pillage, shall suffer death, or such other punishment as a court-martial may direct.*

The several offenses made punishable by this Article can be traced in substance to Articles 21, 22, and 23 of the Prince Rupert Code, which were embodied in a somewhat modified form as the 32d, 33d, and 34th of the British Articles of 1672. In its present form the provision appeared as Articles 12 and 13, Section 14, of the British Code of 1774, as Articles 12 and 13 of the American Articles of 1776, and as No. 52 of the Articles, of 1806. Article 12, Section 14, of the British Code of 1774 and the corresponding Article of the American Code of 1776, having been substantially merged in Article 52 of the Code of 1806, were omitted from the revisions of 1806 and 1874.

Misbehavior before the enemy may be exhibited in the form of cowardice, or it may consist in a willful violation of orders, gross negligence or inefficiency, or in an act of treason or treachery, etc.[2] It need not be committed in the actual sight of the enemy, but the enemy must be in the neighborhood, and the act of offense must have relation to some movement or service directed against the enemy, or growing out of a movement or operation on his part. It may be committed in an Indian war, as well as in a foreign or civil war.[3]

The term "his arms or ammunition" does not refer to arms, etc., which are the personal property of the soldier, but means such as have been furnished to him by the proper officer for use in the service. The term is

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[1] Samuel, 575.

[2] The phases which this offense may assume are well illustrated in the cases published in the following General Orders of the War Department: G. O. 5, War Dept., 1857; do 183, *id.*, 1862; do. 18, 134, 146, 189, 204, 229, 282, 317, *id.*, 1863; do. 27, 64, *id.*, 1864; G. C. M. O. 90, 114, 272, 279, *id.*, 1864; do. 53, 91, 107, 124, 126. 134, 191, 421, *id.*, 1865.

[3] Dig. J. A. Gen., 40, par. 1. See the case reported in General Orders No. 5, War Department, 1857, in which a soldier was sentenced to be hung upon conviction of misbehavior before the enemy on the occasion of a fight with the Indians. O'Brien suggests that the somewhat vague and general statement of the several offenses set forth in this Article was intentional and done "in order that all kinds of misbehavior might be included within its scope, leaving it to the court-martial to assign to each particular fault its appropriate punishment." O'Brien, 142. See, also, Samuel, 592; Hough, Practice, etc., 336.

to be construed in connnection with the further similar expression "his post or colors."[1]

Pillaging and Plundering.—The act here made criminal involves, and is in substance an aggravated form of, the offense of "quitting a guard, platoon, or division" described and made punishable by the 40th Article of War. It includes a willful abandonment of his post on the part of an officer or enlisted man with the intention of committing acts of pillage and plunder. "The mischiefs produced or likely to be produced by this offense are many and obvious; among which may be numbered the diversion of the soldiery from the first and grand object, the pursuit and destruction of the enemy, for a trifling and pitiful gain; the dispersion often of the strength of an army to such wide and distant points as to render it impracticable for it to be collected again on a sudden emergency or need; and the easy extermination of the forces in this divided and isolated state. * * * The anticipation of any one of the results enumerated is sufficient to have induced the rulers or generals of ancient as well as modern armies to punish so dangerous an offense with the highest possible punishment."[2]

ARTICLE 43. *If any commander of any garrison, fortress, or post is compelled, by the officers and soldiers under his command, to give up to the enemy or to abandon it, the officers or soldiers so offending shall suffer death, or such other punishment as a court-martial may direct.*

The act of unlawful compulsion here defined and made punishable is in fact a form of mutiny, and as such properly chargeable under the 22d Article of War. This provision appears as Article 22, Section 14, of the British Code of 1774, as Article 22, Section 13, of the American Articles of 1776, and as No. 59 of the Articles of 1806.

ARTICLE 44. *Any person belonging to the armies of the United States who makes known the watchword to any person not entitled to receive it, according to the rules and discipline of war, or presumes to give a parole or watchword different from that which he received, shall suffer death, or such other punishment as a court-martial may direct.*

Article 33 of the Prince Rupert Code contained the requirement that "whoever makes known the Watch-word without order, or gives any other Word but what is given by the Officer, shall suffer death, or such other punishment as Our General Court-Martial shall think fit." The present provision appears as Article 15, Section 14, of the British Code of 1774, as Article 15, Section 13, of the American Articles of 1776, and as No. 53 of the Articles of 1806.

In the United States service the countersign is not published in orders, but is communicated confidentially to those who are entitled to receive it;

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[1] Dig. J. A. Gen., 40, par. 2. See Samuel, 592; Hough, Practice, etc., 336.
[2] Samuel, 585.

that is, to the officers and non-commissioned officers of the guard, to such members of the guard as are actually engaged in the performance of duty as sentinels, and to such other persons as are permitted or required, on account of their official duties, to pass and repass a line of sentinels at night.

The parole, which serves as a check upon the countersign, is given only to those who, by their office or duty, are entitled to visit and inspect guards or sentinels at night. It is used solely as a means of identification, but it cannot avail as a passport unless accompanied by the countersign. The term "watchword," as used in the Article, comprehends not only the countersign and parole, but any preconcerted word or signal issued, by competent authority, for a similar purpose in the performance of guard or outpost duty.

The offense may be committed by any military person who makes known the watchword to one not entitled to receive it, in accordance with existing orders and regulations, or who gives a parole or watchword different from that which he received. As no specific intent is set forth in the statute, the offense may be committed through negligence or inadvertence, or with the intent to convey the watchword to the enemy; the offense would be complete in either case.

ARTICLE 45. *Whosoever relieves the enemy with money, victuals, or ammunition, or knowingly harbors or protects an enemy, shall suffer death, or such other punishment as a court-martial may direct.*

ARTICLE 46. *Whosoever holds correspondence with or gives intelligence to the enemy, either directly or indirectly, shall suffer death, or such other punishment as a court-martial may direct.*

These provisions appear respectively as Articles 18 and 19, Section 14, of the British Code of 1774, as Articles 18 and 19, Section 13, of the American Articles of 1776, and as Nos. 56 and 57 of the Articles of 1806.

In view of the general term of description "whosoever" in these Articles it was held, during the late war, by the Judge-Advocate-General and by the Secretary of War, and has been held later by the Attorney-General, that civilians, equally with military persons, were amenable to trial and punishment by court-martial under either Article.[1] But the sounder construction would seem to be that, as the Articles of War are a code enacted for the government of the military establishment, they relate only to persons belonging to that establishment unless a different intent should be expressed or otherwise made manifest. No such intent is so expressed or made manifest. Persons not belonging to the military establishment may be proceeded

[1] Dig. J. A. Gen., 40, par. 1. Admitting this construction to be warranted so far as relates to acts committed on the theatre of war or within a district under martial law, it is to be noted that it is the effect of the leading adjudged cases to preclude the exercise of the military jurisdiction over this class of offenses when committed by civilians in places not under military government or martial law. See, especially, *Ex parte* Milligan, 4 Wallace, 121–123; Jones *vs.* Seward, 40 Barb., 563. *Ibid.*, 40, par. 1, note.

against for the acts mentioned in the Article, but it is by virtue of the power of another jurisdiction, namely, martial law; and martial law does not owe its existence to legislation, but to necessity.[1] The scope of these Articles under the legislation of 1776, apparently extending their application to civilians, seems to have been modified as a consequence of the adoption of the Constitution.

Relieving the Enemy.—The act of "relieving the enemy" contemplated by this Article is distinguished from that of trading with the enemy in violation of the laws of war; the former being restricted to certain particular forms of relief, while the latter includes every kind of commercial intercourse not expressly authorized by the government.[2] It is none the less relieving the enemy under this Article that the money, etc., furnished is exchanged for some commodity, as cotton, valuable to the other party.[3]

Holding Correspondence with the Enemy.—The offense of holding correspondence with the enemy is completed by writing and putting in progress a letter to an enemy, as to an inhabitant of an insurrectionary State during the late war; it not being deemed essential to this offense that the letter should reach its destination.[4] It is essential, however, to the offense of giving intelligence to the enemy that material information should actually be communicated to him; and such communication may be verbal, in writing, or by signals.[5]

"The rule which declares that war makes all the citizens or subjects of one belligerent enemies of the government and of all the citizens or subjects of the other applies equally to civil and to international wars." An insurrectionary State is no less "enemy's country," though in the military occupation of the United States, with a military governor appointed by the President.[6]

ARTICLE 47. *Any officer or soldier who, having received pay or having been duly enlisted in the service of the United States, deserts the same, shall, in time of war, suffer death, or such other punishment as a court-martial may direct; and in time of peace, any punishment excepting death which a court-martial may direct.*

The first statutory recognition of this offense in England dates from the middle of the fifteenth century, and will be found in an enactment[7] conferring the status of felony upon a soldier who deserted from the captain whom

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[1] Opin. J. A. Gen.
[2] Dig. J. A. Gen., 41, par. 4.
[3] *Ibid.*, par. 3.
[4] *Ibid.*, 42, par. 1.
[5] *Ibid.*, par. 2.
[6] The Service, 2 Wall., 274, 418. See, also, the opinion of the U. S. Supreme Court (frequently since reiterated in substance) as given by Grier, J., in the "Prize Cases," 2 Black, 666 (862), and by Chase, C.J., in the cases of Mrs. Alexander's Cotton; and Dig. Opin. J. A. Gen., 41, par. 2.
[7] 18 Henry VI., ch. 19.

he had contracted to serve. At a somewhat later date the penalties of this statute were extended to soldiers who had contracted to serve the crown.[1]

Although the crime of desertion was made a capital offense in the first Mutiny Act, the offense itself is not defined in that enactment, nor does it appear as a military offense in the Articles of War issued by James II. under the royal prerogative in 1686. The British Code of 1774 contains the following requirement: "All officers and soldiers who, having received pay or having been duly inlisted in Our Service, shall be convicted of having deserted the same, shall suffer death, or such other Punishment as by a Court-Martial shall be inflicted."[2] The provision appears as Article 1, Section 6, of the American Code of 1776 in the following words: "All officers and soldiers who, having received pay or having been duly enlisted in the service of the United States, shall be convicted of having deserted the same, shall suffer death, or such other punishment as by a court-martial shall be inflicted." With a slight verbal change in the first line, the Article appears as No. 20 of the Articles of 1806. Such modifications as the statute has undergone since 1806 have had chiefly to do with the penalty imposed upon conviction of the offense in time of peace.[3]

The Act of May 29, 1830,[4] contained the requirement that "no officer or soldier in the Army of the United States shall be subject to the punishment of death for desertion in time of peace." In cases in which the death-penalty was not inflicted prior to this enactment, flogging was frequently imposed upon enlisted men as a punishment for desertion in common with a number of the more serious military offenses; and, under the name of "corporal punishment," was more than once recognized in the Articles of 1806. The Act of May 16, 1812,[5] however, repealed so much of the Articles of 1806 as authorized the infliction of corporal punishment by stripes or lashes; but this requirement was itself repealed, as to the offense of desertion, by the Act of March 2, 1833.[6] Flogging, as a form of military punishment, was finally abolished by the Act of August 5, 1861,[7] which is embodied in the 98th Article of War.

The infliction of the death-penalty for desertion in time of peace, which was abolished in the United States service, as has been seen, by the Act of May 29, 1830,[8] continued to be inflicted in the United Kingdom until some

[1] 7 Henry VII., ch. 1; 3 Henry VIII., ch. 25; 2 and 3 Edward VI., ch. 2, which was re-enacted in 4 and 5 Phil. and Mary, ch. 3, sec. 8.

[2] Article 1, Section 6.

[3] An idea of the importance of the offense, and of the frequency of its occurrence in the Revolutionary armies, may be gained by an examination of the Resolutions of Congress of May 31, 1786, in respect to the pursuit and apprehension of deserters. They appear at the close of the clauses amendatory of the Articles of War in regard to the procedure of courts-martial in Volume II. of Winthrop's Military Law, page 97.

[4] 4 Stat. at Large, 418.

[5] 2 *ibid.*, 735.

[6] 4 *ibid.*, 647.

[7] 12 *ibid.*, 317.

[8] 4 *ibid.*, 418.

time after the beginning of the present century. It was authorized by statute in Great Britain until 1881 as a punishment for the offense of desertion when committed in active service,[1] but was abolished by implication in Section 44 of that enactment, which describes the different punishments authorized to be inflicted upon enlisted men. In time of peace, however, the punishment is graded according to the character of the offense; the maximum penalty being penal servitude, in addition to which an "ignominious discharge" may be imposed at the discretion of the court.[2]

Desertion is the most serious offense, involving unauthorized absence, that is known to military law; it is punished severely at all times, and in time of war may be punished with death. The Article describes the persons by whom the offense may be committed (who may be either officers or enlisted men), but contains no definition of the offense itself, which is determined by the custom of service. The offense may be committed (*a*) by an officer or a duly enlisted soldier, and (*b*) by one who, by the receipt of pay, allowances, or emoluments incident to his station in the service, has voluntarily accepted the military status.

Definition.—Desertion may therefore be defined as an unauthorized absenting of himself from the military service by an officer or soldier, with the intention of not returning. In other words, it is the violation of military discipline familiarly known as absence without leave (whether consisting in an original absenting without authority, or in an overstaying of a defined leave of absence), accompanied by an *animus remanendi* or *non revertendi;* this *animus* constituting the gist of the offense. In order to establish the commission of the specific offense, both these elements—the *fact* of the unauthorized voluntary withdrawal and the *intent* permanently to abandon the service—must be proved.[3]

The Intent.—The intent may be inferred, not indeed from the fact of absenting alone, but from the circumstances attending this fact, and here the duration of the absence is especially material. Thus the circumstance that the absence has been exceptionally protracted and quite unexplained will in general furnish a presumption of the existence of the necessary intent. An unauthorized absence, however, of a few hours, terminated by a forcible apprehension, may, under certain situations, be sufficient evidence of such intent and thus proof of a desertion; while an absence for a considerable interval, unattended by circumstances indicating a purpose to separate permanently from the service, or to dissolve the pending engagement of the soldier, may be proof simply of the minor included offense. In order to determine whether or not the officer or soldier absented himself with

[1] Manual Mil. Law, 30. For corporal punishments which may be imposed upon enlisted men in the British service, see *ibid.*, 751.
[2] Man. Mil. Law, 340–342; 1 Clode, Mil. Forces, 154.
[3] Dig. J. A. Gen., 337, par. 1.

the intent not to return, i.e., whether his offense was desertion or absence without leave, all the circumstances connected with his leaving, absence, and return (whether compulsory or voluntary) must be considered together. Each case must be governed by its own peculiar facts, and no general rule on the subject can be laid down.[1]

Essential Elements of the Offense.—The liability of the offender having been established,[2] the offense will be found to consist in absence without

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[1] Dig. J. A. Gen., 337, par. 1. Where an officer left his post on a three days' leave of absence and did not return to duty or report himself at the proper time, but absconded to Canada with a large amount of government funds, *held*, on his being arrested some months subsequently in the United States, that he was clearly chargeable with the offense of desertion.* So where an officer, having been guilty of sundry embezzlements and frauds, and become involved in debt, and being on the point of being placed in arrest, obtained, by means of wholly false representations, a brief leave of absence from his post for the expressed purpose of visiting a certain placed named, and was subsequently apprehended at a place quite other and much more distant than that designated, and while rapidly traveling *en route* for a still more remote locality,—*held*, in the absence of any evidence to rebut the presumption thus raised, that he was properly chargeable with having absented himself with the *animus* of a deserter. *Ibid.*, 338, par. 2.

But that a soldier has been *charged* with a desertion is no evidence that he has committed the offense. Thus *held* that the mere fact that a soldier, absent without authority, had been arrested and returned to his regiment *as a deserter* was no proof whatever of the offense charged. So *held* that a mere entry on a morning-report book, descriptive roll, or other official statement or return, that a soldier deserted on a certain day, was not legal evidence of a desertion by him, but was evidence only that he had been *charged* with desertion.† So a report from the Adjutant-General's Office containing extracts from the muster-rolls of a regiment on which a soldier of the same was noted as having deserted on a certain date, *held* incompetent evidence of the fact of desertion, upon a trial of the soldier for that offense.‡ Similarly *held* that the mere statement of a first sergeant, given as testimony on the trial of a soldier of his company charged with desertion, that the accused "deserted" at a certain time and place, was insufficient as proof of the offense charged, being, indeed, but an assertion of a conclusion of law. In such cases it is for the witness simply to state the facts and circumstances, so far as known to him, attending the act charged; it being the province of the court alone to arrive at the conclusion that the offense has been committed. To convict a deserter upon an accusation merely, however formally and officially the same may be made, would be as unwarranted in law as it would be unjust in fact. *Ibid.*, 339, par. 3.

The fact that a soldier has been dropped from the rolls as a deserter is not legal evidence to prove the fact of desertion on a trial for that offense. *Ibid.*, 346, par. 25.

[2] In a recent decision of the Supreme Court it was held that that the taking of the oath of enlistment "was the pivotal fact which operated to change the status and to charge the person so enlisting with the military duties and responsibilities incident to that relation."§ Proof of due enlistment will in general be afforded by the production of the contract of enlistment containing the oath above referred to. In the second case, the receipt of pay, allowances, etc., evidence such an acquiescence in or acceptance of the military status; and such acquiescence, if established in evidence, will suffice to fix upon the offender the military character, to the extent of making him liable to trial and punishment for desertion; and this independently of the manner in which he came into the service, whether by voluntary enlistment, by conscription, or as a member of a militia organization, in obedience to a call of the President, in time of war or public danger.

In a great majority of cases the proof required in support of the allegation that the accused was a duly enlisted soldier is limited to the testimony of one or more witnesses who identify him as a member of the company and regiment from which he deserted. It very rarely becomes necessary to produce a copy of the enlistment-paper in order to establish the fact of his "having been duly enlisted in the service of the United States."

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* See G. O. 382, War Dept., 1863.

† Compare G. C. M. O. 33, Dept. of the Missouri, 1875. See the title "Charges of Desertion," p. 429, *post*.

‡ Compare Hanson *vs.* S. Scituate, 115 Mass., 336.

§ *In re* Grimley, 137 U. S., 147.

leave, with the added intention of not returning. The fact of unauthorized absence is established as in absence without leave;[1] the intent not to return will in general be proved by circumstantial evidence as to the facts attending the departure of the accused, or the character and duration of the absence. It is the duty of an officer or enlisted man when absent from any cause to return at once to his post of duty; a failure to return, therefore, if persisted in for a sufficient time, will suffice to create the presumption of an intent not to return which constitutes the offense of desertion.[2]

The nature of the offense of desertion is well illustrated in cases of escape. The mere fact that a soldier while awaiting trial or sentence, or while under sentence (and not discharged from the service), escapes from his confinement is not proof of a desertion on his part, since he may have had in view some minor object, such as the procuring of liquor, etc.[3] But an escape followed by a considerable absence, especially if the soldier is obliged to be forcibly apprehended, is strong presumptive evidence of the existence of the intent necessary to constitute the crime. So, though the absence involved may be comparatively brief, the circumstances accompanying the escape, or attending the apprehension, may be such as to justify an equally strong presumption. An escape with intent not only to evade confinement but to quit the service, while the party is held awaiting proceedings for desertion, is of course a second or additional desertion.[4]

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[1] Every desertion includes an offense of absence without leave. See Dig. J. A. Gen., 345, par. 18.

[2] This period is fixed at ten days in paragraph 133, Army Regulations of 1895.

[3] See a case of this nature (an escaping in order to obtain liquor) in G. O. 32, Dept. of the South, 1873; and compare the case in do. 87, *id.*, 1872, in which a conviction of desertion is disapproved on the ground that the evidence showed "merely an escape from the guard-house without intention to leave the service or the vicinity of the post." And see in this connection Samuel, 324, where to be "discovered" after a short absence "in the pursuit of some accidental temporary object, though perhaps otherwise illicit," is instanced as not indicating an intent by the offender "to sever himself from the service." Dig. J. A. Gen., 340, par. 4, note 1.

[4] Dig. J. A. Gen., 340, par. 4. As to the nature of the offense which may be involved, there is properly no substantial distinction between an escape while awaiting trial or sentence and an escape while in confinement under sentence. An escape, indeed, from an imprisonment imposed by sentence would probably be more likely to be characterized by an *animus non revertendi* than an escape from a merely preliminary confinement in arrest. So an escape from confinement while awaiting trial upon a grave charge, which must entail upon conviction a severe punishment, would naturally be more generally so characterized than an escape from an arrest upon a charge of inferior consequence.

Undoubtedly in the great majority of cases escape is desertion; the precedents, however, show that it is not necessarily so;* and upon the mere fact alone that a soldier has liberated himself from military custody, it is not just to convict him of having designed to dissolve his contract and permanently abandon the military service. Of course an escape from legal military custody is always an offense, and the soldier who has escaped may (where his act does not amount to a desertion) be brought to trial for such offense as "conduct to the prejudice of good order and military discipline."

It need hardly be added that an escape from imprisonment under sentence, effected by a party who has been dishonorably discharged under the same sentence, cannot con-

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* See note 8, *supra*.

It is no defense to a charge of desertion that the soldier was induced to abandon the service by reason of ill treatment, want of proper food, etc.; such circumstances can only palliate, not excuse, the offense committed.[1] It is, however, a complete answer to a charge of desertion before a court-martial, that the accused has previously been "restored to duty without trial," as sanctioned by paragraph 128, Army Regulations, provided he has been so restored by competent authority, i.e., the commander who would have been authorized to convene a general court for his trial; otherwise, however, when so restored by a superior not duly authorized.[2]

Apprehension of Deserters.—The right of the United States to arrest and bring to trial a deserter from the military service is paramount to any right of control over him by a parent on the ground of his minority.[3] Such arrests may be made by military persons duly authorized for that purpose, or, under circumstances presently to be explained, by certain civil officers under authority conferred by statute.[4]

Rewards for the Apprehension of Deserters.—The reward made payable by Army Regulations[5] is not due merely on the apprehension of a deserter;

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stitute a desertion or other offense, the party at the time of escape being no longer in the military service. Dig. J. A. Gen., 340, par. 4.

Every desertion includes an absence without leave. Upon a trial for desertion the accused is tried also for the absence without leave involved in the offense charged. * If acquitted *without reservation* of the desertion, he is acquitted also of the lesser offense. If convicted, as he may be, of the lesser offense only under a charge of the greater, he is acquitted in law of the latter. *Ibid.*, 345, par. 18.

[1] Dig. J. A. Gen., 341, par. 6. So, in a case of a Swiss who, having enlisted in our Army, deserted after two years of service, *held* that it was no defense (though, under the circumstances, matter of extenuation) that his act had been induced by an intense *nostalgia* or *maladie du pays* So, in a case of a desertion by a German, *held*, that the fact that he had received a notification from the military authorities of the North German Empire to report at home for military duty, under the penalty of being considered as a deserter from the German army, constituted no defense to a desertion committed by him from our service. As to the principle of the right of expatriation as asserted in our public law, see Sec. 1999, Rev. Sts. *Ibid.*

Held to be no defense to a charge of desertion that the accused, at the time of the enlistment which he is charged with having abandoned, was an unapprehended deserter from the Army; an enlistment of a deserter being not void, but voidable only. Dig. J. A. Gen., 341, par. 5.

[2] *Ibid.*, par. 7. Enlisting in the enemy's army by prisoner of war is desertion, unless submitted to as a last resort to save life, or escape extreme suffering, or obtain freedom. Thus, in a case of a U. S. soldier who entered the service of the enemy from Andersonville, Ga., in the late war, *held* that the burden of proof was on him to establish that he resorted to such enlistment with design of effecting his escape and rejoining his own army; and that his abandoning such enlistment and coming within our lines at the first opportunity was material evidence of such a design. *Ibid.*, 345, par. 20. See, also, paragraphs 22, 23, and 24, p. 346, *ibid.*

[3] *Ibid.*, 345, par. 19; *In re* Cosenow, 37 Fed. Rep., 668; *In re* Kauffman, 41 *ibid.*, 876; *In re* Grimley, 137 U. S., 147.

[4] Such arrests, however, must be effected within the territorial jurisdiction of the United States, unless such arrest be authorized by international convention. See Dig. J. A Gen., 346, par. 21; 347, *ibid.*, par. 29.

[5] Paragraph 124, Army Regulations of 1895.

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* See 13 Opin. Att.-Gen., 460.

he must also be delivered "to an officer of the Army at the most convenient post or recruiting station." The fact of the offer of a reward for the arrest of a deserter does not authorize a breach of the peace or the commission of an illegal act in making the arrest.[1]

To entitle a person to the reward for the arrest of a deserter,[2] the party arrested must be still a soldier. Though at the time of the arrest the period of his term of enlistment may have expired, or he may be under sentence of dishonorable discharge, yet if he has not been discharged in fact, the official duly making the arrest, etc., on account of a desertion committed before the end of his term becomes entitled to the payment of the reward specified in the regulations.[3]

The soldier arrested must be a deserter and legally liable as such. If he has been judicially determined to be not a deserter, as where he has been convicted of absence without leave only,[4] or if, in view of the limitation of the 103d Article, he has a legal defense to a prosecution for desertion,[5] the reward is not payable for his apprehension.[6] The civil official takes the risk of the soldier being or not being an actual *deserter*. If he turns out to be not one, the official loses his time and disbursements, if any.[7]

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[1] Dig. J. A. Gen., 343, par. 12. See, in this connection, Clay *vs.* United States, Devereux, 25, in which an officer who, under the orders of a superior, had, without previously procuring proper authority to enter and search from a civil magistrate, broken into a dwelling-house for the purpose of securing the arrest of certain deserters, was held to have committed an unjustifiable trespass, and his claim to be reimbursed by the United States for the amount of a judgment recovered against him on account of his illegal act was disallowed by the Court of Claims.

[2] The amount of the reward is now fixed by statute at a sum not greater than ten dollars. Acts of August 6, 1894, (28 Stat. at Large, 239,) February 12, 1895, (28 *ibid.*, 659,) and March 16, 1896 (29 *ibid.*, 65). See, also, paragraph 124, Army Regulations of 1895.

The amount of the reward—to cite from G. O. 325, A. G. O. of 1863—is in full "for all expenses incurred in apprehending, securing, and delivering a deserter." Disbursements made by a *civilian*, where no arrest is effected, are at his own risk, and cannot legally be reimbursed by the military authorities. Dig. J. A. Gen., 344, par. 13.

[3] Similarly held where the soldier, arrested when at large as a deserter, had been sentenced to confinement (without discharge) and had escaped therefrom. *Ibid.*, 346, par. 26.

[4] See paragraphs 124 and 126, Army Regulations of 1895.

[5] See par. 124, *ibid.*, and G. O. 22, A. G. O., of 1893.

[6] Dig. J. A. Gen., 347, par. 27. Where the soldier when arrested had been absent but three days, and was still in uniform, and had not been reported or dropped as a deserter, and his company commander had not the "conclusive evidence" of his "intention not to return" referred to in par. 133, A. R. of 1895, *held* that there was not sufficient evidence that he was a deserter to justify the payment of the reward for his arrest and delivery. *Ibid.*, par. 28.

Where a civil official, in good faith and in compliance with military instructions, made the arrest and delivery of a deserter, who, however, was of the class of deserters specified in G. O. 22 of 1893, viz., those who "would have the right to claim exemption from trial and punishment" under the present 103d Article of War—a fact not within the knowledge of the official, and which he could not have ascertained, but who therefore had no legal claim for the payment of the reward—*held* that the reasonable expenses of such official incurred in the arrest, etc., might well be allowed by the Secretary of War out of the appropriation for the contingent expenses of the army. *Ibid.*, 349, par. 37.

[7] *Ibid.* Thus *held* that such official could have no claim to be reimbursed his expenses

The Arrest must be a Legal One.[1]—An act done in violation of law cannot be made the basis of a legal claim. The rule of the common law, that a peace officer or a private citizen may arrest a felon without a warrant, does not extend to the case of an offender against military law, who is punishable exclusively by a court-martial.[2] Under existing statutes such arrests may be made by a military officer,[3] or by a non-commissioned officer or private duly authorized to make the arrest, and by "any civil officer having authority under the laws of the United States or of any State, Territory, or District to arrest offenders, to summarily arrest a deserter from the military service of the United States and deliver him into the custody of the military authority of the general government."[4]

Delivery.—The delivery should be personal and manual on the part of the civil official,[5] and without qualification or condition; the several statutes

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incurred in making, in good faith, the arrest of a supposed deserter who was in fact a dishonorably discharged soldier. Dig. J. A. Gen., 349, par. 37.

[1] Dig. J. A. Gen., 347, par. 29. Thus *held* that the reward was not payable for an arrest made on the soil of Mexico, involving a violation of the territorial rights of that sovereignty. An act done in violation of law cannot be the basis of a legal claim. *Ibid.*

[2] Kurtz *vs.* Moffatt, 115 U. S., 487; Trask *vs.* Payne, 43 Barber, 569.

[3] *Ibid.* Hutchings *vs.* Van Bokkelen, 34 Maine, 126. While deserters may be arrested by officers or enlisted men, rewards for such apprehension are never payable to military persons.

[4] Sec. 2, Act of October 1, 1890 (26 Stat. at Large, 648). See, also, sec. 3, Act of June 16, 1890 (*Ibid.*, 157). An officer of the customs, empowered by law to make arrests of persons violating the revenue laws, but having no such general authority as is ordinarily possessed by peace officers "to arrest offenders" (according to the terms of the Act of October 1, 1890, authorizing certain civil officials to arrest deserters), *held* not entitled to be paid the regulation reward for the apprehension, etc., of a deserter from the Army. Dig. J. A. Gen., 348, par. 34.

Held that a justice of the peace of Idaho was not, by the laws of that State, a peace officer or authorized to arrest offenders, and was therefore not within the terms of the Act of October 1, 1890, or legally entitled to be paid the reward for the arrest, etc., of a deserter. Such justice may by his warrant authorize and thus cause arrests, but actual arrest pertains, under the laws of the State, to another class—sheriffs, constables, city marshals, and policemen. Similarly *held* in regard to an Indian who brought in a deserter to a military post in North Dakota, he having no authority under the laws of that State to make arrests. But *held* that a member of the Indian police, established under the regulations of the Indian Office, was a civil officer having authority to arrest offenders, and was entitled to the reward for the arrest of a deserter. *Ibid.*, par. 35.

[5] Dig. J. A. Gen., 347, par. 31. Where a soldier who had deserted was sentenced to a penitentiary as a horse-thief, and at the end of his term of imprisonment a U. S. marshal caused information that he was a deserter to be conveyed to the commander of a neighboring military post, who thereupon had him arrested and brought to the post, *held* that the marshal was not entitled to claim the reward. *Ibid.*

So where a civil official merely informed a captain of artillery that two soldiers serving in his battery were deserters from the battalion of engineers, *held* that, though such information was correct, the official was not entitled to the reward; and that the amount of the same, which had been erroneously paid him on the certificate of the captain, should be charged against the latter under paragraph 654, Army Regulations, 1895. *Ibid.*, par. 32.

Circular No. 11 (H. A.), 1883, declares that the reward shall not be paid where the deserter, at the time of arrest, "is serving in some other branch of the Army," etc. Thus *held* that the reward was not payable for the arrest of a deserter from the cavalry who, subsequently to his desertion, had enlisted in an infantry regiment in which he was serving at the date of the arrest. *Ibid.*, par. 36.

Where a civil official, having made an arrest of a deserter, concealed him from the military authorities, and afterwards permitted or connived at his escape, *recommended*

authorizing the payment of rewards contemplate such payment only in cases of complete and unconditional delivery. The circumstances attending such delivery must be such as to negative the idea of fraud or collusion on the part of the officer making the arrest.[1]

Where the deserter was not arrested by, but *surrendered* himself to, the civil official, who in good faith took him into custody and securely held and duly delivered him, it has been held that there had been a substantial apprehension for the purpose of reward, and that the reward was properly payable.[2]

Stoppage of Reward.—The legal liability imposed upon the soldier by Army Regulations,[3] to have the amount of the award stopped against his pay, is quite independent of the punishment which may be imposed upon him by sentence of court-martial on conviction of the desertion. Such stoppage is incident upon the conviction,[4] and need not be directed in the sentence; courts-martial indeed have sometimes assumed to impose it like an ordinary forfeiture of pay, but its insertion in the sentence adds nothing to its legal effect.[5]

Where a soldier charged with desertion is acquitted, or where, if convicted, his conviction is disapproved by the competent reviewing authority, he cannot legally be made liable for the amount of a reward paid or payable for his arrest as a deserter, since in such cases he is not a deserter in law.[6]

Where a soldier for whose apprehension as a supposed deserter the legal reward has been paid is subsequently brought to trial upon a charge of desertion, and is found guilty, not of desertion, but of the lesser and distinct offense of absence without leave only, he clearly cannot legally be held liable for the reward by a stoppage of the amount against his pay. In such a case, the instrumentality resorted to by the United States for determining the nature of his offense—the court-martial—having pronounced that it was not desertion, the government is bound by the result, and to visit upon him a penalty to which a deserter only can be subject would be grossly arbitrary and wholly unauthorized. Moreover such action would be directly at variance with the terms of the Army Regulations,[7] which fix such liability

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that the Attorney-General be requested to instruct the proper U. S. district attorney to initiate proceedings under Sec. 5455, Revised Statutes. Dig. J. A. Gen., 345, par. 17.

[1] The reward should be withheld where there is evidence of collusion between the alleged deserter and the civil official. *Advised* that a suspicion of such collusion was properly entertained in a case where the soldier, after an absence of but a few days, voluntarily surrendered himself, at or near the post of delivery, to a policeman, who turned him over, without expense or difficulty, to the military authorities, who did not treat him as a deserter, but caused him to be charged, tried, and convicted as an absentee without leave only. *Ibid.*, p. 348, par. 33.

[2] *Ibid.*, 347, par. 30. See, also, Circular No. 1, H. Q. A., 1886.

[3] Paragraph 126, Army Regulations of 1895.

[4] 16 Opinions Att.-Gen., 474; Dig. J. A. Gen., 344, par. 16.

[5] Dig. J. A. Gen., 344, par. 14.

[6] *Ibid.*, par. 15.

[7] Par. 126, A. R., 1895.

upon the soldier tried in the event only of his conviction of desertion,[1] unless indeed the sentence of the court expressly forfeits the amount.[2]

Statutory Consequences of Desertion.—Certain statutory consequences follow, by operation of law, and not otherwise, upon *conviction* of the offense of desertion. These are: (1) the obligation to make good the time lost;[3] (2) forfeiture of the rights of citizenship;[4] (3) incapacity to hold office under the United States;[5] (4) forfeiture of retained pay and deposits.[6] As in the case of absence without leave, a person absent in desertion forfeits all pay and allowances accruing during such unauthorized absence, but these forfeitures are incurred on account of the violation of the terms of the contract of enlistment, not by operation of law, but because they have not been earned.

The forfeiture of the rights of citizenship, and the incapacity to hold

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[1] 16 Opin. Att.-Gen., 474.

[2] Dig. J. A. Gen., 344, par. 16. A deserter is not chargeable, under par. 126, A. R. 1895, with the expenses of transportation therein specified, if his conviction has been duly *disapproved;* such disapproval being tantamount to an acquittal. *Ibid.*, 349, par. 38.

The *expense of the transportation* of a convicted deserter, incurred in the course of the execution of his sentence, is not chargeable against the deserter under par. 126, A. R. 1895, but must be borne by the United States. *Ibid.*, par. 39.

[3] Every soldier who deserts the service of the United States shall be liable to serve for such period as shall, with the time he may have served previous to his desertion, amount to the full term of his enlistment; and such soldier shall be tried by a court-martial and punished, although the term of his enlistment may have elapsed previous to his being apprehended and tried. 48th Art. of War.

[4] All persons who deserted the military or naval service of the United States and did not return thereto or report themselves to a provost-marshal within sixty days after the issuance of the proclamation by the President dated the eleventh day of March, eighteen hundred and sixty-five, are deemed to have voluntarily relinquished and forfeited their rights of citizenship, as well as their right to become citizens; and such deserters shall be forever incapable of holding any office of trust or profit under the United States, or of exercising any rights of citizens thereof. Section 1996, Revised Statutes.

No soldier or sailor, however, who faithfully served according to his enlistment until the nineteenth day of April, eighteen hundred and sixty-five, and who, without proper authority or leave first obtained, quit his command or refused to serve after that date, shall be held to be a deserter from the Army or Navy; but this section shall be construed solely as a removal of any disability such soldier or sailor may have incurred, under the preceding section, by the loss of citizenship and of the right to hold office, in consequence of his desertion. Section 1997, *ibid.*

[5] Every person who hereafter deserts the military or naval service of the United States, or who, being duly enrolled, departs the jurisdiction of the district in which he is enrolled, or goes beyond the limits of the United States, with intent to avoid any draft into the military or naval service lawfully ordered, shall be liable to all the penalties and forfeitures of section nineteen hundred and ninety-six. Section 1999, *ibid.*

[6] Any enlisted man of the Army may deposit his savings, in sums not less than five dollars, with any Army paymaster, who shall furnish him a deposit-book in which shall be entered the name of the paymaster and of the soldier, and the amount, date, and place of such deposit. The money so deposited shall be accounted for in the same manner as other public funds, and shall pass to the credit of the appropriation for the pay of the Army, and shall not be subject to forfeiture by sentence of court-martial, *but shall be forfeited by desertion*, and shall not be permitted to be paid until final payment on discharge, or to the heirs or representatives of a deceased soldier, and that such deposit be exempt from liability for such soldier's debts: *provided* that the Government shall be liable for the amount deposited to the person so depositing the same. Section 1305, Rev. Stat. See, also, Sec. 2438, *ibid.*

office under the United States, imposed upon deserters by several statutes,[1] can be incurred only upon, and as incident to, a *conviction* of desertion by a general court-martial, duly approved by competent authority.[2] These disabilities, though attaching to every such conviction, may be removed by an executive pardon of the offender.[3]

The forfeiture of pay and allowances prescribed for deserters by paragraphs 132, 1380, and 1381 of the Army Regulations of 1895 can be imposed, in any case, only upon a satisfactory ascertainment of the fact of desertion. The same may indeed legally be enforced in the absence of an investigation by a military court, as, for instance, upon the restoration of a deserter as such to duty without trial, by the order of competent authority, under paragraph 132 of the Army Regulations of 1895. But in general, in this case as in that of the statutory liability, the forfeiture can safely be applied only upon the trial and conviction by court-martial of the alleged deserter.[4]

Approval of Conviction Necessary.—The conviction must of course be duly approved; if it be disapproved, the soldier cannot legally be subjected to the forfeiture, since he cannot be treated as a deserter in law. Nor can he be subjected to the forfeiture if he is acquitted, though the finding be disapproved by the reviewing authority. A removal, in orders of the War Department, of a charge of desertion entered by mistake upon the rolls against a soldier operates to relieve him of any and all stoppages which have been charged against his pay account for forfeitures authorized by the Army Regulations in cases of deserters.[5]

A deserter cannot legally be subjected to any forfeiture other than those prescribed by statute or army regulation. He incurs, for example, no forfeiture of his own personal property[6] as a consequence of desertion.

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[1] Sections 1996 and 1998, Revised Statutes.

[2] Such is believed to have been the uniform course of ruling in the civil courts. See State *vs.* Symonds, 57 Maine, 148; Holt *vs.* Holt, 59 *id.*, 464; Severance *vs.* Healy, 50 N. Hamp., 448; Gotcheus *vs.* Matthewson, 61 N. York, 420 (and 5 Lansing, 214; 58 Barb., 152); Huber *vs.* Reilly, 53 Pa. St., 112; McCafferty *vs.* Guyer, 59 *id.*, 110; Kurtz *vs.* Moffitt, 115 U. S., 501. As to the liability *to make good to the United States the time lost by a desertion*, also incident upon a conviction of this offense, see 48th Article, §§ 1–5.

[3] Dig. J. A. Gen., 342, par. 8.

[4] *Ibid.*, par. 9. The restoration of a deserter to duty without trial, under paragraph 132, Army Regulations of 1895, does not operate as an acquittal, or relieve the deserter from the forfeitures of pay including retained pay) incurred under paragraphs 1380 and 1381 of the Army Regulations (1895). *Ibid.*, 342, par. 8.

[5] *Ibid.*

[6] *Ibid.*, 343, par. 10. So where certain property left by a deserter in his quarters was sold by the authorities of the post with intent to devote the proceeds to the post fund, *held* that such proceeds, upon the subsequent arrest of the deserter, should be paid over to him. So a soldier by reason of having deserted does not forfeit bounty money which has been paid him upon enlistment or subsequently, or any other money found in his possession upon his arrest. And such money cannot legally be withheld from him, to be appropriated to a regimental or post fund or any other purpose, but, being his own personal property, unaffected by his offense, must be left in his possession. *Ibid.*

Charges of Desertion.—It has been seen that the characteristic intent in the offense of desertion is established by the facts attending the unauthorized absence of the deserter from his post of duty. When those circumstances are such as to lead to the belief that the offense of desertion has been committed, that fact is noted upon the records of the command to which the alleged deserter belonged, and such entry constitutes what is known in the military service as a *charge of desertion.* The entry upon the reports and returns is in no sense a military charge upon which the accused can be brought to trial; it is the formal, official record of a fact, made by the proper officer in obedience to law and regulations.

The effects of such a charge, however, are important, since it operates to suspend during its existence all benefits that would accrue to the accused as a consequence of the contractual relation established by him at his enlistment into the military service. In so far as the deserter is concerned, it is also a criminal breach of the enlistment contract. He ceases to be entitled to pay, allowances, or other benefits accruing upon enlistment, his time ceases to run, all payments cease, even of sums due at the date of his desertion, and he becomes liable to apprehension and trial for the crime of desertion, under the 47th Article of War.

The charge so raised can only be completely removed or negatived by an acquittal after a trial by a general court-martial. By several statutes,[1] however, the Secretary of War is authorized to remove the charges of desertion standing against the names of certain soldiers who served in the War of the Rebellion or the War with Mexico. The action of the War Department under these statutes operates rather to do away with the consequences of the charge than to blot out the charge itself, which, being in its nature a fact, cannot be changed by legislation.

A pardon does not operate retroactively, and cannot, therefore, "remove a charge" of desertion. It does not wipe out the fact that the party did desert, nor can it make the record say that he did not desert. It cannot change facts of history. Nor can a pardon restore amounts which have been actually forfeited by desertion.[2]

The restoration of a deserter to duty without trial[3] does not operate as an acquittal, or relieve the deserter from the forfeitures of pay (including retained pay) incurred by operation of law.[4]

ARTICLE 48. *Every soldier who deserts the service of the United States shall be liable to serve for such period as shall, with the time he may have served previous to his desertion, amount to the full term of his enlistment;*

[1] Acts of August 7, 1882, (22 Stat. at Large, 347,) July 5, 1884, (23 *ibid.*, 119,) May 17, 1886, (24 *ibid.*, 51,) March 2, 1889, (25 *ibid.*, 869,) March 2, 1891, (26 *ibid.*, 894,) July 27, 1892, (27 *ibid.*, 278,) and March 2, 1896 (28 *ibid.*, 814). See, also, Dig. J. A. Gen., 342, par. 9.

[2] Dig. J. A. Gen., 351, par. 47.

[3] Par. 132, Army Regulations of 1895.

[4] Dig. J. A. Gen., 351, par. 48; paragraphs 1380 and 1381, A. R. 1895.

and such soldier shall be tried by a court-martial and punished, although the term of his enlistment may have elapsed previous to his being apprehended and tried.

This Article, unlike those which have already been discussed, was neither borrowed nor adapted from a corresponding provision of the British Military Code. It appeared in statutory form in 1802,[1] but was repeated in 1812 in connection with an enactment authorizing an increase of the military establishment, made necessary by the existence of the war with England.

The liability to make good the time lost by his unauthorized absence attaches to a deserter, as such, whatever his status or the disposition of his case. This liability is quite distinct from the liability to punishment. It results from the violation of his contract, and this contract is subject to the law of specific performance. It attaches although he may not have been convicted of the offense, although the statute of limitation may have taken effect in his case (whether or not sustained as a plea on a trial by court-martial), although he may have been pardoned, and although he may have been restored to duty without trial. The liability does not attach, however, to mere absentees without leave.[2] except after conviction. (1.R.

As a conviction is not essential or material to the enforcement of the obligation enjoined by this Article, so if there be a trial and conviction it is not essential or material that the completing of the term of service should be specifically prescribed as a penalty in the sentence. And so a deserter accepting a restoration to duty without trial is liable to be required to make good the time lost by his desertion though the order restoring him makes no mention of such a condition.[3]

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[1] See Sec. 18, Act of March 16, 1802, (2 Stat. at Large, 136,) Act of January 11, 1812, (2 Stat. at Large, 673,) and January 29, 1813, (2 *ibid.*, 796).

[2] Dig. J. A. Gen., 43, par. 8. The liability to make good to the United States the time lost by desertion, enjoined by the first clause of this Article, is independent of any punishment which may be imposed by a court-martial, on conviction of the offense; it need not, therefore, be adjudged or mentioned in terms in a sentence.* If the conviction is disapproved, the legal status of the accused is the same as if he had been acquitted, and the obligation of additional service is of course not incurred. *Ibid.*, 42, par. 1.

Where a deserter was sentenced to imprisonment for the "balance of his term," *held* that he was not absolved from the obligation to make good time lost; these words referring to the balance of the term of his original enlistment. *Ibid.*, par. 2.

The time passed by a deserter in confinement under sentence cannot be computed as a part of the period required by the Article to be made good to the United States, such time not being a time of military service, but of punishment. Nor can the period of confinement be credited where the sentence is remitted before it is fully executed. So time passed by the deserter in arrest or confinement (or in hospital) while waiting trial or action upon his sentence cannot be so computed. *Ibid.*, 43, par. 3.

[3] *Ibid.*, 44, par. 9. The enforcement of the liability, where enforced at all, is generally postponed till after the execution of the punishment (if any) imposed upon the deserter by his sentence. A deserter may still be required to make good the time included in his unauthorized absence from the service, although his term of enlistment has expired

* Until a period so late as 1843 the opposite view prevailed, and the statute was regarded as creating a liability which could only be made operative by the sentence of a court-martial. See G. O. 45, A. G. O., 1843.

The United States may waive the liability imposed by the first clause of the Article. It is in fact waived where the deserter, without being required to perform the service, is discharged by one of the officials authorized by Article 4 to discharge soldiers. So it is waived where the soldier is adjudged to be dishonorably discharged by sentence of court-martial, and this punishment is duly approved and thereupon executed.[1]

The provision of the second clause of this Article applies only to desertions committed while the soldier is duly in the service and before his term of enlistment has expired. A deserter who has been duly discharged from the service of course does not remain amenable to trial under this Article.[2]

The liability to trial and punishment imposed by the second clause of the Article is subject to the limitation of prosecutions prescribed by Article 103.[3]

ARTICLE 49. *Any officer who, having tendered his resignation, quits his post or proper duties without leave, and with intent to remain permanently absent therefrom, prior to due notice of the acceptance of the same, shall be deemed and punished as a deserter.*

This requirement, like that contained in the preceding Article, is new to the United States service. It first appeared in statutory form as Section 2 of the Act of August 5, 1861,[4] and in its present form as No. 49 of the Articles of 1874.

To constitute an offense of constructive desertion under this Article, the tender of resignation and the subsequent departure of the officer from his command must be established; the latter act being combined with the intent of remaining "permanently absent therefrom." This would be shown, as is the case of the intent in desertion, by the circumstances attending the departure of the officer and by his subsequent conduct. When these elements have been established a case of constructive desertion exists, to which the penalties consequent upon conviction of desertion attach by operation of law.

ARTICLE 50. *No non-commissioned officer or soldier shall enlist himself in any other regiment, troop, or company without a regular discharge from the regiment, troop, or company in which he last served, on a penalty of being reputed a deserter, and suffering accordingly. And in case any officer shall knowingly receive and entertain such non-commissioned officer or soldier, or shall not, after his being discovered to be a deserter, immediately confine him and give notice thereof to the corps in which he last served, the said officer shall, by a court-martial, be cashiered.*

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pending a term of confinement adjudged him by court-martial on conviction of his offense, provided he has not been discharged. Dig. J. A. Gen., 43, par. 4.

[1] *Ibid.*, par. 5.

[2] *Ibid.*, par. 6.

[3] *Ibid.*, par. 7.

[4] Section 2, Act of August 5, 1861 (12 Stat. at Large, 316).

Although this requirement had formed a part of the English Articles of War for a number of years, it was not formally embodied in the Mutiny Act until 1783. It will be found as Article 3, Section 6, of the British Code of 1774, as Article 3, Section 5, of the American Articles of 1776, and as No. 22 of the Articles of 1806.

This Article in its first clause does not create a specific offense, or one distinct from the desertion made punishable in the 47th Article, but declares in effect that a soldier who abandons his regiment shall be deemed none the less a deserter although he may forthwith re-enlist in a new regiment. It does not render the act of re-enlistment a desertion, but simply makes the re-enlistment, under the circumstances indicated, *prima facie* evidence of a desertion from the previous enlistment from which the soldier has not been discharged, or, more accurately, evidence of an intent not to return to the same.[1] The object of the provision, as it originally appears in the British Code, apparently was to preclude the notion, that might otherwise have been entertained, that a soldier would be excused from repudiating or departing from his original contract of enlistment, provided he presently renewed his obligation in a different portion of the military force.[2]

The second clause of the Article gives an added sanction to the first, by making it an offense, highly penal in character, "in case any officer shall knowingly receive and entertain such non-commissioned officer or soldier, or shall not, after his being discovered to be a deserter, immediately confine him and give notice thereof to the corps in which he last served, the said officer shall by a court-martial be cashiered." The gravity of the offense is thus seen to be measured by the mandatory sentence of cashiering which a court-martial is required to impose upon an officer found guilty of having received or entertained a deserter, or, knowing a soldier to be such, in not causing him to be immediately confined, and notice given to the corps in which he last served.[3]

ARTICLE 51. *Any officer or soldier who advises or persuades any other officer or soldier to desert the service of the United States shall, in time of war, suffer death, or such other punishment as a court-martial may direct;*

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[1] Dig. J. A. Gen., 44, par. 1. See Gen. Court-martial Order No. 129, Department of the Missouri, 1872; do. 77, *idem*, 1874.

[2] *Ibid.*, 45, par. 1. See, also, Samuel, 330, 331. The provision was first embodied in the Mutiny Act in 1783.

Held that an enlisted marine, who abandoned the marine corps without a discharge and enlisted in the Army, could not be "reputed a deserter" according to the terms of this Article; but *advised* that he be turned over to the commandant of that corps for the proper disposition and action. Dig. J. A. Gen., 45, par. 2.

Where a soldier enlisted in a certain regiment after being officially notified that he was duly discharged from a previous enlistment, but without having received the written certificate and evidence of his discharge, which by mistake or accident had not been delivered to him as required by Article 4, *held* that he could not properly be "reputed" or charged as a deserter. *Ibid.*, par. 3.

[3] Samuel, 331, 332.

and in time of peace, any punishment, excepting death, which a court-martial may direct.

This Article is in substance a re-enactment of Article 4, Section 6, of the British Code of 1774, Article 4, Section 6, of the American Articles of 1776, and No. 23 of the Articles of 1806, to which the requirement of the Act of May 29, 1830,[1] has been added, prohibiting the imposition of the death penalty for the offense of desertion when committed in time of peace.

The acts described, which in this Article are made substantive military offenses, are such in fact as to confer upon those committing them the character of accessories before the fact to the crime of desertion. By the terms of the original Article it was not necessary that there should have been an actual desertion to constitute the offense contemplated; it was sufficient, without looking to the consequence (which depended not on the will of the person counselling the act), that the advice be given or the persuasion used; for in that is the entire offense, so far as it can connect itself with the person giving the counsel.[2] In our own service, however, the provision has been more strictly construed, and it has been held that to constitute the offense of advising to desert it is not essential that there should have been an actual desertion by the party advised. It has been held otherwise, however, as to the offense of persuading to desert: to complete this offense the persuasion should have induced the act.[3]

ARTICLE 52. *It is earnestly recommended to all officers and soldiers diligently to attend divine service. Any officer who behaves indecently or*

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[1] Act of May 29, 1830 (4 Stat. at Large, 418).

[2] Samuel, 339.

[3] Dig. J. A. Gen., 45, par. 1. A declaration made by one soldier to another of a willingness to desert with him in case he should decide to desert, held not properly an advising to desert, in the sense of this Article. *Ibid.*, 45, par. 1.

Section 5455, Revised Statutes, contains the requirement that "every person who entices or procures, or attempts or endeavors to entice or procure, any soldier in the military service of the United States, or who has been recruited for such service, to desert therefrom, or who aids any such soldier in deserting or attempting to desert from such service, or who harbors, conceals, protects, or assists any such soldier who may have deserted from such service, knowing him to have deserted therefrom, or who refuses to give up and deliver such soldier on the demand of any officer authorized to receive him, shall be punished by imprisonment not less than six months nor more than two years, and by a fine not exceeding five hundred dollars; and every person who entices or procures, or attempts or endeavors to entice or procure, any seaman or other person in the naval service of the United States, or who has been recruited for such service, to desert therefrom, or who aids any such seaman or other person in deserting or in attempting to desert from such service, or who harbors, conceals, protects, or assists any such seaman or other person who may have deserted from such service, knowing him to have deserted therefrom, or who refuses to give up and deliver such sailor or other person on the demand of any officer authorized to receive him, shall be punished by imprisonment not less than six months nor more than three years, and by a fine of not more than two thousand dollars, to be enforced in any court of the United States having jurisdiction." *

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* Where a civil official, having made an arrest of a deserter, concealed him from the military authorities, and afterwards permitted or connived at his escape, recommended that the Attorney-General be requested to instruct the proper United States district-attorney to initiate proceedings under Section 5455, Revised Statutes. Dig. Opin. J. A. Gen., 345, par. 17.

irreverently at any place of divine worship shall be brought before a general court-martial, there to be publicly and severely reprimanded by the president thereof. Any soldier who so offends shall, for his first offense, forfeit one sixth of a dollar; for each further offense he shall forfeit a like sum, and shall be confined twenty-four hours. The money so forfeited shall be deducted from his next pay, and shall be applied, by the captain or senior officer of his troop, battery, or company, to the use of the sick soldiers of the same.

The first provision respecting divine service, in the Articles of 1662–1663, required chaplains to "read the Common Prayers of the Church of England to the Soldiers respectively under their charge, and to preach to them as often as with convenience shall be thought fit; and if any neglect his duty herein, he to be punished at discretion; and every Officer or Soldier absent from prayers shall, for every absence, lose a day's pay to His Majesty." The direction for daily service was not of long continuance, for the Articles of 1673 made mention only of Sundays and of public festivals and fasts. The requirement assumed its present form in the Articles of 1717 and appears as Article 1, Section 1, of the British Code of 1774, as Article 2, Section 1, of the American Articles of 1776; the positive command of the British Article being modified in form to an earnest recommendation, in which shape it appears as No. 2 of the Articles of 1806. The several codes prior to and including that of 1806 contained a requirement imposing a special penalty upon chaplains for a failure to perform their duties by reason of unauthorized absence. As chaplains were placed upon the footing of commissioned officers of the Army, by the Act of April 9, 1864,[1] they became subject to the same penalties for absence without leave as applied to other commissioned officers, and this provision was therefore omitted from the Articles of War in the revision of 1874.

ARTICLE 53. *Any officer who uses any profane oath or execration shall, for each offense, forfeit and pay one dollar. Any soldier who so offends shall incur the penalties provided in the preceding article; and all moneys forfeited for such offenses shall be applied as therein provided.*

Not a little space is devoted in the earlier military codes to provisions calculated to insure respect for the Articles of Faith of the Church of England. By the middle of the eighteenth century these clauses had been considerably reduced in number and severity; such as remained, however, were adopted by Congress in the Articles of 1776. Mere profanity, as distinguished from blasphemy, and profanation of the Articles of Faith, was forbidden in Article 3 of the Prince Rupert Code in the following terms: "whosoever shall use any unlawful oath or Execration (whether Officer or Souldier), shall incur the penalty as exprest in the 1st Article" (enjoining attendance upon divine service)." This provision is repeated in the Articles

[1] 13 Stat. at Large, 46.

of James II., and appears as Article 2, Section 1, of the British Code of 1774, and as Article 3, Section 1, of the American Articles of 1776, in which, for the first time, was embodied the requirement which is contained in the first clause of the present Article imposing a fine of one dollar for each offense, when committed by a commissioned officer. The provision was reenacted in the Articles of 1806 and 1874 without substantial change.

ARTICLE 54. *Every officer commanding in quarters, garrison, or on the march shall keep good order, and, to the utmost of his power, redress all abuses or disorders which may be committed by any officer or soldier under his command; and if, upon complaint made to him of officers or soldiers beating or otherwise ill-treating any person, disturbing fairs or markets, or committing any kind of riot, to the disquieting of the citizens of the United States, he refuses or omits to see justice done to the offender, and reparation made to the party injured, so far as part of the offender's pay shall go toward such reparation, he shall be dismissed from the service, or otherwise punished, as a court-martial may direct.*

This provision appears as Article 2, Section 9, of the British Code of 1774, as Article 1, Section 9, of the American Articles of 1776, and as No. 32 of the Articles of 1806.

"It is at all times most desirable that an army whilst marching through a foreign territory, and much more through its own country or that of an ally, should conciliate the people by its peaceable demeanor and render the progress through it as little inconvenient or prejudicial to the common inhabitants as may be. The same is also to be desired of its conduct during its temporary sojournment in quarters or in garrison."[1]

This Article is directory upon the commanding officers of military posts or troops in the field in two particulars: *First*, in requiring justice to be done to the offender. This duty is performed by bringing the accused to trial by court-martial under appropriate charges; *Second*, in requiring reparation to be made to the party injured, to the extent of the offender's pay. This is a summary proceeding which is regulated in a proper case by the terms of General Orders of the War Department.

Procedure.—The procedure under this Article[2] is as follows: The citizen aggrieved tenders a "complaint" under oath, charging the injury against a particular soldier or soldiers, described by name (if known), regiment, etc., and accompanied by evidence of the injury, and of the instrumentality of the person or persons accused. If such evidence be satisfactory, the commanding officer has the damages assessed by a board, and makes order for such stoppage of pay as will be sufficient for the "reparation" enjoined by the Article. The commander must have a proper case presented to him; he cannot legally proceed of his own motion.[3]

[1] Samuel, 539.
[2] See General Orders No. 35, War Department, of 1868.
[3] Dig. J. A. Gen., 47, par. 7. The pay of the offender or offenders can be resorted to

The stoppage contemplated is quite distinct from a punishment by fine, and it cannot affect the question of the summary reparation authorized by the Article, that the offender or offenders may have already been tried for the offense and sentenced to forfeiture of pay. In such a case, indeed, the forfeiture, as to its execution, would properly take precedence of the stoppage. On the other hand, where the stoppage is first duly ordered under the Article, it has precedence over a forfeiture subsequently adjudged for the offense.[1]

ARTICLE 55. *All officers and soldiers are to behave themselves orderly in quarters and on the march; and whoever commits any waste or spoil, either in walks or trees, parks, warrens, fish-ponds, houses, gardens, grain-fields, inclosures, or meadows, or maliciously destroys any property whatsoever belonging to inhabitants of the United States, (unless by order of a general officer commanding a separate army in the field,) shall, besides such penalties as he may be liable to by law, be punished as a court-martial may direct.*

This requirement appears as Article 16, Section 14, of the British Code of 1774, as Article 16, Section 13, of the American Articles of 1776, and as No. 54 of the Articles of 1806. The reason assigned for the excepting clause in the British Articles of 1774, and in the corresponding provision of the American Articles of 1776, and which is declared in the former "to annoy rebels or other enemies in arms against Us," and in the latter "to annoy

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only for the purpose of the "reparation." A military commander can have no authority to add a further amount of stoppage by way of *punishment*. Dig. J. A. Gen., 47, par. 5.

[1] *Ibid.*, 46, par. 2. *Held* that, as an agency for assessing the amount of the damage, a court-martial could not properly be substituted for the board, directed by G. O. 35, Hdqrs. of Army, 1868, to be convened for such purpose. *Ibid.*, par. 6.

It does not affect the question of reparation under the Article that the offender or offenders may be criminally liable for the injury committed, or may have been punished therefor by the civil authorities. *Ibid.*, par. 3.

Held that the remedial provision of this Article could not be enforced in favor of military persons, or in favor of the United States, or to indemnify parties for property *stolen* or *embezzled*. *Ibid.*, par. 4.

Where proof was duly made under this Article of injury done by some persons of a command, but the active perpetrators could not upon investigation be determined, and it appeared that the entire command was present and implicated, *held* that the stoppage might legally be made against all the individuals present. *Ibid.*, par. 8.

In a few cases a stoppage of the pay of an entire regiment for damage to private property committed by its members has been sanctioned as authorized under the general remedial provisions of this Article. *Ibid.*, 46, par. 1.

While this Article would certainly appear to contemplate the making of reparation for injuries done to the *persons* of citizens rather than for injuries done to their *property*, yet *advised*, in view of the precedents, that it might probably be regarded as within the equity of the Article to indemnify a citizen for wanton injury done to his *property* by a soldier or soldiers, by means of a stoppage against his or their pay, summarily ordered upon investigation by the commanding officer.* *Ibid.*

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* See, also, G. O. 35, Hdqrs. of Army, 1868, construing this Article, and prescribing the proceeding under it, reparation for injury to *property* as well as *person* being authorized. The Article, however, is antiquated in form and indefinite and incomplete in its provisions, and calls for repeal or amendment. For the principal cases in which it has been applied in our practice, the student is referred to G. O. 4, Dept. of the Ohio, 1863; do. 123, Dept. of the Gulf, 1864; do. 161, Dept. of Washington, 1865; do. 59 *ad.* 1866; do. 74, Dept. of Arkansas, 1865; do. 48, 55, Dept. of Louisiana, 1866; do. 6, Dept. of the Cumberland, 1867; do. 10, Dept. of the South, 1870.

rebels or other enemies in arms against said States," is omitted from the re-enactments of 1806 and 1874.

The acts of trespass, etc., indicated in this Article are made punishable as special breaches of discipline, and less for the protection of citizens than for the maintenance of the orderly behavior and *morale* of the military force.[1]

The 55th Article makes an exception in respect to property destroyed "by order of a general officer commanding a separate army in the field." This is believed to be the only case in which, by a formal enactment of Congress, obedience to the orders of a superior can be pleaded in bar to an action for damages growing out of the destruction of the private property of an inhabitant of the United States by an officer or soldier. The excepting clause operates to transfer the responsibility from the person by whom the destruction was committed to the officer ordering the particular property to be destroyed.

ARTICLE 56. *Any officer or soldier who does violence to any person bringing provisions or other necessaries to the camp, garrison, or quarters of the forces of the United States in foreign parts, shall suffer death, or such other punishment as a court-martial may direct.*

As it is impracticable for armies to carry along with them the necessary provisions for their consumption during a lengthened campaign, and as they must in a great measure depend for their supply on the countries through which they pass, be they friendly or hostile, it is at all times for the interest of such armies, and has therefore been the peculiar care of the generals commanding them, to encourage and protect countrymen and others in bringing provisions to the camp. The military regulations have been uniform at all times in awarding the extreme punishment of death to soldiers who should do any violence to the persons of those who furnish the army with provisions, or to their goods or merchandise.[2] Such conduct was forbidden under penalty of death by the war statutes of Henry V., as well as by those of Elizabeth and Charles I.

Article 35 of the Prince Rupert Code contains the requirement that "whoever shall do violence to any who shall bring victuals to the camp or garrison, or shall take his horse or goods, shall suffer death, or such other punishment as he shall be sentenced to by Our General Court-Martial." The provision was repeated as Article 33 of the Code of James II. and appears in its present form as Article 11, Section 14, of the British Code of

[1] Dig. J. A. Gen., 48. par. 1. Where, under the charge of "maliciously destroying property" in violation of this Article, the court convicted the accused, except as to the word "maliciously," and imposed sentence, *held* that by this exception in its finding of the *gist* of the offense charged the court had in fact acquitted the accused of the same, and that the form of its judgment was therefore irregular and improper; and *advised* that the proceedings be returned to the court for revision, so that it might either formally acquit the accused altogether or find him not guilty of the charge, but guilty of "conduct to the prejudice of good order and military discipline." *Ibid.*, par. 2.

[2] Samuel, 560–562.

1774, as Article 11, Section 13, of the American Articles of 1776, and as No. 57 of the Articles of 1806.

ARTICLE 57. *Whosoever, belonging to the armies of the United States in foreign parts, or at any place within the United States or their Territories during rebellion against the supreme authority of the United States, forces a safeguard, shall suffer death.*

Article 10 of the Prince Rupert Code contained the following provision on this subject: "Whoever shall presume to violate Our Safe-guard, Safe-Conduct, or Protection (knowing the same), shall suffer death or such other punishment as shall be inflicted upon him by Our General Court-Martial." It will be observed that this provision is considerably more comprehensive in its terms than the present Article, inasmuch as all forms of instruments similar in tenor to safeguards, such as safe-conducts and the like, are included within the scope of the Article. The requirement appears as Article 17, Section 14, of the British Code of 1774, as Article 17, Section 13, of the American Articles of 1776, and as No. 55 of the Articles of 1806.

The British Military Codes have always made a distinction between offenses committed within the territorial limits of the United Kingdom and those committed outside of, or beyond, such jurisdiction. This has been the case to a marked degree since the passage of the first Mutiny Act, and the distinction has been repeatedly made in the Mutiny Acts themselves. This distinction was based upon the fact that the exercise of military jurisdiction in certain cases would not be sanctioned by Parliament if attempted within the territorial limits above stated; without such limits, or in "foreign parts," in the language of the Articles and Mutiny Acts, the common law not being operative, no such conflict of jurisdiction could arise. As no such jurisdictional question was likely to arise in the military procedure of the United States, the words "foreign parts" were omitted from all the Articles except two, the 56th and 57th of the present Code.

A doubt having arisen, during the pendency of the War of the Rebellion, as to the power of a court-martial to try an offense under the Article when committed in a State in rebellion against Federal authority but within the territory of the United States, the clause "or at any place within the United States or their Territories during rebellion against the supreme authority of the United States" was added to the Article.[1]

[1] Section 5, Act of July 13, 1861, (12 Stat. at Large, 257,) and Act of July 31, 1861 (12 *ibid.*, 340). In its present form the Article confers upon a general court-martial jurisdiction to try the offense of forcing a safeguard in two cases: (1) when the offense is committed in "foreign parts," and (2) when committed within the territorial limits of the United States during rebellion against their authority. It may be questioned, however, whether the offense would be so triable if committed within the territory of the United States during invasion by a foreign power, and in the theatre of active military operations. In such a case it is believed that resort would have to be had to the military commission, the grant of jurisdiction to a court-martial, in the 57th Article, not being sufficiently comprehensive.

Safeguards.—A *safeguard* is a written instrument issued by the general commanding an army in the field, for the purpose of affording protection to the person or property of a non-combatant within the theatre of active military operations. The instrument is ordinarily issued in the form of an order in writing, signed by the commanding general and authenticated by the signature of a principal officer of the staff, and is posted on the premises to which it is intended to afford protection. An escort or guard may or may not be furnished to enforce respect to its terms. It is not necessary to specify in the instrument itself the precise amount of protection that is to be afforded, since it is the purpose of the commanding general, in issuing the safeguard, to guarantee a complete immunity from interference in behalf of the person or property therein mentioned.

Forcing a Safeguard.—The offense of forcing a safeguard is committed by a military person who, with a knowledge of its existence, does any act of violence or spoliation in or upon the premises protected, or willfully disregards the protection afforded by the instrument; such knowledge being obtained from the display of the instrument, or from the notification of the person in whose behalf or for whose protection it was issued, or by some other sufficient means; otherwise the offender could not be guilty of the high contempt for authority which is indicated by the commission of the offense.[1]

While it is a serious offense against discipline to assault a sentinel, or to offer violence to his person, or to disobey his instructions, or even to be wanting in respect for his office, the crime of forcing a safeguard is entirely different from any of these, and is much more grave in character, since it involves a willful disregard of the authority of the commander-in-chief of an army in the field.[2]

ARTICLE 58. *In time of war, insurrection, or rebellion, larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault and battery with an intent to kill, wounding, by shooting or stabbing, with an intent to commit murder, rape, or assault and battery with an intent to commit rape, shall be punishable by the sentence of a general court-martial when committed by persons in the military service of the United States; and the punishment in any such case shall not be less than the punishment provided for the like offense by the laws of the State, Territory, or district in which such offense may have been committed.*

This provision first appeared in the following form as Article 2, Section 20, of the British Code of 1774: "Notwithstanding its being directed in the Eleventh Section of these Our Rules and Articles, that every Commanding

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[1] That such a previous knowledge is essential is indicated by the terms of the Article as it appears in the Codes of Prince Rupert and James II., where it is described as an integral and indispensable part of the offense by the use of the words "knowing the same" which have been omitted from subsequent codes.

[2] Samuel, 566–571; Halleck, Int. Law, 665 and authorities cited.

Officer is required to deliver up to the Civil Magistrate all such Persons under his Command who shall be accused of any Crimes which are punishable by the known Laws of the Land; yet in Our Garrison of Gibraltar, Island of Minorca, Fort of Placentia, and Annapolis Royal, where Our Forces now are, or in any other Place beyond the Seas, to which any of Our Troops are or may be hereafter commanded, and where there is no Form of Our Civil Judicature in Force, the Generals or Governors, or Commanders respectively, are to appoint General Courts-martial to be held, who are to try all Persons guilty of Wilful Murder, Theft, Robbery, Rapes, Coining or Clipping the Coin of Great Britain, or of any Foreign Coin current in the Country or Garrison, and all other Capital Crimes, or other Offenses, and punish Offenders with Death or otherwise, as the Nature of their Crimes shall deserve."

As the reasons assigned for the existence of this Article did not exist in America, that is, as the United States had no possessions beyond the seas, and as there were no portions of the territories of the United States over which the courts of some one of the States did not exercise jurisdiction in respect to the trial and punishment of criminal offenses, and, moreover, as the authority of the Continental Congress did not extend to judicial matters not arising in the land and naval forces, this provision was not embodied in the Articles of either 1776 or 1806. It first appeared in statutory form in the Act of March 3, 1863,[1] and is embodied in the present code as the 58th Article of War.[2]

Application of the Article.—Prior to the enactment of this Article the offenses enumerated therein would have been punishable, if at all, by martial law; the effect of the enactment has therefore been to restrict the operation of martial law in its application to the offenses named.

The jurisdiction conferred by this Article upon military courts has been held by the highest judicial authority to be exclusive, not concurrent

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[1] 12 Stat. at Large, 736. See, also, Acts of July 13, 1861, sec. 5, (12 Stat. at Large, 257,) and July 31, 1861 (12 *ibid.*, 284).

[2] The Article in its present form, however, is not directly traceable to the corresponding provision of the British Code which it so closely resembles, but is a "part of an Act containing numerous provisions for the enrollment of the national forces, * * * having for their object to secure a large force to carry on the then existing war, and to give efficiency to it when called into service. It was enacted not merely to insure order and discipline among the men composing those forces, but to protect citizens not in the military service from the violence of soldiers. It is a matter well known that the march even of an army not hostile is often accompanied with acts of violence and pillage by straggling parties of soldiers which the most rigid discipline is hardly able to prevent. The offenses mentioned are those of most common occurrence, and the swift and summary justice of a military court was deemed necessary to restrain their commission." Coleman *vs.* Tennessee, 97 U. S., 509. In the same case it was held that the criminal courts of the loyal States had concurrent jurisdiction with military courts for the trial of the several offenses named in the Article, but that when the Federal forces were in the enemy's country military tribunals had exclusive jurisdiction for the trial of offenses committed by persons in the military service of the United States.

merely with that of the civil tribunals.[1]

In framing a charge under this Article, it will not in general be essential to allege in connection with the date of the offense, or to show by evidence, that the act was committed at a time of war, etc.; this being a fact of which a court will ordinarily properly take judicial notice.[2]

Where a sentence adjudged by a court convened by the authority of this Article imposed a punishment of less severity than that provided for the same offense by the law of the State in which the offense was committed (as imprisonment where the law of the State required the death-penalty), it has been held that such a sentence was unauthorized and inoperative. But though the punishment must not be "less," it may legally be of greater severity than that provided by the local statute.[3]

In imposing punishment the court should be governed by the local law (so far as is required by the Article), although the offense was committed in a state whose ordinary relations to the general government had been suspended by a state of war or insurrection.[3]

Arson.—Arson is the malicious and willful burning of the house of another.[4] It was punishable capitally at common law, being an offense not against property merely, but one affecting the security of the dwelling; and it is still so punishable when committed upon territory within the exclusive jurisdiction of the United States.[5] The intent, which constitutes an essen-

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[1] Coleman *vs.* Tennessee, 97 U. S., 513. And see People *vs.* Gardiner, 6 Parker, 143; G. O. 29, Dept. of the Northwest, 1864; do. 32, Dept. of Louisiana, 1866. But see Dig. J. A. Gen., par. 87.

Dig. J. A. Gen., 49, par. 2; People *vs.* Gardiner, 6 Parker, 143.

[2] *Ibid.*, par. 3. *Held* (November, 1865) that military courts were still empowered to exercise the jurisdiction conferred by this Article, the *status belli* not having yet been declared to be terminated either by the Executive or Congress. A court-martial of course could have no authority whatever to decide whether the war was ended. It is the better practise, however, to allege in the specification the existence of a State of War at the time of the commission of the offense. *Ibid.*, par. 4.

See the application of this principle to the fact of the existence of the late War of the Rebellion, in Justice Field's charge to the grand jury in United States *vs.* Greathouse, 4 Sawyer, 457.

[3] Dig. J. A. Gen., 49, par. 5. That the Southern States during the late war were at no time out of the Union, see White *vs.* Hart, 13 Wall., 646.

[4] 4 Blackstone, 218; 2 East P. C., 1015; Coke 3, Inst., 66; I. Hawkins P. C., 137.

[5] This offense is defined in the Revised Statutes in the following terms:

Every person who, within any fort, dock-yard, navy-yard, arsenal, armory, or magazine, the site whereof is under the jurisdiction of the United States, or on the site of any lighthouse or other needful building belonging to the United States, the site whereof is under their jurisdiction, willfully and maliciously burns any dwelling-house or mansion-house, or any store, barn, stable, or other building, parcel of any dwelling or mansion-house, shall suffer death.*

Every person who, in any of the places mentioned in the preceding section, maliciously sets fire to or burns any arsenal, armory, magazine, rope-walk, ship-house, warehouse, block-house, or barrack, or any store-house, barn, or stable not parcel of a dwelling-house, or any other building not mentioned in such section, or any vessel built or begun to be built, or repairing, or any lighthouse or beacon, or any timber, cables,

* Section 5385, Revised Statutes.

tial element of the offense, must be positive in character, as is evidenced by the descriptive words of the definition "willful and malicious," and an act of burning not accompanied by such an intent would constitute some form of criminal trespass, or a statutory offense of lesser degree than arson.[1] For this reason, also, the element of intent cannot be replaced by negligence or mischance.[1] Where, however, the burning is wilful, malice is presumed from the deliberate character of the act.[2] To constitute arson at common law, there must be an actual burning of some part of the house; but it is not necessary that any part of the house be actually consumed.[3] It is sufficient if the wood of the house be charred in a single place, so as to destroy its fibre.[4]

Assault and Battery.—The offense of *assault and battery* is composed of the two elements named, which, taken together, constitute the complete offense. An *assault* is an attempt with force and violence to do corporal injury to another, as by striking at him with a weapon.[5] "The laying of a hand upon another, or seizing his clothing, if done in friendship or for a benevolent purpose, is not an assault; but if the act is done in anger or in a rude and insolent manner or with a view to hostility, it amounts not only to an assault, but to a battery. Even striking at a person, though no blow be inflicted, or raising the arm to strike, or holding up one's fist at him, if done in anger or in a menacing manner, are considered by law as assaults."[6] *Battery* is the unlawful beating or wounding of another.[7] A battery, from the nature of the offense, includes an assault, and is therefore charged as "assault and battery"; but there may be an assault without battery, which is regarded by the law as a criminal offense.

Assault and Battery with Intent to Kill.—The crime over which jurisdiction is conferred upon courts-martial by this Article is not that of assault and battery simply, but an aggravated form of that offense, described in the

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rigging, or other materials for building, repairing, or fitting out vessels, or any pile of wood, boards, or other lumber, or any military, naval, or victualing stores, arms, or other munitions of war, shall be punished by a fine of not more than five thousand dollars and by imprisonment at hard labor not more than ten years.*

Every person who maliciously sets on fire or burns or otherwise destroys any vessel of war of the United States afloat on the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular State, shall suffer death.†

[1] 1 Bishop C. L., § 559; 2 *ibid.*, § 14; Coke, 23 Inst., 67; 2 East P. C., 1019.

[2] Brown *vs.* State, 52 Ala., 345; People *vs.* Fanshawe, 137 N. Y., 68.

[3] Mary *vs.* State, 24 Ark., 44; State *vs.* Sandy, 3 Ind., 570; People *vs.* Butler, 16 Johns., 203; Com. *vs.* Van Scherick, 16 Mass., 105.

[4] People *vs.* Haggerty, 46 Cal., 354.

[5] U. S. *vs.* Hand, 2 Wash., 435; State *vs.* Morgan, 3 Iredell, 186; State *vs.* Bradley, 34 Tex., 95.

[6] U. S. *vs.* Ortega, 4 Wash., 531; U. S. *vs.* Kiernan, 3 Cr. C. C., 435; People *vs.* Islas, 27 Cal., 680; Smith *vs* State, 39 Miss., 521; Lawson *vs.* State, 30 Ala., 14.

[7] Wharton Law. Dict.; II. Bishop, Crim. Law, 70-72.

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* Sec. 5386, Revised Statutes.
† Sec. 5387, *ibid.*

statute as "assault and battery with intent to kill." The specific intent so described may be express, as shown by the circumstances attending the commission of the assault, or, like the malicious intent in murder, "may be inferred from the character of the assault, the use of deadly weapons, and other attending circumstances."[1] The proof under a charge of assault with intent to kill must be such as to show that, if death had been caused by the assault, the assailant would have been guilty of murder.[2]

Wounding, by Shooting or Stabbing, with an Intent to Commit Murder.—This offense, like that last discussed, is an aggravated form of assault and battery; the aggravation depending upon the character of the weapons used and the amount of injury inflicted. To warrant a conviction of this offense the bodily injury must have been inflicted in one of the particular methods set forth in the statute; an injury inflicted by any other means than shooting or stabbing, or with any other instrument than a fire-arm or cutting weapon, would be chargeable as an assault and battery with intent to kill as above described. The evidence must also be such as would have warranted a conviction for murder, as distinguished from manslaughter merely, had death resulted from the assault.[3]

Burglary.—*Burglary*, at the common law, is the breaking and entering of a dwelling-house by night with intent to commit a felony therein, whether such felonious intent be executed or not. The breaking is either actual, as where the person makes a hole in a door or opens a window, or in law, (constructive) as where he obtains an entrance by threats, or fraud, or by collusion with some one in the house.[4] In the United States the English definition of burglary has been so far modified by statute as to include offenses committed by day as well as by night, and in other buildings than dwelling-houses; and various degrees of the offense have also been established.[5]

To constitute burglary there must be a breaking, removing, or putting aside of some part of the dwelling-house which is relied on as a security against intrusion. A door or window left open is no such security. But if the door or window be shut, it need not be locked, bolted, or nailed; a latch to the door, or the weight of the window, being sufficient. The outer door being open, entering and unlatching, or unlocking a chamber door, is burglary.[6] The raising a window-sash which was down and closed, and

[1] Walls *vs.* State, 90 Ala., 619.

[2] State *vs.* Reed, 40 Vt., 603; Hall *vs.* State, 9 Fla., 203.

[3] Meredith *vs.* State, 60 Ala., 441; Stopp *vs.* State, 3 Tex. App., 138; People *vs.* Devine, 59 Cal., 630.

[4] Sweet Law Dict., U. S. *vs.* Bowen, 4 Cr. C. C., 604. Larceny may be a lesser included offense where burglary with an intent to commit larceny is charged. U. S. *vs.* Dixon, 1 Cr. C. C., 414; U. S. *vs.* Read, 2 Cr. C. C., 198; State *vs.* Wilson, Coxe, 441; Com. *vs.* Newell, 7 Mass., 247; Dig. J. A. Gen., 207.

[5] Archbold Crim. Law, 1069.

[6] State *vs.* Bowen, 13 Ind., 244; State *vs.* Reid, 20 Iowa, 413; Lyons *vs.* People, 68 Ill., 271; Com. *vs.* Strapney, 105 Mass., 588.

which was the only fastening to the window, and the entry of the party through the same into the house, is such a breaking as constitutes burglary.[1]

Breaking; Time.—The act of breaking and entering necessarily involves the use of force. Such breaking may be actual or constructive. It is actual where the offender, for the purpose of getting admission for any part of his body, or for a weapon or other instrument, in order to effect his felonious intention breaks a hole in the wall of a house, breaks a door or window, picks the lock of a door or opens it with a key, or even by lifting the latch, or unlooses any other fastenings to doors or windows which the owner has provided.[2] Constructive breaking is where a person by the use of deceit, artifice, or fraud secures entrance to a habitation with intent to commit a felony therein.[3] It is also essential that the offense should have been committed at night.[4]

The Building.—Every dwelling-house is a habitation in which burglary may be committed, and also all outhouses attached to the dwelling and intended for the comfort and convenience of the family.[5] A portion of a building may come under this description if such portion be used as a dwelling, the rest being appropriated to other purposes.[6] It is not necessary that the premises be actually occupied, that is, that a person should be actually in the building at the time when the burglary is committed.[7]

[1] Frank *vs.* State, 39 Miss., 485. Where an entry to a building is effected through a hanging window over a shop door, designed for light and ventilation, kept down by its own weight so firmly as to be opened only by the use of force, and so situated that a ladder or something of the kind is necessary to reach it, is a sufficient breaking to constitute burglary. Dennis *vs.* People, 27 Mich., 151. An area or excavation in front of a cellar window covered and protected by an iron grating is to be deemed a part of the cellar, and the raising of the grating is a breaking and entering within the statute of Michigan. People *vs.* Nolan, 22 Mich., 229. So, also, as to entering by getting down a chimney. Com. *vs.* Stephenson, 8 Pick., 354; State *vs.* Willis, 7 Jones, 190. And so as to the removal of a plank forming part of partition-wall, the plank being loose and constituting no part of the freehold. Com. *vs.* Trimmer, 1 Mass., 476.

Burglary at common law is the breaking and entering of a dwelling in the night-time with a felonious intent. Where a soldier was brought to trial upon a charge of "burglary," with a specification setting forth that he entered the quarters of an officer in the night through an *open* window with intent to steal, *held* that, although the offense described was not a burglary in law—the essential element of a breaking being wanting—the charge and specification, taken together, made out a sufficient pleading of a disorder to the prejudice of good order and military discipline under the 62d Article of war.* And similarly *held* of an offense charged as "burglary," but described in the specification as consisting in the breaking and entering of a post-trader's *store* in the *daytime*. Dig. J. A. Gen., 207.

[2] II. Russell on Crimes, 2; Com. *vs.* Merrill, Thach. Crim. Cases, 1; Ray *vs.* State, 66 Ala., 281; II. Bishop C. L., 91–100.

[3] State *vs.* Johnson, Phil. (N. C.) 186; State *vs.* Mordecai, 68 N. C., 207; State *vs.* Henry, 9 Iredell, 403; People *vs.* Boujet, 2 Parker, 11; 1 Hale P. C., 552.

[4] In the law respecting burglary this condition is fulfilled where there is not daylight enough to discern a face; actual obscurity is not necessary. 4 Black. Com., 224. It will not avail an accused person that there was enough light from the moon, street-lamps, and buildings, aided by snow, to discern the features of another person. State *vs.* Morris, 47 Conn., 179; II. Bish. C. L., 101–103.

[5] Russell on Crimes, 15; II. Bish. C. L., 104–108.

[6] *Ibid.;* II. Bish. C. L., 104, 105.

[7] State *vs.* Reid, 20 Iowa, 513; State *vs.* Williams, 90 N. C., 724.

* See Gen. Ct.-martial Orders, No. 205, A. G. O., 1876.

The Intent.—The intent in the breaking and entering must be to commit felony, that is, to commit larceny, robbery, arson, or some other crime amounting to felony in the jurisdiction within which the offense is committed; and such intent must be alleged in the charges.[1] It is not necessary, however, that the intent should have been carried into effect. The intent will in general be proved from the circumstances attending the commission of the offense. Where no such intent can be established the act of forcible entry constitutes a trespass.

Murder—Degrees.—*Murder* is the willful killing of a human being in the peace of the country, with malice aforethought either express or implied.[2] Although the definitions of murder differ somewhat in the several States, there is general concurrence as to premeditation or malice aforethought being an essential ingredient of the offense—that is, that there was a deliberately cherished intention to cause death or to inflict grievous bodily harm, or such reckless disregard of the consequences of a wrongful act as to warrant the inference of such an intention. There is also some difference as to the kind or amount of evidence necessary to establish premeditation; but it may be said, in general terms, that the malice aforethought may be established by independent testimony or may be inferred when "the fact of killing is proved by satisfactory evidence, and there are no circumstances

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[1] State *vs.* Eaton, 3 Harrington, 554; Bell *vs.* State, 48 Ala., 684; State *vs.* Lockhart, 24 Ga., 420; Com. *vs.* Doherty, 10 Cush., 52; Barber *vs.* State, 78 Ala., 19.

[2] U. S. *vs.* Outerbridge, 5 Sawyer, 620; U. S. *vs.* Carr, 1 Woods, 480; U. S. *vs.* King, 34 Fed. Rep., 302; U. S. *vs.* Meagher, 37 *ibid.*, 875.

Murder at common law is "the unlawful killing by a person of sound memory and discretion of any reasonable creature in being and under the peace of the State, with malice aforethought either express or implied." In many of the States two or more degrees of murder are now distinguished by the statute law; murder in the first degree—generally defined as a killing accompanied by express malice, or a deliberate unlawful intent to cause the death of the particular person killed—being ordinarily alone made *capital*. Dig J. A. Gen., 524, par. 1. See, also, Coke, Inst., 47; 4 Bl. Com., 95; 1 East P. C., 214; 1 Russell Cr., 482; 1 Gabbett, 454; 2 Wharton Cr. L., § 930; 3 Greenl. Ev., § 130; Commonwealth *vs.* Webster, 5 Cush., 304; G. O. 28, Dept. of California, 1865 (Remarks of Maj.-Gen. McDowell). "Murder, originally," says Foster (p. 302, citing Bracton "de murdro"), was "an insidious secret assassination; *occulta occisio, nullo sciente aut vidente.*" Now, secrecy in the commission of the act is significant only as evidence of legal malice. Dig. J. A. Gen. 524, par. 1.

Where a soldier, while a superior acting in the line of his duty was attempting to arrest him for a grave breach of discipline, discharged his loaded musket at the latter with intent to kill him, but, missing him, killed a soldier standing near, *held* that the crime committed was clearly murder. Dig. J. A. Gen., 524, par. 2; Angell *vs.* State, 36 Tex., 542.

The taking of the life of a prisoner of war when not concerting an escape or engaging in any violence or breach of discipline justifying such an extreme measure is as fully murder as could be any homicide committed with deliberate malice in time of peace.* Dig. J. A. Gen., 524, par. 3.

Where, in a case of an officer charged with the murder of a soldier, it appeared that the killing was done with a sword properly worn as a side-arm, *held* that its employment did not justify the same presumption of deliberate intent to kill which the use of a deadly weapon authorizes in cases in general. *Ibid.*, 525, par. 4.

* While it is lawful to kill an enemy "in the heat and exercise of war," yet "to kill such an enemy after he has laid down his arms, and especially when he is confined in prison, is murder." State *vs.* Gut, 13 Minn., 341.

disclosed tending to show justification or excuse, and there is nothing to rebut the natural presumption of malice.[1] In some of the States the offense of murder is divided into degrees, depending upon the kind and amount of malice shown, as tending to aggravate the crime and to exclude considerations of justification or excuse. The distinction, wherever it exists, is statutory, not being recognized at the common law.

Manslaughter.—*Manslaughter* is the unlawful killing of a human being without malice, express or implied. It may be voluntary or involuntary. It is *voluntary* when committed with a design to kill, under the influence of sudden or violent passion, caused by great provocation, which the law considers such a palliative of the offense as to rebut the presumption of malice which would otherwise arise.[2] It is *involuntary* when committed by accident or without any intention to take life.[3] "The crime of manslaughter is involved in that of murder; and so if a jury, in a prosecution for murder, finds that the homicide was without malice, they may find the defendant guilty of manslaughter alone."[4]

Manslaughter, at common law, is distinguished from murder by the absence of malice aforethought. The State statutes have generally constituted degrees of the offense of manslaughter as of murder, a different measure of punishment being assigned to each degree. The laws of the United States, though prescribing different punishments for manslaughter under different circumstances, recognize no discriminations of grades in either manslaughter or murder.[5]

This crime, when its commission by an officer or soldier affects directly the discipline of the service (as where the person killed is another officer or soldier, and the killing occurs at a military post or while the parties are on active service), may be taken cognizance of by a court-martial, in time of peace, under Article 62, as "conduct to the prejudice of good order and military discipline."[6]

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[1] Com. *vs.* Webster, 59 Mass., 306.

[2] Mere provocative words, however aggravating, are not sufficient to reduce a crime from murder to manslaughter. Allen *vs.* U. S., 164 U. S., 492.

[3] U. S. *vs.* Outerbridge, 5 Sawyer, 620–625. See, also, Sections 5339 and 5341, Revised Statutes, and Act of March 3, 1875 (18 Stat. at Large, 473).

[4] U. S. *vs.* Carr, 1 Woods, 480, 487.

[5] Dig. J. A. Gen., 524, par. 1.

[6] *Ibid.*, 485. Where a soldier, confined with other prisoners in a guard-house in time of peace, was under the influence of liquor and noisy, and continued to be noisy and disorderly though repeatedly ordered by the officer of the day to keep quiet, and was finally struck or thrust in the breast by the latter with his sword and mortally wounded so that he presently died; and it did not appear that there was any danger of mutiny or serious disturbance on the part of the other prisoners present at the time,—*held* that the evidence established no sufficient justification for a resort by the officer to such an extreme proceeding, and that his conviction by court-martial of "manslaughter to the prejudice of good order and military discipline," and sentence of dismissal, were warranted and proper. An officer has no right to take the life of a soldier, nor to commit a battery upon him with a dangerous weapon, except in a most aggravated case; as in a case of riot, rescue, or mutiny, violent resistance to superior authority, escape, or refusal to obey a lawful order requiring instant obedience—when no other but such extreme

Homicide.—Homicide is a generic term embracing every mode by which the life of one man is taken by another.[1] *Criminal* or *felonious homicide*, which has already been discussed under the heads of murder and manslaughter, consist in the unlawful taking by one human being of the life of another, in such a manner that he dies within the space of a year and a day from the time of the giving of the mortal wound.[2] But there are circumstances in which the taking of human life is one of the high duties of persons in office; such is the case, for example, when the life of a criminal is taken by an officer of the law, in execution of a capital sentence lawfully imposed by a competent tribunal; or where the life of an enemy is taken, in a time of public war, by a duly authorized combatant, in the actual military service of a belligerent. Although this duty is not to be sought, its performance, like that of all others, is truly commendable and should never be made the ground of reproach; indeed, its performance by a soldier in the defense of his country is highly praiseworthy. Of course, in the circumstances above set forth, the force which caused death was not unlawful, and the taking of life is, for that reason, not punishable. So, too, as will presently be seen, it is lawful to resist, by whatever force is necessary, one who is attempting to commit a felony; and the same is true when one causes death in the exercise of his right of self-defense. The taking of human life, therefore, is not always a criminal act, and when non-criminal in character may be either *justifiable* or *excusable*.

Justifiable Homicide.—*Justifiable homicide* consists in the taking of human life either in obedience to the law, as in the execution of a criminal or the killing of an enemy in war, under such circumstances as to warrant the inference that the act was done without malice or criminal intention. The principal cases of justifiable homicide are:

Homicide in Obedience to Law.—Under this head fall the execution of

means will restrain or compel compliance.* And an act of killing of a soldier which in time of war might be justifiable homicide might be manslaughter, or even murder, in time of peace. *Ibid.*, 486, par. 4.

Where, *in time of peace*, a soldier while running toward his quarters from two officers of the command, who were attempting to arrest him for disorderly conduct at night, was, by the order of the superior officer, fired at by the inferior and mortally wounded; and it was doubtful upon the evidence whether a sufficient effort had been made to halt the soldier before firing, while at the same time it appeared quite probable that he might subsequently have been identified at the post and duly punished,—*held* that, whatever may have been the offense, if any, of the junior officer, the superior who directed the firing might, upon the death of the soldier from his wound, properly be brought to trial on a charge of "manslaughter to the prejudice of good order and military discipline." *Ibid.*, par. 3.

Held that the fact that the party shot and killed in an altercation with another was himself armed with a pistol, which, however, he did not produce or use, and was not proved to have attempted to produce or use, was evidence wholly insufficient to sustain a plea of self-defense offered by the party by whom the homicide was committed. *Ibid.*, 487, par. 5.

[1] Com. *vs.* Webster, 5 Cush., 303.

[2] Com. *vs.* MacLoon, 101 Mass., 6, 8.

* See G. C. M. O. 47, H. Q. A., 1877, and U. S. *vs.* Carr, 1 Woods, 484.

criminals and the killing of enemies in war. The former case needs no explanation, save to say that it is an imperative duty, prescribed by the law, the performance of which cannot be avoided. The killing of an enemy is justifiable only when he is a part of the armed force of a belligerent State or is engaged in the performance of an act of war.

When an officer of the law encounters resistance in the execution of lawful process, or in an attempt to make a lawful arrest, he may use sufficient force to overcome such unlawful resistance. The kind and amount of force used will depend upon the character of the resistance encountered. If the person arrested be unarmed, only such force will be lawful as is necessary to compel obedience; if he have in his possession a deadly weapon, extreme measures will be justified on the part of the officer making the arrest.[1] It is proper to observe, in this connection, that any opposition, obstruction, or resistance intended to prevent an officer from doing his official duty is an indictable offense at common law, the punishment of which is regulated by the nature of the offense.[2]

Excusable Homicide.—*Excusable homicide* is that which results, from *accident* or *misadventure* in the doing of a lawful act; or in a proper and reasonable exercise of the right of *self-defense.*[3] Of the former, the flying off of the head of a hatchet which is being used by its owner with reasonable care and for a lawful purpose, by which a bystander is killed; or where a child dies as a result of moderate correction at the hands of a parent, are examples. In these cases the act is legal and the homicidal consequence is accidental.[4]

Self-defense.—A man may repel force by force in the defense of his person, his family, or property against any one who manifestly endeavors by violence or surprise to commit a felony, as murder, robbery, or the like. The right to oppose force by force in such a case is founded upon the law of nature, and is not and cannot be superseded by the law of society.[5] To justify the taking of life in self-defense "the intent must be to commit a felony." If it be only to commit a trespass, as to beat the party, it will not justify the killing of the aggressor. No words, no question, however insulting and irritating, not even an assault, will afford such justification, although it may be sufficient to reduce the offense from murder to manslaughter. "In the next place, the intent to commit a felony must be apparent, which will be sufficient, although it afterwards turn out that the real intention was less criminal, or was even innocent. This apparent intent is to be collected from the attending circumstances, such as the manner of the

[1] U. S. *vs.* Rice, 1 Hughes, 560, 568; Cunningham *vs.* Neagle, 135 U. S., 1; U. S. *vs.* King, 34 Fed. Rep., 302; State *vs.* Kirkpatrick, 42 *ibid.*, 689.
[2] U. S. *vs.* Outerbridge, 5 Sawyer, 620, 625.
[3] 4 Blackstone, 182–188; II. Bishop, Crim. Law, §§ 617–620.
[4] 4 Blackstone, 182–188.
[5] U. S. *vs.* Rice, 1 Hughes, 560, 568.

assault, the nature of the weapons used, and the like. And lastly, to produce this justification it must appear that the danger was imminent and the species of resistance used necessary to avert it."[1] By imminent danger is meant immediate danger—one that must be instantly met; one that cannot be guarded against by calling on the assistance of others or the protection of the law. And the species of resistance used—that is, the means to prevent the threatened injury—must be such as were necessary to avert it.[2]

Larceny.—*Larceny* is the wrongful or fraudulent taking and carrying away of things personal with the intent to deprive the owner of the same.[3] To constitute the offense there must be an unlawful taking, which implies that the goods must pass from the possession of the true owner, or of one having a qualified right of property therein, and without his consent. There must not only be a taking, but a carrying away. A bare removal from the place in which he found the goods, though the thief does not quite make off with them, is a sufficient *asportation*, or carrying away.[4] The taking and carrying away must also be with intent to deprive the owner of the thing taken.[5]

This offense, save in the case contemplated in the 58th Article, is in general chargeable under the 62d Article, when it clearly and directly affects the order and discipline of the military service. Stealing, for example, from a fellow soldier or from an officer, or the stealing of public money or property, where the offense is not more properly a violation of Article 60, is generally so chargeable.[6]

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[1] U. S. *vs.* Wiltburger, 3 Wash., 521.

[2] U. S. *vs.* Lee, 12 T. R., 816; Allen *vs.* U. S., 150 U. S., 551; Starr *vs.* U. S., 153 U. S., 614; Parrish *vs.* Com., 81 Va., 1, 14–16; Logue *vs.* Com., 2 Wright (Pa.), 265.

[3] 2 East Pl. Cr., 553; Ransom *vs.* State, 22 Conn., 156; U. S. *vs.* Duffy, 1 Cr. C. C., 164; U. S. *vs.* Mason, 3 Blatch., 360; U. S. *vs.* Sims, 4 Cr. C. C., 618.

[4] State *vs.* Wisdom, 8 Porter, 511; State *vs.* Jackson, 65 N. C., 305; Eckels *vs.* State, 20 Ohio, N. S., 508; Com. *vs.* Berry, 99 Mass., 428; People *vs.* Selden, 37 Cal. 51.

[5] Dodd *vs.* Hamilton, 12 Taylor, 31; State *vs.* Hawkins, 8 Porter, 461; Com. *vs.* Low, Thach. Crim. Cases, 477; U. S. *vs.* Durkee, 1 Wall., 196.

[6] Dig. J. A. Gen., 67, par. 2. A soldier, contemplating desertion, borrowed from another soldier, on the day of his absenting himself, a blouse, which he thereupon proceeded wrongfully to dispose of. *Held* that if, as was quite evidently the fact, he had, at the time of borrowing, the intention to appropriate, he was chargeable with larceny, since the owner, in lending, consented to part with the possession only, not the property. *Ibid*, 467, par. 2.

A soldier was charged with the larceny of a certain sum of money in currency from the post-trader's store. At his arrest a sum in currency of about the same amount, but not capable of identification as the same money, was found on his person, and, being claimed by the trader was turned over to him. The soldier was then tried and acquitted. *Held* that the trader was legally liable to be called upon to refund the amount received. *Ibid.*, par. 3.

Where a State statute imposed the disability of loss of the right of suffrage upon persons convicted of larceny, *held* that the conviction intended was conviction by a civil court, and that a conviction of this crime by a court-martial (convened within the State) would not work such disability, or—to enable the soldier, upon his discharge, to vote in the State—require a pardon by the President. *Ibid.*, par. 4.

Held that grass cut for hay upon a military reservation was in law, at least if not at once removed, personal property, so that a person wrongfully cutting such grass and allowing it to remain till it became hay, or for any material period before asportation,

Robbery.—*Robbery* is the felonious taking of goods from the person of another, or in his presence, by violence or by putting him in fear, and against his will.[1] Robbery is thus seen to be an aggravated form of larceny; the aggravation consisting in the taking of property from the person of its owner by violence or intimidation. The offense, as to its essential elements, is the same as larceny; but there must be in addition some actual violence inflicted upon the person robbed, or such demonstrations or threats, and under such circumstances, as to create in him reasonable apprehension of bodily injury. It is sufficient in this offense that instead of actual violence the wrong-doer creates in his victim a reasonable apprehension of it, and thus secures his object.[2]

Embezzlement.—*Embezzlement* is a species of larceny in the nature of a criminal breach of trust, and consists in the fraudulent conversion of property to his own use by an agent, clerk, servant, or in general by any person acting in a fiduciary capacity. In order to constitute the crime, it is necessary that the property embezzled should have come lawfully into the hands of the embezzler, and by virtue of the position of trust he occupies in relation to the person whose property he takes.[3] In this respect it differs from the crime of larceny, in which the property is unlawfully taken and retained.[4]

The fiduciary relation which is essential to the offense of embezzlement is sufficiently expressed by the averment that the property was delivered to the defendant upon the trust and confidence that he would return it to the owner on demand. A fraudulent conversion to the defendant's own use would be an embezzlement whether demand were made or not, and such demand therefore need neither be averred nor proved.[5] The charges should also set forth that the defendant was the officer or agent of the United States, or the clerk or servant of some person or corporation, and that the money or property embezzled came into his possession by virtue of such employment. As the offense involves fraudulent conversion, that is, as there must be a conversion or change from a lawful to an unlawful possession, the lawful object for which the money or property was entrusted to the defendant must also be set forth and described. Ownership should be averred; such ownership being in general in the United States, or the person toward

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was chargeable with a stealing of property of the United States under the Act of March 3, 1875, c. 144, which makes such stealing a felony punishable by fine and imprisonment. Dig. J. A. Gen., 466, par. 1.

[1] II. Bishop, Crim. Law, §§ 1156, 1166.

[2] II. *ibid.*, §§ 1166–1176.

[3] Dodd *vs.* Hamilton, 2 Taylor, 31; State *vs.* Hawkins, 8 Porter, 461; Com. *vs.* Low, Thach. Crim. Cases, 477; U. S. *vs.* Durkee, 1 McAllister, 196.

[4] Com. *vs.* Hussey, 111 Mass., 432; Com. *vs.* Butterick, 100 Mass., 1; Com. *vs.* King, 9 Cushing, 284. The offense, wherever it exists, is statutory, being unknown to the common law. The scope of the offense of embezzlement has been considerably extended, by Federal statutes, in its application to certain unlawful acts respecting the public money and property committed by public officers.

[5] Com. *vs.* Hussey, 111 Mass., 432; Com. *vs.* Tuckerman, 10 Gray, 173.

whom the fiduciary relation exists. Where, however, the nature of the relation is such as to have made it the duty of the accused to carry or transport the property from one person to another with a view to a transfer of ownership, or where the embezzlement took place while in transit, such ownership may be alleged in either party to the transaction.[1] The fraudulent conversion may be consummated in any manner capable of effecting it; and its commission is a matter of fact, and not of pleading, when the indictment charges that the defendant did embezzle, fraudulently misapply, and convert to his own use the property entrusted to him.[2]

Statutory Embezzlements.—The Revised Statutes of the United States contain a number of statutory embezzlements, the offense in most cases having to do with certain wrongful or prohibited acts committed by disbursing officers in connection with the custody or disbursement of the public funds.[3]

The Act of March 3, 1875, contains the requirement that "any person who shall embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, shall be deemed guilty of felony, and on conviction thereof before the district or circuit court of the United States in the district wherein said offense may have been committed, or into which he shall carry or have in possession said property so embezzled, stolen, or purloined, shall be punished therefor by imprisonment at hard labor in the penitentiary not exceeding five years, or by a fine not exceeding five thousand dollars, or both, at the discretion of the court before which he shall be convicted.[4] The same statute also contains a provision to the effect "that if any person shall receive, conceal, or aid in concealing, or have, or retain in his possession with intent to convert to his own use or gain, any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, which has theretofore been embezzled, stolen, or purloined from the United States by any other person, knowing the same to have been so embezzled, stolen, or purloined, such person shall, on conviction before the circuit or district court of the United States in the district wherein he may have such property, be punished by a fine not exceeding five thousand dollars, or imprisonment at hard labor in the penitentiary not exceeding five years, one or both, at the discretion of the court before which he shall be convicted; and such receiver may be tried either before or after the conviction of the principal felon; but if the party has been convicted, then the judgment against him shall be conclusive evidence in the prosecution against such

[1] Riley *vs.* State, 32 Texas, 763; Com. *vs.* Norton, 11 Allen, 110.
[2] Leonard *vs.* State, 7 Tex. App., 417.
[3] See Sections 5488–5497, Revised Statutes; see, also, *ibid.*, §§ 3618–3652.
[4] Sec. 1, Act of March 3, 1875 (18 Stat. at Large, 479).

receiver that the property of the United States therein described has been embezzled, stolen, or purloined." [1]

The statute above cited confers upon larceny and embezzlement the quality of felony, and a person so convicted suffers such penalties, attaching to that status, as are imposed or warranted by the laws of the United States.

Receiving Stolen Goods.—This offense is defined in Section 5357 in the following terms: "Every person who, upon the high seas or in any place under the exclusive jurisdiction of the United States, buys, receives, or conceals any money, goods, bank-notes, or other thing which may be the subject of larceny, and which has been feloniously taken or stolen from any other person, knowing the same to have been taken or stolen, shall be punished by a fine of not more than one thousand dollars, and by imprisonment at hard labor not more than three years."

The element of intent in this offense is replaced by knowledge on the part of the accused that the goods received were stolen. The "knowing the same to have been taken or stolen" constitutes the guilty knowledge which is essential to a conviction of the crime above described.

Rape.—*Rape* is the violation or carnal knowledge of a woman, forcibly and against her will.[2] The offense must have been committed by a male person with requisite physical capacity; for this reason a boy under fourteen is presumed to be incapable of its commission. In England the presumption of incapacity is conclusive; in some jurisdictions in the United States it may be rebutted by testimony showing capacity. There must be want of consent on the part of the woman, and the offense may be committed upon the person of a prostitute. Girls under a certain age, which is regulated locally by statute, are held to be incapable of giving consent. The fact of penetration is an essential ingredient of the offense, as is the use of force on the part of the offender. The force used may be either actual or constructive, but must be sufficient to accomplish the purpose.[3]

Assault and Battery with Intent to Commit Rape.—To constitute the aggravated assault here defined, the assault must be accompanied with the specific intention to rape; that is, to have carnal knowledge of the woman without her consent, and by the use of such force as should be sufficient to overcome such resistance as the woman could make.[4] The nature of the charge presupposes that the intent is not carried out. It is therefore necessary that the acts and conduct of the prisoner should be shown to be such that there can be no reasonable doubt as to the criminal intent. If these acts and conduct are equivocal, or equally consistent with the absence

[1] Sec. 2, Act of March 3, 1875 (18 Stat. at Large, 474).
[2] Charles *vs.* State, 6 Eng., 389; Cato *vs.* State, 9 Fla., 163.
[3] Cato *vs.* State, 9 Fla., 163; State *vs.* Burgdorf, 53 Mo., 65; Strange *vs.* People, 24 Mich., 1.
[4] Shields *vs.* State, 32 Tex. Crim. Rep., 502; Am. and Eng. Encyc. of Law, 2d Ed., vol. 2, pp. 973–975.

of the felonious intent charged, then it is clear that they are insufficient to warrant a verdict of guilty.[1]

Mayhem.—At the common law the offense of *mayhem* consisted in the act of unlawfully and violently depriving another of the use of such of his members as might render him less able, in fighting, either to defend himself or annoy his adversary.[2] By statute in most of the States the scope of this offense has been extended so as to include all malicious injuries to the person, the original condition that the part injured should have been useful in fighting having been quite lost sight of. Before the Conquest such offenses formed an elaborate and extensive branch of the law, but the offenses were treated as torts rather than crimes. Some of the laws set forth with the utmost minuteness and particularity the compensation to be made for every sort of bodily injury. After the Conquest the offense of wounding seems to have been regarded rather as a crime than as a tort or civil injury, and to have been defined and punished as such.[3]

Although forgery and perjury are not enumerated in the 58th Article of War, they are defined in connection with the offenses already described.

Forgery.—*Forgery* is the false or fraudulent making or alteration of an instrument with intent to defraud or to prejudice the right of another. The essence of the offense is the intent to defraud, and to constitute forgery there must have been a person in existence at the time of the execution of the fraudulent instrument who was capable of being defrauded thereby. The offense may consist in the forgery of an instrument, as in the case of a check, note, or bill of exchange, or of a signature only, or of an instrument partly engraved and partly written, like a bank-note, or of an instrument wholly engraved, as in the case of a railroad or steamship ticket.[4]

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[1] Com. *vs.* Merrill, 14 Gray (Mass.), 415; Am. and Eng Encyc. of Law, 2d Ed., vol. 2, pp. 973–975.

[2] 4 Blackstone Com., 205; U. S. *vs.* Oskins, 4 Cranch C. C., 98; II. Bishop Crim. Law, § 1001.

[3] III. Stephen's Hist. Crim. Law, 108, and cases cited. Section 5348 of the Revised Statutes contains a statutory definition of this offense when committed on the high seas or at places within the exclusive jurisdiction of the United States. "Every person who, within any of the places upon the land under the exclusive jurisdiction of the United States, or who, upon the high seas, in any vessel belonging to the United States, or to any citizen thereof, maliciously cuts off the ear, cuts out or disables the tongue, puts out an eye, slits the nose, cuts off the nose or lip, or cuts off or disables any limb or member of any person, with intent to maim or disfigure such person, shall be imprisoned at hard labor not more than seven years, and fined not more than one thousand dollars."

[4] State *vs.* Pierce, 8 Iowa, 231; State *vs.* Thompson, 19 *ibid.*, 299; People *vs.* Brotherton, 47 Cal., 388; U. S. *vs.* Jolly, 37 Fed. Rep., 108; *In re* Benson, 34 *ibid.*, 649; U. S. *vs.* Moore, 60 *ibid.*, 738, 740.

A disbursing officer who pays out money of the United States upon vouchers that are forged will in general make himself liable for the amount paid. Thus where such an officer paid out public money upon transportation requests addressed to a railroad company and accepted by it, which requests had been fraudulently prepared by a quartermaster's clerk who had forged the name of the quartermaster thereto, *held* that the disbursing officer was responsible for the amount paid. Dig. J. A. Gen., 424, par. 1.

A paymaster drew his check in favor of a discharged soldier for the amount due him

It sometimes happens that signatures and, in some cases, entire instruments are forged to which no quality of property attaches; to this class belong passes, permits in writing to be absent from a command, or other privileges of a merely personal character. Such conduct, while a serious military offense, does not conform to the definition of forgery, since the forged instrument cannot operate to defraud, or to prejudice the property rights of another. Like forgery itself it should therefore be charged as a violation of the 62d Article of War.

Perjury.—*Perjury* may be generally defined as false swearing, and includes the breach of the solemn sanction of an oath or the making of a false oath. When a witness to whom a lawful oath has been administered in a judicial proceeding swears falsely in a matter material to the issue, he is said to commit perjury. It is essential to the offense that the oath should have been duly administered by a person having authority to do so and in the course of a judicial proceeding.[1] In most jurisdictions there may be false swearing amounting to perjury in some forms of non-judicial proceedings. Such an offense, however, is strictly statutory in character, and is not included in the definition of the offense at common law. The false oath must be taken willfully, with some degree of deliberation, and with intent to impede or otherwise interfere with the due administration of justice. It must be taken positively and directly, and must in most cases relate to the existence or non-existence of a material fact; for if a man swears to what he believes or remembers, he is not in general guilty of perjury; but if he swears

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on final settlement. The payee indorsed the check in blank, and the paymaster then, according to a common practice, sub-indorsed it, adding his official designation, merely for the purpose (though the indorsement did not so state) of identifying the signature of the payee. The writing in the body of the check was then removed or altered and the check filled in for a very much greater amount. The check thus raised was on the next day presented to and paid by the Assistant Treasurer at New York. *Held* that while in the hands of a *bona-fide* indorsee the liability of the paymaster would have been that of a regular indorser, parol evidence not being then admissible to show that he indorsed merely for identification; * yet the loss in this case legally fell upon the Assistant Treasurer, whose liability was the same as that of a bank which pays a forged check in a case in which the forgery has not been facilitated by the negligence of the drawer.† *Ibid.*, par. 2.

[1] Bishop Crim. Law (7th ed.), § 1020; U. S. *vs.* Ambrose, 2 Fed. Rep., 556. The offense is also defined in Section 5392 of the Revised Statutes in the following terms: "Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than two thousand dollars, and by imprisonment, at hard labor, not more than five years; and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed." See, also, U. S. *vs.* Passmore, 4 Dall., 372; U. S. *vs.* Bailey, 9 Pet., 238; U. S. *vs.* Wood, 14 Pet., 430; U. S. *vs.* Nickersen, 17 How., 204; U. S. *vs.* Clark, 1 Gallis, 497; U. S. *vs.* Kendrick, 2 Mass., 60.

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* Daniel on Negotiable Instruments, vol. i. p. 19.

† Byles on Bills (Sharswood's Ed.), 337.

that he believes a fact to be true which he knows to be false, he is guilty of perjury. The fact sworn to should be material; for if such fact have no bearing upon the issue, the administration of justice has not been affected injuriously and there has not been perjury. *Subornation of perjury* is the offense of procuring another to take such a false oath as constitutes perjury in the principal.[1]

Perjury in Military Practice.—False swearing by a witness before a military court is not perjury at common law, nor is it made a specific offense by any of the Articles of War.[2] But though perjury is not made a specific offense by the military code, false swearing by an officer or soldier before a court-martial is "conduct to the prejudice of good order and military discipline," and is cognizable and punishable as such under the general (62d) Article. And a charge of "perjury" in connection with a specification setting forth a false swearing upon a court-martial will constitute a sufficient allegation of an offense under this Article.[3]

It was an essential prerequisite to a conviction of this offense at common law that the commission should have been established by the testimony of at least two competent witnesses. This to secure the preponderance necessary to overcome the reasonable doubt.[4]

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[1] The offense of subornation is defined in Section 5393, Revised Statutes, which provides that "every person who procures another to commit any perjury is guilty of subornation of perjury, and punishable as in the preceding section prescribed." See, also, U. S. *vs.* Bailey, 9 Pet., 238; U. S. *vs.* Moore, 2 Lowell, 232; U. S. *vs.* Stanley, 6 McLean, 409; U. S. *vs.* Perdue, 4 Fed. Rep., 897; U. S. *vs.* Mayer, Deady, 127; U. S. *vs.* Smith, 1 Sawy., 277; U. S. *vs.* Coons, 1 Bond, 1.

[2] Perjury as a criminal offense against the United States is defined in Section 5392, Revised Statutes. In England false swearing before a court-martial appears to be regarded as being indictable as perjury at common law. See Queen *vs.* Heane, 4 B. & S. 947; also Clode, Military Forces of the Crown, vol. i. pp. 169, 552–4.

A special statutory provision making a false oath before a *naval* court-martial indictable as perjury was contained in the Articles for the government of the navy established by the Act of July 17, 1862, c. 204, and appears still to subsist in the 41st of the present Articles and Sec. 1023, Rev. Sts. There is no statute relating specifically to false swearing before a court-martial of the *army*. The general provision, however, of Sec. 5392, Rev. Sts., providing for the punishment of perjury, is broad enough to include a case of false swearing as to "material matter" before any court-martial equally as before a civil tribunal of the United States. Thus a military person guilty of making a false material statement under oath as a witness upon a military trial would be amenable not only to a military charge, but apparently also to indictment in the U. S. District Court.

[3] Dig. J. A. Gen., 585, par. 1; *ibid.*, 497, par. 1.

[4] *Ibid.*, 586, par. 2. *Held* that a recruit who made a false statement as to his age, in a sworn declaration, was not indictable for perjury under Sec. 5392, Rev. Sts. There is no law requiring the recruit's declaration as to his age to be under oath. And in the usual form of the oath of enlistment prescribed by Article 2, the statement of age is not properly a part of the oath, but matter of description only. *Ibid.*, par. 3.

Where the prosecution introduced but one witness to prove the falsity of the testimony under the charge of perjury, and that witness was contradicted as to a material point, *advised* that the conviction and sentence adjudged by the court be disapproved on account of failure of proof. *Ibid.*, 407, par. 2.

Under this charge testimony which consists of answers to questions going to the credit of a particular witness, or of other witnesses whom he corroborated, is "material to the issue." *Ibid.*, par. 1.

False swearing before a court-martial not being perjury at common law, the rules as to the character and amount of the evidence necessary to sustain an indictment for perjury, though they may profitably be referred to, need not govern the proof of the *military* offense. Such offense will ordinarily be sufficiently established by the written record (or, in its absence, by secondary proof) of the testimony as given, together with any reliable and satisfactory evidence that the same was knowingly false.[1]

ARTICLE 59. *When any officer or soldier is accused of a capital crime, or of any offense against the person or property of any citizen of any of the United States which is punishable by the laws of the land, the commanding officer, and the officers of the regiment, troop, battery, company, or detachment to which the person so accused belongs, are required, except in time of war, upon application duly made by or in behalf of the party injured, to use their utmost endeavors to deliver him over to the civil magistrate, and to aid the officers of justice in apprehending and securing him, in order to bring him to trial. If, upon such application, any officer refuses or willfully neglects, except in time of war, to deliver over such accused person to the civil magistrates, or to aid the officers of justice in apprehending him, he shall be dismissed from the service.*

Article 18 of the British Code of 1717 required the commanding officer of any regiment to surrender to the civil authority for trial any officer or soldier under his command who had committed a crime punishable "by the known laws of the land." The Mutiny Act for the year 1718 contained the requirement "that any soldier accused of a criminal offense punishable by the known laws of the land should be given up to the civil magistrate by the commanding officer, under the penalty of his being cashiered for neglect or refusal."[2] This requirement was coupled with the provision that "no person convicted by the civil magistrate should be liable to court-martial punishment, save that of cashiering, for the same offense." The provision appears in substantially its present form as Article 1, Section 2, of the British Code of 1774, as Article 1, Section 10, of the American Articles of 1776, and as No. 59 of the Articles of 1806. The clause making the provision applicable in time of peace only was incorporated in the Article in 1863.[3]

Purpose of the Enactment.—The Constitution of the United States, like those of the several States, recognizes, as a fundamental principle, that such military jurisdiction as is created by its authority is to be exercised in strict subordination to the civil power.[4] The law also recognizes the fact that

[1] Dig. J. A. Gen., 586, par. 2.
[2] Clode, Mil. Law. 53, 54.
[3] Section 30, Act of March 3, 1863 (12 Stat. at Large, 736).
[4] Dow *vs.* Johnston, 100 U. S., 169. This Article is a recognition of the general principle of the subordination of the military to the civil power, and its main purpose evidently is to facilitate, in cases of offenders against the local civil statutes who happen to be connected with the army, the execution of those statutes where, as citizens, such

military persons constitute a class apart, and are subject to rules differing in many material respects from those regulating the conduct of the general body of citizens. The military status, however, confers no special immunities upon members of the military establishment, who are in general subject to the laws in the same manner and to precisely the same extent as other citizens or inhabitants. Whoever, therefore, violates the criminal law of the United States or that of a State is subject to arrest, trial, and punishment therefor. If such offender be a citizen, the local law prescribes the methods of such arrest; if, on the other hand, he be a military person serving under the immediate command of a military superior, the 59th Article of War prescribes a method of procedure in accordance with which his arrest must be effected.

In the application of this statute several questions may arise, which will be discussed in order.

1. The Article relates to a military person who, at the time the arrest is sought, is a member of an organized command; it matters not whether that command be stationary, as in the case of a post or camp, or movable, as would be the case of a column on the march. An isolated member of the military establishment (an officer on leave of absence, or an enlisted man on furlough, for example) who commits an offense may be arrested by the proper representative of the local authority whose law or ordinance has been violated.[1]

2. The provisions of the Article are applicable to an officer or soldier who is charged with a crime or offense "which is punishable by the laws of the land." This term has been held to include not only offenses against the laws of a State, but violations of municipal by-laws and city ordinances; it does not extend, however, to offenses committed against the United States, or to offenses committed within territory over which the United States exercises exclusive jurisdiction.[2]

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persons remain legally amenable to arrest and trial thereunder. Protection to military persons from civil arrest is not the object of the Article. Dig. J. A. Gen., 50, par. 1.

[1] Dig. J. A. Gen., 50, par. 1; *ibid.*, 245, par. 3, 4. In *Ex parte* McRoberts, 16 Iowa, 600, 603, it was *held* that the provisions of the Article apply only to officers and soldiers while within the immediate control and jurisdiction of the military authorities, and therefore do not apply to a case of a soldier *absent on furlough;* but that such a soldier, pending his furlough, may be arrested in the same manner as any civilian.

[2] Opin. Att.-Gen. of Nov. 26, 1894, published in Circular No. 15, A. G. O., Dec. 6, 1894; Dig. J. A. Gen., 50, par. 4; *Ex parte* Bright, 1 Utah, 145. This case, however, is regarded as going too far, in holding that though a soldier may, without application to the military authorities, be *arrested and detained* by the civil authorities for the violation of a city ordinance, he may not be *tried or punished* by the latter, but for that purpose must be surrendered to the military commander. Unless the offense of such a soldier directly prejudiced military discipline he could not be tried for the same at all by a military court; and if it did, he would be triable only for the breach of discipline, leaving him still amenable to the local law for the civil disorder.

For exemption of enlisted men from arrest on mesne process, or in execution for debt in certain cases, in accordance with Sec. 1237, Rev. Stat., see White *vs.* Lowther, 3 Ga., 397; Moses *vs.* Willitt, 3 Strobhart (S. C.), 210; Ray *vs.* Hogeboom, 11 Johns., 433.

The term "any of the United States," employed in this Article, *held* properly to

3. The Article requires that the application shall be "duly made" and "by or in behalf of the party injured." The commanding officer, before surrendering the party, is entitled to require that the "application" shall be so specific as to identify the accused and to show that he is charged with a particular crime or offense which is within the class described in the Article. Where it is doubtful whether the application is made in good faith and in the interests of law and justice, the commander may demand that the application be especially explicit and be sworn to; and in general the preferable and indeed only satisfactory course will be to require the production, if practicable, of a due and formal warrant or writ for the arrest of the party.[1]

Procedure.—The commanding officer, before surrendering the party, is entitled to require that the "application" shall be so specific as to identify the accused and to show that he is charged with a particular crime or offense which is within the class described in the Article. Where it is doubtful whether the application is made in good faith and in the interests of law and justice, the commander may demand that the application be especially explicit and be sworn to; and in general the preferable and indeed only satisfactory course will be to require the production, if practicable, of a due and formal warrant or writ for the arrest of the party.[2] The application required by the Article should be made in a case where the crime was committed by the party *before* he entered the military service, as where it was committed by him while in the service.[3] In the former case a more exact identification may perhaps reasonably be required.[4]

The provisions of the Article are applicable not only when the officer or soldier is accused of a crime or offense "which is punishable by the laws of the land," i.e., by the public law—statutes or constitution—of the particular State, but his surrender may be similarly demanded for the violation of a municipal ordinance.[5]

The party should be surrendered upon proper application, though the offense be one of which a military court has jurisdiction concurrently with the civil courts; unless, indeed, the military jurisdiction has already duly attached (as by arrest, or service of charges with a view to trial), in which case the prisoner may be surrendered or not as the proper authority may determine. A soldier under a sentence of confinement imposed by court-

include any and all the political members of our governmental system, and to embrace an organized Territory equally with a State. Dig. J. A. Gen., 53, par. 9. See, also, par. 4, *post*.

[1] Dig. J. A. Gen., 51, par. 3; 2 Opin. Att.-Gen., 10.

[2] *Ex parte* McRoberts, 16 Iowa, 603–605.

[3] See G. O. 29, Dept. of the Northwest, 1864, where it is remarked that there is an *especial* obligation to surrender the soldier where the crime was committed by him before entering the military service.

[4] 2 Opin. Att.-Gen., 10.

[5] Dig. J. A. Gen., 51, par. 4; Opin. of Att.-Gen. of Nov. 26, 1894. See Circular No. 15, A. G. O., of 1894.

martial cannot in general properly be surrendered under this Article. In such a case the civil authorities should regularly defer their application till the military punishment has been executed or remitted.[1]

Surrenders, under the Article, can lawfully be made only in accordance with its terms. "An officer or soldier accused as indicated by the Article, though he may be willing and may desire to surrender himself to the civil authorities, or to appear before the civil court, should not in general be permitted to do so, but should be required to await the formal application."[2]

The Article is directory, not jurisdictional. It does not limit the action to be taken by the military authorities to cases where the application is made by the party; it may be made in his behalf. It does not place a soldier who has committed a crime and been indicted therefor beyond the reach of the civil power if the person injured does not apply for his surrender. In a case —one of murder, for example—where there can be no personal application, the State properly takes the place of the individual. And so in all other cases where an indictment has been found or a warrant of arrest has been issued the State, with which resides the jurisdiction and the power to prosecute, may make the demand, and upon its demand it is the duty of the commanding officer to surrender the party charged.[3]

The Article contemplates only cases in which an "officer or soldier is accused," and has no application to civilians employed or resident at a military post.[4] Nor does it apply to the service by a sheriff of a subpœna on an officer or soldier to appear as a witness before a civil court. In such a case, indeed, the civil official should, as a matter of comity, apply first to the post commander, whether or not the post be within the exclusive jurisdiction of the United States. It will then be for the commander, in comity, to facilitate the service and to issue the necessary permit or order to enable and cause the officer or soldier to attend the court.[5]

The several executive departments, and other instrumentalities of the Federal Government, being agencies of the same sovereignty, the Article is not applicable to offenses against the laws of the United States, or to offenses committed in places over which the United States has exclusive jurisdiction.[6]

[1] Dig. J. A. Gen., 52, par. 6. Where a soldier, duly surrendered under this Article and allowed to go on bail, was thereupon returned to duty, *held* that it was within the spirit of the Article for the department commander to instruct the commanding officer of such soldier to cause him to appear for trial at the proper time. *Ibid.*

[2] *Ibid.*, 53, par. 7.

[3] *Ibid.*, 53, par. 10. In view of the obligation devolved by this Article upon officers of the Army, a post commander would properly be required to apprehend and hold for surrender to the civil authorities a soldier who, having been once surrendered under the Article, had escaped and returned to the post. *Ibid.*, par. 8. See, also, for a similar case, G. O. 7, Dept. of the South, 1871.

[4] *Ibid.*, 54, par. 11. So *held* that it did not apply to a case of a civilian (Chinese) laundryman employed and residing at a military post accused of a civil crime. While it would be equally desirable that the surrender should be made in such a case, such surrender would be a matter of comity, not of official duty under the Article. *Ibid.*

[5] *Ibid.*, 54, par. 11.

[6] Dig. J. A. Gen., 52, par. 5.

The term "any of the United States," employed in this Article, properly includes any and all of the political members of our governmental system, and embraces an organized Territory as well as a State. As the offenses for which surrender may be demanded are made such by the common law, or by statute in a State or Territory, the Article is not applicable to a case of an offense committed against the laws of the *United States*, as, for instance, the statutes prohibiting the introduction of liquor into the Indian country. Nor is it applicable to a case of an offense committed in a place over and within which the jurisdiction of the United States is exclusive.[1]

SERVICE OF PROCESS IN GENERAL.

The 59th Article of War provides a method of procedure in effecting the arrest of a military person charged with an offense against the law of a State or Territory; it contains no provisions respecting the general service of process, and is silent as to the service of process in civil as distinguished from criminal cases. This subject is regulated, in some cases, by the compact between the State and the general government, as expressed in the Act of the Legislature consenting to a particular purchase or ceding jurisdiction over a particular tract. If the right to serve process within the ceded territory in civil and criminal cases arising *within* the State but *without* such ceded territory be reserved in the act of cession, then process in such cases may be served, and the service will be regulated by the laws of the State in whose name and by whose courts it is issued. It has already been seen that where there has been no cession of jurisdiction by the State its officials have the same authority to serve the process and mandates of its courts, and its courts have the same jurisdiction over acts done and crimes committed within the military post as elsewhere in the State; the mere fact of ownership or occupation of the land by the United States having no effect to except it from the operation of the State laws.[2]

Service of Process in the Territories.—Service of process in the Territories is analogous to similar procedure in the several States within lands over which exclusive jurisdiction has not been ceded to the United States. Where a military post or reservation is situated in a Territory the Territorial courts are authorized to issue process for the arrest of officers or soldiers of the command charged with crime, or to cite them to appear before them as defendants in civil actions, or to attach, replevy upon, or take in execution

[1] Dig. J. A. Gen., 53, par. 9. It is further held, in *Ex parte* McRoberts, 16 Iowa, 603, that the provisions of the Article apply only to officers and soldiers while within the immediate control and jurisdiction of the military authorities, and therefore do not apply to a case of a soldier *absent on furlough;* but that such a soldier, pending his furlough, may be arrested in the same manner as any civilian.

[2] Fort Leavenworth R. R. Co. *vs.* Lowe, 114 U. S., 525, 527, 533; U. S. *vs.* Cornell, 2 Mason, 60; Com. *vs.* Clary, 8 Mass., 72; Mitchell *vs.* Tibbitts, 17 Pick., 298; Dig. J. A. Gen., 245, par. 3.

any property belonging to them within the posts, etc., not specially exempted from legal seizure. This for the reason that the courts in which is vested the judicial power of a Territory are not the courts of a sovereignty distinct from the United States, but are the creatures of Congress, being established by it directly, or indirectly by its authority through the Territorial legislature, under the provision of the Constitution[1] empowering Congress "to make all needful rules and regulations respecting the territory belonging to the United States."[2]

Thus while officials charged with the service of the process of such—as indeed of any—courts would, in comity, properly refrain from entering a military post for the purpose of serving process therein, or at least from making the service, till formal permission for the purpose had been sought and obtained from the commanding officer, yet, on the other hand, officers commanding military posts in the Territories should certainly interpose no obstacle to the due service within their commands of the legal process of the Territorial courts.[3]

ARTICLE 60. (1) *Any person in the military service of the United States who makes or causes to be made any claim against the United States, or any officer thereof, knowing such claim to be false or fraudulent; or*

(2) *Who presents or causes to be presented to any person in the civil or military service thereof, for approval or payment, any claim against the United States or any officer thereof, knowing such claim to be false or fraudulent; or*

(3) *Who enters into any agreement or conspiracy to defraud the United States by obtaining, or aiding others to obtain, the allowance or payment of any false or fraudulent claim; or*

(4) *Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or against any officer thereof, makes or uses, or procures or advises the making or use of, any writing or other paper, knowing the same to contain any false or fraudulent statement; or*

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[1] Constitution of the United States, Art. IV, Sec. 3, par. 2.

[2] See Franklin *vs.* U. S., and Reynolds *vs.* People, in 1 Colorado Reports.

[3] "A Territory is not properly sovereign. It is an organization through and by means of which Congress for a time governs a particular portion of the country. Its rights are those which are set forth in the organic Act." 16 Opin. Att.-Gen., 115; Dig. J. A Gen., 739, par. 1, 2, and 3.

The power of Congress over the Territories is general and plenary, arising from the right to acquire them. It may legislate over them within the scope of its constitutional powers in relation to the citizens of the United States, or it may confer a limited power of legislation over local subjects upon the territorial government created by its authority, but may annul such legislation at its discretion. It may create territorial courts, and may endow them with appropriate jurisdiction; but such courts are in no sense courts of the United States and form no part of its judicial system. Mormon Church *vs.* U. S., 136 U. S., 1; Scott *vs.* Sandford, 19 How., 393; Ferris *vs.* Higley, 20 Wall., 375; Hornbuckle *vs.* Toombs, 18 Wall., 648; Davis *vs.* Billsland, *idem;* Scott *vs.* Jones, 5 How., 343; Clinton *vs.* Englebrecht, 13 Wall., 434; Franklin *vs.* U. S., 1 Col.; Reynolds *vs.* People, *ibid.;* G. O. 30, H. Q. A., 1878; 7 Opin. Att.-Gen., 564.

(5) *Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, makes, or procures or advises the making of, any oath to any fact or to any writing or other paper, knowing such oath to be false; or*

(6) *Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, forges or counterfeits, or procures or advises the forging or counterfeiting of, any signature upon any writing or other paper, or uses, or procures or advises the use of, any such signature, knowing the same to be forged or counterfeited; or*

(7) *Who, having charge, possession, custody, or control of any money or other property of the United States, furnished or intended for the military service thereof, knowingly delivers, or causes to be delivered, to any person having authority to receive the same, any amount thereof less than that for which he receives a certificate or receipt; or*

(8) *Who, being authorized to make or deliver any paper certifying the receipt of any property of the United States, furnished or intended for the military service thereof, makes, or delivers to any person, such writing, without having full knowledge of the truth of the statements therein contained, and with intent to defraud the United States; or*

(9) *Who steals, embezzles, knowingly and willfully misappropriates, applies to his own use or benefit, or wrongfully or knowingly sells or disposes of any ordnance, arms, equipments, ammunition, clothing, subsistence stores, money, or other property of the United States, furnished or intended for the military service thereof; or*

(10) *Who knowingly purchases, or receives in pledge for any obligation or indebtedness, from any soldier, officer, or other person who is a part of or employed in said forces or service, any ordnance, arms, equipments, ammunition, clothing, subsistence stores, or other property of the United States, such soldier, officer, or other person not having lawful right to sell or pledge the same,*

(11) *Shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial may adjudge, or by any or all of said penalties. And if any person, being guilty of any of the offenses aforesaid, 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.* Section 5, Act of March 2, 1901. (31 Statutes at Large, 951.)

This Article, which was enacted during the continuance of the War of the Rebellion, creates a number of offenses against the United States, each of which involves actual fraud and an intent to defraud the public. The

several offenses named in the enactment are statutory in character, and each should be charged and proved in accordance with the definitions prescribed in the particular clause to which the offense relates. A statutory intent is alleged in several clauses, which must also be set forth in the charges, and established in evidence, in order to warrant a conviction under the terms of the Article.

Fraudulent Claims.—Clauses one to six, inclusive, relate to fraudulent claims and demands against the United States and make each of the following acts an offense against the United States;

(1) "Any person in the military service of the United States who makes or causes to be made any claim against the United States, or any officer thereof, knowing such claim to be false or fraudulent; or

(2) "Who presents or causes to be presented to any person in the civil or military service thereof, for approval or payment, any claim against the United States or any officer thereof, knowing such claim to be false or fraudulent; or

(3) "Who enters into any agreement or conspiracy to defraud the United States by obtaining, or aiding others to obtain, the allowance or payment of any false or fraudulent claim; or

(4) "Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or against any officer thereof, makes or uses, or procures or advises the making or use of, any writing or other paper, knowing the same to contain any false or fraudulent statement; or

(5) "Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, makes, or procures or advises the making of, any oath to any fact or to any writing or other paper, knowing such oath to be false; or

(6) "Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, forges or counterfeits, or procures or advises the forging or counterfeiting of, any signature upon any writing or other paper, or uses or procures or advises the use of, any such signature, knowing the same to be forged or counterfeited."

The claims referred to in the statute are "false and fraudulent," that is, they are wrongful demands for money alleged to be due for supplies furnished or for services rendered,[1] and are known to be such by the accused, at the time of their presentment.

[1] The offense known as the duplicating of pay-rolls, where it involves, as it generally does, a presenting or a causing to be presented of a false or fraudulent claim against the United States, is properly chargeable under this Article. Dig. J. A. Gen., 55, par. 1.

Where an officer who had been sentenced to forfeit all pay due, but whose sentence had not yet been approved or published, presented pay accounts to the paymaster for his pay, and received the amount of the same, *held* that he was not triable for the offense of presenting a fraudulent claim under this Article. *Ibid.*, par. 2.

The presenting of false and fraudulent claims for horses lost in battle, for recruiting

Short Payments; Receipts in Blank.—Clauses seven and eight also make it a criminal offense on the part of any person

(7) "Who, having charge, possession, custody, or control of any money or other property of the United States, furnished or intended for the military service thereof, knowingly delivers, or causes to be delivered, to any person having authority to receive the same, any amount thereof less than that for which he receives a certificate or receipt; or

(8) "Who, being authorized to make or deliver any paper certifying the receipt of any property of the United States, furnished or intended for the military service thereof, makes, or delivers to any person, such writing, without having full knowledge of the truth of the statements therein contained, and with intent to defraud the United States."

The offense described in clause seven is that of "short payments," that is, payments of money less in amount than are called for in the receipts given therefor by creditors of the United States. The principle applies equally to property transactions, and impliedly prohibits the giving of blank receipts by officers of the army.[1]

Clause eight makes a certain form of negligence in the verification of articles, or quantities, of property or stores received by an officer, in behalf of the United States, in pursuance of a contract or agreement; such negligence consisting in the making or delivery of a paper certifying the receipt of property without having full knowledge of the truth of the statements contained in such paper, and with intent to defraud the United States.[2]

Stealing, Larceny, Embezzlement, etc.—The ninth clause makes it an offense on the part of any person "who steals, embezzles, knowingly and willfully misappropriates, applies to his own use or benefit, or wrongfully or knowingly sells or disposes of any ordnance, arms, equipments, ammunition, clothing, subsistence stores, money, or other property of the United States, furnished or intended for the military service thereof."

The offense of stealing, indicated in the 9th paragraph of this Article,

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expenses, and for rewards for the arrest of deserters, *held* offenses within paragraphs 1, 2, and 4 of this Article. Dig. J. A. Gen., par. 3.

Where a soldier, in order to procure his discharge from the service and the payment thereupon of a considerable amount not in fact due him, forged the name of his commanding officer on a discharge-paper and a "final statement" paper, and presented the same to a paymaster, *held* that he was chargeable with offenses defined in the 2d, 4th, and 6th paragraphs of this Article. *Ibid.*, par. 4.

[1] Where a disbursing officer, having caused a creditor of the United States to sign a receipt in blank, paid him a less sum than was due him, and afterwards inserted the true amount due in the receipt, so as to obtain credit with the United States for the greater sum, *held* that he was chargeable with the offense defined in the 7th paragraph of this Article. *Ibid.*, 56, par. 5.

[2] Where an officer, by collusion with a contractor who had contracted for the delivery of military supplies, received for a pecuniary consideration from the latter a less amount of supplies than the United States was entitled to under the contract, while at the same time giving him a voucher certifying on its face the delivery of the whole amount, *held* that such officer was chargeable with an offense of the class defined in the 8th paragraph of this Article. *Ibid.*, par 6.

consists in a larceny of "property of the United States furnished or intended for the military service." Except in time of war,[1] larceny of other property can be charged as a military offense only when cognizable under Article 62, as prejudicing good order and military discipline.[2]

The offense of embezzlement has already been discussed.[3] In order to determine whether certain acts or conduct may properly be charged as constituting embezzlement of public money under the ninth paragraph of this Article, the Sections of the Revised Statutes[4] relating to embezzlements may properly be recurred to. Acts here specified as constituting embezzlements in law may, when committed by officers of the army, be charged as embezzlements under this Article, and the rules of evidence established by these Sections may also be applied, where apposite, to military cases.[5] But as to the *penalties* prescribed in the same, these, though useful as going to indicate a reasonable measure of punishment when imprisonment or fine is proposed to be adjudged, are of course in no respect obligatory upon military tribunals, and any approved military penalty or penalties, such as dismissal, suspension, etc., may be imposed by courts-martial upon conviction of embezzlement, either alone or in connection with imprisonment or fine. So a term of confinement, or a fine (or forfeiture of pay), in *excess* of the penalties authorized for civil offenders may legally be adjudged by such courts.[6]

In a case of embezzlement of public funds[7] or property, charged under this Article, it is not necessary to allege in terms, or to prove, an *intent to defraud* the United States. It is the *act* of legal embezzlement which is made the offense, irrespective of the purpose or motive of such act.[8]

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[1] See the 58th Article of War, *supra*. See, also, under the 58th Article, the title *Larceny*.

[2] Dig. J. A. Gen., 59, par. 16.

[3] See Article 58, *supra*, title *Embezzlement*.

[4] See Title LXX, Rev. Stat. See, also, Dig. J. A. Gen. 60, pars. 19–23.

[5] See cases in which embezzlements of this class were charged against officers of the Army, in G. O. 1, War Dept., 1861; G. C. M. O. 43, 86, Hdqrs. of Army, 1868; do. 21, War Dept., 1871; do. 27, 34, *id.*, 1872; do. 81, *id.*, 1874; do. 52, Hdqrs. of Army, 1877.

[6] Dig J. A. Gen., 56, par. 8.

[7] "All money lawfully in the hands of a public officer, and for which he is accountable, is money of the United States." United States *vs.* Watkins, 3 Cranch C. C., 441.

[8] Dig. J. A. Gen., 56, par. 7. The withdrawing, by a disbursing officer of the Army, from an authorized depository, of public funds for a purpose not prescribed or authorized by law—as for personal use, or to pay claims not due from the United States or payable by such officer—being a form of embezzlement defined by Sec. 5488, Rev. Sts., *held* properly charged as embezzlement under the present Article; and convictions of officers upon such a charge *held* authorized and legal. *Ibid.*, 57, par. 9.

But *held* that to constitute such embezzlement it is not necessary that there should have been a personal conversion of the funds or an intent to defraud. The object of the law is to provide a safeguard against the misuse and diverting from their appointed purpose of public moneys, and the intent of the offender, whether fraudulent or not, enters in no respect into the statutory crime. If the withdrawal or application of the funds is simply one not prescribed or authorized by law, the offense is complete. An absence, however, of criminal motive in the illegal act may be shown in mitigation of sentence in a military case. *Ibid.*

So *held* that it constituted no *defense* to a charge of an embezzlement of this class

Misappropriation; Misapplication. — *Misappropriation* is a form of wrongful conversion of the ownership of the money or property of the United States; as here used it is nearly synonymous with embezzlement. *Misapplication* is a diversion of public money or property from the particular use authorized in the act of appropriation to another use not so authorized; the title and ownership continuing in the United States. "The misappropriation specified in the Article need not be an appropriation for the personal profit of the accused. The words 'to his own use or benefit' qualify only the term 'applies.'"[1]

In charging a stealing, embezzlement, misappropriation, etc., under this Article, it is not necessary to allege that the funds or property were "furnished or intended for the military service": it is sufficient if this fact appears from the evidence, and in most cases it will be inferable from the very nature of the property itself—as where, for example, the same consists

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(though it might be shown in mitigation of punishment) that the officer had restored to the public depository the funds illegally withdrawn by him before a formal demand was made for the same. Dig. J. A. Gen., 57, par. 9.

It is a defense to a charge (under this Article) of the embezzlement defined in Section 5490, Revised Statutes, as consisting in a failure to safely keep public moneys by an officer charged with the safe-keeping of the same, that the funds alleged to have been embezzled were, without fault on the part of the accused, lost in transportation, or fraudulently or feloniously abstracted. *Ibid.*, par. 10.

Section 5495, Revised Statutes, provides that the refusal of any person charged with the disbursement of public moneys promptly to transfer or disburse the funds in his hands, "upon the legal requirement of an authorized officer, shall be deemed, upon the trial of any indictment against such person for embezzlement, as *prima facie* evidence of such embezzlement." Applying this rule to a military case, it is clear that, in the event of such a refusal by a disbursing officer of the Army, the burden of proof would be upon him to show that his proceeding was justified, and that it would not be for the prosecution to show what had become of the funds. So where an acting commissary of subsistence, on being relieved, failed to turn over the public moneys in his hands to his successor, or to his post commander when ordered to do so, or to produce such moneys, exhibit vouchers for the same, or otherwise account for their use, when so required by his department commander, *held* that he was properly charged with and convicted of embezzlement under this Article. *Ibid.*, par. 11.

In view of the injunction and definition of Sections 3622 and 5491, Revised Statutes, an officer who, in his official capacity, receives public money (not pay or an allowance) which he fails duly to account for to the United States is guilty of embezzlement. The statute makes no distinction as to the sources from which the money is derived or the circumstances of its receipt. Nor is it material whether or not the officer actually converted it to his own use or what was the motive of his disposition of it. So *held* that an officer who, having claimed and exacted certain moneys from Government contractors for alleged liabilities on their part, failed to pay the same into the treasury, or to duly account therefor, was guilty of embezzlement under the ninth paragraph of this Article. *Ibid.*, 60, par. 19.

Where an officer allowed to an enlisted man and paid to him, out of certain public funds consisting of the proceeds of a public sale of condemned quartermaster stores, an amount of 10 per cent. on the total of such proceeds, as a compensation for the services of such man as auctioneer at the sale, *held* that such payment was illegal and unauthorized and constituted an embezzlement of public money chargeable under the 60th or the 62d Article. *Ibid.*, par. 20.

Repeated false statements of the accused relative to the public moneys for which he was accountable are competent evidence going to sustain a charge of embezzlement under this Article. *Ibid.*, 61, par. 22.

[1] Dig. J. A. Gen., 58, par. 13.

of "quartermaster's stores," "subsistence stores," "ordnance stores," etc.[1]

The application or operation of this Article is in no manner affected by the enactment of March 3, 1875, constituting embezzlement of public property a felony and making it triable by a United States court, such Act being a purely civil statute.[2]

Purchasing Articles of Equipment, etc.—Clause ten makes it a criminal offense on the part of any person "who knowingly purchases, or receives in pledge for any obligation or indebtedness, from any soldier, officer, or other person who is a part of or employed in said forces or service, any ordnance, arms, equipments, ammunition, clothing, subsistence stores, or other property of the United States, such soldier, officer, or other person not having lawful right to sell or pledge the same."[3]

This clause makes it unlawful to purchase, sell, or receive in pledge the articles of Government property therein named, and deprives all such transactions of legal validity which have not been effected in strict conformity to law.

The penalty imposable upon conviction of any of the offenses named in the article is contained in clause eleven which provides that such offenders shall, on conviction thereof, be punished by fine or imprison-

[1] Dig. J. A. Gen., 58, par. 14.

[2] *Ibid.*, 61, par. 23.

Where an officer of the Quartermaster Department used teams, tools, and other public property, in his possession as such officer, in erecting buildings, etc., for the benefit of an association, composed mainly of civilians, of which he was a member, *held* that he was properly chargeable with a misappropriation of property of the United States. And similarly *held* of a loaning by such an officer of public property (corn) to a contractor for the purpose of enabling him to fill a contract made with the United States through another officer. The fact that a practice exists in a post or other command of making a use (not authorized by regulation or order) of government property for private purposes, or of loaning it in the prospect of a prompt return, can constitute no defense to a charge for such act as an offense under this Article. Such practice, however, if sanctioned, though improperly, by superior authority, may be shown in evidence in mitigation of sentence. *Ibid.*, 59, par. 15.

Where a quartermaster used temporarily with his private carriage a pair of government horses in his charge, *held* that he was not properly chargeable with embezzlement, but with the offense, under this Article, of "knowingly applying to his own use and benefit property of the United States furnished for the military service." *Ibid.*, 58, par. 12.

[3] *Held* that under the concluding provision of this Article* a soldier might be brought to trial for an offense of the class specified therein while held imprisoned, after dishonorable discharge under a sentence imposed for another offense, provided, of course, the two years' limitation of Article 103 had not expired. Dig. J. A. Gen., 59, par. 17.

In view of the words "in the same manner," employed in the last paragraph of this Article, considered in connection with the 77th Article and Section 1658, Revised Statutes, *held* that a volunteer or militia officer or soldier could be tried, after his discharge from the service for a breach of this Article committed while in the service, only by a court composed in the one case of other than regular officers and in the other of militia officers. *Ibid.*, 60, par. 18.

* Whether this provision, in subjecting officers and soldiers discharged, mustered out, etc., and become *civilians*, to trial by court-martial in the same manner as if they were a part of the Army, is constitutional, is a question which is believed not to have been judicially passed upon. Probably originally inserted in the Act of March 2, 1863, (from which the Article is repeated,) as in the nature of a *war measure*, it was in fact relied upon as giving jurisdiction in but a small number of cases even during the war, and since that period no case is known in which the exceptional jurisdiction conferred has been taken advantage of.

ment, or by such other punishment as a court-martial may adjudge. And if any person, being guilty of any of the offenses aforesaid 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."

This clause confers jurisdiction upon a general court-martial to try an offender, for an offense in violation of this Article, after his discharge or muster-out, provided the statute of limitations has not run at the date of the order for such trial.

ARTICLE 61. *Any officer who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service.*

This Article does not appear in any of the codes issued under the royal prerogative prior to the Mutiny Act. In its original form the Article contained the requirement that "in every charge against an officer for scandalous or unbecoming behavior the fact or facts whereon the same is grounded shall be clearly specified." Although the facts continued to be set forth in the specifications, the provision requiring that course had disappeared from the Article prior to the middle of the last century. The requirement in substantially its present form appears as Article 23, Section 15, of the British Code of 1774, as Article 21, Section 14, of the American Articles of 1776, and as No. 83 of the Articles of 1806. The words "scandalous and infamous," which had appeared in the earlier Articles and which, having been confused with the word "infamous" as used at the common law, had given rise to some conflict in interpretation, were omitted from the revision of 1806.

Nature of the Offense.—This Article, like the 62d, is in form an apparent exception to the rule that offenses against the United States must be exactly described in the enactment which creates them. The effect of the Article is to establish a standard of conduct in respect to commissioned officers of the Army, and to give to material departures from such standard the character of serious military offenses. The particular acts or classes of acts which constitute such departures from the standard established in the Article are determined in part by custom of service and in part, as will presently be seen, by an application of the terms of the Article to the particular acts or omissions which are set forth in the charges and specifications; if the conduct charged be found, upon inquiry, to conform to the conditions set forth in the statute, that is, to be "conduct unbecoming an officer and gentleman," the offense described in the Article has been committed and the mandatory sentence of dismissal must be imposed.[1]

[1] In Dynes *vs.* Hoover, 80 How., 82, it was held that the jurisdiction of courts-martial under the Articles for the government of the Navy established by Congress was not limited to the crimes defined or specified in those Articles, but extended to any offense which, by fair deduction from the definition, Congress meant to subject to punishment,

Scope of the Article.—In its original form the Article required the conduct to be "scandalous and infamous," but these words were omitted from the revision of the Articles of War in 1806, and in an early case it was held by the Secretary of War that they had been dropped intentionally, and in a manner amounting to a declaration by Congress that it should no longer be necessary in order to bring an officer within the scope of the Article that the act charged should be "scandalous and infamous," provided it were "unbecoming an officer and gentleman."[1] What constitutes conduct unbecoming an officer and gentleman will therefore be determined by custom of service, and such conduct has been declared to be "something more than indecorum" and "such as to disgrace the offender—to make him an unfit associate for officers and gentlemen, and to render his expulsion from the society of such necessary to the preservation of the respect due to them as a class."[2] Nor is it *essential* that the act should compromise the

being one of a minor degree, of kindred character, which has already been recognized to be such by the practice of courts-martial in the army and navy services of nations, and by those functionaries in different nations to whom has been confided a revising power over the sentences of courts-martial; or which, though not included, in terms or by construction, within a comprehensive enactment, such as the 32d Article for the government of the Navy, which means that courts-martial have jurisdiction of such crimes as are not specified, but which have been recognized to be crimes and offenses by the usages of the navy of all nations, and that they shall be punished according to the laws and customs of the sea. Dynes *vs.* Hoover, 20 How., 82; Smith *vs.* Whitney, 116 U. S., 167, 183, 185.

[1] Dig. J. A. Gen., 61, par. 1; Ives, p. 265. To constitute an offense under this Article the conduct need not be "scandalous and infamous." These words, contained in the original Article of 1775, were dropped in the form adopted in 1806. An act, however, which is only slightly discreditable is not in practice made the subject of a charge under this Article. The Article, in making the punishment of dismissal imperative in all cases, evidently contemplates that the conduct, while unfitting the party for the society of men of a scrupulous sense of decency and honor, shall exhibit him as unworthy to hold a commission in the army. Dig. J. A. Gen., 61, par. 1.

[2] G. O. 97, Army of the Potomac, March 8, 1862; G. O. 111, *ibid.*, March 25, 1862. See, also, General Orders, 41, A. G. O., of 1879, in which General Sherman remarks that "the charge of violating the 61st Article of War should only be made when the conduct of the accused is such as to unfit him to be an associate of officers and gentlemen."

Knowingly making to a superior a false official report *held* chargeable under this Article. So of a deliberately false official certificate as to the truth or correctness of an official voucher, roll, return, etc. So of any deliberately false official statement, written or verbal, of a material character. So where an officer caused the sergeant of the guard to enter in the guard-book a false official report that he (the officer) had duly visited the guard at certain hours as officer of the day (when he had in fact been guilty of a neglect of duty in this particular), and thereupon himself signed such report and submitted it to his post commander, *held* that his conduct was chargeable as an offense under this Article. Dig. J. A. Gen., 62, par. 2.

The following acts committed in a particular case *held* to be offenses within this Article: preferring false accusations against an officer; attempting to induce an officer to join in a fraud upon the United States; attempt at subornation of perjury. *Ibid.*, par. 3.

The use of abusive language toward a commanding officer may constitute an offense under this Article. But, both as a matter of correct pleading, and because the 20th Article authorizes a punishment less than dismissal, the language should be so particularized as to show that it constituted an offense more grave than the mere disrespect which is the subject of the latter Article. A specification not thus setting forth and characterizing the epithets or words employed will be subject to a motion to make definite or strike out. *Ibid.*, 65, par. 21.

Held that a surgeon who appropriated to his own personal use, and to that of his

honor of the officer.[1] It is only necessary that the conduct should be such as is at once disgraceful or disreputable and manifestly unbefitting both an officer of the army and a gentleman.[2]

Conduct Need Not Directly Affect the Military Service.—To justify a charge under this Article, it is not necessary that the act or conduct of the officer should be immediately connected with or should *directly* affect the military service. It is sufficient that it is morally wrong and of such a nature that, while dishonoring or disgracing him as a gentleman, it compromises his character and position as an officer of the Army.[3]

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private mess, food furnished by the government for hospital patients was guilty of an offense under this Article. Dig. J. A. Gen., 62, par. 5.

The violation by an officer of a promise or pledge on honor given by him to a superior, in consideration of the withdrawal by the latter of charges preferred for drunkenness, that he would abstain for the future, or for a certain period, from the use of intoxicating drink, *held* chargeable under this Article. *Ibid.*, par. 6.

The mere acceptance by an officer of compensation from private parties (civilians) whom, by permission of his superior, he assists in a private undertaking, though it may be an indelicate act, is not an offense under this Article. Of the propriety of such conduct an officer must judge for himself. *Ibid.*, 65, par. 22.

The duplication of a "pay-roll," or claim for monthly pay, is always an offense under this Article. It is no defense that the transfer was made before the pay was actually due and payable, i.e., before the end of the month. While such a transfer may be inoperative in view of par. 1440, A. R., in so far as that the Government may refuse to recognize it, it is valid as between the officer and the party, and to allow the former to shelter himself behind the regulation would be to permit him to take advantage of his own wrongful and fraudulent act. *Ibid.*, 66, par. 23.

The regulation, par. 1300, A. R. 1895, does not assume to invalidate, as between the parties, a transfer made or dated before the last day of the month, nor could it do so, Nor, though the money may not be payable thereon by the paymaster, is the offense of the officer, under this or the 60th Article, any the less. An officer has no right to present for payment and procure to be paid to himself a pay account of which a duplicate remains outstanding in the hands of a *bona fide* transferee. The latter has an equitable, if not a legal, claim to the pay, and this claim cannot be ignored by the officer without dishonor. Moreover an officer of the Army has no right to place the military authorities in the position of thus refusing to pay a *bona fide* holder of a draft upon the treasury. Such an act compromises and discredits the United States and the Government, and is especially an offense in a public officer. *Ibid.*, par. 24.

It is no defense whatever to a charge under this Article that between the date of the refusal by the United States to pay the assignee of a duplicated voucher and the date of the arraignment of the officer or of the service of the charges, the money due has been paid, or somehow secured or made good to the assignee, or that he has been induced to withdraw or suspend his claim against the officer.* *Ibid.*, 66, par. 25.

Held that a continued neglect, without adequate excuse, to satisfy a pecuniary obligation long overdue, after specific assurances given of speedy payment, was a dishonorable act constituting an offense under this Article.† *Ibid.*, par. 26.

[1] *Ibid.*, 61, par. 1. See General Orders No. 25, Dept. of the Missouri, 1867.

[2] "An officer of the army is bound by the law to be a gentleman." Att.-Gen. Cushing, 6 Opins. 417. See definitions or partial definitions of the class of offenses contemplated by this Article in G. O. 45, Army of the Potomac, 1864; do. 29, Dept. of California, 1865; do 7, Dept. of the Lakes, 1872; G. C. M. O. 69, Dept. of the East, 1870; do. 41, Hdqrs. of Army, 1879.

[3] Dig. J. A. Gen., 63, par. 10. Thus, though a mere neglect on the part of an officer to satisfy his private pecuniary obligations will not ordinarily furnish sufficient ground for charges against him, yet where the debt has been dishonorably incurred—as where money has been borrowed under false promises or representations as to payment or

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* See the remarks of the reviewing authority in the cases published in G. C. M. O. 88 of 1896, and 56 of 1893.

† See the recent ruling to a similar effect by the Supreme Court in Fletcher vs. U. S., 148 U. S., 91, 92; also the same case in 26 Ct. Cl., 541.

According to the accepted principle of interpretation by which Articles of War enjoining a specific punishment or punishments are held to be in

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security, or where the non-payment has been accompanied by such circumstances of fraud, deceit, evasion, denial of indebtedness, etc., as to amount to dishonorable conduct—the continued non-payment in connection with the facts or circumstances rendering it dishonorable may properly be deemed to constitute an offense chargeable under this Article.* Dig. J. A. Gen., 63, par. 11. See, also, *ibid.*, 62, paragraphs 4 and 5.

Neglect or refusal to pay honest debts may constitute an offense under this Article where so repeated or persistent as to furnish reasonable ground for inferring that the officer designs or desires to avoid or indefinitely defer a settlement. This especially where the debts are due to *soldiers* for money borrowed from or held in trust for them. *Ibid.*, 64, par. 13.

An indifference on the part of an officer to his pecuniary obligations of so marked and inexcusable a character as to induce repeated just complaints to his military commander or the Secretary of War by his creditors, and to bring discredit and scandal upon the military service, *held* to constitute an offense within the purview of this Article.† *Ibid.*, par. 14.

Where an officer in payment of a debt gave his check upon a bank, representing at the same time that he had funds there, when in fact, as he was well aware, he had none, *held* that he was amenable to a charge under this Article. *Ibid.*, par. 12.

The following acts held to constitute offenses under this Article: fraudulently procuring a divorce from his wife by an officer; failure on the part of an officer to support his wife and child without adequate excuse therefor; procuring or allowing himself, by a retired officer, to be placed by legal proceedings under a conservator as a habitual drunkard. *Ibid.*, 65, par. 20.

The institution by an officer of fraudulent proceedings against his wife for divorce, and the manufacture of false testimony to be used against her in the suit in connection with an abandonment of her and neglect to provide for her support, *held* to constitute "conduct unbecoming an officer and a gentleman" in the sense of this Article. *Ibid.*, par. 18.

Where an officer stationed in Utah was married there by a Mormon official to a female with whom he lived as his wife, although having at the same time a legal wife residing in the States, *held* that he might properly be brought to trial by general court-martial for a violation of this Article. So *held* of an officer who committed bigamy by publicly contracting marriage in the United States while having a legal wife living in Scotland whom he had abandoned. *Ibid.*, 64, par. 16.

Abusing and assaulting his wife by an officer at a military post in so public and marked a manner as to disturb the post and bring scandal upon the service *held* chargeable as an offense under this Article. *Ibid.*, par. 17.

Where certain officers of a colored regiment made a practice of loaning to men of the regiment small amounts of money, for which they charged and received in payment at the rate of two dollars for one at the next pay-day, *held* that they were properly convicted of a violation of this Article. *Ibid.*, par. 15.

Engaging when intoxicated in a fight with another officer in the billiard-room at a post trader's establishment in the presence of other officers and of civilians *held* an offense within this Article. So *held* of an engaging in a disorderly and violent altercation and fight with another officer in a public place at a military post in sight of officers and soldiers. So *held* of an exhibition of himself by an officer in a public place in a grossly drunken condition. *Ibid.*, 63, par. 8.

Gambling *per se* does not constitute a military offense. If indulged in, however, to such an extent or in such a manner as to give it the character of a disorder "to the prejudice of good order and military discipline" in the sense of Article 62, or under circumstances so personally discreditable as to bring it within the description of "conduct unbecoming an officer and a gentleman," it may of course be taken cognizance of by a

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* Cases of officers made amenable to trial by court-martial under this Article for the non-fulfillment of pecuniary obligations to other officers, enlisted men, post traders, and civilians are found in the following General Orders of the War Dept. and Hdqrs. of Army: No. 87 of 1866; do. 3, 55, 64 of 1869; do. 15 of 1870; do. 17 of 1871; do. 22, 46 of 1872; do. 10 of 1873; do. 25, 50, 68, 82 of 1874; do. 25 of 1875; do. 100 of 1879; do. 46 of 1877.

† See, on the subject of these complaints, the Circular issued originally from the War Department (A. G. O.) on Feb. 8, 1872, in which the Secretary of War "declares his intention to bring to trial by court-martial," under the 61st Article of War, "any officer who, after due notice, shall fail to quiet such claims against him."

this particular both mandatory and exclusive, no sentence other than one of simple dismissal can legally be adjudged upon a conviction under this Article. A sentence which adds to dismissal any other penalty or penalties, as disqualification for office, forfeiture of pay, imprisonment, etc., is valid and operative only as to the dismissal, and as to the rest should be formally disapproved as being unauthorized and of no effect.[1]

ARTICLE 62. *All crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing Articles of War, are to be taken cognizance of by a general or a regimental, garrison, or field officers' court-martial, according to the nature and degree of the offense, and punished at the discretion of such court.*[2]

Article 116 of the military code of Gustavus Adolphus contained the provision that "whatsoever offense, finally, shall be committed against these orders, that shall the several Commanders make good, or see severally punished, unless themselves will stand bound to give further satisfaction for it."[3] In the King James Code of 1686[4] the Article assumed something of its present form, in the requirement of Article 64 that "all other faults, misdemeanours and disorders, not mentioned in these Articles, shall be punished, according to the discretion of the Court-Martial; Provided that no punishment amounting to the loss of Life or Limb, be inflicted upon any offender, in time of Peace, although the same be allotted for the said Offense by these Articles, and the Law and Customs of War." In Article 3, Section 20, of the British Code of 1774 the provision appears in the following form: "All Crimes not Capital and all Disorders and Neglects, which Officers and Soldiers may be guilty of to the Prejudice of good Order

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court-martial. The Army Regulations (par. 590) recognize it as peculiarly objectionable when practiced by a disbursing officer.* Dig. J. A. Gen., 427.

Gambling with enlisted men in a public place, *held* an offense within this Article. And so of frequenting in uniform a disreputable gambling-house and gambling with gamesters. *Ibid.*, 63, par. 9.

Where an officer appeared in uniform at a theatre, drunk, and conducted himself in such a disorderly manner as to attract the attention of officers and soldiers who were present, as well as the audience generally, *held* that he was properly convicted of a violation of this Article. *Ibid.*, 62, par. 7.

[1] *Ibid.*, 65, par. 19.

[2] Section 3 of the Act of July 27, 1892, (27 Statutes at Large, 277,) contained the requirement that "fraudulent enlistment, and the receipt of any pay or allowance thereunder, is hereby declared a military offense and made punishable by court-martial, under the 62d Article of War."

[3] The Articles of Gustavus Adolphus, which appeared in 1621 under the title "Articles and Military Lawes to be observed in the Warres," will be found printed in full in Vol. II. of Winthrop, Military Law, p. 8 of Appendix.

[4] For a copy of this code see II. Grose Mil. Antiquities, 139.

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* See in G. C. M. O. 18, War Dept., 1871, a case of a disbursing officer convicted of gambling as an offense under Article 62; and note the remarks of the reviewing authority upon an instance of this class in G. O. 2, Dept. of Arizona, 1878. In an early case—in G. O. 104, Hdqrs. of Army, 1833—it was held that a claim by a disbursing officer that he had played for too small stakes to endanger the safety of the public funds entrusted to his charge was not a sufficient excuse for his gambling, in view of the regulation.

and Military Discipline, though not mentioned in the above Articles of War, are to be taken Cognizance of by a General or Regimental Court-Martial, and be punished at their Discretion." In this form it appeared as Article 5, Section 18, of the American Articles of 1776, in which the clause conferring jurisdiction to try offenses under the Article "according to the nature and degree of the offense" was added. As so modified the provision was re-enacted in the revisions of 1806 and 1874.[1]

Nature of the Offense.—This Article, like that last described, is an apparent exception to the rule that offenses against the United States must be exactly described in the statutes creating them, in that it establishes certain conditions to which a wrongful act or omission must conform in order to give it the character of a military offense and authorize its trial by a military tribunal. The offenses over which jurisdiction is conferred must therefore conform strictly to the conditions set forth in the statute; that is, they must be either "crimes not capital" or "neglects and disorders," and to warrant their trial by court-martial must in every case operate "to the prejudice of good order and military discipline." The offense must in general be committed by a military person, and in every case by a person subject to military jurisdiction.[2]

Crimes.—The word "crimes" in this Article, distinguished as it is from "neglects" and "disorders," relates to military offenses of a more serious character than mere neglects and disorders, and includes such as are also civil crimes—as homicide, robbery, arson, larceny, etc. "Capital" crimes (i.e., crimes capitally punishable), including murder, or any grade of murder made capital by statute, cannot be taken cognizance of by courts-martial under this Article.[3]

Neglects and Disorders.—A "neglect" is an omission or forbearance to do a thing that can be done or that is required to be done.[4] In its ordinary meaning it is an omission, from carelessness, to do something that can be done or ought to be done. The obligation to perform the act or thing neglected is military in character, and arises in connection with the requirements of military duty. Law, regulations, orders, and, where these are

[1] This requirement was known in the English service as "The Devil's Article."

[2] See the chapters entitled JURISDICTION OF COURTS-MARTIAL and CHARGES AND SPECIFICATIONS.

[3] Dig. J. A. Gen., 67, par. 1. A crime which is in fact murder, and capital by statute of the United States or of the State in which committed, cannot be brought within the jurisdiction of a court-martial under this Article, by *charging* it as "manslaughter, to the prejudice," etc., or simply as "conduct to the prejudice," etc.* If the specification or the proof shows that the crime was murder and a capital offense, the court should refuse to take jurisdiction or to find or sentence. If it assume to do so, the proceedings should be disapproved as unauthorized and void. *Ibid.* See, also, the 58th Article of War, *supra*.

[4] Anderson Law Dict.

* See this opinion, as given in an important case, adopted by the Secretary of War in his action on the same published in G. C. M. O. 3, War Dept., 1871; also the similar rulings in G. C. M. O. 28, Dept. of Texas, 1875; G. O. 14, Dept. of Dakota, 1868; do. 104, Army of the Potomac, 1862.

silent, the custom of service prescribe the several military duties and obligations the neglect of which is chargeable under this Article; the evidence submitted in a particular case shows the manner in which the duty was performed, and the particulars in respect to which there has been criminal neglect.[1] The term "disorder," as used in this connection, is more comprehensive than when used in reference to civil affairs, and includes not only disorders, in the sense of frays, quarrels, and the like, but all interruptions of the good order which should prevail in camp or garrison and willful departures from that orderly recurrence of events which constitutes military discipline and which are, as such, harmful or prejudicial to good order and military discipline.[2]

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[1] To constitute negligence at criminal law the duty neglected must have been created or imposed by law or contract. Military negligence differs from this in that the duty must be created by law, orders, regulations, or by custom of service. No military duties can be created by contract or agreement, or be made the subject of a contractual relation. The neglect of a duty of a personal character, created by contract, may give rise to a prosecution under this Article, as will be seen by an inspection of the cases referred to in the next note.

[2] The following offenses have been held properly charged or chargeable under this Article as *disorders* or *neglects* "to the prejudice of good order and military discipline:" Drunkenness or drunken and disorderly conduct, at a post or in public, committed by a soldier or officer when not "on duty," and when the act (in the case of an officer) does not more properly fall within the description of Art. 61; escape from military confinement or custody (where not amounting to desertion, see Article 47); breach of arrest (where not properly chargeable under Art. 65); malingering; disclosing a finding or sentence of a court-martial in contravention of the oath prescribed in Art. 84 or 85; refusing to testify when duly required to attend and give evidence as a witness before a court-martial; joining with other inferior officers of a regiment in a letter to the colonel asking him to resign; neglecting, by a senior officer "present for duty" with his regiment, to assume the command of the same when properly devolved upon him, and allowing such command to be exercised by a junior; culpable malpractice by a medical officer in the course of his regular military duty; colluding with bounty brokers in procuring fraudulent enlistments to be made and bounties to be paid thereon; violations by an officer of par. 680, Army Regulations of 1895, in bidding-in and purchasing, through another party, public property sold at auction by himself as quartermaster; also, in purchasing subsistence stores ostensibly for domestic use, but really for purposes of traffic.

Violations, indeed, of Army Regulations in general are properly chargeable under this Article; as are neglects (or disorders) to the prejudice of good order and military discipline: causing (by a quartermaster) troops to be transported upon a steamer known by him to be unsafe; paying money due under a contract (for military supplies) to a party to whom, with the knowledge of the accused, the contract had been transferred in contravention of Sec. 3737, Rev. Sts.; inciting (by an officer) another officer to challenge him to fight a duel; assuming (by a soldier) to be a corporal in the recruiting service, and as such enlisting recruits and obtaining board and lodging for himself and recruits without paying for same; procuring (by a soldier) whiskey from the post trader by forging an order for the same in the name of a laundress; breach of faith (by a soldier) in refusing to pay the post trader for articles obtained on credit, upon orders on him which had been guaranteed or approved by the company commander upon the condition that the amounts should be paid on the next pay-day; gambling by officers or soldiers under such circumstances as to impair military discipline (where the conduct, in the case of an officer, does not rather constitute an offense under Article 61); striking a soldier, or using any unnecessary violence against a soldier, by an officer. Dig. J. A. Gen., 69, par. 6.

The following are examples of offenses which have been held cognizable under Article 62: Neglect on the part of an officer of engineers to oversee the execution of a contract for a public work placed under his charge, the due fulfillment of such charge being a military duty; a public criticism in a newspaper by an officer of a case which had been investigated by a court-martial and was awaiting the action of the President; assuming

Prejudice of Good Order and Military Discipline.—The term "to the prejudice of good order and military discipline" qualifies, according to the accepted interpretation, the word "crimes" as well as the words "disorders and neglects." Thus the crime of larceny (sometimes charged as "theft" or "stealing") is held chargeable under this Article when it clearly affects the order and discipline of the military service. Stealing, for example, from a fellow soldier or from an officer or stealing of public money or other public property (where the offense is not more properly a violation of Article 60), is generally so chargeable. And so of any other crime (not capital) the commission of which has prejudiced military discipline.[1]

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by an officer to copyright as owner, and thus asserting the exclusive right to publish, in an abridged form, the Infantry Drill Regulations, property of the United States, and the formal official publication of which had already been announced in orders by the Secretary of War; selling condemned military stores by an officer without due notice, and not suspending the sale when better prices could have been obtained by deferring it, in violation of par. 679, A. R. 1895; misconduct by a soldier at target-practice, consisting of breaches of the published instructions, false statements or markings with a view fraudulently to increase a score, etc.; violation by a soldier of a pledge given to his commanding officer to abstain from intoxicating liquors, on the faith of which a previous offense was condoned; bigamy by a soldier committed at a military post. Dig. J. A. Gen., 73, par. 12.

The following acts *held* not to be cognizable as offenses under this Article: a resort to civil proceedings by suit against a superior officer on account of acts done in the performance of military duty (but *held* that if the verdict should be for the defendant, and it should appear that the suit was without probable cause and malicious, a charge under this Article might perhaps be sustainable); the mere loaning of money at usurious or excessive rates of interest by a non-commissioned officer to privates, unless it should clearly be made to appear that such conduct promoted desertions or other results prejudicial to the discipline of the command, (but as the practice in this case had been long continued, and was clearly demoralizing, *advised* that the non-commissioned officer be summarily discharged); the becoming infected by a soldier with a disease unfitting him for service, as the result of vicious conduct; the living in adultery by a soldier at Plattsburg village, where he was permitted to reside, situate about a mile from Plattsburg Barracks (*advised* in this case that the offender be turned over to the civil authorities for trial under the laws of New York). *Ibid.*, 74, par. 13.

The following acts or offenses have been held to be *not* properly chargeable under this Article: a mere breach of the peace committed by a soldier (while absent alone and at a distance from his post) in a street of a city, and in violation of a municipal ordinance; pecuniary transactions between enlisted men of a culpable character, but in their private capacity and not directly affecting the service or impairing military discipline; speculating and gambling in stocks by a disbursing officer, the proper performance of whose military duty was not affected (but *recommended* that he be relieved from the duty of disbursing public money); re-enlisting by the procurement of the recruiting officer, after having been discharged for a disability still continuing; the act being in good faith, and the alleged offense being committed before the party could be said to have fully come into the service. *Ibid.*, 71, par. 7.

[1] Dig. J. A. Gen., 67, par. 2. As, for example, manslaughter (or homicide not amounting to murder) of a soldier, assault with intent to kill a fellow soldier; forgery of the name of a disbursing or other military officer to a government check or draft, or forgery of an officer's name to a check on a bank (and this whether or not anything was in fact lost by the government or the bank or officer); forgery in signing the name of a fellow soldier to a certificate of indebtedness to a sutler, or to an order on a paymaster; embezzlement or misappropriation of the property of an officer or soldier. *Ibid.*

No distinction of grand and petit larceny is known to military law. An inferior court has, under this Article, the same jurisdiction of larceny as has a general court. This crime, however, is, in general, one requiring too severe a sentence to be adequately punished by an inferior court-martial. *Ibid.*, 69, par. 4.

Held that a specification alleging homicide, but not adding "with malice afore-

As to whether an act which is a civil crime is also a military offense no rule can be laid down which will cover all cases, for the reason that what may be a military offense under certain circumstances may lose that character under others. For instance, larceny by a soldier from a civilian is not alway a military crime, but it may become such in consequence of the particular features, surroundings, or locality of the act. What these may be cannot be anticipated with a sweeping rule comprehensive enough to provide for every possible conjunction of circumstances. Each case must be considered on its own facts. But if the act be committed on a military reservation, or other ground occupied by the army, or in its neighborhood, so as to be in the constructive presence of the army; or if committed while on duty, particularly if the injury be to a member of the community whom it is the offender's duty to protect; or if committed in the presence of other soldiers, or while in uniform; or if the offender use his military position, or that of another, for the purpose of intimidation or other unlawful influence or object—such facts would be sufficient to make it prejudicial to military discipline within the meaning of the 62d Article of War.[1]

Charging of Offenses.—A crime, disorder, or neglect cognizable under this Article may be charged either by its name simply, as "larceny," "drunkenness," "neglect of duty," etc.; or by its name with the addition of the words "to the prejudice of good order and military discipline"; or simply as "conduct to the prejudice of good order and military discipline"; or as a "violation of the 62d Article of War." It is immaterial in which form

thought," or in terms to that effect, was a pleading of manslaughter only and thus within this Article. Dig. J. A. Gen., 73, par. 10.

Held that for an officer to print and publish to the Army a criticism upon an official report made by another officer in the course of his duty to a common superior, charging that such report was erroneous and made with an improper and interested motive, was gravely unmilitary conduct to the prejudice of good order and military discipline. An officer who deems himself wronged by an official act of another officer should prefer charges against the latter or appeal for redress to the proper superior authority. He is not permitted to resort to any form of *publication* of his strictures or grievances. So *held* that for an officer to publish or allow to be published in a newspaper of general circulation charges and insinuations against a brother officer by which his character for courage and honesty is aspersed and he is held up to odium and ridicule before the Army and the community was a highly unmilitary proceeding and one calling for a serious punishment upon a conviction under this Article, and this whether or not the charges as published were true. *Ibid.*, 69, par. 5.

[1] Opin. J. A. Gen., Manual for Courts-martial, 16, par. 7. Whether acts committed against *civilians* are offenses within this Article is a question to be determined by the circumstances of each case, and in regard to which no general rule can be laid down. If the offense be committed on a military reservation, or other premises occupied by the Army, or in its neighborhood so as to be, so to speak, in the constructive presence of the Army; or if committed by an officer or soldier while on duty, particularly if the injury is done to a member of the community whom the offender is specially required to protect; or if committed in the presence of other soldiers, or while the offender is in uniform; or if the offender uses his military position or that of a military superior for the purpose of intimidation or other unlawful influence or object—the offense will in general properly be regarded as an act prejudicial to good order and military discipline and cognizable by a court-martial under this Article. The judgment on the subject of a court of military officers, experts as to such cases, confirmed by the proper reviewing commander, should be reluctantly disturbed. *Ibid.*, 73, par. 11.

the charge is expressed, provided the specification sets forth facts constituting an act *prima facie* prejudicial to good order and military discipline. Whenever the charge and specification taken together make out a statement of an act clearly thus prejudicial, etc., the pleading will be regarded as substantially sufficient under this general Article.[1]

Findings under Article 62 as a Minor included Offense.—Where an accused is charged with "conduct unbecoming an officer and a gentleman," or with any specific offense made punishable by the Articles of War, and the court is of opinion that, while the material allegations in the specification or specifications are substantially made out, they do not fully sustain the charge as laid, but do clearly establish the commission of a neglect of military duty or a disorder in breach of military discipline as involved in the acts alleged, the accused may properly be found guilty of the specification (or specifications), and not guilty of the charge but guilty of "conduct to the prejudice of good order and military discipline." Such a form of finding is now common in our practice (especially where the charge is laid under Article 61), and its legality is no longer questioned.[2]

The authority thus to find, however, has not been extended beyond the case indicated in the last paragraph; the *reverse*, for example, of this form of finding has never been sanctioned.[3]

The general finding of "conduct to the prejudice," etc., in the cases indicated in the foregoing paragraph, is sanctioned in order to prevent a

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[1] Dig. J. A. Gen., 72, par. 8. A charge of "conduct to the prejudice," etc., with a specification setting forth merely trials and convictions of the accused for previous offenses, is not a pleading of an offense under this Article, or of any military offense. So of a charge of "habitual drunkenness to the prejudice," etc., with a specification setting forth instances in which the accused has been sentenced for acts of drunkenness. Such charges indeed are in contravention of the principle that a party shall not be twice tried for the same offense. So a specification under the charge of "conduct to the prejudice," etc., which sets forth not a distinct offense, but simply the result of an aggregation of similar offenses, is insufficient in law. Where the specifications to such a charge, in the case of an officer, set forth that the accused was "frequently" drunk, "frequently" absented himself without authority from his command, etc., *held* that these specifications were properly struck out by the court on the motion of the accused. In such a case the only correct pleading is a general charge under this Article, with specifications, each setting forth separately, some particular and specific instance of offense. *Ibid.*, par. 9.

Held that a specification alleging homicide, but not adding "*with malice aforethought*," or in terms to that effect, was a pleading of manslaughter only, and thus within this Article. *Ibid.*, 73, par. 10.

[2] *Ibid.*, 411, par. 10.

[3] *Ibid.*, par. 11. A finding of guilty of a certain *specific* offense under a charge of another specific offense, or under a charge of "conduct unbecoming an officer and a gentleman" or of "conduct to the prejudice of good order and military discipline," would be wholly irregular and invalid. Thus a finding of guilty of disobedience of orders (or of a violation of Article 21) under a charge of mutiny in violation of Article 22, or a finding of drunkenness on duty (or of a violation of Article 38) under a charge for a drunken disorder laid under Article 62 or 61, would be not only unauthorized, but now almost unprecedented, and if such a finding were made it could scarcely fail to be formally disapproved. And so of a finding of "conduct unbecoming an officer and a gentleman" under a charge of "conduct to the prejudice of good order and military discipline." *Ibid.*, par. 11.

failure of justice, not for the purpose of relieving the accused of any of his due share of culpability. It should not, therefore, be resorted to where the specific offense charged is substantially made out by the testimony.[1]

ARTICLE 63. *All retainers to the camp, and all persons serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders according to the rules and discipline of war.*

This provision appeared for the first time as a military regulation as Article 23, Section 14, of the British Code of 1749, and was repeated without substantial change in the British Code of 1774, and in the American Articles of 1776, 1806, and 1874.

The accepted interpretation of this Article is that it subjects (in time of war) the classes of persons specified not only to military discipline and government in general, but also to the jurisdiction of courts-martial (upon the theory, probably, that they are thus made, for the time being, a part of the Army). Individuals, however, of the class termed "retainers to the camp," or officers' servants and the like, as well as camp-followers generally, have rarely been subjected to trial in our service. For breaches of discipline committed by them the punishment has generally been expulsion from the limits of the camp and dismissal from employment.[2]

The discipline authorized by the Article has mainly been applied to the description of "persons serving with the armies of the United States in the field"—that is to say, civilians employed by the United States or serving in a *quasi*-military capacity in connection with troops in time of war and on its theatre.[3] But the mere fact of employment by the government pending a general war does not render the civil employee so amenable. The employment must be in connection with the army in the field and on the theatre of hostilities.[4]

Civil employees of the United States serving with the Army in the field during active warfare with hostile Indian tribes have been held amenable to

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[1] Dig. J. A. Gen., 412, par. 12. Thus in a case where the facts set forth in the specification to a charge of "conduct unbecoming an officer and a gentleman," and clearly established by the evidence, fixed unmistakably upon the accused dishonorable behavior compromising him officially and socially, *held* that a finding by the court that he was guilty only of "conduct to the prejudice of good order and military discipline" should not be accepted, but that the court should be reconvened for the purpose of inducing, if practicable, a finding in accordance with the facts and with justice. *Ibid.*

[2] Dig. J. A. Gen., 75, par. 1. For a discussion of the question of jurisdiction involved, see the chapter entitled JURISDICTION OF COURTS-MARTIAL.

[3] *Ibid.*, par 2.

[4] *Ibid.* Thus during the late war civilians of the following classes were in repeated cases held amenable under this Article to the military jurisdiction, and subjected to trial and punishment by courts-martial: teamsters employed with wagon-trains, watchmen, laborers and other employees of the quartermasters, subsistence, engineer, ordnance, provost-marshal etc., departments; ambulance-drivers, telegraph-operators, interpreters, guides, paymasters' clerks, veterinary surgeons, "contract" surgeons, nurses and hospital attendants; conductors and engineers of railroad trains operated upon the theatre of war for military purposes; officers and men employed on government transports, etc. *Ibid.*

trial by court-martial under this Article. A civilian who acted as guide to a command operating in a hostile movement during an Indian war, for example, has also been held so triable.[1]

The jurisdiction authorized by this Article cannot be extended to civilians employed in connection with the Army in time of peace, nor to civilians employed in such connection during the period of an Indian war but not on the theatre of such war. In view of the limited theatre of Indian wars this exceptional jurisdiction is to be extended to civilians, on account of offenses committed during such wars, with even greater caution than in a general war.[2]

ARTICLE 64. *The officers and soldiers of any troops, whether militia or others, mustered and in pay of the United States shall, at all times and in all places, be governed by the Articles of War, and shall be subject to be tried by courts-martial.*

The subjection even of military persons to the operation of the Articles of War has been a gradual process, extending in the British service over nearly two centuries, and has been due to the fact that extensions of the military code to persons other than officers and soldiers in pay has been, from the first, narrowly watched and at times strenuously opposed by Parliament.[3] The terms of the first Mutiny Act applied only to persons mustered and in pay as officers and soldiers.[4] The provisions of the Act were extended to

[1] Dig. J. A. Gen., 76, par. 4. *Held* (June, 1863) that the force employed in the "ram fleet" on Western waters was properly a contingent of the Army rather than of the Navy, and accordingly that civilian commanders, pilots, and engineers employed upon such fleet during the war and before the enemy were persons serving with the armies in the field in the sense of this Article, and therefore amenable to trial by court-martial.

[2] *Ibid.*, par. 5. A civil employee of the United States in time of peace is most clearly not made amenable to the military jurisdiction and trial by court-martial by the fact that he is employed in an office connected with the administration of the military branch of the Government. Such employment does not make him a part of the military establishment, nor is his offense, however nearly it may affect the military service, "a case arising in the land forces" in the sense of Article V of the Amendments to the Constitution. So *held* (June, 1877) that a civilian clerk employed in time of peace in the office of the chief quartermaster at San Francisco was manifestly not amenable, under this Article or otherwise, to trial by court-martial for the embezzlement or misapplication of Government funds appropriated for the quartermaster department.* And *remarked* that if this official could be made liable to such jurisdiction, all the male and female clerks employed in the War Department might upon the same principle be held thus amenable for offenses against the Government committed in connection with their duties. And so *held* in the case of a civilian clerk employed at Camp Robinson, Nebraska, charged with conspiring with contractors to defraud the United States; the post not being within the theatre of any Indian war, or hostilities pending at the period of the offense.† *Ibid.*, 77, par. 7.

Held (April, 1877) that superintendents of national cemeteries, being no part of the Army, but civilians (see Sec. 4874, Rev. Sts.), were clearly not amenable to military jurisdiction or trial under this Article or otherwise.‡ *Ibid.*, par. 8.

[3] Clode, Mil. Law, 59. The conjunction "and" was omitted and replaced by "or" by 6 Anne, ch. 18.

[4] 1 Wm. and Mary, ch. 5.

* See the confirmatory opinion in this case of the Attorney-General of May 15, 1878—16 Opins., 13.
† See opinion to a similar effect of the Attorney-General of June 15, 1878—16 Opins., 48.
‡ See to the same effect the opinion of the Attorney-General referred to in note *.

officer and soldiers of the trains of artillery in 1702, but the personnel of the artillery was not brought under the permanent operation of the Mutiny Act until 1739.[1] In 1754 the local army of the East India Company was brought under the Act,[2] the operation of which was extended in the same year to include the English troops and the local forces operating with them in North America.[3] The provisions of the Act were extended to include the English militia when in actual service in the year 1756;[4] and its operation was extended to the engineers (sappers and miners) and to artificers of ordnance in 1788.[5] The Article appears in its present form as Article 1, Section 19, of the British Code of 1774, as Article 1, Section 17, of the American Articles of 1776, and as No. 97 of the Articles of 1806.

Military Offenses Not Territorial.—It is a general principle, confirmed by the comprehensive terms of this Article, that military offenses are not territorial in character. The obligations imposed by the Article upon military persons follow them wherever they may go in the performance of proper military duty.[6] The only limitation in this respect is that imposed by paragraphs 1602 to 1604 of the Navy Regulations, which contain the requirement that "no Army court-martial shall be held or military punishment inflicted on board a ship of the Navy in commission."

ARTICLE 65. *Officers charged with crime shall be arrested and confined in their barracks, quarters, or tents, and deprived of their swords by the commanding officer. And any officer who leaves his confinement before he is set at liberty by his commanding officer shall be dismissed from the service.*

The Articles of War of Prince Rupert and King James II. nowhere recognize the status of arrest as a form of restraint in the case of a commissioned officer, although both codes contain express provisions in respect to the confinement of enlisted men. If the practice of placing officers in arrest, either as a measure of restraint or with a view to their trial, existed or was recognized during the last half of the seventeenth century, it must have rested upon the custom of service, or upon a usage dating from the period of chivalry. That the principle was known to the military service in early times is evidenced by the requirement of the War Ordinances of Henry VIII.

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[1] 1 Anne, ch. 20, sec. 46. See, also, 13 Geo. II., c. 10 and 12; Geo. II., ch. 12. Cited in I. Clode, Mil. Forces, p. 178. The distinction between the artillery and the other arms of the service continued to be made in all sets of Articles of War, up to and including those of 1806. The officers and enlisted men of the artillery were for the first time placed upon precisely the same footing as troops of other armies in the Articles of 1874.

[2] 27 Geo. II, ch. 9.

[3] 28 Geo. II., ch. 4, sec. 74.

[4] 30 Geo. II., ch. 25.

[5] Clode, Mil. Law, 60.

[6] So, too, an officer who is guilty of conduct unbecoming an officer and gentleman, the offense having been committed without the territorial jurisdiction of the United States, is liable, on his return, to trial under the 61st Article. See Digest of Opinions of the Judge-Advocate General, 331, par. 20; see, also, the chapter entitled THE JURISDICTION OF COURTS-MARTIAL.

that "every man shall obey the King's Sargantes, * * * and all other officers having authoritie to arrest, assigned by the King's Majestie, or the Marshall, or by anie other officers of authoritie. And that no man presume to break their arrests, upon payne of imprisonment, and his bodie to be at the King's pleasure, his Grace's lieutenant or lieutenants; and if the prisoner disobeyinge the sayd arrest mayme anie of the said officers, then he so offending, to suffer the payne of death, and if hee grievously wound or hurt any of them, then to be imprisoned and punished at the King's pleasure."[1]

The Article appears substantially in its present form as Article 17, Section 15, of the British Code of 1774, which provides that "to the end that Offenders may be brought to Justice, We hereby direct that, whenever any Officer or Souldier shall commit a Crime deserving punishment, he shall, by his commanding Officer, if an Officer, be put in Arrest; if a Non-Commissioned Officer or Souldier, be imprisoned till he shall be either tried by a Court-Martial, or shall be lawfully discharged by a proper Authority." This requirement was repeated as Article 15, Section 14, of the American Articles of 1776.

In the Articles of 1806 the clauses relating to officers and enlisted men were separated; that in relation to the arrest of officers being embodied as No. 77, and that respecting the confinement of enlisted men as No. 78; to the former was added the provision defining the offense of "breach of arrest" and assigning the penalty of dismissal thereto which had been embodied in Article 22, Section 15, of the British Code of 1774 as Article 20, Section 14, of the American Articles of 1776, and as Article 14 of the Amendments of 1786. The requirement that an officer placed in arrest "shall be deprived of his sword" was not contained in the British Code from which the American Articles were taken, and appears for the first time as Article 14 of the Resolution of Congress of May 31, 1786, and was embodied as the last clause of the 77th of the Articles of 1806.

The term "crime" as employed in this as in the following Article is used in a general sense, referring to offenses of a military character, as well as to those of a civil character which are cognizable by court-martial. An offense in violation of this Article is only committed when an officer confined in "close arrest" to his quarters leaves the same without authority. A breach of a mere formal arrest, or of any arrest not accompanied by confinement to quarters, would be an offense not within this Article, but under Article 62.[2]

Arrests, How Executed.—An officer may be put in arrest by a verbal or written order or communication from an authorized superior advising him

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[1] Samuel, 85.

[2] Dig. J. A. Gen., 78, par. 1. See, also, for a discussion of the subject of arrest, the chapter entitled ARREST AND CONFINEMENT. Compare Walton *vs.* Gavin, 16 Ad. & El., 66, 68; Simmons, § 360; I. Winthrop, pp. 136–149.

that he is placed in arrest or will consider himself in arrest, or in terms to that effect; the reason for the arrest need not be specified. At the same time he is usually required to surrender his sword, though this formality may be dispensed with. But an arrest, though an almost invariable, is not an essential, preliminary to a military trial; to give the court jurisdiction it is not necessary that the accused should have been arrested; it is sufficient if he voluntarily, or in obedience to an order directing him to do so, appears and submits himself to trial. So neither the fact that an accused has not been formally arrested, or arrested at all, nor the fact that, having been once arrested and released from arrest, he has not been rearrested before trial, can be pleaded in bar of trial or constitute any ground of exception to the validity of the proceedings or sentence. An officer is in no case entitled to *demand* to be arrested.[1]

By Whom Imposed.—Except in the class of cases indicated in the 24th Article, only "commanding officers" can place commissioned officers in arrest.[2] The commanding officer thus authorized is the commander of the regiment, company, detachment, post, department, etc., in which the officer is serving. Where a company is included in a post command, the commander of the post, rather than the company commander, is the proper officer to make the arrest of a subaltern of the company.[3] In the majority of cases, however, arrests are originally ordered by the authority by whom the court has been or is to be convened.[4]

An officer is not privileged from arrest by virtue of being at the time a member of a general court-martial. But an arrest of an officer while actually engaged upon court-martial duty should if possible be avoided.[5]

"A medical officer charged with the commission of an offense need not be placed in arrest until the court-martial for his trial convenes, if the service would be inconvenienced thereby, unless the charge is of a flagrant character."[6]

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[1] Dig. J. A. Gen., 169, par. 1. "An officer arrested will repair at once to his tent or quarters, and there remain until more extended limits have been granted by the commanding officer, on written application. Close confinement will not be enforced except in cases of a serious nature." Par. 898, A. R. 1895.

[2] "Commanding officers only have power to place officers in arrest, except as provided in the 24th Article of War. An arrest may be ordered by the commanding officer in person or through his staff officer, orally or in writing." Par. 897, A. R. 1895.

[3] Dig. J. A. Gen., 170, par. 2; par. 897, A. R. 1895.

[4] Dig. J. A. Gen., 170, par. 2.

[5] *Ibid.*, par. 6.

[6] Par. 900, Army Regulations of 1895. "Officers will not be placed in arrest for light offenses. For these the censure of the commanding officer will generally answer the purpose of discipline. Whenever a commanding officer places an officer in arrest and releases him without preferring charges, he will make a written report of his action to the department commander, stating the cause. The department commander, if he thinks the occasion requires, will call on the officer arrested for any explanation he may desire to make, and take such other action as he may think necessary, forwarding the papers to the Adjutant-General of the Army for file with the officer's record or for further action." Par. 899, *ibid.*

The principle of the common law by which a witness is protected from arrest

The Status of Arrest; Limits.—The *status* of being in arrest is inconsistent with the peforming of military duty. Placing an arrested officer or soldier on duty terminates his arrest. Releasing a soldier from arrest and requiring him to perform military duty, after his trial and while he is awaiting the promulgation of his sentence, can be justified only by an extraordinary exigency of the service.[1]

It is clearly to be inferred from paragraphs 897 and 898 of the Army Regulations of 1895 that, unless other limits are specially assigned him, an officer in arrest must confine himself to his quarters. It is generally understood indeed that he can go to the mess-house or other place of necessary resort. It is not unusual, however, for the commander to state in the order of arrest certain limits within which the officer is to be restricted, and, except in aggravated cases, these are ordinarily the limits of the post where he is stationed or held. An officer or soldier, though retained in close arrest, should be permitted to receive such visits from his counsel, witnesses, etc., as may be necessary to enable him to prepare his defense.[2]

An officer under arrest is not disqualified to prefer charges.[3]

The imposition of an arrest affects in no manner the right of an officer or soldier to receive the pay and allowances of his rank. Except in a case of a deserter,[4] no legal inhibition exists to paying a soldier while in arrest, either before trial or while awaiting sentence, his regular pay and emoluments.[5]

ARTICLE 66. *Soldiers charged with crimes shall be confined until tried by court-martial or released by proper authority.*

This appears as No. 78 of the Articles of 1806, as Article 15, Section 14, of those of 1776, as Article 15, Section 14, of the Resolution of Congress of May 31, 1786, and as Article 17, Section 15, of the British Code of 1774. The clause relating to the confinement of enlisted men was first made a separate Article of War in the Resolution of Congress of 1786. While the power to place officers in arrest is, as has been seen, an attribute of command, and is in general restricted in its exercise to the commanding officer, the corresponding power to confine enlisted men is one which may be exercised, in a proper case, by any commissioned officer. It is usually exercised, however, by the offender's immediate commander, or by the officer under whose orders he may happen to be at the time the offense is committed.

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should in general be applied to military cases. If it can well be avoided, an arrest should certainly not be imposed upon an officer or soldier while attending a court-martial as a witness. But such an arrest would constitute an irregularity only, and would not affect the validity of the proceedings of a trial to which the party thus arrested was subsequently subjected. Dig. J. A. Gen., 171, par. 9.

[1] Dig. J. A. Gen., 170, par. 4; 1 Greenleaf, § 816.

[2] *Ibid.*, par. 8.

[3] *Ibid.*, 171, par. 7.

[4] See par. 129, A. R. 1895.

[5] Dig. J. A. Gen., 171, par. 8.

The confinement, though required by regulation and by custom of service to be *ordered* by a commissioned officer, may be *executed* by a subordinate, or by any duly authorized military person, as by a non-commissioned officer or by a sentinel.[1]

The word "crimes," as used in this Article, is construed to mean serious military offenses. So that a soldier will not properly be confined where not charged with one of the more serious military offenses; in other words, where charged only with an offense of a minor character.[2]

Character of Restraint.—Soldiers held in confinement, while they may be subjected to such restraint as may be necessary to prevent their escaping or committing violence, cannot legally be subjected to any punishment; the imposition of punishment upon soldiers while thus detained has been on several occasions emphatically denounced by department commanders.[3]

Confinement of Enlisted Men, How Executed.—It has been seen that the arrest of a non-commissioned officer or the confinement of a private soldier may be ordered by any commissioned officer of the Army.[4]

Non-commissioned officers against whom charges may be preferred for trial will be placed in arrest in their barracks or quarters. They will not be confined in the guard-house in company with privates, except in aggravated cases or when escape is feared.[5]

Soldiers "against whom charges may be preferred for trial by summary court will not be confined in the guard-house, but will be placed in arrest in quarters, before and during trial and while awaiting sentence, except when in particular cases restraint may be necessary."[6]

Privates against whom charges may be preferred for trial by general court-martial will be confined in the guard-house before and during trial. While awaiting trial and sentence, or undergoing sentence, they will, if practicable, be kept apart from privates confined for minor offenses or by sentence of an inferior court.[7]

A soldier while confined in arrest should not be fettered or ironed except

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[1] See Article 65, *supra*, and the chapter entitled ARREST AND CONFINEMENT.

[2] Dig. J. A. Gen., 79, par. 2.

[3] *Ibid.*, par. 1. See, for example, the remarks of department commanders in G. O. 23, Department of the East, 1863; do. 26, Department of California, 1866; do. 23, Department of the Lakes, 1870; do. 106, Department of Dakota, 1871. And compare the remarks of Justice Story in Steere *vs.* Field, 2 Mason, 516.

[4] See the chapter entitled ARREST AND CONFINEMENT, *supra*. Except as provided in the 24th Article of War or when restraint is necessary, no soldier will be confined without the order of an officer, who shall previously inquire into his offense. Confinement without trial, as a punishment for an offense, is forbidden. An officer authorizing the arrest or confinement of a soldier will, as soon as praticable, report the fact to his company or detachment commander. Pars. 905, 906, A. R. 1895.

[5] Paragraphs 904 and 936, A. R. 1895. Enlisted men in arrest in barracks or quarters will be designated as "in arrest"; those confined in the guard-house awaiting trial or result of trial as "in confinement." Manual for Courts-martial, p. 6, par. 1.

[6] Par. 936, *ibid.*

[7] Par. 907, *ibid.*

where such extreme means are necessary to restrain him from violence, or there is good reason to believe that he will attempt an escape and he cannot otherwise be securely held.[1]

Status of Confinement.—Non-commissioned officers in arrest will not be required to perform any duty in which they may be called upon to exercise command. Non-commissioned officers in confinement will not be sent out to work with prisoners under sentence.[2]

Enlisted men in arrest may, in the discretion of the commanding officer, be required to attend parades, inspections, drills, school, or other military duties and to assist in policing in and around their barracks. Privates in confinement awaiting trial will not be sent to work with prisoners undergoing sentence if it can be avoided; but may, in the discretion of the commanding officer, be required to attend drills, or be sent to work during the usual working hours under charge of a special sentinel.[3]

The work which may be required of soldiers in arrest is determined by paragraph 907, Army Regulations of 1895.[4] Under the regulation as thus established, soldiers in confinement awaiting action on the proceedings of their trials are assimilated to those awaiting trial, and both classes may, at the discretion of the commanding officer, be employed, separately from prisoners undergoing sentence, upon such labor as is habitually required of soldiers. More severe or other labor would not be legal, nor would labor with a police party consisting in whole or in part of men under sentence however slight their sentence might be.[5] A soldier in arrest in quarters may be required to do cleaning or police work about his quarters which otherwise other soldiers would have to do for him.[6]

ARTICLE 67. *No provost-marshal, or officer commanding a guard, shall refuse to receive or keep any prisoner committed to his charge by an officer belonging to the forces of the United States; provided the officer committing shall, at the same time, deliver an account in writing, signed by himself, of the crime charged against the prisoner.*

The 71st Article of the Prince Rupert Code contained the following requirement: "No Provost-Marshal shall refuse to receive or keep a prisoner sent to his charge by authority, or shall dismiss him without order, upon pain of such punishment as a Court-Martial shall think fit. And if the offense for which the prisoner was apprehended deserved death, the Provost-Marshal failing to receive and keep him as aforesaid shall be lyable to the same punishment." This was repeated as Article 50 of the King James Code of 1686. The provision appeared in its present form as Article 19,

[1] Dig. J. A. Gen., 171, par. 10. See, also, Manual for Courts-martial, p. 70, par. 3.
[2] Manual for Courts-martial, p. 6, par. 3.
[3] Par. 907, A. R. 1895.
[4] See, also, Circulars 3 and 7, H. Q. A., 1890.
[5] See Gen. Orders, 44, Div. of the Atlantic, 1889.
[6] Dig. J. A. Gen., 171, par. 11.

Section 15, of the British Code of 1774, as Article 17, Section 14, of the American Articles of 1776, as Article 17, Section 14, of the Resolution of Congress of 1786, and as No. 80 of the Articles of 1806.

The requirement that the order of arrest should be in writing was embodied in the Article in 1742; those of 1748 required that the offense charged should also be stated.[1] It is the duty of the receiving officer to satisfy himself that the prisoner tendered is one subject to military law. Beyond this he has no responsibility, the duty and responsibility of receiving and keeping the prisoner arising, *eo instante*, as soon as he is presented. His obligation is the same whether the offense charged be civil or military.[2]

ARTICLE 68. *Every officer to whose charge a prisoner is committed shall, within twenty-four hours after such commitment, or as soon as he is relieved from his guard, report in writing to the commanding officer the name of such prisoner, the crime charged against him, and the name of the officer committing him; and if he fails to make such report, he shall be punished as a court-martial may direct.*

Article 72 of the Prince Rupert Code contained the following requirement: "If any person be committed by the Provost-Marshal's own authority, without other command, he shall acquaint the General or other chief Commander with the cause thereof within twenty-four hours, and the Provost-Marshal shall thereupon dismiss him, unless he have order to the contrary." This provision is repeated as Article 51 of the King James Code of 1686, and a similar provision appears in the Articles of 1717.[3] The Article appeared in its present form as Article 21, Section 15, of the British Code of 1774, as Article 19, Section 14, of the American Articles of 1776, as Article 19, Section 14, of the Resolution of Congress of 1786, and as No. 82 of the Articles of 1806.

The Article of 1774 required the report to be made to the Colonel of the regiment to which the offender belonged when the offense related to a neglect of duty in his own corps. The other prisoners, not being regimental, were known as "general prisoners," and the report respecting them was submitted to the commander-in-chief. The use of the term "general prisoners" as applied to this class of prisoners is believed to have originated in the distinction required by this Article.

ARTICLE 69. *Any officer who presumes, without proper authority, to release any prisoner committed to his charge, or suffers any prisoner so committed to escape, shall be punished as a court-martial may direct.*

[1] Clode, Mil. Law, 99, 100.

[2] *Ibid.*, 100; Wolton *vs.* Gavin, 16 Q. B. Rep., 70. The 20th of the English Articles of 1855 makes it optional with the committing officer to state the charge at the time of commitment, or without any unnecessary delay thereafter.* The Army Act of 1881 contains the same requirement.†

[3] Article 44.

* Clode, Mil. Law, 100.

† Manual of Mil. Law, 376. See, also, the chapter entitled ARREST AND CONFINEMENT.

This appears as Article 20, Section 15, of the British Code of 1774, as Article 18, Section 14, of the American Articles of 1776, and the Resolution of Congress of 1786, and as No. 81 of the Articles of 1806. Although no specific intent is set forth in the Article, in order to constitute the offense of suffering a prisoner to escape, the executive order prescribing maximum punishments assigns different limits of punishment for *willfully* and for *negligently* allowing an escape, as separate offenses. A charge for suffering an escape, under this Article, should therefore, indicate in the specification, whether the act is alleged to be willful or negligent only.[1] In the British service a distinction is made in the statute between an offender who "willfully or otherwise" releases a prisoner, or who "willfully or without reasonable cause" allows a prisoner to escape.

ARTICLE 70. *No officer or soldier put in arrest shall be continued in confinement more than eight days, or until such time as a court-martial can be assembled.*

The 40th of the Articles of 1717 fixed the duration of the confinement of an officer or enlisted man prior to trial at "five days at farthest"; and this period was extended to eight days in the Articles of 1742, at which it has since remained. It so appears in Article 18, Section 15, of the British Code of 1774, as Article 16, Section 14, of the American Articles of 1776, and of the Resolution of Congress of 1786, and as No. 79 of the Articles of 1806.

The latter part of the clause evidently allows a latitude which is capable of being abused; but as in a free country there is no wrong without a remedy, the military law prescribes a mode of redress for all officers and soldiers who conceive themselves injured by their commanding officers, which must always be sufficient for the restraint of every act of material injustice or oppression.[2]

Detaining soldiers in arrest for long and unreasonable periods, when it is practicable to bring them to trial, is arbitrary and oppressive, and in contravention both of the letter and spirit of this Article. Whether the delay in any case is to be regarded as so far unreasonable as properly to subject the commander responsible therefor to military charges or to a civil action must depend upon the circumstances of the situation and the exigencies of the service at the time.[3]

ARTICLE 71. *When an officer is put in arrest for the purpose of trial, except at remote military posts or stations, the officer by whose order he is*

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[1] Dig. J. A. Gen., 79.

[2] Tytler, 106.

[3] Dig J. A. Gen., 80. Compare Blake's Case, 2 Maule & Sel., 428; Bailey *vs.* Warden, 4 *ibid.*, 400.

The fact that a soldier has been held in arrest for an unreasonably protracted period before trial, or while awaiting the promulgation of his sentence, is a good ground for a mitigation of his punishment. Dig. J. A. Gen., 170, par. 5.

arrested shall see that a copy of the charges on which he is to be tried is served upon him within eight days after his arrest, and that he is brought to trial within ten days thereafter, unless the necessities of the service prevent such trial; and then he shall be brought to trial within thirty days after the expiration of said ten days. If a copy of the charges be not served, or the arrested officer be not brought to trial, as herein required, the arrest shall cease. But officers released from arrest under the provisions of this Article may be tried, whenever the exigencies of the service shall permit, within twelve months after such release from arrest.

This appears for the first time in statutory form as the Act of July 16, 1862.[1] Soon after the battle of Ball's Bluff, Virginia, in October, 1861, Brigadier-General Charles P. Stone, U. S. Volunteers, the commander of the district in which the engagement took place, was arrested and placed in close confinement at Fort Lafayette in New York Harbor. The cause of his arrest was not made known to him at the time of his arrest, or subsequently, and no military charges were ever preferred against him, nor was a general court-martial convened for the trial of his case. General Stone endeavored, but without success, to ascertain the cause of his arrest, and requested in vain to have his case investigated by a court-martial or a court of inquiry. The matter was finally brought to the attention of Congress, and, as a result of legislative inquiry, the Act of July 16, 1862,[1] was passed. This enactment was had apparently with a view to secure the release of General Stone, and with no expressed intention on the part of the legislature to add to the existing Articles of War or to modify existing procedure. The provision was embodied, however, in the Articles of War upon their re-enactment in 1874.

The term "within ten days thereafter" has been held to mean after his arrest.[2] It has also been held a sufficient compliance with the requirement as to the service of charges to have served a true copy of the existing charges and specifications, though the list of witnesses appended to the original charges was omitted, and though the charges themselves were not in sufficient legal form, and were intended to be amended and redrawn.[3]

The fact that cases of officers put in arrest "at remote military posts or stations" are excepted from the application of the Article does not authorize an abuse of the power of arrest in these cases. And where, in such a case, an arrest, considering the facilities of communication with the department headquarters and other circumstances, was in fact unreasonably protracted without trial, it has been held that the officer was entitled to be released from arrest upon a proper application submitted for the purpose.[4]

Though an officer in whose case the provisions of this Article in regard to service of charges and trial have not been complied with is entitled to be

[1] 12 Statutes at Large, 595.
[2] Dig. J. A. Gen., 80, par. 2
[3] *Ibid.*, 81, par. 3.
[4] *Ibid.*, 81, par. 4.

released from arrest, he is not authorized to release himself therefrom. If he be not released in accordance with the Article, he should apply for his discharge from arrest, through the proper channels, to the authority by whose order the arrest was imposed, or other proper superior.[1]

ARTICLE 72. *Any general officer commanding an army, a territorial division, or a department, or colonel commanding a separate department, may appoint general courts-martial whenever necessary. But when any such commander is the accuser or prosecutor of any officer under his command, the court shall be appointed by the President, and its proceedings and sentence shall be sent directly to the Secretary of War, by whom they shall be laid before the President for his approval or orders in the case.*

The early English Articles are specific as to the rank and other qualifications for membership of general courts-martial, but are silent as to the authority by whom they were to be convened. It has been seen that the earl marshal constituted, *ex officio*, the marshal's court, and that court therefore existed so long as the office of earl marshal continued to be held by a subject. It is difficult and, for want of authentic records, practically impossible to determine when the marshal's court ceased to exist as such and gave place to the modern court-martial. The transition was easy, as other members are known to have been associated with the earl marshal in the composition of the court, and it was only necessary for him to cease to serve as a member in order to give to that tribunal the character of a court-martial. The clause relating to general courts-martial in Prince Rupert's Articles of War refers to the court in the singular, and speaks of its members as "those who compose Our General Court-Martial."[2] As the first standing army in England constituted the personal guard of the sovereign, and was not strong in point of numbers, it is probable that all cases properly triable by such a body were in fact brought before a single general court, sitting in London or at the residence of the sovereign.

When military forces were embodied either for foreign service or to carry on hostilities on the Scotch border, commissions were issued to the commander-in-chief, and in some instances to several persons, by title of office, conferring power to convene general courts-martial whenever, in their opinion, the interests of discipline made such a course necessary. These commissions were casual or occasional, not permanent in character, and were issued from time to time whenever active operations were undertaken. They expired or ceased to exist with the termination of the war or campaign for which they were issued.[3]

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[1] Dig. J. A. Gen., 80, par. 1.

[2] Article 60.

[3] Such are the war ordinances of Richard I. (II. Grose, 59), those of Richard II. (II. *ibid.*, 59), of Henry V. (II. *ibid.*, 65), of Henry VII. (II. *ibid.*, 83), of Henry VIII. (II. *ibid.*, 85), those of the Earl of Northumberland, 1640 (II. *ibid.*, 106), of the Earl of Essex, 1643 (II. *ibid.*, 107).

The first Mutiny Act embodied the existing usage in statutory form and authorized the sovereign and the general commanding-in-chief to grant commissions "to any lieutenants-general, or other officers not under the degree of colonels, from time to time to assemble courts-martial for punishing such offenses as aforesaid."[1] As the offenses thus made punishable were desertion and mutiny, it is plain that the courts-martial so authorized were of the grade now known as general courts. From the date of the first Mutiny Act until 1776, when the American Articles were adopted, the annual Mutiny Acts contained provisions similar in effect to that above cited. General courts-martial were convened beyond the seas by the generals commanding-in-chief, by whom, also, their sentences were approved and carried into effect.

When the first American code was enacted in 1776[2] the British Articles of 1774 were made the basis of the enactment, but the Mutiny Act, as such, was not enacted as a separate instrument, nor were all of its provisions embodied in the Articles so adopted. The American Articles of 1776 therefore departed from the English practice in this regard, and contained no provision conferring authority upon any military officer to convene general courts-martial, although such courts were convened in practice by the general commanding the army. By the Resolution of Congress of May 21, 1786,[3] Section 14 of the Articles of 1776, relating to military tribunals, was repealed and replaced by new Articles which conferred power to convene general courts-martial upon "the general or other officer commanding the troops." The corresponding Article of the code of 1806[4] conferred this power upon "any general officer commanding an army or colonel commanding a separate department," and authorized such courts to be convened "whenever necessary." To this was added in 1830 the requirement that "when any such commander is the accuser or prosecutor of any officer under his command the court shall be appointed by the President, and its proceedings and sentence shall be sent directly to the Secretary of War, by whom they shall be laid before the President, for his approval or orders in the case."[5]

The provision of this Article which conferred power to convene general courts-martial upon "colonels commanding separate departments," which was omitted from the revision of 1874, was restored by the Act of July 5,

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[1] I. Wm. and Mary, ch. 5.

[2] Resolution of Congress, September 20, 1776, 2 Journals of Congress, 343. The Articles of 1775 contained a similar requirement.*

[3] 11 Journals of Congress, 107.

[4] Article 65. This modification was suggested by Alexander Hamilton; see note—to the History of the Articles of War, *supra*. This Article appears in the code of 1874 as Articles 72, 105, and 106.

[5] Act of May 29, 1830 (4 Statutes at Large, 417).

* Resolution of June 30, 1775, 1 Journals of Congress, 120.

1884.[1] Prior to this amendment a colonel commanding a department was not authorized, as such, to convene a general court; otherwise, however, of a colonel assigned by the President to the command of a department according to his brevet rank of brigadier or major-general.[2]

The Convening Authority.[3]—This Article specifies by what military officers a general court-martial may be constituted. The President of the United States has the power to order such a court, as the constitutional commander-in-chief of the Army, irrespective of this Article or other statute.[4]

This Article, in empowering certain commanders to constitute the superior courts-martial, makes them the judges, in general, of the expediency of ordering such courts in particular instances.[5] So where a commander empowered by this Article to convene a general court-martial declines, in the exercise of his discretion, to approve charges submitted to him by an inferior and to order a court thereon, his decision should, in general, be regarded as final.[6] Except where specially authorized to do so by law or regulation, an officer or soldier cannot demand a court-martial in his own case.

Accuser or Prosecutor.—The provision of this Article and of Article 73, that when the convening commander is "accuser or prosecutor" the court shall be convened by the President or "next higher commander," being expressly restricted to general courts, has of course no application to regimental or garrison courts.[7] The same principle, however, will properly be applied to proceedings before these courts, if it can be done without serious embarrassment to the service.[8]

The objection that the convening commander was the "accuser" or "prosecutor" of the accused, being one going to the legal constitution of the court, may be raised before the court at any stage of its proceedings. Or it may be taken to the reviewing officer with a view to his disapproving the proceedings, or may be made to the President, after the approval and execution of the sentence, with a view to having the same declared invalid, or to the obtaining of other appropriate relief. Regularly, however, the objection, if known or believed to exist, should be taken at or before the arraignment. If the objection is not admitted by the prosecution to exist, the accused is entitled to prove it like any other issue.[9]

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[1] 23 Statutes at Large, 121.
[2] Dig. J. A. Gen., 82, par. 4.
[3] See the chapter entitled CONSTITUTION OF COURTS-MARTIAL.
[4] *Ibid.*, 81, par. 1; Swaim *vs.* U. S., 28 Ct. Cls., 173; *ibid.*, 165 U. S., 553.
[5] *Ibid.*, par. 2.
[6] *Ibid.*, par. 3.
[7] But see the title "The Summary Court" in the chapter entitled THE INFERIOR COURTS-MARTIAL. A general court-martial, convened by the division commander (a major-general) duly acting as department commander in the absence of the regular department commander, is legally convened by a general officer commanding a department in the sense of this Article. *Ibid.*, 84, par. 10.
[8] Dig. J. A. Gen., 84, par. 9.
[9] *Ibid.*, par. 8.

The mere fact that a general court-martial is convened by a department commander does not make such commander an "accuser or prosecutor" in the sense of this Article.[1] A department commander is not an "accuser or prosecutor" when, upon information of misconduct duly laid before him, he orders the acting judge-advocate of the department or the colonel commanding the regiment to take steps to bring the offender to trial, this being a part of the due and regular supervision of his command.[2]

ARTICLE 73. *In time of war the commander of a division, or of a separate brigade of troops, shall be competent to appoint a general court-martial. But when such commander is the accuser or prosecutor of any person under his command, the court shall be appointed by the next higher commander.*

The power to convene general courts-martial conferred upon the commanders of military departments and generals commanding armies by the Articles of 1806 was found adequate to the disciplinary needs of the forces embodied during the War of 1812, the War with Mexico, and the several Indian wars, some of them of considerable magnitude, which occurred between the years 1800 and 1860. Such was not the case, however, with the armies called forth at the outbreak of the War of the Rebellion in 1861. The power to convene general courts-martial was therefore, by an enactment of December 24, 1861,[3] extended to the commanders of divisions, the largest unit of organization then existing in the Armies of the United States, and which had already come to be regarded as the unit for certain tactical and administrative purposes. To meet the case of brigades not attached to or forming an integral part of any division, the power to appoint such courts was, by the same enactment, extended to the commanders of separate brigades.

Divisions; Separate Brigades.—According to the general definition given in the Revised Statutes,[4] a division is an organized command consisting of at least two brigades, and a brigade an organized command consisting of at least two regiments of infantry or cavalry.[5] To constitute a command a "separate brigade" in the sense of this Article, it must not exist as a component part of a division; to authorize its commander to convene a general court-martial it must be detached from or disconnected with any division and be operating as a distinct command.[6]

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[1] 16 Opin. Att.-Gen., 109.
[2] Dig. J. A. Gen., 84, par. 11.
[3] Act of December 24, 1861 (12 Stat. at Large, 330).
[4] Section 1114, Rev. Stat., Act of March 3, 1799 (1 Stat. at Large, 749).
[5] Dig. J. A. Gen., 85, par. 1.
[6] *Ibid.* Thus where it appeared from the record of a trial that the court was convened by a colonel commanding the "2d Brigade, 3d Division, 14th Army Corps," *held* that it was quite clear that such colonel did not command a "separate brigade," and was therefore not authorized to order a general court-martial.* *Ibid.*

* Under G. O. 251, A. G. O. of 1864, which was applied mainly to the commands designated in the late war as "districts," it was held by the Judge-Advocate General as follows: That the fact that a district command was composed not of regiments but of detachments merely (which, however in the

On August 31, 1864, a general order was issued from the War Department which directed as follows: "Where a post or district command is composed of mixed troops, equivalent to a brigade, the commanding officer of the department or Army will designate it in orders as 'a separate brigade,' and a copy of such order will accompany the proceedings of any general court-martial convened by such brigade commander. Without such authority, commanders of posts and districts having no brigade organization will not convene general courts-martial." [1]

ARTICLE 74. *Officers who may appoint a court-martial shall be competent to appoint a judge-advocate for the same.* [2]

Whenever a court-martial shall sit in closed session the judge-advocate shall withdraw, and when his legal advice or his assistance in referring to recorded evidence is required it shall be obtained in open court. [3]

Section 21 of the Act of March 16, 1802,[4] provided that "whenever a general court-martial shall be ordered the President of the United States may appoint a fit person to act as judge-advocate," and * * * "in cases where the President shall not have made such appointment the brigadier-general (commanding the army) or the president of the court may make the same." This clause was not repeated in, or in terms repealed by, the Articles of 1806, but, taken in connection with Article 69 of that enactment, was interpreted as conferring upon the authority competent to convene a

[1] Dig. J. A. Gen., 85, par. 3. Prior to Aug. 31, 1864 the date of the general order above specified, it had been held that, where a command not attached to a division, but occupying a separate post or district, or operating separately in the field, was made up of regiments or parts of regiments sufficient to compose a brigade, and such as were commonly or might properly be organized into a brigade command, the same might in general be viewed as constituting a "separate brigade" in the sense of this Article, i.e., so far as to empower its commander to convene a general court-martial. But where a certain command consisted of but one regiment of infantry with three batteries of artillery, *held* that it could scarcely be regarded as a separate brigade within the meaning of the statute. *Ibid.*, par. 2.

[2] See the chapter entitled THE COMPOSITION OF COURTS-MARTIAL.

[3] Sec. 2, Act of July 27, 1892 (27 Stat. at Large, 278).

[4] 2 Statutes at Large, 132.

number of the troops, were equal to or exceeded two regiments) did not preclude its being designated as a "separate brigade," and that when so designated its commander had the same authority to convene general courts martial as he would have if the command had the regular statutory brigade organization; that though a district command embraced a force considerably greater than that of a brigade as commonly constituted, yet if not designated by the proper authority as a "separate brigade," its commander would be without authority to convene general courts-martial, unless indeed his command constituted a separate "army" in the sense of the 65th (now 72d) Article: that it was not absolutely necessary, to give validity to the proceedings or sentence of a general court-martial convened by the commander of a separate brigade, that the command should be described as a separate brigade in the caption or superscription of the order convening the court and prefixed to the record, or even that a copy of the order designating the command as a separate brigade should accompany the proceedings. As to the latter feature, the order of 1864 is viewed as directory merely. And though not to accompany the record with a copy of the order thus constituting the command would be a serious irregularity, as would be also, though a less serious one, the omission of the proper formal description of the command from the convening order, yet if the command had actually been duly designated, and *in fact* was, a separate brigade, and this fact existed of record and could be verified from the official records of the department or Army, the omission of either of these particulars, though a culpable and embarrassing neglect on the part of the court or judge-advocate, would not *per se* invalidate the proceedings or sentence. Dig. J. A. Gen., 85, par. 3.

Held (January, 1866) that until the *status belli* had been formally declared to be terminated by the President or Congress, such *status* must be held to be subsisting; and that, till such declaration, the authority vested by the Act of Dec. 24, 1861, (now Art. 73,) in commanders of divisions and separate brigades might lawfully continue to be exercised. *Ibid.*, 86, par. 4.

general court-martial the power to appoint a judge-advocate for the same. This clause first appeared in statutory form as No. 73 of the Articles of 1874.

ARTICLE 75. *General courts-martial may consist of any number of officers from five to thirteen, inclusive; but they shall not consist of less than thirteen when that number can be convened without manifest injury to the service.*

The requirement of this Article in respect to the number of members composing a general court-martial seems to have been derived, proximately at least, from the "Articles and Military Lawes" of Gustavus Adolphus. The 140th and 141st Articles of that code provide that regimental courts-martial shall be composed of such number of officers that "together with the President they may be to the number of thirteene at the leaste." The "Highest Marshall Court" provided for by that code, corresponding to the modern general court-martial, must have been composed of more than thirteen members, since five general officers sat as members by title of office, together with all the colonels, "and in their absence their lieutenant-colonels," and the 142d Article provided that "these shall sit together when there is any matter of great importance in controversie."

The requirement that general courts-martial should be composed of thirteen members, "whereof none were to be under the degree of captains," appeared as a clause of the first Mutiny Act, and has formed a part of all subsequent enactments of a similar nature. The clause permitting a less number to be convened, when that number cannot be convened "without manifest injury to the service," was added to the American Articles by the Resolution of Congress of May 31, 1786.[1]

Eligibility for Membership.[2]—Under this Article all officers of the active list of the Army are eligible to be detailed as members of general courts-martial. Chaplains, however, are at present not so detailed in practice. Retired officers, in view of the prohibitory provisions of the Revised Statutes,[3] cannot legally be assigned to court-martial duty.[4]

But only *officers* can be so detailed; courts-martial composed in whole or in part of enlisted men are unknown to our law.[5] Though any officer may legally be detailed, it is desirable that no officer should be selected who, from having preferred the charges or other known reason, may be presumed to be biased or interested in the case.[6]

It is not essential to the validity of the proceedings that the order convening a general court-martial of less than thirteen members should state

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[1] 11 Journals of Congress, 107.
[2] See the chapter entitled COMPOSITION OF COURTS-MARTIAL.
[3] Sections 1259 and 1260, Revised Statutes.
[4] Dig. J. A. Gen., 87, par. 1.
[5] *Ibid.*, par. 2. So an "acting assistant surgeon," being a civilian, is not qualified to sit on a court-martial. *Ibid.*
[6] *Ibid.*, par. 1.

that "no other officers" (or "no greater number") "than those named can be assembled without manifest injury to the service." Attorney-General Wirt[1] did not hold such a statement to be essential, but simply expressed the opinion that the President, before confirming a certain death-sentence adjudged by a court of less than thirteen members, would properly satisfy himself that a court of the full number could not have been convened without prejudice to the service. It was held at an early period by the United States Supreme Court that it was for the convening authority to determine as to what number of officers could be detailed without manifest injury to the service, and that his decision on the subject would be conclusive.[2]

While a less number of members than five cannot be organized as a court or proceed with a trial, they may perform such acts as are preliminary to the organization and action of the court. Less than five members may adjourn from day to day; and where five are present and one of them is challenged the remaining four may determine upon the sufficiency of the objection.[3]

Where, in the course of a trial, the number of members of a general court-martial is reduced by reason of absence, challenge, or the relieving of members, the court may legally proceed with its business so long as five members, the minimum quorum, remain; it is otherwise, however, where the number is thus reduced below five.[4]

ARTICLE 76. *When the requisite number of officers to form a general court-martial is not present in any post or detachment, the commanding officer shall, in cases which require the cognizance of such a court, report to the commanding officer of the department, who shall thereupon order a court to be assembled at the nearest post or department at which there may be such a requisite number of officers, and shall order the party accused, with necessary witnesses, to be transported to the place where the said court shall be assembled.*

This provision appeared for the first time in statutory form as Section 23 of the Resolution of Congress of May 31, 1786, and was embodied without change as Article 86 in the revision of 1806.

ARTICLE 77. *Officers of the Regular Army shall not be competent to sit on courts-martial to try the officers or soldiers of other forces, except as provided in Article 78.*

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[1] 1 Opin. Att.-Gen., 296.

[2] Dig. J. A. Gen., 88, par. 8; Martin *vs.* Mott, 12 Wheaton, 34–37 (1827).

[3] *Ibid.*, 87, par. 4.

[4] *Ibid.*, par. 3. Where a court, though reduced by the absence of members, operation of challenges, etc., to below five members, yet proceeds with and concludes the trial, its further proceedings, including its finding and sentence (if any), are unauthorized and inoperative. *Ibid.*, 88, par. 6.

A court reduced to four members, and thereupon adjourning for an indefinite period, does not dissolve itself. In adjourning it should report the facts to the convening authority and await his orders. He may at any time complete it by the addition of a new member or members and order it to reassemble for business. *Ibid.*, par. 5.

This requirement does not appear in the British Code of 1774 from which our Articles were immediately derived. Article 1, Section 17, of the American Articles, however, contains the requirement that "the officers and soldiers of any troops, whether minute-men, militia, or others, being mustered and in Continental pay, shall, at all times and in all places, when joined or acting in conjunction with the regular forces of the United States, be governed by these rules or Articles of War, and shall be subject to be tried by courts-martial in like manner with the officers and soldiers in the regular forces, save only that such courts-martial shall be composed entirely of militia officers of the same provincial corps with the offender." The final clause of this Article also provided that "such militia and minute-men as are now in service, and have, by particular contract with the respective States, engaged to be governed by particular regulations while in Continental service, shall not be subject to the above Articles of War."

The Act of May 2, 1792,[1] contained the more specific requirement that "courts-martial for the trial of militia shall be composed of militia officers only," which was embodied as the last clause of the 97th of the Articles of 1806.[2]

Although officers and soldiers of volunteers, not being militia, are as much a part of the Army of the United States as are regular officers, yet, in view of the terms of this Article, an officer of the regular army, so called, would not be eligible for detail as a member of a court-martial convened for the trial of volunteer officers or soldiers, nor, when duly detailed as a member of a court-martial, would he be competent to take part in the trial of a volunteer by such court.[3]

ARTICLE 78. *Officers of the Marine Corps, detached for service with the Army by order of the President, may be associated with officers of the Regular Army on courts-martial for the trial of offenders belonging to the Regular Army, or to forces of the Marine Corps so detached; and in such cases the orders of the senior officer of either corps, who may be present and duly authorized shall be obeyed.*

The Marine Corps was created by the Act of July 11, 1798.[4] It was augmented by the Acts of March 3, 1809,[5] and April 16, 1814.[6] It was reorganized by the Acts of March 3, 1817,[7] and June 30, 1834;[8] this Article

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[1] Sec. 6, Act of May 2, 1792 (1 Stat. at Large, 222).

[2] This requirement was also repeated as Section 6 of the Act of February 28, 1795, (1 *ibid.*, 424,) Section 1, Act of April 8, 1814, (3 *ibid.*, 134,) and July 29, 1861 (12 *ibid.*, 282.)

[3] See the chapters entitled respectively THE COMPOSITION OF COURTS-MARTIAL and THE CONSTITUTION OF COURTS-MARTIAL.

[4] 1 Statutes at Large, 394.

[5] 2 *ibid.*, 544.

[6] 3 *ibid.*, 124.

[7] 3 *ibid.*, 276.

[8] 4 *ibid.*, 712.

appeared as Section 2 of the Act of June 30, 1834,[1] and was embodied in the Articles of War in the revision of 1874.

Although the Act of July 11, 1798,[2] had provided "that the Marine Corps, established by this Act, shall, at any time, be liable to do duty in the forts and garrisons of the United States, on the seacoast, or any other duty on shore, as the President in his discretion shall direct," some such statutory provision was made necessary by the fact that the military and naval Articles of War are distinct and separate enactments, neither of which constitutes a rule of discipline for forces employed under the other; nor may officers of one branch, by virtue of either enactment, exercise command or authority in the other, save by virtue of an express enactment to that effect, like that contained in the 78th Article.

ARTICLE 79. *Officers shall be tried only by general courts-martial; and no officer shall, when it can be avoided, be tried by officers inferior to him in rank.*

Article 9, Section 15, of the British Code of 1774, and Article 7, Section 14, of the American Articles of 1776, contained the requirement that "no Field Officer shall be tried by any person under the degree of Captain." The provision appeared in its present form as Article 11, Section 14, of the Resolution of Congress of May 31, 1786, and was re-enacted as No. 75 of the Articles of 1806, and as No. 79 of those of 1874.

Whether the trial of an officer by officers of an inferior rank can be avoided or not is a question, not for the accused or the court, but for the officer convening the court; and his decision (as indicated by the detail itself as made in the convening order) upon this point, as upon that of the number of members to be detailed, is conclusive.[3] An officer, therefore, cannot successfully challenge a member *merely* because of being of a rank inferior to his own.[4]

The statement sometimes added in orders convening courts-martial to the effect that "no officers other than those named can be detailed without injury to the service" is as superfluous and unnecessary for the purpose of excusing the detailing of officers junior to the accused as it is for accounting for the fact that less than the maximum number have been selected for the court.[5]

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[1] 4 Stat. at Large, 712.
[2] 1 *ibid.*, 394.
[3] See Article 75, *supra*.
[4] Dig. J. A. Gen., 89, par. 1.
[5] *Ibid*, par. 2. At the opening of a trial by court-martial it was objected by the accused that nine of the thirteen members as detailed were his inferiors in rank, and that the detailing of such inferiors could have been "avoided" without prejudice to the service. *Held* that the objection was properly overruled by the court. Whether such a detail "can be avoided" is a question to be determined by the convening authority alone, and one upon which his determination is conclusive. See, also, Mullan *vs.* U. S., 140 U. S., 240.

ARTICLE 80.[1] *The commanding officer of each garrison, fort, or other place, regiment or corps, detached battalion or company, or other detachment in the Army, shall have power to appoint for such place or command, or in his discretion for each battalion thereof, a Summary Court to consist of one officer to be designated by him, before whom enlisted men who are to be tried for offenses, such as were prior to the passage of the Act "to promote the administration of justice in the Army,"*[2] *approved October first, eighteen hundred and ninety, cognizable by garrison or regimental courts-martial, and offenses cognizable by field-officers detailed to try offenders under the provisions of the eightieth and one hundred and tenth Articles of War,*[3] *shall be brought to trial within twenty-four hours of the time of the arrest, or as soon thereafter as practicable,*[4] *except when the accused is to be tried by general court-martial; but such Summary Court may be appointed and the officer designated by superior authority when by him deemed desirable.*[5] Act of June 18, 1898. (30 Stat. at Large, 483.)

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[1] Article 80 of the revision of 1874 conferred authority for the appointment of the Field-officer's Court in time of war. It was repealed by the Act of June 18, 1898. (30 Statutes at Large, 483.) Article 80 contained the requirement that "in time of war a field-officer may be detailed in every regiment to try soldiers thereof for offenses not capital; and no soldier serving with his regiment shall be tried by a regimental or garrison court-martial when a field-officer of his regiment may be so detailed."

This court was created during the continuance of the War of the Rebellion. It was the purpose of the Congress in establishing it to replace the regimental court-martial for the trial of offenders by a tribunal having a more summary and less formal procedure. The statute establishing the court, however, was open to the construction that such tribunals were authorized at all times, and in time of peace equally as in time of war. The 80th Article, therefore, expressly limited the detailing of Field-officer's Courts to "time of war." The Field-officer's Court thus became unauthorized in *time of peace* from and after June 22, 1874, the date on which the present Article took effect as part of the Revised Statutes. The Article substituted the Field-officer's Court for the regimental or garrison court in *time of war* in all cases arising in a regiment for the trial of which it is practicable to detail a field-officer of the regiment. This court ceased to exist on August 17, 1898, the day on which the Act of June 18, 1898, creating the Summary Court became operative.

[2] 26 Statutes at Large, 648.

[3] The 80th and 110th Articles of War were expressly repealed by the Act of June 18, 1898. (30 Statutes at Large, 483.)

[4] The provision of the Act that accused soldiers shall be brought before the Summary Court for trial "within twenty-four hours from the time of their arrest, or as soon thereafter as practicable," is not a statute of limitations nor jurisdictional in its character, but directory only—directory upon the officers whose duty it is to bring offenders before the court. The proceedings will thus be legally valid though the accused does not appear for trial within the period specified. So *held*, in a case of an accused soldier arrested on Saturday, that the court did not by not sitting on Sunday lose jurisdiction, and therefore that it is not necessary that a Summary Court should ever sit on a Sunday. Dig. J. A. Gen., 725, par. 10.

The provision in the Act in regard to the trial being had within twenty-four hours of the arrest being directory only, a trial held after that time is entirely valid. Thus where a soldier, by reason of drunkenness or otherwise, is not in a condition to be tried within that time, his trial may be postponed till he is in such condition. (*Ibid.*, 727, par. 11.)

[5] The statute above set forth (Act of June 18, 1898) substitutes the Summary Court for (*a*) the Field-officer's Court, having jurisdiction for the trial of enlisted men in time

The officer holding the Summary Court shall have power to administer oaths and to hear and determine such cases, and when satisfied of the guilt of the accused adjudge the punishment to be inflicted.[1] Ibid.

Summary Courts detailed under existing laws to try enlisted men shall not have power to try capital cases or commissioned officers, but shall have power to award punishment not to exceed confinement at hard labor for three months or forfeiture of three months' pay, or both, and in addition thereto, in the case of non-commissioned officers, reduction to the ranks, and in the case of first-class privates reduction to second-class privates: Provided, *That a Summary Court shall not adjudge confinement and forfeiture in excess of a period of one month, unless the accused shall, before trial, consent in writing to trial by said court; but in any case of refusal to so consent, the trial may be had either by general, regimental, or garrison court-martial, or by said Summary Court, but in any case of trial by said Summary Court, without consent as aforesaid, the court shall not adjudge confinement or forfeiture of pay for more than one month.* Section 4, Act of March 2, 1901. (31 Stats. at Large, 951.)

There shall be a Summary Court record kept at each military post and in the field at the headquarters of the proper command, in which shall be entered a record of all cases heard and determined and the action had thereon; and no sentence adjudged by said Summary Court shall be executed until it shall have been approved by the officer appointiny the court, or by the officer commanding for the time being. Ibid.

When but one commissioned officer is present with a command he shall hear and finally determine such cases.[2] Ibid.

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of war, and (*b*) the old Summary Court, having jurisdiction for the trial of enlisted men in time of peace, much as the 80th Article of War (Section 7 of the Act of July 17, 1862, 12 Stat. L., 598) substituted the Field-officers' Court for the regimental court-martial in time of war.

[1] The procedure of the Summary Court should be similar to that of the older courts-martial. The charges and specifications should be read to the accused, and he be required to plead guilty or not guilty, and the witnesses should be sworn. But the testimony is not set forth in the record. Dig. J. A. Gen. 725, par. 13.

The Act of 1898, in providing that the trial officer "shall have power to administer oaths," has reference to the oaths of witnesses. The officer himself is not sworn. But the witnesses must be sworn; and, in a case in which it appeared that they were not in fact sworn, *held* that the proceedings and sentence were invalidated, and that a forfeiture imposed was illegally charged against the accused, who should be credited with the amount of the same on the next muster and pay roll. But the record need not state in terms that the witnesses were sworn; it will be presumed that the law has been complied with unless the contrary appears. *Ibid.*, par. 14.

A Summary Court is not empowered to issue process of attachment to compel the attendance of a civilian witness. *Ibid.*, par. 15.

[2] Where a post commander sits as a Summary Court no approval of the sentence is required by law, but he should sign the sentence and date his signature. A certification by the post adjutant is unnecessary and irregular and should not be permitted. Dig.

No one while holding the privileges of a certificate of eligibility to promotion shall be brought before a Summary Court, and non-commissioned officers shall not, if they object thereto, be brought to trial before Summary Courts without the authority of the officer competent to order their trial by general court-martial, but shall in such cases be brought to trial before garrison, regimental, or general courts-martial, as the case may be. Ibid.

The commanding officers authorized to approve the sentences of Summary Courts and superior authority shall have power to remit or mitigate the same.[1] Sec. 3, ibid.

Post and other commanders shall in time of peace, on the last day of each month, make a report to the department headquarters of the number of cases determined by Summary Court during the month, setting forth the offenses committed and the penalties awarded, which report shall be filed in the office of the judge-advocate of the department, and may be destroyed when no longer of use.[2] Sec. 4, ibid.

The commanding officer's approval should be over his own signature, and as forfeitures adjudged are operative only upon pay accruing subsequent to the approval unless otherwise directed in the sentence, the date of approval should be entered on the record. Dig. Opins. J. A. G., 1901, par. 2394.

Where a soldier who had been convicted by a Summary Court had passed into another command, so that the officer who approved his sentence was no longer his commanding officer, such officer could not legally exercise the power of remission or mitigation of the sentence. *Ibid.*, par. 2403.

This tribunal was intended to provide for the trial of enlisted men

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J. A. Gen., 725, par. 3. The statute creating the original Summary Court conferred authority upon the post commander to approve but not to remit or mitigate sentences imposed by Summary Courts. Section 5 of the Act of July 27, 1892, (27 Stat. at Large, 277,) however, conferred such authority, and placed post commanders, in this respect, upon the same footing as other reviewing authorities.

[1] It will be observed that the statute vests the power to convene the Summary Court in the commander of a regiment, post, garrison, separate battalion, etc., subject to the qualification that "the court may be convened and the officer designated by superior authority when by him deemed desirable." The convening authority thus vested in a superior commander may be exercised by him directly (by creating the court, or designating the trial officer), or he may point out the subordinate commanders, within the sphere of his authority, by whom such power is to be exercised. Having done so, however, the subordinate commanders so designated become, under the statute, the reviewing authorities of the courts created in pursuance of orders from superior authority, and the proceedings of the several Summary Courts so created are reviewed and their sentences approved and made operative by them; and such superior commander cannot interpose as a reviewing authority; his subsequent action in respect to them being restricted to the field of mitigation and remission which is expressly vested in him by the statute creating the court.

[2] Section 7 of the Act of June 18, 1898, contains the requirement that the statute shall "take effect sixty days after its passage."

[3] See the chapters entitled THE JURISDICTION OF COURTS-MARTIAL and THE INFERIOR COURTS-MARTIAL.

under all conditions of service. *Held*, therefore, that the surgeon in command of the Army and Navy General Hospital, Hot Springs, Ark., being an officer of the Army, has authority under this act to appoint a summary court for the trial of enlisted men of the army under his command. And *held*, that if the U. S. General Hospital at Fort Myer, Va., and at Fort McPherson, Ga., were not included in the command of the respective post commanders, the surgeons commanding the hospitals would be competent under the act cited to appoint Summary Courts. *Held*, also, where the division field hospital and the division field ambulance company were independent commands and responsible directly to the division surgeon and division commander, that their respective commanders were competent to appoint Summary Courts for the same. And the surgeon in command of a U. S. hospital ship is a commanding officer within the meaning of the Summary Court Act, and may appoint such court for the trial of enlisted men on such ship. *Ibid.*, par. 2405.

Held, that the Summary Court is a court-martial within the meaning of the acts making appropriation "for expenses of courts-martial, * * * and compensation of witnesses * * * attending the same." The Summary Court officer would make the necessary certificate as to the fact of attendance in the case of a civilian witness and administer the oath respecting his expense account. *Ibid.*, par. 2406.

Exceptions to Jurisdiction as to Persons.—The Act of June 18, 1898, contains the requirement that "no one while holding the privileges of a certificate of eligibility to promotion shall be brought before a Summary Court, and that non-commissioned officers shall not, if they object thereto, be brought to trial before Summary Courts without the authority of the officer competent to order their trial by general court-martial, but shall in such cases be brought to trial before garrison, regimental, or general courts-martial, as the case may be."[1] It will thus be seen that the Summary Court is without jurisdiction to try enlisted men "holding the privileges of a certificate of eligibility to promotion," and it may only try non-commissioned officers, in the event of their objection to such trial, with the authority of the officer competent to order their trial by general court-martial.

ARTICLE 81. *Every officer commanding a regiment or corps shall, subject to the provisions of Article 80, be competent to appoint, for his own regiment or corps, courts-martial, consisting of three officers, to try offenses not capital.*

This appears as Article 59 of Prince Rupert's Code in the following form: "The Commission-Officers of every regiment may hold a Court-Martial for the regiment, upon all necessary occasions." From this it would appear

[1] Act of June 18, 1898. (30 Stat. at Large, 483.)

that all the commissioned officers present for duty with a regiment constituted the regimental court-martial. Articles 12 and 13 of Section 15 of the British Codes of 1765 and 1774 contained a similar requirement, but provided that five officers should constitute a minimum of membership. Article 3, Section 14, of the Resolution of Congress of May 31, 1786, fixed the membership at three and vested the appointing power in the regimental commander. The clause was re-enacted as No. 66 of the Articles of 1806 and as No. 81 of those of 1874.

Constitution, Composition, etc.—The constitution and composition of this tribunal have already been explained. In addition to the regiments constituting the line of the army, it has been held that the chief of engineers was authorized to order a court under this Article for the trial of soldiers of the engineer battalion; the same, in connection with the engineer officers of the army, being deemed, in view of Sections 1094, 1151, 1154, etc., of the Revised Statutes, to constitute a "corps" in the sense of the Article. So held that the chief of ordnance was authorized to convene such a court for the trial of the enlisted men authorized by Section 1162, Revised Statutes, to be enlisted by him; the same being deemed to constitute, with the ordnance officers, such a separate and distinct branch of the military establishment as to come within the general designation of "corps" employed in the Article. So held that the Chief Signal Officer, under the provisions of the Acts of July 24, 1876,[1] June 20, 1878,[2] etc., relating to his branch of the service, was authorized to order courts-martial, as commanding a "corps" in the sense of this Article.[3]

It is not necesssary that an order convening a court under this (or the next) Article, in time of war, should state in terms that it is not practicable to detail a field-officer under Article 80. It is good practice, however, and not unusual, to add a statement to this effect.[4]

ARTICLE 82. *Every officer commanding a garrison, fort, or other place where the troops consist of different corps shall, subject to the provisions of Article* 80, *be competent to appoint, for such garrison or other place, courts-martial, consisting of three officers, to try offenses not capital.*[5]

In order to provide a suitable military force for the occupation and preservation of such forts, castles, or other fortified places as constituted a

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[1] 19 Statutes at Large, 97.
[2] 20 *ibid.*, 146.
[3] Dig. J. A. Gen., 92, par. 1.
[4] *Ibid.*, 93, par. 2. Under par. 898, Army Regulations of 1861, it devolved upon a department commander to supervise the proceedings of regimental and garrison courts-martial transmitted to his headquarters, and if he discovered any material error, defect, or omission in a record, or in the action taken in the case by the inferior commander, to return the proceedings to the latter, calling his attention to the correction deemed proper to be made. This paragraph is not contained in the Regulations of 1889 or in the existing Regulation of 1895. *Ibid.*, par. 3.
[5] See the chapter entitled THE INFERIOR COURTS-MARTIAL.

part of the defenses of the realm, garrisons were established, and maintained with the sanction of Parliament, at a very early period of English history ;[1] and these forces, together with the personal guards of the sovereign, constituted, in great part, the lawful military establishment during the sixteenth and seventeenth centuries. With a view to the maintenance of discipline in the garrisons thus authorized, the governor, or commander, was empowered by the early Articles of War[2] to assemble courts-martial for the trial of offenders; and these tribunals were placed on the same footing, as respects jurisdiction, as the already existing regimental courts-martial. They were to consist of not less than five members, and their sentences were inoperative until they had been confirmed by the commanding officer. In the British Code of 1774 the requirement appears,[3] as a condition precedent to their constitution, that the garrison shall "consist of detachments from different regiments, or of independent companies." This Article was embodied as Article 12, Section 14, in the American Articles of 1776, and continued in force for nearly ten years, when it was replaced by the new section in respect to the administration of military justice which is contained in the Resolution of Congress of May 31, 1786; in which enactment the authority for the constitution of regimental and garrison courts-martial was contained in a single Article and the number of members was fixed at three. In this form it was re-enacted as No. 66 of the Articles of 1806.

Until 1880 the junior member acted as the judge-advocate of this tribunal, but, in conformity to the terms of General Orders, No. 15, of the War Department of that year, separate judge-advocates were required to be detailed to prosecute cases before these courts in behalf of the United States.

The garrison or detachment court-martial in England was discontinued in 1829, its jurisdiction being merged in that of the regimental court-martial.[4]

Constitution and Composition.[5]—It is not essential, in this or the preceding Article, that the "officer commanding" should be of the rank of field-officer. A commanding officer, though a captain or lieutenant, may convene a court-martial, under this Article, provided he has the required command.[6] A commanding officer, however, is not authorized to detail himself, with two other officers, as a court under either Article.[7]

The general term "other place" is deemed to be intended to cover and include any situation or locality whatever—post, station, camp, halting-

[1] I. Clode, Mil. Forces, 52.
[2] See Articles of 1666 and 1672. See, also, Clode, Mil. Law, 33.
[3] Article 14, Section 15.
[4] Simmons, § 110.
[5] See the chapters entitled respectively CONSTITUTION OF COURTS-MARTIAL and THE COMPOSITION OF COURTS-MARTIAL.
[6] Dig. J. A. Gen., 93, par. 1.
[7] *Ibid.*, par. 2. An "acting assistant surgeon," not being an officer of the Army, cannot be detailed on such court. *Ibid.*

place, etc.—at which there may remain or be, however temporarily, a separate command or detachment in which different corps of the army are represented, as indicated in the next paragraph. If such command, so situated, contains three officers, other than the commander, available for service on court-martial, the commander will be competent to exercise the authority conferred by this Article.[1]

In view of the early orders[2] relating to the subject, and of the practice thereunder, it has been held that the presence on duty with a garrison, detachment, or other separate command, at a fort, arsenal, or other post or place, and as a part of such command, of a single representative, officer or soldier, of a corps, arm, or branch of the service other than that of which the bulk of the command is composed—as an officer of the quartermaster, subsistence, or medical department, a chaplain, an ordnance sergeant or hospital steward, an officer or soldier of artillery where the command consists of infantry or cavalry, or *vice versa*, etc.,—might be deemed sufficient to fix upon the command the character of one "where the troops consist of different corps," in the sense of this Article, and to empower the commanding officer to order a court-martial under the same. The presence, however, with the command of a *civil* employee of the Army (as an "acting assistant surgeon") could have no such effect.[3]

ARTICLE 83. *Regimental and garrison courts-martial and summary courts detailed under existing laws to try enlisted men shall not have power to try capital cases or commissioned officers, but shall have power to award punishment not to exceed confinement at hard labor for three months, or forfeiture of three months' pay, or both; and in addition thereto, in the case of non-commissioned officers, reduction to the ranks, and in the case of first-class privates reduction to second-class privates: Provided, That a summary court shall not adjudge confinement and forfeiture in excess of a period of one month, unless the accused shall before trial consent in writing to trial by said court; but in any case of refusal to so consent the trial may be had either by general, regimental, or garrison court-martial, or by said Summary Court; but in case of trial by said Summary Court, without consent as aforesaid, the court shall not adjudge confinement or forfeiture of pay for more than one month.* (Act of March 2, 1901. 31 Stat. at Large, 951.)

The grant of jurisdiction to the regimental court-martial in Albemarle's Articles, as well as in the Prince Rupert Code and in that of James II., is

[1] Dig. J. A. Gen., 93, par. 3.

[2] In order that the practice throughout the Army under the second clause of the 66th (present 82d) Article may be uniform, it is published for the information of all, as the opinion at General Headquarters, that the presence on duty of an ordnance sergeant, like that of an officer or man of any other different corps, at any military post garrisoned with troops, gives to its commanding officer the legal power to appoint garrison courts-martial for the trial of petty military offenses committed at the same. Par. 1, General Orders, No. 5, H. Q. Army, January 18, 1843. See, also, Gen. Orders, No. 13, Fourth Mil. District, 1867.

[3] *Ibid.*, 94, par. 4.

somewhat vague, and seems to have rested to some extent upon custom of service; the commissioned officers of every regiment being authorized to hold a court-martial "on all necessary occasions."[1] In the British Codes of 1765 and 1774,[2] and in the American Articles of 1776,[3] the jurisdiction conferred is still very indefinite in character, being expressly restricted to the "infliction of corporal punishment for small offenses." In Article 4, Section 14, of the amendment of the American Articles of 1776, which is embodied in the Resolution of Congress of May 31, 1786, the present restriction upon the power of the minor courts to punish military offenses is for the first time made the subject of legislative enactment, together with the clause withdrawing capital cases and those affecting commissioned officers from the jurisdiction of regimental and garrison courts-martial. As so modified, the requirement was embodied in the Articles of 1806 and, save for the addition of the clause extending the provisions of the Article to the newly created field-officer's court,[4] was re-enacted without change in the revision of the Articles in 1874.

Extent of Jurisdiction.—The power to punish being expressly restricted to the forfeiture of three months' pay, or to imprisonment for a period not longer than three months, a sentence forfeiting pecuniary allowances in addition to pay, where the forfeiture amounts to a sum greater than three months' pay, would not be authorized under this Article.[5] So, also, a sentence adjudged by a garrison court of confinement "till the expiration of the term of service" of a soldier would be unauthorized unless the soldier had no more than one month left to serve.[6]

The limitations imposed by the Article have reference of course to single sentences. For distinct offenses made the subject of different trials resulting in separate sentences, a soldier may be placed at one and the same time under several penalties of forfeiture and imprisonment, or either, exceeding together the limit fixed by the Article for a single sentence.[7]

An inferior court is not empowered to impose a sentence of dishonorable discharge. Such a punishment is not expressly authorized by the 83d Article of War, to be adjudged by regimental, garrison, or summary courts-martial, the power to impose it being restricted to general courts-martial by the Fourth Article of War.

While inferior courts have, equally with general courts, *jurisdiction* of all military offenses not capital, yet, in view of the limitations upon their authority to sentence, it is in general inexpedient to resort to them for the

[1] See Articles 50 and 62, Prince Rupert Code, and Articles 47, 50, and 56 of the James II. Articles.
[2] Article 12, Section 15.
[3] Article 12, Section 14.
[4] Section 7, Act of July 17, 1862. (12 Stat. at Large, 598.)
[5] Dig. J. A. Gen., 95, par. 3. See, also, the chapter entitled PUNISHMENTS.
[6] *Ibid.*, par. 4.
[7] *Ibid.*, par. 6. See General Orders, No. 18, War Dept., 1859.

trial of the graver offenses, such as larcenies, aggravated acts of drunkenness, protracted absences without leave, etc., a proper and adequate punishment for which would be beyond the power of such tribunals. So, as a reviewing officer is never authorized to add to the punishment imposed by any court-martial, the more serious offenses should, where practicable, be referred for trial to general courts-martial, which alone are vested with a full discretion to impose punishments in proportion to the gravity of the offenses.[1]

ARTICLE 84. *The judge-advocate shall administer to each member of the court, before they proceed upon any trial, the following oath, which shall also be taken by all members of regimental and garrison courts-martial: "You, A B, do swear that you will well and truly try and determine, according to evidence, the matter now before you, between the United States of America and the prisoner to be tried, and that you will duly administer justice, without partiality, favor, or affection, according to the provisions of the rules and articles for the government of the armies of the United States; and if any doubts should arise, not explained by said Articles, then according to your conscience, the best of your understanding, and the custom of war in like cases; and you do further swear that you will not divulge the sentence of the court until it shall be published by the proper authority, except to the judge-advocate; neither will you disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof, as a witness, by a court of justice, in a due course of law. So help you God."*

The 60th of the Prince Rupert Articles contains the following requirement as to the oath of a member: "Those who are judges in Our General Court-martials * * * shall take oath for the due administration of Justice according to this Article, or (where these Articles assign no absolute punishment) according to their consciences, the best of their Understanding, and the custome of war in like cases." The Articles of 1672 and 1686 contain a similar requirement. In Article 22 of the British Code of 1717 the clause was inserted requiring the case to be tried "without partiality, favor or affection," and upon doubt arising "not explained by the said Mutiny Act and the Articles of War," then, as before directed, "according to their consciences, the best of their understanding and the custom of war in like cases."[2] This oath was required to be administered to members of the inferior courts-martial by Article 6, Section 14, of the Resolution of Congress of May 31, 1786. No oath was required of the members of a regimental or garrison court in England until 1805.[3]

The oath in substantially its present form appears as Article 6, Section 15, of the British Codes of 1765 and 1774; in the American Articles of 1776

[1] Dig. J. A. Gen., 95, par. 7. [2] Clode, Mil. Law, 113. [3] *Ibid.*, 129.

and in the revision of the section relating to the administration of military justice, by the Resolution of Congress of May 31, 1786, the oath of the British Code of 1774 is replaced by two forms of oath, the first containing the clause respecting the trial, the second the undertaking to administer justice and the clauses relating to the disclosure of the finding and sentence. The single form is restored in No. 69 of the Articles of 1806, and is so re-enacted in the Articles of 1874. The clause permitting the disclosure of the finding and sentence to the judge-advocate was inserted by the Act of July 27, 1892.[1]

Procedure.—This Article makes the administering to the court of the form of oath thereby prescribed an essential preliminary to its entering upon a trial.[2] Until the oath is taken as specified, the court is not qualified "to try and determine." The arraignment of a prisoner and reception of his plea—which is the commencement of the trial—before the court is sworn is without legal effect. The Article requires that the oath shall be taken not by the court as a whole, but by "each member." Where, therefore, all the members are sworn at the same time, the judge-advocate will preferably address each member by name, thus: "You, A. B., C. D., E. F., etc., do severally swear," etc. A member added to the court after the members originally detailed have been duly sworn should be separately sworn by the judge-advocate in the full form prescribed by the Article; otherwise he is not qualified to act as a member of the court. A member who prefers it may be affirmed instead of sworn.[3]

Obligation.—The members are sworn to try and determine *the matter before them* at the time of the administering of the oath.[4] It is also a departure from the engagement expressed in the body of the oath—to try and determine according to evidence, and administer justice according to the

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[1] 27 Stat. at Large, 278. In the leading case of Dawkins *vs.* Rokeby it was held by Justice Willes that this oath "is abundant to show that, with respect to all matters which come under the cognizance of the military tribunals, they are subject to a test of law which is different from that administered in a civil court, and it is to be according to military usages and their approval; whereas here (in the Court of Common Pleas) we have a test according to the law and custom of England, that is to say, the law and custom which regulate ordinary transactions out of the Army." Dawkins *vs.* Rokeby, 4 Fos. & Fin., 833.

[2] See, in this connection, G. O. 15, Headquarters of Army, 1880, cited under "Judge-advocate," section 1, which, in directing that judge-advocates shall be detailed for regimental and garrison, as well as general, courts-martial, rescinds G. O. 49 of 1871, prescribing a special form of oath for the former courts, and thus provides for their taking the due and regular oath recited in Article 84. Dig. J. A. Gen., 96, par. 1, note 1.

[3] Dig. J. A. Gen., 96, par. 1.

[4] *Ibid.*, 97, par. 2. In a case, therefore, where, after the court had been sworn and the accused had been arraigned and had pleaded, an additional charge, setting forth a new and distinct offense was introduced into the case, and the accused was tried and convicted upon the same, *held* that, as to this charge, the proceedings were fatally defective, the court not having been sworn to try and determine such charge.* *Ibid.*

* See General Court-martial Orders, No. 39, War Dept., 1867; Gen. Orders, No. 13, Northern Dept., 1864.

Articles of War, etc.—for a court-martial to determine a case either upon personal knowledge of the facts possessed by the members and not put in evidence, or according to the private views of justice of the members independently of the provisions of the code.[1]

Where the vote of each member of the court upon one of several specifications upon which the accused was tried was stated in the record of trial, it was held that such statement was a clear violation of the oath of the court, though it did not affect the validity of the proceedings or sentence. A statement in the record to the effect that all the members concurred in the finding or in the sentence, while it does not vitiate the proceedings or sentence, is a direct violation of the oath prescribed by this Article.[2]

The obligation in respect to secrecy arose out of the necessities of the case. In the early practice of courts-martial, subsequent to the passage of the Mutiny Act, the books of the War Office show that the finding of each member came up before the crown or general; with a view to the security of the members, the oath of secrecy was imposed as early as Queen Anne's reign and has continued to the present day.[3]

The words "a court of justice" are deemed to mean a civil or criminal court of the United States, or of a State, etc.,[4] and not to include a court-martial.[5] A case can hardly be supposed in which it would become proper or desirable for a court-martial to inquire into the votes or opinions given in closed court by the members of another similar tribunal.[6]

The disclosure of the finding and sentence to the judge-advocate is expressly authorized by statute; such disclosure, however, to a clerk by permitting him to remain with the court at the final deliberation and enter the judgment in the record is a violation of the oath and a grave irregularity, though one which does not affect the validity of the proceedings or sentence.[7]

ARTICLE 85. *When the oath has been administered to the members of a court-martial, the president of the court shall administer to the judge-advocate, or person officiating as such, an oath in the following form:*

"You, A B, do swear that you will not disclose or discover the vote or opinion of any particular member of the court-martial, unless required to

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[1] Dig. J. A. Gen., 97. par. 3. Compare G. O. 21, Dept. of the Ohio, 1866; G. C. M. O. 41, Dept. of Texas, 1874.

[2] *Ibid.*, par. 4.

[3] Clode, Mil. Law, 114.

[4] The only case which has been met with in which the members of a court-martial have been required to disclose their votes by the process of a civil court is that of *In re* Mackenzie, 1 Pa. Law J. R., 356, in which the members of a naval court-martial were compelled, against their objections, to state their votes as given upon the findings at a particular trial.

[5] In the corresponding British Article the words "or a court-martial" are added after the words "a court of justice."

[6] Dig. J. A. Gen., 98, par. 6.

[7] *Ibid.*, par. 5.

give evidence thereof, as a witness, by a court of justice, in due course of law; nor divulge the sentence of the court to any but the proper authority until it shall be duly disclosed by the same. So help you God."

The judge-advocate's oath appears as Article 6, Section 14, of the British Code of 1774 in the following form: "I, A. B., do swear that I will not upon any account, at any time whatsoever, disclose or discover the Vote or Opinion of any Particular Member of the Court-Martial, unless required to give Evidence thereof as a Witness by a Court of Justice in a due course of Law." It was repeated in this form as Article 3, Section 14, of the American Articles of 1776, and was re-enacted without change in the Resolution of Congress of May 31, 1786. In the Articles of 1806, the words "upon any account, at any time whatsoever" were omitted, and the Article appears as No. 69 of that code in precisely the same form in which it appears in the Articles of 1874.

The member's oath imposes certain duties upon the officers to whom it is administered, in respect to the conduct of the trial, to which is added the obligation of secrecy as to the vote or opinion of any member, and the undertaking not to disclose the sentence until it shall have been disclosed by the proper authority. The oath of the judge-advocate, on the other hand, imposes no duties save that of secrecy in respect to the findings and sentence, which are obtained by him, not from his own knowledge or observation, but as they are disclosed to him by the president of the court with a view to their being entered upon the record.

ARTICLE 86. *A court-martial may punish, at discretion, any person who uses any menacing words, signs, or gestures in its presence, or who disturbs its proceedings by any riot or disorder.*

Article 66 of the Prince Rupert Code contains the following provision: "The Officer or Souldier, who shall presume to draw his sword in any place of Judicature while the Court is sitting, shall suffer such punishment as shall be inflicted upon him by a Court-Martial. And We do hereby authorize our Provost-marshal General of Our Army, by his own authority, to apprehend such offenders." Although this offense must have related to a particular form of contempt offered to a civil court, it is not so restricted by its terms. Article 73 of the same code related to the offense of actual contempt of a military court, and appeared in the following form: "No man shall presume to use any braving or menacing words, signs, or gestures, where any of the aforesaid Courts of Justice are sitting, upon pain of suffering such punishment as the Court-martial shall think fit." With a slight verbal change, this provision appears as Article 16, Section 15, of the British Code of 1774, as follows: "No person whatsoever shall use menacing Words, Signs, or Gestures in the Presence of a Court Martial then sitting, or shall cause any Disorder or Riot, so as to disturb their proceedings on the Penalty of being punished at the Discretion of the said Court-Martial." With the

substitution of "whatever" for "whatsoever" in the first line, it appears as Article 14, Section 14, of the American Code of 1776, and with a reversion to the earlier form of "whatsoever" it appeared as Article 14, Section 14, of the Resolution of Congress of May 31, 1786, and was re-enacted without change as No. 76 of the Articles of 1806. In its present form the arrangement of clauses is not quite the same as in the corresponding Article of 1806, but its force and legal effect are unchanged.

The power of a court-martial to punish, under this Article, being confined practically to acts done in its immediate presence, such a court can have no authority to punish, as for a contempt, a neglect by an officer or soldier to attend as a witness in compliance with a summons.[1]

Where a contempt within the description of this Article has been committed by a person subject to military jurisdiction and the court deems it proper that the offender shall be punished, the proper course is to suspend the regular business, and, after giving the party an opportunity to be heard in defense, to proceed, if the explanation is insufficient, to impose a punishment, resuming thereupon the original proceedings. The action taken is properly summary, a formal trial not being called for. Close confinement in quarters or in the guard-house during the trial of the pending case, or forfeiture of a reasonable amount of pay, has been the more usual punishment. Instead of proceeding against a military person for a contempt, in the mode contemplated by this Article, the alternative course may be pursued of bringing him to trial before a new court on a charge for a disorder under Article 62.[2]

Refusal of a Civilian Witness to Testify.—A court-martial has none of the common-law power to punish for contempt vested in the ordinary courts of justice, but only such authority as is given it by this Article. For this reason a court-martial would not be authorized to punish, as for a contempt, under this Article (or otherwise), a civilian witness duly summoned and appearing before it, who, when put on the stand, declines (without disorder) to testify.[3] In such a case the witness is proceeded against in accordance with the method prescribed in the Act of March 2, 1901,[4] which provides that "Every person not belonging to the Army of the United States who, being duly subpœnaed to appear as a witness before a general court-martial of the Army, wilfully neglects or refuses to appear, or refuses to qualify as a witness to testify or produce documentary evidence which such person may have been legally subpœnaed to produce, shall be deemed guilty of a

[1] Dig. J. A. Gen., 98, par. 1.
[2] *Ibid.*, par. 3. Compare Samuel, 634. The latter course has not infrequently been adopted in our service.
[3] *Ibid.*, 99, par. 2. See, also, 18 Opin. Att.-Gen., 278.
[4] Act of March 2, 1901 (31 Stats. at Large, 951).

misdemeanor, for which such person shall be punished on information in the district court of the United States; and it shall be the duty of the United States district attorney, on the certification of the facts to him by the general court-martial, to file an information against and prosecute the person so offending, and the punishment of such person, on conviction, shall be a fine of not more than five hundred dollars or imprisonment not to exceed six months, or both, at the discretion of the court: *Provided*, That this shall not apply to persons residing beyond the State, Territory, or district in which such general court-martial is held, and that the fees of such witness, and his mileage at the rates provided for witnesses in the United States district court for said State, Territory, or district, shall be duly paid or tendered said witness, such amounts to be paid by the Pay Department of the Army out of the appropriation for the compensation of witnesses: *Provided*, That no witness shall be compelled to incriminate himself or to answer any questions which may tend to incriminate or degrade him."[1]

ARTICLE 87. *All members of a court-martial are to behave with decency and calmness.*

Article 60 of the Prince Rupert Code contained the requirement that "those who are judges in Our General Court-martial, or in regimental Court-martials, * * * shall demean themselves orderly in the hearing of causes (as becomes the gravity of such a court) * * * ." This provision appears as a part of Article 7, Section 15, of the British Code of 1774, in the following form: "All the Members of a Court Martial are to behave with decency and, in the giving of their votes, are to begin with the youngest." The requirement was repeated as Article 4, Section 14, of the American Code of 1776, with the addition of the words "and calmness" after the word "decency" in the first line; with a view to remove doubt as to the meaning of the word "youngest," a legislative interpretation was placed upon it by the addition of the words "in commission." In this form the clause was re-enacted as Article 7, Section 14, of the Resolution of Congress of May 31, 1786, and as the first clause of No. 72 of the Articles of 1806. In the Articles of 1874 this Article was divided into two; the requirement as to the behavior of members constituting the 87th Article, while that respecting the order of voting was embodied in the 98th Article of that Code.

ARTICLE 88. *Members of a court-martial may be challenged by a prisoner, but only for cause stated to the court. The court shall determine the relevancy and validity thereof, and shall not receive a challenge to more than one member at a time.*

[1] Act of March 2, 1901. (31 Stats. at Large, 951.) The power to proceed against a witness for refusing to testify before a court-martial was conferred in England in 1830. 11 Geo. IV., ch. 7, sec. 16.

The right of challenge was first established, as a custom of service, by analogy to the right of challenge which existed in behalf of an accused person at the common law. The privilege was recognized by statute, for the first time, in England by Section 5 of the Mutiny Act of 1847. The right first received statutory sanction in the United States by Article 71 of the Code of 1806, and was re-enacted without substantial change as No. 88 of the Articles of 1874.[1]

Extent of the Right.—This Article authorizes the exercise of the right of challenge before all courts except field-officers' courts and summary courts. These courts are not subject to be challenged, because, being composed of but one member, there is no authority provided which is competent to pass upon the validity of the challenge.[2]

The Article imposes no limitation upon the exercise of the right of challenge other than that "more than one member shall not be challenged at a time." Thus while the panel, or the court as a whole, is not subject to challenge, yet all the members may be challenged provided they are challenged separately. The Article contains no authority for challenging the judge-advocate.[3] The terms of the Article also forbid what are called "peremptory challenges," that is, objections to members for which no cause is stated.

Time of Making.—Where, before arraignment, the accused (an officer), without having personal knowledge of the existence of a ground of challenge to a member, had credible hearsay information of its existence, it has been held that he should properly have raised the objection before the members were sworn, and that the court was not in error in refusing to allow him to take it at a subsequent stage of the trial.[4]

Courts should be liberal in passing upon challenges, but should not entertain an objection which is not *specific*, or allow one upon its mere assertion by the accused without proof, and in the absence of any admission on the part of the member.[5]

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[1] See the title "Challenges" in the chapter entitled INCIDENTS OF THE TRIAL.

[2] Dig. J. A. Gen., 99, par. 1.

[3] *Ibid.*, 102, par. 15. Challenges to the array, though expressly forbidden in the Article, seem to have been not unknown to the English practice during the period prior to 1847, where the right rested upon analogy to the corresponding civil procedure. Hough, Precedents, 662, 663. See as to the judge-advocate, Dig. J. A. Gen., 457, par. 8. The practice of challenging this officer ceased, in pursuance of a War Office order, in 1830.

[4] Dig. J. A. Gen., 102, par. 13. The fact that a sufficient cause of challenge exists against a member but, through ignorance of his rights, is not taken advantage of by the accused, or if asserted is improperly overruled by the court, can affect in no manner the validity in law of the proceedings or sentence, though it may sometimes properly furnish occasion for a disapproval of the proceedings, etc., or a remission in whole or in part of the sentence. *ibid.*, par. 14. See, also, 15 Opin. Att.-Gen., 432; Keyes *vs.* U. S., 15 Ct. Cls., 532; *ibid.*, 109 U. S., 336.

[5] See Dig. J. A. Gen., 101, par. 12 and note.

The Voir Dire Form of Oath.—The following is the form of oath to be administered to members or witnesses: "You swear that you will true answers make to questions touching your competency as a member of the court (or witness) in this case. So help you God."[1]

ARTICLE 89. *When a prisoner, arraigned before a general court-martial, from obstinacy and deliberate design stands mute or answers foreign to the purpose, the court may proceed to trial and judgment as if the prisoner had pleaded not guilty.*

Under the ancient criminal practice of England, if a prisoner charged with a capital felony stood mute, it was deemed that no trial or conviction could be had, and the prisoner was obliged to undergo the *peine forte and dure*, that is, to be pressed to death in prison.[2] This punishment is said to have been inflicted in England so late as the beginning of the last century. In 1772 an Act was passed in England, which was to extend to the colonies and plantations in America, by which if any person arraigned upon an indictment for felony or piracy should stand mute, the trial was to be proceeded with, and the court was to award judgment and execution as if such person had been convicted by verdict or upon confession.[3] Such conviction, however, took place only when the refusal to plead was willful; if it was due to defect of understanding, the defendant was remanded, and the question of such defect of understanding was tried by the jury. Congress in the first Crimes Act,[4] passed in 1790, adopted the humane rule that, in all capital cases defined by that Act, standing mute should be equivalent to a plea of not guilty.[5] Although courts-martial seem to have interpreted standing mute as a plea of not guilty from a very early period, the practice first received statutory sanction in the United States in No. 70 of the Article of 1806.

ARTICLE 90. *The judge-advocate, or some person deputed by him, or by the general or officer commanding the Army, detachment, or garrison, shall prosecute in the name of the United States; but when the prisoner has made his plea, he shall so far consider himself counsel for the prisoner as to object to any leading question to any of the witnesses, and to any question to the prisoner, the answer to which might tend to criminate himself.*

The 64th of the Prince Rupert Articles contained the requirement that "in all criminal causes which concern Our Crown, Our Advocate-General or Judge-Advocate of Our Army, shall inform the Court and prosecute in Our behalf"; which is repeated in the 52d of the Articles of James II. in 1686. In Article 6, Section 15, of the British Codes of 1765 and 1774 it

[1] Manual for Courts-martial, edition of July, 1898, p. 28.
[2] The effect of this was to preserve the blood of the prisoner from taint and to permit his descendants to inherit. I. Stephen Hist. Crim. Law, 298, 299.
[3] 12 Geo. III., chap. 20.
[4] Section 30, Act of April 30, 1790 (1 Stat. at Large, 119).
[5] *In re* Smith, 13 Fed. Rep., 25.

is provided that "the Judge-Advocate-General or some person deputed by him shall prosecute in His Majesty's Name," and this provision is repeated as Article 3, Section 14, of the American Articles of 1776, the prosecution being, however, in the name of the United States of America. In the amendment of this section by the Resolution of Congress of May 31, 1786, the above requirement appears, to which for the first time the clause is added that the judge-advocate "shall so far consider himself as counsel of the prisoner, after the said prisoner shall have made his plea, as to object to any leading question, to any of the witnesses, or any question to the prisoner, the answer to which might tend to criminate himself." In this form the requirement was embodied as No. 69 of the Articles of 1806.

While, as has been seen, the American Articles have since 1786 imposed upon the judge-advocate the somewhat incompatible duties of prosecutor and counsel for the accused, a contrary tendency has manifested itself in England, where, since 1860, it has been expressly provided in the Articles of War[1] that the judge-advocate shall no longer act as prosecutor, or appear, as a witness for the Government, during the progress of the trial;[2] his duties being restricted to the summoning of witnesses, the administration of oaths, the preparation of the record of proceedings, and advising the court in matters of law.

So much of the first clause of this Article as authorizes the judge-advocate to depute "some person" to prosecute for him is now practically obsolete. In the British Articles of 1774 the Judge-Advocate General was vested with authority to "depute" a person to represent him in the capacity of public prosecutor. In the early American Articles the principal officer of the Judge-Advocate General's Department was styled indifferently Judge-Advocate and Judge-Advocate General, and he was similarly empowered to depute a suitable officer to conduct prosecutions in behalf of the United States. The Act of March 16, 1802,[3] vested the power to appoint "a fit person to act as Judge-Advocate" in the President of the United States, and in cases where the President shall not have made such appointment the Brigadier-General,[3] or the president of the court may make the same." This provision was not incorporated in the Articles of 1806, although the power to prosecute is there vested in "the Judge-Advocate, or some person deputed by him, or by the general or officer commanding the army, detachment, or garrison." The office of Judge-Advocate, or Judge-Advocate General, was not in existence between April 10, 1806, the date of the adoption of the Articles of that year, and March 2, 1849, the date upon which

[1] Article 163, British Code of 1860.
[2] Clode, Mil. Law, 110.
[3] Stat. at Large, 132. The brigadier-general here referred to being the senior officer of the Army as then constituted.

the statute reviving the office of Judge-Advocate of the Army became operative;[1] it was therefore impossible for the judge-advocate of a general court-martial to have been "deputed" to act in such capacity by that officer. During that interval judge-advocates were selected by convening officers acting under the authority conferred by the 69th of the Articles of 1806. In the Articles of 1874, although the clause is left standing as a part of the 90th Article, the power to appoint judge-advocates is held to be derived from the authority expressly conferred in the 74th Article of War.

ARTICLE 91. *The depositions of witnesses residing beyond the limits of the State, Territory, or district in which any military court may be ordered to sit, if taken on reasonable notice to the opposite party and duly authenticated, may be read in evidence before such court in cases not capital.*

This provision appears for the first time in statutory form as Article 10, Section 14, of the Resolution of Congress of May 31, 1786. It was re-enacted as No. 74 of the Articles of 1806. The present Article is an enactment of 1863.[2] In the early history of court-martial procedure the evidence was in many cases (civil rather than criminal) taken by affidavit sworn before the Judge-Advocate General,[3] who would seem to have exercised a jurisdiction in some respects resembling that of the grand jury. As there was no express authority for the introduction of depositions in England, the conclusion is warranted that if such instruments of evidence were introduced in court-martial trials it was rather from analogy to the civil procedure, and was not regarded as a matter of absolute right, to be exercised in pursuance of authority conferred either by the Mutiny Act or by the Articles of War. At present there is in the British service no specific authority of law for the admission of depositions upon the trial of military offenses properly so called. Such right as may be said to exist is based upon an interpretation of two statutes[4] which permits the introduction of testimony by deposition in the trial of offenses punishable by the ordinary criminal law.[5]

Scope of the Article.—It is the purpose of this Article, in its application to cases properly falling within its scope, to provide a means of securing the testimony of witnesses who reside at a considerable distance from the place in which the court may be ordered to sit. While the statute is in general permissive in character, there are some cases in which its operation is rather directory than affirmative or permissive merely.

An accused party, therefore, cannot be deemed to be entitled to have a witness summoned from a distance whose military or administrative duties are of such a character that they cannot be left without serious prejudice to the public interests. Article VI of the Amendments to the Constitution,

[1] 9 Stat. at Large, 851.
[2] Section 29, Act of March 3, 1863 (12 Stat. at Large, 736).
[3] Clode, Mil. Law, 127.
[4] 11 and 12 Vict., ch. 42, sec. 17, and 30 and 31 Vict., ch. 35, 36.
[5] Manual of Mil. Law, 86.

declaring that the accused shall be entitled "to be confronted with the witnesses against him," applies only to cases before the United States courts.[1]

Where the evidence of high officers or public officials—as a department commander, or chief of a bureau of the War Department—is required before a court-martial,—especially if the court is assembled at a distant point,—it should be taken by deposition if authorized under this Article. Such officers should not be required to leave their public duties to attend as witnesses, except where their depositions will not be admissible, and where the case is one of special importance and their testimony is essential.[2]

In respect to the cases brought within its operation by the Article, however, its terms are mandatory, and a deposition cannot be read in evidence in a capital case—as in a case of a violation of Article 21, or a case of a spy, or one of desertion in time of war; otherwise in a case of desertion in time of peace. Nor is the deposition admissible of a witness who resides in the State, district, etc., within which the court is held, except by consent.[3]

The deposition must also be "duly authenticated." The Article, in specifying that the deposition, to be admissible in evidence, shall be "duly authenticated," makes it essential that the same shall be sworn to before, i.e., taken under an oath administered by, an official competent to administer oaths for such purpose. A deposition should now be sworn to before one of the military officers specified in the Act of July 27, 1892,[4] or, if such an officer be not accessible, by a civil official competent to administer oaths in general. An official, empowered to administer oaths only for a certain special purpose or purposes cannot legally qualify a witness whose deposition is sought to be taken under this Article.[5]

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[1] Dig. J. A. Gen., 752, par. 10. Thus where the offense charged is not capital, and a deposition may therefore legally be taken under the 91st Article of War, the Secretary of War will not in general authorize the personal attendance at the place of trial of a witness whose office or duty makes it necessary or most important that he should remain elsewhere. *Ibid.*

[2] *Ibid.*, 104, par. 2. The Secretary of War should not be required to attend as a witness, or to give his deposition in a military case, where the chief of a staff corps or other officer in whose bureau the evidence sought is matter of record, or who is personally acquainted with the facts desired to be proved, can attend or depose in his stead. *Ibid.*

[3] *Ibid.*, 104, par. 1. Note the remarks of the reviewing authority in G. C. M. O. 102, Dept. of the East, 1871; do. 1, Division of South, 1875.

[4] Sec. 4 of the Act of July 27, 1892, (27 Stat. at Large, 278,) provides that judge-advocates of departments and of courts-martial, and the trial officers of summary courts, are hereby authorized to administer oaths for the purposes of the administration of military justice and for other purposes of military administration.

The Act of July 27, 1892, c. 272, s. 4, in authorizing certain military officers to administer certain oaths, does not, of course, affect the power of other officials to administer such oaths who may have been authorized to administer them before the passage of the Act. Such officials may still administer the same, and, when doing so, should be paid their fees as notaries, commissioners, etc., as before. But, to avoid expense, it is desirable to resort to the officers empowered by the statute, where practicable. Dig. J. A. Gen., 539, par. 4.

[5] Dig. J. A. Gen., 105, par. 9.

A court-martial has no power to qualify or authorize a commanding officer, or any other officer or person, to take a deposition or administer an oath.[1]

A deposition, introduced by either party, which is not "duly authenticated" should not be admitted in evidence by the court, although the other party may not object. A deposition would be thus irregular and inadmissible where it failed to show that the officer by whom it was taken was authorized to take it, or that he was qualified to administer the oath to the witness.[2]

Procedure.—The judge-advocate, in forwarding the interrogatories for a deposition, should transmit with them a subpœna (in duplicate) requiring the witness to appear, at a stated place and date, before a certain person who is to take the deposition. Particulars not ascertained may be left blank to be supplied by the officer or person by whom the subpœna is served. When the deposition has been duly taken and returned, the judge-advocate should transmit to the witness (or to some officer, etc., for him) the usual certificate of attendance (accompanied by a copy of the convening order), the duration of the attendance to be ascertained from the deposition.[3]

The officer detailed to have a deposition taken, i.e., to see to its being taken, should, before serving the subpœna, complete it, if necessary, by inserting the name and official designation of the notary (or other official having authority to administer the oath) before whom it is to be taken, and the date on which, and the place where it is proposed to take it. And when the deposition has been duly taken, he should certify it as so taken, and transmit it in a sealed package to the president of the court.[4]

Civilian witnesses who duly give their depositions under this Article are entitled to the same fees and allowances as are witnesses who duly attend the court in person.[5] The voucher to enable such a witness to obtain his dues should simply set forth the facts as to his service, substituting, for the usual statement in regard to attendance before the court, a statement that he duly attended as a witness at a certain time and place, and duly gave his deposition before a certain official named.[6]

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[1] Dig. J. A. Gen., 106, par. 11.
[2] *Ibid.*, 105, par. 8.
[3] *Ibid.*, 463, par. 36.
[4] *Ibid.*, 106, par. 15.
[5] See Manual for Courts-martial, 88, par. 1–7. See, also, Circular No. 9, H. Q. Army, 1883.
[6] Dig. J. A. Gen., 106, par. 16. *Held* that duly attending by a civilian witness before a duly authorized official to give a *deposition*, to be used in evidence on a military trial, was to be regarded as practically equivalent to attending a court-martial, and that the deponent was entitled to be paid the usual allowances (*i.e.*, the same as those of witnesses appearing before the court) out of the regular appropriation for the "compensation of witnesses attending before courts-martial." *Ibid.*, 759, par. 36.
Held that the sum of $3, disbursed by an officer ordered to procure a deposition to be

Admission in Evidence.—This Article, in any case within its terms and in which its conditions are complied with, entitles either party to have depositions taken and "read in evidence." The court alone has no power to decide that a deposition, where legal and material, shall not be taken.[1]

A deposition duly taken, under the Article, on the part of the prosecution, is not subject to objection by the accused and cannot be rejected by the court merely upon the ground that it is declared in the Sixth Amendment to the Constitution that "in all criminal prosecutions the accused shall enjoy the right * * * to be confronted with the witnesses against him." This constitutional provision has no application to courts-martial; the "criminal prosecutions" referred to are prosecutions in the United States civil courts.[2]

The party at whose instance a deposition has been taken cannot be admitted, against the objection of the other party, to introduce only such parts of the deposition as are favorable to him or as he may elect to use; he must offer the deposition in evidence as a whole or not offer it at all.[3]

If the party at whose instance a deposition has been taken decides not to put it in, it may be read in evidence by the other party. One party cannot withhold a deposition (duly taken and admissible under this Article) against the consent of the other.[4]

Questions as to the competency or credibility of the deponent are determined by the court, and the deposition of an incompetent deponent, though formal and properly obtained and not subject to exception in respect to validity of execution, is not admissible in evidence at a trial by court-martial.[5]

ARTICLE 92. *All persons who give evidence before a court-martial shall be examined on oath or affirmation in the following form: "You swear (or affirm) that the evidence you shall give, in the case now in hearing, shall be the truth, the whole truth, and nothing but the truth. So help you God."*

The swearing of witnesses was first required by the Articles of 1666, which authorized the judge-advocate "to send for witnesses, and to administer an oath, in order to the examination and trial of all offenses." Prince Rupert's Code and the Articles of 1672 and 1686 were silent on this subject; but those of 1717 directed "that all witnesses should be examined upon oath." In the Articles of 1748, and in those subsequently issued until the

taken, as a payment to a justice of the peace before whom the deposition was given, would legally be reimbursed, on the presentation of a proper voucher, by the Quartermaster Department, out of the appropriation for the expenses of witnesses before courts-martial. *Ibid.*, 107, par. 17.

[1] Dig. J. A. Gen., 105, par. 7.

[2] *Ibid.*, 107, par. 18.

[3] *Ibid.*, 104, par. 3.

[4] *Ibid.*, 105, par. 4.

[5] Where a deposition introduced by the prosecution, though legal, was incomplete,

year 1805, the oaths were imposed only in cases tried before general courts; but in the year 1805 (against the advice of many general officers, including the Duke of Wellington) Parliament for the first time imposed oaths upon the judges and witnesses in regimental courts.[1]

Article 8, Section 15, of the British Code of 1774 contained the requirement that "all persons who give evidence before a general court-martial are to be examined upon oath"; which is repeated in Article 5, Section 14, of the American Code of 1776, and in Article 8, Section 14, of the Resolution of Congress of May 31, 1786; in which, also, for the first time an affirmation is authorized. The present form of witnesses' oath was first prescribed in No. 73 of the Articles of 1806, which was re-enacted as No. 92 of the Articles of 1874. The ancient procedure of the regimental and garrison courts-martial, being to a great extent summary in character, did not require the administration of oaths to either members or witnesses. They were first authorized as to such courts in England in 1805.[2] An oath was first required to be administered to all witnesses by Article 8, Section 14, of the Resolution of Congress of May 31, 1786.

The Article prescribes a single form of oath or affirmation to be taken by all witnesses. The Constitution, however, has provided[3] that Congress shall make no law prohibiting the free exercise of religion. Where, therefore, the prescribed form is not in accordance with the religious tenets of a witness, he should be permitted to be sworn according to the ceremonies of his own faith or as he may deem binding on his conscience.[4]

The Article does not prescribe by whom the oath shall be administered. By the custom of the service it is administered by the judge-advocate.[5] When the judge-advocate himself takes the witness-stand, he is properly sworn by the president of the court.[6]

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but the defect was waived by the accused, it has been held that the prosecution was estopped from afterwards questioning it as competent evidence. *Ibid.*, 106, par. 14. Where the judge-advocate offered in evidence, on the part of the prosecution, a deposition which proved to have been given by a person other than the one to whom the interrogatories were addressed, and the accused objected to its introduction, but the objection was overruled by the court, *held* error; the fact that the intended deponent was but the agent, in the transaction inquired about, of the person who actually furnished the deposition, not being sufficient to make such deposition admissible except by consent of parties. Dig. J. A. Gen., 105, par. 6. See Gen. Court-martial Order No. 9, H. Q. Army, 1879.

The provisions of Sections 866–870, Revised Statutes, relate to depositions in the United States courts and have no application to courts-martial, which are no part of the United States judiciary. *Held*, therefore, that there was no authority whatever for prescribing, as was done in General Order 2, Department of Texas, 1888, that the laws of Texas in regard to the taking of depositions should govern depositions in military courts held within that State. *Ibid.*, par. 19.

[1] Clode, Mil. Law, 126.

[2] 45 Geo. III., ch. 16, sec. 17. No form of oath, however, is prescribed by statute, or by the Articles of War in the British service.

[3] Article I of Amendments.

[4] Dig. J. A. Gen., 107, par. 1; I. Greenleaf, § 371; O'Brien, 260.

[5] *Ibid.*, 108, par. 2; see Sec. 4, Act of July 27, 1892 (27 Stat. at Large, 278).

[6] *Ibid.*, par. 2.

A witness who has once been sworn and has testified is not required to be resworn on being subsequently recalled to the stand by either party. The reswearing, however, of such a witness will not affect the legal validity of the proceedings or sentence.[1]

ARTICLE 93. *A court-martial shall, for reasonable cause, grant a continuance to either party for such time, and as often as may appear to be just: provided that if the prisoner be in close confinement, the trial shall not be delayed for a period longer than sixty days.*

This provision first appeared in statutory form as Section 29 of the Act of March 3, 1863;[2] prior to that date the matter was regulated by custom of service.

Reasonable Cause.—What constitutes "reasonable cause," within the meaning of the Article, is a matter for the determination of the court. Where, however, such "reasonable cause" is, in the judgment of the court, exhibited, the party is entitled to some continuance under the Article.[3] A refusal, indeed, by the court to grant such continuance will not invalidate the proceedings, but, if the accused has thus been prejudiced in his defense, may properly constitute good ground for disapproving the sentence,[4] or for mitigating or partially remitting the punishment.[5]

Procedure.—In making an application for a continuance or postponement under this article on account of the absence of a witness, it should distinctly appear in the affidavit of the applicant that the witness is material and

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[1] Dig. J. A. Gen., 107, par. 3.

[2] 12 Stat. at Large, 736.

[3] It would properly be so held upon common-law principles, even independently of the positive terms of the Article. In Rex *vs.* D'Eon, 1 W. Black., 514, it was declared by Lord Mansfield that "no crime is so great, no proceedings so instantaneous, but that *upon sufficient grounds* the trial may be put off." Dig. J. A. Gen., 109, par. 2.

[4] See G. C. M. O. 35, War Dept., 1867; do. 128, Hdqrs. of Army, 1876; G. O. 24, Dept. of Arizona, 1874.

[5] Dig. J. A Gen., 109, par. 2. Where an accused soldier, by reason of his regiment having been moved a long distance since his arrest, was separated at his trial from certain witnesses material to his defense, *held* that he was entitled to a reasonable continuance for the purpose of procuring their attendance or their depositions. *Ibid.*, par 3.

That the charges and specifications upon which an accused is arraigned differ in a material particular from those contained in the copy served upon him before arraignment may well constitute a sufficient ground for granting him additional time for the preparation of his defense. *Ibid.*, par. 4.

Where after arraignment a material and substantial amendment is allowed by the court to be made by the judge-advocate in a specification, the effect of which amendment is to necessitate or make desirable a further preparation for his defense on the part of the accused, a reasonable postponement for this purpose will in general properly be granted by the court. Dig. J. A. Gen., 109, par. 5.

It is in general good ground for a reasonable continuance that the accused needs time to procure the assistance of counsel if it is made to appear that such counsel can probably be obtained within the time asked, and that the accused is not chargeable with remissness in not having already provided himself with counsel. *Ibid.*, 110, par. 6.

why, and that the party has used due diligence to procure his attendance, and has reasonable ground to believe, and does believe, that he will be able to procure such attendance within a reasonable time stated.[1]

While the court may refuse the application if the conditions above set forth be not fulfilled, it may, in its discretion, refrain from insisting that the same be strictly complied with, and accept a modified form.[2] It should, however, in all cases require that the desired evidence appear, or be shown to be, material and not merely cumulative,[3] and that to await its production will not delay the trial for an unreasonable period. It should also, in general, before granting the continuance, be assured that the absence of the witness is not owing to any neglect on the part of the applicant. This feature, however, will not be so much insisted upon in military as in civil cases.[4]

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[1] Dig. J. A. Gen., 108, par. 1; Manual for Courts-martial, p. 29, par. 2.

[2] It is not the practice of courts-martial to admit counter-affidavits from the opposite party as to what the absent witness would testify. And as to the civil practice, see Williams *vs.* State, 6 Nebraska, 334.

[3] Compare People *vs.* Thompson, 4 Cal., 238; Parker *vs.* State, 55 Miss., 414.

[4] Dig. J. A. Gen., 108, par. 1. A military accused cannot be charged with laches in not procuring the attendance at his trial of a witness who is prevented from being present by superior military authority. Thus in a case in G. O. 63, Dept. of Dakota, 1872, an accused soldier was held entitled to a continuance till the return of material witnesses then absent on an Indian expedition.

Postponements.—Postponements, strictly speaking, are granted by the convening authority in virtue of his power to constitute courts-martial; continuances are granted by the court itself under the authority conferred by the above Article. The subject of postponements is regulated by the officer appointing the court, in accordance with the following requirements of the Manual for Courts-martial:

If postponement is *necessary*, application therefor should properly be made to the convening authority before the accused is arraigned.*

Application for *extended* delay will, when practicable, be made to the authority appointing the court. When made to the court, and if in the opinion of the court it is well founded, it will be referred to the convening authority to decide whether the court shall be adjourned or dissolved.†

The 94th Article of War, which was repealed by Section 2 of the Act of March 2, 1901 (31 Stats. at Large, 951), contained the requirement that "Proceedings of trials shall be carried on only between the hours of eight in the morning and three in the afternoon, excepting in cases which, in the opinion of the officer appointing the court, require immediate example."

The hours of session were fixed at from 8 A.M. to 1 P.M. in the first Mutiny Act. In Article 9, Section 15, of the British Code of 1774 the period of each day within which courts-martial may lawfully sit is fixed at from eight in the morning to three in the afternoon "except in cases which require an immediate example." This provision was adopted as Article 7, Section 14, of the Articles of 1776, and as Article 11, Section 14, of the Resolution of Congress of May 31, 1786, in which for the first time the power to adjudge the necessity for sitting beyond the statutory hours is vested in the convening authority. As so modified, the clause was re-enacted as No. 75 of the Articles of 1806, and as Article 94 of the revision of 1874.

There is now no requirement of law which prescribes the hours of session of courts-martial, which are regulated by the court itself, in the exercise of the general discretion in respect to matters of procedure which is vested in it, by the rules of parliamentary procedure. Since the repeal of the 94th Article it is of course no longer legally necessary

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* Manual for Courts-martial, p. 29, par. 1.
† *Ibid.*, par. 3.

ARTICLE 95. *Members of a court-martial in giving their votes shall begin with the youngest in commission.*

This provision does not appear in the Prince Rupert Code. In the "English Military Discipline" of James II. it is provided that "the Captains shall sit according to rank, the Lieutentants, Sub-Lieutenants, and Ensigns have right to enter the Room where the Councel of War (or Court Martial) is held. But they are to stand at the Captains backs with their hats off, and have no Vote." The same Article contained the requirement that "the youngest Officer gives his Opinion first, and the rest in order till it comes to the President, who speaks last." Article 7, Section 15, of the British Code of 1774 provides that members, "in the giving of Votes, are to begin with the youngest." The American Articles of 1776 contain the same provision; at the end of the clause, however, the words "in commission" are added. In this form the clause appears as the last clause of No. 72 of the Articles of 1806 and as No. 95 of the Articles of 1874.

ARTICLE 96. *No person shall be sentenced to suffer death except by the concurrence of two-thirds of the members of a general court-martial and in the cases herein expressly mentioned.*

The death-penalty, either in the form of a mandatory or discretionary sentence, appears with great frequency in the earlier codes of military law. The cases in which it is authorized to be inflicted, however, diminish in number with the advance of civilization and the improvement of military discipline. The first Mutiny Act contained the requirement that in all cases "where the offender may be punished with death, the Judges were to be sworn upon the Holy Evangelists well and truly to try and determine, etc., * * * and nine of them at least were to concur in the sentence." Article 8, Section 15, of the British Code of 1774 contained the requirement that "no sentence of death shall be given against any offender, * * * unless Nine officers present shall concur therein." This provision was repeated in Article 5, Section 14, of the American Articles of 1776, and as Article 8, Section 14, of the Resolution of Congress of May 31, 1786, and as No. 87 of the Articles of 1896, which contained the added requirement that no death-sentences were to be imposed "except in the cases herein expressly mentioned." In this form it was re-enacted as No. 96 of the Articles of 1874.[1]

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that the record should show affirmatively the hours of meeting and adjournment. With a view to show the correct sequence of trials, when more than one takes place on the same day, it is proper and, indeed, the best practice that the hour of meeting and adjournment should be set forth in the record.

[1] Though it has sometimes been viewed otherwise, it is deemed quite clear upon the terms of the present Article that it is not necessary to the legality of a death-sentence that two thirds of the court should have concurred in the finding as well as the sen-

ARTICLE 97. *No person in the military service shall, under the sentence of a court-martial, be punished by confinement in a penitentiary unless the offense of which he may be convicted would, by some statute of the United States, or by some statute of the State, Territory, or District in which such offense may be committed, or by the common law as the same exists in such State, Territory, or District, subject such convict to such punishment.*

This enactment, which is peculiar to the military jurisprudence of the United States, is in substance a legislative recognition of the principle that military offenses, as such, are not felonies, and that conviction of such offenses should involve none of the disabilities which attach to the status of felony at common law. The status of felony, in the criminal practice of the United States, is either created by statute, in the enactment describing a particular offense and defining its punishment, or is determined by the place in which the sentence, if of imprisonment or confinement, is to be executed. If such sentence involves confinement in a State prison or penitentiary, the punishment is infamous and, as such, operates to confer some of the disabilities incident to felony. As military offenses properly so called, such as desertion, disobedience of orders, neglect of duty, and the like, are not felonies, it was not the intention of Congress that any of the consequences of felony should attach to any officer or soldier who was convicted of them; as a result Congress in 1863 enacted this Article, the operation of which is to restrict sentences of imprisonment in State prisons and penitentiaries to offenses which "would, by some statute of the United States, or by some

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tence.* Further, in the absence of any requirement to that effect in the Article, it is not deemed essential to the validity of the sentence that the record should state the fact that two-thirds of the court concurred therein. The practice, however, has been to add such a statement. Dig. J. A. Gen., 112, par. 1.

A sentence of death imposed by a court-martial upon a conviction of several distinct offenses will be authorized and legal if any one of such offenses is made capitally punishable by the Articles of War, although the other offenses may not be so punishable. *Ibid.*, par. 2.

A court-martial in imposing a death-sentence should not designate a time or place for its execution, such a designation not being within its province, but pertaining to that of the reviewing authority. If it does so designate, this part of the sentence may be disregarded, and a different time or place fixed by the commanding general. *Ibid.*, par. 3.

Where a death-sentence imposed by a court-martial has been directed by the proper authority to be executed on a particular day, and this day, owing to some exigency of the service, has gone by without the sentence being executed, it is competent for the same authority or his proper superior to name another day for the purpose, the time of its execution being an immaterial element of this punishment.† *Ibid.*, par. 4.

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* Compare McNaghten, 120.

† It was held by the Supreme Court in Coleman *vs.* Tennessee (7 Otto, 519, 520) that a soldier who had been convicted of murder and sentenced to death by a general court-martial in May, 1865, but the execution of whose sentence had been meanwhile deferred by reason of his escape and the pendency of civil proceedings in his case, might at the date of the ruling (October term, 1878) "be delivered up to the military authorities of the United States, to be dealt with as required by law."

More recently (May, 1879, 16 Opins., 349) it has been held in this case by the Attorney-General that the death-sentence might legally be executed notwithstanding the fact that the soldier had meanwhile been discharged from the service, such discharge, while formally separating the party from the Army, being viewed as not affecting his legal status as a military convict. But in view of all the circumstances of the case it was recommended that the sentence be commuted to imprisonment for life or a term of years.

statute of the State, Territory, or District in which such offense may be committed, or by the common law as the same exists in such State, Territory, or District, subject such convict to such punishment."

As this Article, by necessary implication, prohibits the imposition of confinement in a penitentiary as a punishment for offenses of a purely or exclusively military character,[1] it follows that a sentence of penitentiary confinement in a case of a purely military offense is wholly unauthorized and should be disapproved. Effect cannot be given to such a sentence by *commuting* it to confinement in a military prison, or to some other punishment which would be legal for such offense. Nor, in case of such an offense, can a severer penalty, as death, be commuted to confinement in a penitentiary.[2]

An offense charged as "conduct to the prejudice of good order and military discipline," which, however, is in fact a larceny,[3] embezzlement, violent crime, or other offense made punishable with penitentiary confinement by the law of the State, etc., may legally be visited with this punishment.[4]

The term "penitentiary," as employed in this Article, has reference to civil prisons only—as the penitentiary of the United States or District of Columbia at Washington, the public prisons or penitentiaries of the different States, and the penitentiaries "erected by the United States"[5] in most of the Territories. The military prison at Leavenworth is not a penitentiary

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[1] Dig. J. A. Gen., 113, par. 1.

[2] *Ibid.*, par. 2. Nor can penitentiary confinement be legalized as a punishment for purely military offenses by *designating* a penitentiary as a "military prison," and ordering the confinement there of soldiers sentenced to imprisonment on conviction of such offenses. *Ibid.*, par. 3.

Held that penitentiary confinement could not legally be adjudged upon a conviction of a violation of the 21st Article, alleged in the specification to have consisted in the lifting up of a weapon (a pistol) against a commanding officer and discharging it at him with intent to kill. By charging the offense under this Article, the Government elected to treat it as a purely military offense subject only to a military punishment. So, upon a conviction of joining in a mutiny, in violation of Article 22, *held* that a sentence of confinement in a penitentiary would not be legal although the mutiny involved a homicide, set forth in the specification as an incidental aggravating circumstance. To have warranted such a punishment in either of these cases the Government should have treated the act as a "crime," and charged and brought it to trial as such, under Article 62. *Ibid.*, 115, par. 10.

"Obtaining money under false pretenses" is punishable by confinement in a penitentiary by the laws of Arizona. A sentence of court-martial, imposing this punishment on conviction of an offense of this description committed in this Territory, charged as a crime under Article 62, *held* authorized by Article 97. *Ibid.*, par. 12.

[3] In a case of *larceny* the court should inform itself as to whether the *value* of the property stolen be not too small to permit of penitentiarry confinement for the offense under the local law. See G. O. 44, Eighth Army Corps, 1862; G. C. M. O. 63, Dept. of the Platte, 1872. See, also, Dig. J. A. Gen., 115, par. 13.

[4] Dig. J. A. Gen., 114, par. 4. So, too, where the act is charged as a crime under Article 62, and charge and specification taken together show an offense punishable with confinement in a penitentiary by the law of the *locus* of the crime, the sentence may legally adjudge such a punishment. So *held* in a case where charge and specification together made out an allegation of perjury under Sec. 5392, Rev. Sts. *Ibid.*, 115, par. 11.

[5] See Sec. 1892, Rev. Stat., and the Act of March 2, 1895 (27 Stat. at Large, 957).

in the sense of the Article. The term State (or State's) prison in a sentence is equivalent to penitentiary.[1]

A court-martial, in imposing by its sentence the punishment of confinement in a penitentiary, is not required to follow the statute of the United States or of the State, etc., as to the term of the confinement. It may adjudge, at its discretion, a less or a greater term than that affixed by such statute to the particular offense. At the same time the court will often do well to consult the statute, as indicating a reasonable measure of punishment for the offense.[2]

Where a soldier is sentenced to be confined in a penitentiary, the proper reviewing authority may legally designate any State or Territorial penitentiary within his command for the execution of the punishment. Where there is no such penitentiary available for the purpose, or desirable to be resorted to, he will properly submit the case to the Secretary of War for the designation of a proper penitentiary.[3]

But where a sentence of confinement is expressed in general terms, as where it directs that the accused shall be confined "in such place or prison as the proper authority may order," or in terms to such effect, it has been held that the same may, under this Article, legally be executed by the commitment of the party to a penitentiary, to be designated by the reviewing officer or Secretary of War, provided of course the offense is of such a nature as to warrant this form of punishment.[4]

A military prisoner duly sentenced or committed to a penitentiary becomes subject to the government and rules of the institution.[5] A sentence of confinement in a penitentiary, however, where legal, may be mitigated to confinement in a military prison or at military post.[6]

ARTICLE 98. *No person in the military service shall be punished by flogging, or by branding, marking, or tattooing on the body.*

[1] Dig. J. A. Gen., 114, par. 5. Where a court-martial specifically sentences an accused to confinement in a "military prison," he cannot legally be committed to a penitentiary, although such form of imprisonment would be authorized by the character of his offense. *Ibid.*, par. 9.

[2] *Ibid.*, 114, par. 8.

[3] *Ibid.*, par. 7. See paragraphs 910 and 941, Army Regulations of 1895.

[4] *Ibid.*, par. 9.

[5] *Ibid.*, par. 6. A discharged soldier serving a sentence of confinement in a State or Territorial penitentiary still remains under military control, at least so far as that his sentence may, by competent military authority or by the President, be remitted, or may be mitigated—as, for example, to confinement in a military prison or at a military post. Where the place of confinement is a State or Territorial penitentiary which is within a department command, the commander may legally remit or mitigate the sentence. But the President may limit this authority by excluding such penitentiaries from the department command. The function of remitting the sentences of discharged soldiers confined in penitentiaries is now, by regulation, restricted to the President.* *Ibid.*, 116, par. 16.

[6] *Ibid.*, 116, par. 15.

* The power to pardon or mitigate punishment imposed by a court-martial, vested in the authority which confirms the proceedings, extends only to unexecuted portions of a sentence, and continues only while the prisoner remains under the jurisdiction of that authority; the fact that a soldier has been dishonorably discharged through his sentence does not affect this power. An application for clemency in case of a general prisoner sentenced to confinement in a penitentiary will be forwarded to the Secretary of War for the action of the President. Par. 916, A. R. 1895.

The first limitation upon the infliction of flogging as a military punishment appeared in the provision of No. 87 of the Articles of 1806 depriving general courts-martial of the power to award more than fifty lashes by way of punishment for any military offense. Flogging was discontinued as a punishment by Section 7 of the Act of May 16, 1812;[1] it was revived, however, as a punishment for desertion, and continued to exist as such until 1861, when, by the Act of August 5th of that year, it was finally abolished.[2]

ARTICLE 99. *No officer shall be discharged or dismissed from the service, except by order of the President, or by sentence of a general court-martial; and in time of peace no officer shall be dismissed except in pursuance of the sentence of a court-martial, or in mitigation thereof.*

Article 48 of the Prince Rupert Code provided that "all commissions granted by Us, or Our General, to any Officer in pay, shall be brought to the Muster Master, who is to record and enter the same in a book fairly written. And no Commissioned Officer shall be allowed in musters, without a commission from Us or Our General, and the same entered with the Commissaries-General of the musters, or their Deputies, who are required forthwith, and from time to time, to send the Officers names to the Secretary and Judge Advocate of Our Forces." This seems to have been the first attempt to create and define the status of commissioned officers in the British military establishment. Article 49 of the same code contained the requirement that "no Commissioned Officer, after inrollment and being mustered, shall be dismiss'd or cashier'd, without order from Us or Our General, or Our General Court-Martial."

This provision, however, reserved the power of dismissal to the sovereign, or to the general commanding-in-chief, unless such dismissal was in pursuance of the sentence of a general court-martial. The power to terminate the engagement of a commissioned officer by dismissal, upon the ground that his services were no longer needed, has been recognized from the earliest times as an essential incident of the royal prerogative; the tenure of military office in England being at the pleasure of the sovereign. A similar power of summary dismissal was recognized to exist in the President, as an incident of his power to make appointments to office, from the foundation of the Government under the Constitution until 1866, when the enactment of this Article[3] restricted the executive power of summary dismissal to a time of war.

Dismissal by executive order is quite distinct from dismissal by sentence. The latter is a punishment; the former is removal from office.[4] The power

[1] 2 Stat. at Large, 735.
[2] Act of August 5, 1861 (12 State at Large, 317).
[3] Act of July 13, 1866 (sec. 5.). (14 Stat. at Large, 92). A similar provision is contained in Section 1229 of the Revised Statutes; see, also, Act of June 6, 1872 (17 Stat. at Large. 261).
[4] See 7 Opins. Att.-Gen., 251.

to dismiss, which, as being an incident to the power to appoint public officers, had been regarded since 1789 as vested in the President by the Constitution,[1] was for the first time in 1866 expressly divested by Congress in so far as respects its exercise in time of peace.[2] By the statute law it is now authorized only in time of war.[3]

Procedure.—The summary dismissal of an officer in time of war is effected by the issue of an order designating the officer by name; the cause may be stated or withheld, at the discretion of the President. A summary dismissal "by order of the Secretary of War" is in law the act of the President.[4]

A summary dismissal of an officer does not properly take effect until the order of dismissal or an official copy of the same is delivered to him, or he is otherwise officially notified of the fact of the dismissal.[5]

In summarily dismissing an officer the Executive cannot at the same time deprive him of pay due. Nor can the right of an officer to his pay for any prior period be divested by dating back the order of dismissal. Such an order cannot be made to relate back so as to affect the status or rights of the officer as they existed before the date of the taking effect of the order of dismissal.[6]

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[1] See, as among the principal authorities on this subject, Commonwealth *vs.* Bussier, 5 Sergt. & Rawle, 461; *Ex parte* Hennen, 13 Peters, 258, 259; United States *vs.* Guthrie, 17 Howard, 307; 4 Opins. Att.-Gen., 1, 609–613; 6 *id.*, 5, 6; 7 *id.*, 251; 8 *id.*, 230–232; 12 *id.*, 424–426; Sergeant, Const. Law, 373; 2 Story's Com., § 1537, note; 1 Kent's Com., 310; 2 Marshall's Washington, 162.

[2] See 16 Opins. Att.-Gen., 315.

[3] During the late war it was exercised in a great number of cases, sometimes for the purpose of summarily ridding the service of unworthy officers, sometimes in the form of a discharge or muster-out of officers whose services were simply no longer required. The distinction between this species of dismissal and dismissal by sentence is illustrated by the fact that the former has, with the sanction of legal authority, been repeatedly ordered in cases where a court-martial has previously *acquitted* the officer of the very offenses on account of which the summary action has been resorted to. Dig. J. A. Gen., 369, par. 1; see, also, 12 Opin. Att.-Gen., 421; McElrath *vs.* U. S., 12 Ct. Cls., 201.

[4] *Ibid.*, 370, par. 3. A department or army commander can have, of course, no authority to summarily dismiss or discharge an officer from the military service. But where, in a case of a regular officer, this authority was in fact exercised, and the President, treating his office as vacant, proceeded to fill the vacancy by a new appointment, *held* that he had made the dismissal his own act and legalized the same.* So where (in 1863) an officer of volunteers was dismissed by the order of an army commander, which was never ratified in terms by the President, but a successor, appointed to the vacancy by the governor of the State, was accepted and mustered in by the United States, *held* (in 1880) that the dismissal was to be regarded as having been substantially ratified and legalized. So an unauthorized dismissal, by order of a regular officer, may be in effect made operative by a subsequent appointment and confirmation of a successor—as in Blake's Case.†

[5] Dig. J. A. Gen., 370, par. 5.

[6] *Ibid.*, 369, par. 2. *Held* that it could not affect the operation of an order summarily dismissing an officer as "second-lieutenant" that, before its being communicated to him by being promulgated to the regiment, he had become by promotion a first lieutenant. *Ibid.*, 370, par. 6.

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* 16 Opin. Att.-Gen., 298.
† Blake *vs.* U. S., 103 U. S., 231.

Effect of Dismissal.—There can be no revocation of a duly executed order of dismissal, however unmerited or injudicious the original act may be deemed to have been. For, distinct as dismissal by order is, in its nature, from dismissal by sentence, the effect of the proceeding in divesting the office is the same in each case. An officer dismissed by an order, though his dismissal may have involved no disgrace, is assimilated to an officer dismissed by sentence, in so far that he is completely relegated to a civil status, having in law no nearer or other relation to the military service than has any civilian who has never been in the army. Thus an order assuming to revoke a legal order of dismissal is as unauthorized as it is ineffectual. The original dismissal is an act done which cannot be undone, and the order, which is the evidence of it, is therefore incapable of revocation or recall.[1]

Nor can that be effected indirectly which cannot legally be done directly. An officer dismissed by executive order cannot be relieved by being allowed to resign or be retired, or by being granted an honorable discharge. For, in order to be discharged, etc., from the Army, he must first be in the Army, and there is but one mode by which an officer once legally separated from the Army can be put into it, viz., by a new appointment according to the Constitution.[2]

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[1] See 4 Opins. Att.-Gen., 124; 12 *id.*, 424–8; 14 *id.*, 520; 15 *id.*, 658. A contrary view expressed by the Court of Claims, in its earlier period, in a series of cases,—see Smith *vs.* United States, 2 Ct. Cl., 206; Winters *vs.* United States, 3 *id.*, 186; Barnes *vs.* United States, 4 *id.*, 216; Montgomery *vs.* United States, 5 *id.*, 93,—was finally practically abandoned in McElrath *vs.* United States, 12 *id.*, 201.

[2] Dig. J. A. Gen., 371, par. 8. See 8 Opins. Att.-Gen., 235; 12 *id.*, 421; 13 *id.*, 5; McElrath *vs.* United States, 12 Ct. Cls., 202.

That a summary dismissal is not revocable by an executive order is established law. Where an officer duly summarily dismissed in July, 1863, and subsequently restored by an order assuming to revoke the order of dismissal, procured to be passed by Congress in 1890 an Act recognizing his restoration as legal, which, however, was vetoed by the President, *held* that his status was that of a person who had been illegally in the military service since the date of the order of so-called revocation. *Ibid.*, par. 9.

Held that the ruling in Blake's Case* was applicable, and that the office of an army officer might legally be vacated by the appointment and commission of a successor, although between the office of the original officer and that of the successor there may have intervened a tenure by a third officer. Thus: (1) Captain A was dismissed from his office without legal authority; (2) Captain B, an unassigned officer, was assigned to the captaincy of A, and held it till his own resignation, one year and three months later; (3) Lieutenant C was then promoted and appointed to the office, and his appointment was confirmed. *Held* that Lieutenant C was the legal incumbent of the office. *Ibid.*, 372, par. 12.

Held that the ruling of the Supreme Court in the case of Blake was not applicable to volunteer officers of State organizations, and that a Governor of a State, who had duly appointed a certain volunteer officer in a regiment, was not empowered to dismiss him by simply appointing to the same office, commissioning, and causing to be mustered into the U. S. service another person. *Ibid.*, par. 13.

Held that it was quite evidently the intention of Congress in the Act of July 15, 1870, s. 12, that the commissions held by the officers who remained unassigned on January 1, 1871, should cease on that day. No action on the part of a mustering officer was required to carry the law into effect—as is shown by G. O. 1 of January 2, 1871, in

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* Blake *vs.* U. S., 103 U. S., 231.

A dismissal of an officer by executive order does not operate to disqualify him for reappointment to military office, or for appointment to civil office under the United States.

Trial of Dismissed Officer.—It is provided in Section 1230, Revised Statutes, that when any officer dismissed by order of the President makes in writing an application for trial, setting forth under oath that he has been wrongfully dismissed, the President shall, as soon as the necessities of the service may permit, convene a court-martial to try such officer on the charges on which he shall have been dismissed. And if a court-martial is not so convened within six months from the presentation of such application for trial, or if such court, being convened, does not award dismissal or death as the punishment of such officer, the order of dismissal by the President shall be void.[1]

The statute does not indicate within what period after the dismissal the application for a trial should be made. It can only be said that, in submitting it, due diligence should be exercised—that it should be presented within a reasonable time.[2]

Though it may be sufficient that the application made under the statute should state simply that the applicant has been "wrongfully" dismissed, the preferable form would be for the applicant to set forth in what the alleged wrong consisted.[3]

The Act of March 3, 1865,[4] which first restricted the power of the President in respect to the dismissal of officers, referring as it does to officers "hereafter dismissed," was not retroactive in its operation, and did not

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which the separation from the service, on January 1st, of the unassigned officers was formally announced. Dig. J. A. Gen., 372, par. 14. See Street *vs.* U. S., 133 U. S., 299.

The President had not the same power of dismissal in the case of a *volunteer* officer as he has in that of a regular officer. This for the reason that the tenure of office of the former is for a fixed term and for a limited time only; the power to dismiss is thus, in his case, not an incident of the appointing power.* But the President was invested with a special power of dismissal of volunteer officers by the Act of Congress of July 17, 1862. *Ibid*, par. 11.

Where, by the direction of the President, an order was issued canceling the muster-in of a volunteer officer on account of facts indicating that he was not a fit person to hold a commission, *held* that this was a legal exercise of the authority of summary dismissal for cause vested in the President by the Act of July 17, 1862. *Ibid.*, par. 10.

[1] Acts of March 3, 1865, (sec. 12,) (13 Stat. at Large, 489,) June 22, 1874, (sec. 2,) (18 *ibid*, 192).

[2] Dig. J. A. Gen., 373, par. 2. To take advantage of the benefit conferred by this section, the officer must apply for trial within a reasonable time after dismissal or acquiescence will be presumed. A delay of nine years in a particular case held to create such presumption of acquiescence. Newton *vs.* U. S., 18 C. Cls. R., 435; Germaine *vs.* U. S., 26 *ibid.*, 383.

Held that a party who (without any sufficient excuse) delayed for *nine* years to apply for a trial under the statute might well be regarded as having waived his right thereto. It could scarcely have been contemplated by Congress that a dismissed officer should be at liberty to defer his application for a trial till the evidence on which he was dismissed, or a material part of the same, had ceased to exist, and his restoration would thus be made certain. *Ibid.*

[3] *Ibid.*, 374, par. 3.

[4] Sec. 12, Act of March 3, 1865 (13 Stat. at Large, 489).

* Mechem on Public Officers, 283, § 445.

embrace cases of officers dismissed by order before the date of its passage. And it has been similarly held as to the provision now incorporated in Section 1230, Revised Statutes; the same, though somewhat differently worded from the original statute, being construed as not intended to enlarge the application of the latter.[1]

Although the Act provides that if the sentence of the court be not one of death or dismissal the party tried shall be restored to his office, yet it has been held, in a case in which the court acquitted the accused, that the President possessed the authority, vested in reviewing officers in all other cases tried by court-martial, of returning the proceedings to the court for revision, and was therefore empowered to reassemble the court for a reconsideration of the testimony, on the ground that the same did not, in his opinion, justify the acquittal.[2]

ARTICLE 100. *When an officer is dismissed from the service for cowardice or fraud, the sentence shall further direct that the crime, punishment, name, and place of abode of the delinquent shall be published in the newspapers in and about the camp, and in the State from which the offender came or where he usually resides; and after such publication it shall be scandalous for an officer to associate with him.*

This Article appeared for the first time in statutory form as Article 22,

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[1] Dig. J. A. Gen., 373, par. 1. This statute was held by the Attorney-General (12 Opins., 4) not to be unconstitutional in that it was not "obnoxious to the objection that it invades or frustrates the power of the President to dismiss an officer." More serious objections to its constitutionality are believed to be: (1) that it authorizes the subjecting to military trial of a civilian; (2) that in restoring an officer to the Army it substitutes the action of a court-martial for the appointing power of the President. See, also, 16 Opin. Att.-Gen., 599.

Where a trial of a volunteer officer under this statute resulted in an acquittal, and his original dismissal thus became "void," but meanwhile his regiment had been mustered out of service, *held* that he was properly entitled to an honorable discharge as of the date of the muster-out of the regiment, with full pay and allowances up to that time. Dig. J. A. Gen., 374, par. 4.

Whatever might be the effect under existing law upon the status of a *volunteer* officer, acquitted or not dismissed by a court-martial upon a trial under this statute, of the fact that the vacancy created by his original dismissal had been meanwhile filled, *held* that the effect in a similar case of an officer of the *regular army* would be to add him to the army as an extra officer in his previous grade. *Ibid.*, par. 5.

Under the statute of 1865 there were but few trials; this legislation having been followed in the next year by the provision of the Act of July 13, 1866, (now incorporated in the second clause of Sec. 1229, Rev. Sts., and the 99th Article of War,) prohibiting executive dismissals of officers of the Army and Navy in time of peace. Since the date of this Act there have been no trials under the Act of 1865; the later statute indeed would appear to have deprived the earlier one of all present application and effect. Thus *held* (December, 1879) that an officer *dropped for desertion* under the first clause of Sec. 1229, Rev. Sts., was not entitled upon application therefor to a trial under Sec. 1230; that the provision of the former section making such an officer ineligible for reappointment in the Army was incompatible with his restoration by the action of a court-martial under the latter section; and that the latter section applied only to officers dismissed by order of the President under the general power to remove public officers appointed by him and frequently exercised in cases of army officers during the late war, but which as to its exercise in time of *peace* had been divested by Congress by the Act of July 13, 1866. *Ibid.*, par. 6.

[2] *Ibid.*, 375, par. 7.

Section 14, of the American Code of 1776; it was repeated in the Resolution of Congress of May 31, 1786, as No. 85 of the Articles of 1806, and as No. 100 of those of 1874.

The terms "cowardice" and "fraud," employed in this Article, may be considered as referring mainly to the offenses made punishable by Articles 42 and 60. With these, however, may be regarded as included all offenses in which fraud or cowardice is necessarily involved, though the same be not expressed in terms in the charge or specification.[1]

Though the injunction of the Article, as to the direction to be added in the sentence, should be regularly complied with, a failure so to comply will not affect the validity of the punishment of dismissal adjudged by the sentence.[2] The declaration of the Article that after the publication "it shall be scandalous for an officer to associate with" the dismissed officer, though it has in a few cases[3] been incorporated in the sentence, is not intended to be, and should not be, so expressed by the court.[4]

ARTICLE 101. *When a court-martial suspends an officer from command, it may also suspend his pay and emoluments for the same time, according to the nature of his offense.*[5]

This provision appeared for the first time in statutory form as Article 21, Section 14, of the Resolution of Congress of 1786; it was re-enacted without change as No. 84 of the Articles of 1806, and as No. 101 of those of 1874. At the date of the legislation of 1786 suspension was already recognized by custom of service as a punishment properly to be imposed upon commissioned officers; the effect of this enactment, therefore, was to give statutory sanction to a punishment already recognized by custom of service.

Form.—The punishment of suspension, as imposed by sentence, is usually in the form of a suspension from *rank*, or from *command*, for a stated term, sometimes accompanied by a suspension from *pay* for the same period. Suspension from rank includes suspension from command.[6]

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[1] Dig. J. A. Gen., 117, par. 1.

[2] Note the action taken in the case published in G. C. M. O. 27, War Dept., 1872.

[3] As in cases published in G. O. (A. & I. G. O.) of May 13, 1820; do. 168, Dept. of the Missouri, 1865.

[4] Dig. J. A. Gen., 117, par. 2.

[5] See, in the chapter entitled PUNISHMENTS, the title "Punishments of Officers."

[6] Dig. J. A. Gen., 729, par. 1. Suspension as a punishment for a *non-commissioned* officer is not authorized in terms in Article 101, nor is it contemplated in the Army Regulations. It has been adjudged in but rare cases,* and cannot be regarded as sanctioned by principle or usage. *Ibid.*, 733, par. 15. It is not infrequently imposed, however, as a punishment for cadets at the Military Academy.

A sentence "to be suspended from the Military Academy" in a case of a cadet practically severs him from the performance of his duties as a cadet during the term of the suspension. It is usually added in such a sentence that at the end of such term the party is to join the next lower class. *Ibid.*, 732, par. 13.

* See, for a comparatively recent instance, G. C. M. O. 33, Dept. of the East, 1872.

The form of words used in a sentence of suspension should be such as to indicate clearly the scope and character of the punishment intended to be imposed, as "to be suspended from rank," or "from rank and command," or "from rank and pay," and the like. The sentence should also be explicit as to the duration of the suspension. "In rare cases the form 'to be suspended from the service' has been employed in the sentence. Such a suspension is equivalent in substance to a suspension from rank. A still rarer form, 'to be suspended from duty,' has been deemed to be practically equivalent to a sentence of suspension from command.[1] These forms are now rarely resorted to."[2]

Effects.—Like dismissal, suspension takes effect upon and from notice of the approval of the sentence officially communicated to the officer, either by the promulgation of the same at his station, or, where he is absent therefrom by authority, by the delivery to him of a copy of the order of approval or other form of official personal notification of the fact of such approval.[3]

The effect of a suspension from rank (besides detaching the officer from the performance of the duties incident to his rank) is to deprive him of any right of promotion to a vacancy in a higher grade occurring pending the term of suspension, and which he would have been entitled to receive by virtue of seniority had he not been suspended; such right accruing to the officer next in rank. But no such loss of promotion is incident to a mere suspension from command.[4]

It is further the effect of a suspension from rank that the officer loses for the time the minor rights and privileges of priority and precedence annexed to rank or command. Among these is the right to select quarters relatively to other officers. And where quarters are to be selected by several officers, one of whom is under sentence of suspension from rank, the suspended officer necessarily has the last choice. Or rather he has no choice, but quarters are assigned him by the commander; for, being still an officer of the Army, though without rank, he is entitled to some quarters. An officer sentenced to be suspended from rank could not, however, because of such suspension alone, be deprived of quarters previously duly selected, and occupied at the time of the suspension; such a sentence not affecting a right previously accrued and vested.[5]

Where, however, the suspension is in terms extended by the sentence to pay, the pay is forfeited absolutely, not merely withheld. And all the pay

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[1] Suspension *from duty*, as distinguished from suspension from rank, is a recognized punishment in the *naval* service. Navy Regulations, Article 1750; Harwood, 134–5. The form "to be suspended from rank and duty" occurs in G. C. M. O. 19 of 1885.

[2] Dig. J. A. Gen., 732, par. 12.

[3] *Ibid.*, 732, par. 14.

[4] *Ibid.*, 730, par. 3.

[5] Dig. J. A. Gen., 730, par. 5.

is forfeited unless otherwise expressly indicated in the sentence. The forfeiture imposed by a sentence of suspension from rank (or command) and pay, for a designated term, is a forfeiture of pay for that specific term, the suspension of the rank and that of the pay being coincident. Under such a sentence the officer cannot legally be deprived of pay due for a period prior to the suspension.[1]

A suspension from rank does not affect the right of the officer to his office. He retains the office, as before, and, as an officer, remains subject to military control, as well as to the jurisdiction of a court-martial for any military offense committed pending the term of suspension.[2]

Suspension from rank does not, however, deprive the officer of the right to rise in files in his grade—upon the promotion, for example, of the senior officer of such grade. The number of an officer in the list of his grade is not an incident of his rank, but of his appointment to office as conferred and dated, and, as we have seen, suspension does not affect the office. Moreover loss of files is a continuing punishment, and if held to be involved in suspension from rank the result would be that, for an indefinite period after the term of suspension had expired, the officer would remain under punishment, the sentence imposed by the court being thus added to in execution, contrary to a well-known principle of military law.[3]

A sentence of suspension from rank and pay does not affect the right of the officer to the allowances which are no part of his pay[4]—as the allowance for rent of quarters, as also the allowance for fuel or, rather, the right to purchase fuel at a reduced rate.[5]

Under existing usage (1897) an officer suspended, by sentence, from rank and command is deemed entitled to retain his quarters. But such rule may in some cases work a considerable inconvenience as well as prejudice to discipline; as where, for example, the suspended officer is a post commander and continues, pending the term of his suspension and while

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[1] *Ibid.*, 731, par. 8. Where an officer was sentenced to suspension from rank and pay for six months, *held* that his entire pay for those months was absolutely forfeited notwithstanding that the pay of officers of his grade was increased by statute pending the term. *Ibid.*

Suspension does not affect pay unless expressly forfeited in the sentence. Nor does a commutation of dismissal to suspension affect pay. Thus where a sentence of dismissal of a cadet was commuted to suspension for one year, *held* that he was entitled to full pay during suspension. See note, 5, p., 529, *ante*).

Suspension from rank or command does not involve a loss or authorize a stoppage of pay for the period of suspension.* Pay cannot be forfeited by implication. Unless, therefore, the sentence imposes a suspension from rank (or command) "and pay," or in terms to that effect, the suspended officer remains as much entitled to his pay as if he had not been suspended at all, and to require him to forfeit any pay would be *adding to the punishment* and illegal. *Ibid.*, par. 7.

[2] *Ibid.*, 729, par. 2. See, also, 5 Opin. Att.-Gen., 740; 6 *idem*, 715.

[3] *Ibid.*, 730, par. 4.

[4] McNaghten, 27.

[5] Dig. J. A. Gen., 731, par. 9.

*4 Opin. Att.-Gen., 444; 6 *id.*, 203.

another officer has succeeded him as commander, to occupy the proper commanding officer's quarters. The adoption of an army regulation prescribing that an officer in such a status shall not be entitled to retain or to select quarters by virtue of rank, but shall have any quarters assigned him that are available at his late station or elsewhere, has been advised as desirable.[1]

Status; Termination.—Suspension not divesting the officer of his office or commission, but simply holding in abeyance the rights and functions attached to his rank or command, he properly reverts, when the term of the punishment is completed, to his former rank and the command attached thereto, and continues to hold and exercise the same as before his arrest or trial.[2]

Suspension from rank does not involve a status of confinement or arrest. In sentencing an officer to be suspended from rank, it is not unusual for the court to require that he be confined during the term of suspension to his proper station or that of his company or regiment, and that the sentence be executed there. Where this is not done, while the suspended officer is not entitled to a leave of absence it cannot affect the execution of his sentence to grant him one, and leaves of absence are not unfrequently granted under such circumstances.[3]

The status of an officer under suspension is the same whether such suspension has been imposed directly by sentence or by way of commutation for a more severe punishment. Thus where a sentence of dismissal was commuted to suspension from rank on half-pay for one year, it has been held that the officer, while forfeiting the rights and privileges of rank and command during such term, was yet amenable to trial by court-martial for a military offense committed pending the same.[4]

Where an officer, while under a sentence of suspension, is ordered by the commander who approved the sentence, or some higher competent authority, to resume his command or the performance of his regular military duty, such order will in general operate as a constructive remission of the punishment and thus terminate the suspension.[5]

Loss of Rank or Files.—A form of punishment similar in its effects to suspension has already been discussed.[6] The effect of this punishment is to

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[1] *Ibid.*, 733, par. 17. Under the ruling of the Secretary of War, as published in Circ. No. 3 (H. A.), 1888, an officer under suspension, but not required by his sentence to be "confined to the limits of his post," is not entitled to forage for his horse or horses during the term of his suspension. *Ibid.*, par. 18.

[2] *Ibid.*, par. 16. Sullivan, who (p. 88) traces this punishment to "the ecclesiastical jurisdiction which admitted suspension as a minor excommunication," adds, in regard to the officer sentenced: "At the expiration of the term of suspension he becomes a perfect man again."

[3] *Ibid.*, 730, par. 6.

[4] *Ibid.*, par. 10.

[5] *Ibid.*, 732, par. 11. See McNaghten, 22.

[6] See the chapter entitled PUNISHMENTS, *ante*.

deprive the officer of such relative right of promotion, as well as right of command, and of precedence on courts or boards and in selecting quarters, etc., as he would have had had he remained at his original number. Such effect continues till the sentence is remitted. But this punishment cannot *per se* affect the officer's right to pay.[1]

ARTICLE 102. *No person shall be tried a second time for the same offense.*

This requirement, as it affects the question of jurisdiction, has formed a part of the Mutiny Act rather than of the Articles of War. The first limitation in the prosecution of military offenses was that contained in the Mutiny Act of 1760.[2] To constitute a bar to trial, the proceedings must (in England as well as in the United States) have been carried to a conviction or acquittal, that is, there must have been a trial, not a mere placing in jeopardy, as is required in the corresponding constitutional limitation. The provision appeared for the first time in the American Articles as the last clause of the Articles of 1806; it appeared as a separate Article as No. 102 of the Articles of 1874.

The Constitution declares that "no person shall be subjected for the same offense to be twice put in jeopardy of life or limb."[3] The United States courts, in treating the term "put in jeopardy" as meaning practically tried, hold that the "jeopardy" indicated "can be interpreted to mean nothing short of the acquittal or conviction of the prisoner and the judgment of the court thereon."[4] So it has been held that the term "tried," employed in this Article, meant *duly prosecuted, before a court-martial, to a final conviction or acquittal;* and therefore that an officer or soldier, after having been duly convicted or acquitted by such a court, could not be subjected to a second military trial for the same offense, except by and upon his own waiver and consent. For that the accused may *waive* objection to a second trial was held by Attorney-General Wirt in 1818,[5] and has since been regarded as settled law.[6]

Where the accused has been once duly convicted or acquitted he has been "tried" in the sense of the Article, and cannot be tried again, against his will, though no action whatever be taken upon the proceedings by the reviewing authority, or though the proceedings, findings (and sentence, if any) be wholly disapproved by him.[7] It is immaterial whether the former conviction or acquittal is approved or disapproved.[8]

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[1] Dig. J. A. Gen., 483, par. 3.
[2] 1 Geo. I., ch. 6, sec. 71.
[3] Article V of Amendments.
[4] United States *vs.* Haskell, 4 Wash. C. C., 409. And see United States *vs.* Shoemaker, 2 McLean, 114; United States *vs.* Gilbert, 2 Sumner, 19; United States *vs.* Perez, 9 Wheaton, 579; 1 Opins. Att.-Gen., 294. But for a different view see Cooley, Constitutional Law, 308, and cases cited.
[5] 1 Opins. Att.-Gen., 233. And see, also, 6 *id.*, 205.
[6] Dig. J. A. Gen., 118, par. 1.
[7] Compare Macomb, § 159, O Brien, 277; Rules for the Bombay Army, 45.
[8] Dig. J. A. Gen., 119, par. 5.

Where an officer or soldier has been duly acquitted or convicted of a specific offense, he cannot, against his consent, be brought to trial for a minor offense included therein, and an acquittal or conviction of which was necessarily involved in the finding upon the original charge. Thus a party convicted or acquitted of a desertion cannot afterwards be brought to trial for an absence without leave committed in and by the same act.[1]

Where an officer or soldier, having been acquitted or convicted of a criminal offense by a civil court, is brought to trial by a court-martial for a military offense involved in his criminal act, he cannot plead "a former trial" in the sense of this Article. So where the trial for the military offense has preceded, he cannot plead *autrefois acquit* or *convict* to an indictment for the civil crime committed in and by the same act.[2]

There cannot, in view of this Article, be a second trial where the offense is really the same, though it may be charged under a different description and under a different Article of War. Thus where the Government elects to try a soldier under the 32d Article for "absence without leave," or under the 42d for "lying out of quarters," and the testimony introduced develops the fact that the offense was desertion, the accused, after an acquittal or conviction, cannot legally be brought a second time to trial for the same absence charged as a desertion.[3]

That an accused has been, in the opinion of the reviewing authority, inadequately sentenced, either by a general or an inferior court, cannot

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[1] Dig. J. A. Gen., 118, par. 2. *Held* that there was no "second" trial, in the sense of the Article, in the following cases, viz.: where the party, after being arraigned or tried before a court which was illegally constituted or composed, or was without jurisdiction, was again brought to trial before a competent tribunal; where the accused, having been arraigned upon and having pleaded to certain charges, was rearraigned upon a new set of charges substituted for the others, which were withdrawn; where one of several distinct charges upon which the accused had been arraigned was withdrawn pending the trial, and the accused, after a trial and finding by the court upon the other charges, was brought to trial anew upon the charge thus withdrawn; where, after proceedings commenced but discontinued without a finding, the accused was brought to trial anew upon the same charge; where, after having been acquitted or convicted upon a certain charge which did not in fact state the real offense committed, the accused was brought to trial for the same act, but upon a charge setting forth the true offense; where the accused was brought to trial after having had his case fully investigated by a different court, which, however, failed to agree in a finding and was consequently dissolved;* where the first court was dissolved because reduced below five members by the casualties of the service pending the trial; where, for *any* cause, there was a "mistrial," or the trial first entered upon was terminated, or the court dissolved, at any stage of the proceedings before a final acquittal or conviction. *Ibid.*, par. 3.

[2] Dig. J. A. Gen., 119, par. 4. See, also, 6 Opin. Att.-Gen., 413, 506. Where an officer who had killed a superior officer in an altercation at a military post was brought to trial before a civil court on a charge of murder and acquitted, and was subsequently arraigned before a court-martial for the offense against military discipline involved in his criminal act, *held* that a plea of former trial interposed by him was properly overruled by the court. *Ibid.*, par. 7.

[3] *Ibid.*, 120, par. 9.

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* See U. S. *vs.* Perez, 9 Wheaton, 579.

except his case from the application of this Article; though insufficiently punished, he cannot be tried again for the same offense.[1]

ARTICLE 103. *No person shall be liable to be tried and punished by a general court-martial for any offense which appears to have been committed more than two years before the issuing of the order for such trial, unless, by reason of having absented himself, or of some other manifest impediment, he shall not have been amenable to justice within that period.*

The first statute of limitation upon the prosecution of military offenses appeared in the Mutiny Act for the year 1760.[2] The period of limitation was fixed at three years, and the statute applied to all military offenses except desertion. The first statutory limitation upon the prosecution of military offenses in the United States appeared as No. 88 of the Articles of 1806. The time within which a prosecution could be brought was fixed at two years, instead of three as in the corresponding British statute, possibly from analogy to the similar limitation in the practice of the criminal courts of the United States.

By the Act of April 11, 1890,[3] it was provided that "no person shall be tried or punished by a court-martial for desertion in time of peace and not in the face of an enemy, committed more than two years before the arraignment of such person for such offense, unless he shall meanwhile have absented himself from the United States, in which case the time of his absence shall be excluded in computing the period of the limitation, *provided* that such limitation shall not begin until the end of the term for which said person was mustered into the service."

In view of this Article it is the duty of the Government to prosecute an offender within a reasonable time after the commission of the offense.[4] The limitation, however, is properly a matter of defense to be specially pleaded and proved.[5] By pleading the general issue the accused is assumed to waive the right to plead the limitation by a special plea in bar. But under a plea of not guilty the limitation may be taken advantage of by evidence showing that it has taken effect.[6]

The prohibition of the Article relates only to prosecutions before general

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[1] Dig. J. A. Gen., 120, par. 6. A soldier was convicted of "manslaughter," but the findings and sentence were disapproved. He was then brought to trial on a charge of mutiny, as committed on the occasion of the homicide, the latter being alluded to in the specification as an incidental circumstance of aggravation, and was found guilty and sentenced. *Held* that the accused was not, in the sense of this Article, "tried a second time for the same offense," the mutiny not consisting in the act of homicide, but constituting a distinct offense.

[2] 1 Geo. I., ch. 6, sec. 71. For a discussion of statutes of limitation see the title *Pleas* in the chapter entitled THE INCIDENTS OF THE TRIAL.

[3] 26 Statutes at Large, 54.

[4] Dig. J. A. Gen., 124, par. 11.

[5] *In re* Bogart, 2 Sawyer, 397; *In re* White, 17 Fed., 723; *In re* Davison, 21 Fed., 618; *In re* Zimmerman, 30 Fed., 176; G. O. 22 of 1893. And compare U. S. *vs.* Cooke, 17 Wallace, 168.

[6] Dig. J. A. Gen., 124, par. 12.

courts-martial; it does not apply to trials by inferior courts. So courts of inquiry may be convened without regard to the period which has elapsed since the date or dates of the act or acts to be investigated.[1] Nor does the rule of limitation apply to the hearing of complaints by regimental courts under Article 30.[2]

The liability to trial after discharge, imposed by the last clause of Article 60, has been held subject to the limitation prescribed in Article 103.[3] And so held as to the liability to trial after the expiration of the term of enlistment, under Article 48.[4]

By the absence referred to in the original Article, in the clause "unless by reason of having absented himself," is believed to be intended, not necessarily an absence from the United States, but an absence by reason of a "fleeing from justice," analogous to that specified in Section 1045, Revised Statutes, which has been held to mean leaving one's home, residence, or known abode within the district, or concealing one's self therein, with intent to avoid detection or punishment for the offense against the United States.[5] Thus it has been held that, in a case other than desertion, it was not essential for the prosecution to be prepared to prove that the accused had been beyond the territorial jurisdiction of the United States in order to save the case from the operation of the limitation.[6]

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[1] 6 Opin. Att.-Gen., 239.

[2] Dig. J. A. Gen., 124, par. 10. See Article 30, *supra*. For application of the terms of the Article to arrests, see Dig. J. A. Gen., 123, par. 7.

[3] See Article 60, *supra*.

[4] Dig. J. A. Gen., 124, par. 9; 14 Opin. Att.-Gen., 52.

[5] U. S. *vs.* O'Brien, 2 Dillon, 381; U. S. *vs.* White, 5 Cr. C. C., 38, 73; Gould & Tucker, Rev. Stat., 349.

[6] Dig. J. A. Gen., 125, par. 14. It is quite clear that any person who takes himself out of the jurisdiction with the intention of avoiding being brought to justice for a particular offense can have no benefit of the limitation, at least when prosecuted for that offense in a court of the United States. * * * A person fleeing from the justice of his country is not supposed to have in mind the object of avoiding the process of a particular court, or the question whether he is amenable to the justice of a nation, or of the State, or of both. Proof of a specific intent to avoid either could seldom be had, and to make it an essential requisite would defeat the whole object of the provision in question. Street *vs.* United States, 160 U. S., 128; United States *vs.* Smith, 4 Day, 121, 125; Roberts *vs.* Reilly, 116 U. S., 80, 97.

The mere fact that the offense was concealed by the accused and remained unknown to the military authorities for more than two years constitutes no "impediment" in the sense of the Article. Dig. Opin. J. A. Gen., 123, par. 5.

A mere allegation in a specification to the effect that the whereabouts of the offender was unknown to the military authorities during the interval of more than two years which had elapsed since the offense is not a good averment of a "manifest impediment" in the sense of the Article. *Ibid.*, par. 6.

A court-martial, in a case of an offense other than desertion, sustained a plea of the statute of limitations in bar of trial for the reason that the judge-advocate could produce no evidence to show that the accused was not within the territorial jurisdiction of the United States during his absence. *Held* that such showing was not necessary, and that it was sufficient that the absence should be any unauthorized absence from the military service whereby the absentee evades and for the time escapes trial. This construction of the term "absented himself" in the Article corresponds to that placed on the words "fleeing from justice" as used in the statutes of the United States to designate those whom the statutes of limitation for the prosecution of crimes do not protect. *Ibid.*, 125, par. 15.

ARTICLE 104. *No sentence of a court-martial shall be carried into execution until the same shall have been approved by the officer ordering the court, or by the officer commanding for the time being.*

The requirement that a court-martial sentence shall be made operative by the approval or confirmation of a reviewing authority is relatively recent in the procedure of military tribunals. The 60th of the Prince Rupert Articles contained the requirement that "when sentence is to be given, the President shall pronounce it; and after that the sentence is pronounced, the Provost-marshal shall have warrant to cause execution to be done according the sentence."

Later Articles vest the power to review and confirm proceedings, findings, and sentences in the sovereign, or the officer commanding-in-chief, or in certain cases in some person duly authorized by the sovereign under his sign manual; such delegation of authority being in some cases final, and in others provisional only, until the directions of the sovereign could be known.[1] This is the case in the British Articles of 1765 and 1774, which contain the requirement that "no sentence of a general Court Martial shall be put in execution till after a report shall be made of the whole proceedings to Us, or to Our Commander in Chief, or some other Person duly authorized by Us, under Our Sign Manual to confirm the same; and Our or his Directions shall be signified thereupon," etc. Article 8, Section 14, of the American Code of 1776 required the proceedings to be reported "to Congress, or to the general or commander-in-chief of the forces of the United States, and their or his directions be signified thereupon." Article 2, Section 14, of the Resolution of Congress of May 31, 1786, required the sentences involving death or the dismissal of a commissioned officer to be laid "before Congress for their confirmation or disapproval, and their orders in the case." All other sentences were to "be confirmed by the officer ordering the court to assemble, or the commanding officer for the time being, as the case may be."[2] Article 65 of the Code of 1806 vested the power of review in the officer appointing the court except in the cases specified in the last clause of the Article which now constitutes the 105th Article of War. The first clause of No. 65 of the Articles of 1806 forms the 104th Article of the Code of 1874; the second clause having been re-enacted as Article 105 of the same Code.

The Reviewing Authority.—This term is employed in military parlance[3] to designate the officer whose province and duty it is to take action upon—approve or disapprove, etc.—the proceedings of a court-martial after the

[1] The practice of such delegation seems to have originated with William III. on account of his occasional absences from the kingdom. See I. Clode, Mil. Forces, Appendix, pp. 502, 503.

[2] There are instances in which this power was exercised by Congress. See 3 Journals of Cong., 37, 144, 158, 386, 714; 4 *ibid.*, 268, 367, 368; Winthrop, 632, note 4.

[3] The term is also employed in Section 1228, Revised Statutes.

same are terminated, and when the record is transmitted to him for such action. This officer is ordinarily the commander who has convened the court. In his absence, however, or where the command has been otherwise changed, his successor in command or, in the language of Articles 104 and 109, "the officer commanding for the time being," is invested (by those Articles) with the same authority to pass upon the proceedings and order the execution of the sentence in a case of conviction.[1]

In cases, however, of sentences of dismissal and of death imposed in time of peace, and of some death-sentences adjudged in time of war, as also of all sentences "respecting general officers," while the convening officer (or his successor) is the *original* reviewing authority, with the same power to approve or disapprove as in other cases, yet, inasmuch as it is prescribed by Articles 105, 106, 108, and 109 that the sentence shall not be *executed* without the confirmation of the President, the latter becomes in these cases the *final* reviewing officer, when, the sentence having been *approved* by the commander (for, if *disapproved* by him, there is nothing left to be acted upon by the superior), the record is transmitted to him for his action.[1]

A similar division of the reviewing function exists in cases in which sentences are approved, but the execution of the same is suspended, and the question of their execution referred to the President, under Article 111. The same function is also shared between inferior and superior commanders, under Article 107, in cases in which sentences are imposed by division or separate brigade courts; so, under Article 110, in cases of sentences adjudged by field-officers' courts in time of war.[1]

Where a general court-martial is convened directly by the President as Commander-in-Chief, he is of course both the original and final reviewing authority.[1]

Action on Proceedings.—This Article is properly to be complied with by an approval of the sentence (where the same is approved in fact) by "the officer ordering the court," etc., although, as in a case of a sentence of dismissal in time of peace, he may not be empowered *finally* to confirm and give effect to the sentence. His approval is required as showing affirmatively that he does not disapprove the sentence, as he is authorized to do.[2]

While *approval* gives life and operation to proceedings or sentence, *disapproval*, on the other hand, quite nullifies the same. A disapproval of the proceedings of a court-martial by the legal reviewing authority is not a mere expression of disapprobation, but a final determinate act putting an end to such proceedings in the particular case, and rendering them entirely nugatory and inoperative; and the legal effect of a disapproval is the same

[1] Dig. J. A. Gen., 670, par. 1. See, also, the chapter entitled THE REVIEWING AUTHORITY.

[2] *Ibid.*, 126, par. 1.

whether or not the officer disapproving is authorized finally to confirm the sentence. But to be thus operative, a disapproval should be *express*. As frequently remarked in the opinions of the judge-advocate general, the mere absence of an approval is not a disapproval, nor can a mere reference of the proceedings to a superior without words of approval operate as a disapproval of the proceedings or sentence.[1] The effect of the entire disapproval of a conviction or sentence is not merely to annul the same as such, but also to prevent the accruing of any disability, forfeiture, etc., which would have been incidental upon an approval. A disapproval of a conviction of a particular offense also operates to nullify the conviction of any lesser included offense involved in the conviction of the specific offense charged.[2]

The "Officer Commanding for the Time Being."—The "officer commanding for the time being," indicated in this Article, is an officer who has permanently or temporarily succeeded to the command of the officer who convened the court; as where the latter has been regularly relieved and another officer assigned to the command, or where the command of the convening officer has been discontinued, and merged in a larger or other command, at some time before the proceedings of the court are completed and required to be acted upon. Thus where, under these circumstances, a separate brigade has ceased to exist as a distinctive organization and been merged in a division, or a division has been similarly merged in an army or department, the commander of the division in the one case and of the army or department in the other is "the officer commanding for the time being," in the sense of the Article.[3]

The "officer commanding for the time being" must, to legally act, have the necessary qualifications. Thus where the sentence is one of a general court-martial, this officer must have the same rank and *status* as the convening officer must have had under the 72d Article, i.e., he must be either a

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[1] See 16 Opins. Att.-Gen., 312, where it is remarked that it is not a legal *disapproval* of a conviction or sentence for the original reviewing officer, in forwarding the proceedings for the action of superior authority, to indorse upon the same an opinion to the effect that the finding is not sustained by the evidence.

[2] Dig. J. A. Gen., 671, par. 2. A reviewing officer cannot disapprove a sentence and then proceed to mitigate or commute the punishment, since, upon the disapproval, there is nothing left in the case upon which any such action can be based.

It is quite immaterial to the legal effect of a disapproval whether any *reasons* are given therefor, or whether the reasons given are well founded in fact or sufficient in law. *Ibid.*

A disapproval of a sentence by the proper reviewing authority is "tantamount to an acquittal by the court." 13 Opins. Att.-Gen., 460.

A disapproval of a finding by the proper reviewing authority has the same legal effect as an acquittal, and the soldier cannot be made to suffer any of the legal consequences of a conviction. *Ibid.*, 675, par. 9.

[3] Dig. J. A. Gen., 127, par. 5. So where, before the proceedings of a garrison court convened by a post commander were completed, the post command had ceased to exist, and the command become distributed in the department, *held* that the department commander, as the legal successor of the post commander, was the proper authority to approve the sentence under this Article. *Ibid.*

general officer commanding the army, division, or separate department, or a colonel commanding a department.[1]

Record of Action in Review.—The approval of the sentence indicated by this Article should properly be of a *formal* character. An indorsement, signed by the commander, of the single word "Approved,"—a form not unfrequently employed during the late war,—though strictly sufficient in law, is irregular and objectionable.[2]

Limits of Reviewing Authority.—The authority of a military commander as reviewing officer is limited to taking action upon the proceedings and sentence (if any) by approving or disapproving the same (wholly or in part), and directing the execution of the sentence; and to the incidental function, as conferred by Article 112, of pardoning or mitigating the punishments which have been approved by him. Action not included within these powers he is not authorized to take. Thus he cannot himself correct the record of the court, by striking out any part of the finding or sentence or otherwise, nor can he in general change the order in which different penalties are adjudged by the court to be suffered, nor can he add to the punishment imposed by the court though deemed by him quite inadequate to the offense.[3]

It is equally beyond the power of the reviewing officer to change a finding by his own action. Thus where, in a case of conviction of desertion, the reviewing authority approved "so much only of the finding of guilty of desertion as convicted the accused of absence without leave," it has been held that he had thus substituted a finding of his own for that of the court, and that his action was unauthorized.[4]

Reasons for Disapproval.—While it is not legally essential to a disapproval that the reasons therefor should be stated, a reviewing officer may in general specify the reasons for the action taken by him without transcending his authority. Thus where a department commander disapproved a sentence as inadequate, and in stating his grounds for so doing commented unfavorably upon the conduct of the accused as indicated by the

[1] Dig. J. A. Gen., 127, par. 7. Where a department command was discontinued without being transferred to or included in any other specific command, *held* that the general in command of the Army was "the officer commanding for the time being," and the proper authority to act, under this Article and the 109th, upon the proceedings and sentence of a court which had been ordered by the department commander, but whose judgment had not been completed at the time of the discontinuance of the command. *Ibid.*, par. 6.

[2] *Ibid.*, 126, par. 2. So *held* that a mere statement, written in or upon the proceedings, in transmitting them to the President, that the record was "forwarded" for the action of superior authority, was insufficient as not implying the requisite approval according to the Article; and *held similarly* of a mere recommendation that the proceedings be approved by such authority. *Ibid.*

[3] Dig. J. A. Gen., 672, par. 3.

[4] *Ibid.*, 675, par. 11. As has been seen, it is within the authority of a department commander, as reviewing officer, in a case in which a soldier of his command has been sentenced to confinement in a penitentiary, to designate a particular penitentiary within such command as the place of confinement. *Ibid.*, par. 12.

evidence, it was held that such comments were a legitimate explanation of the action taken, and did not constitute an adding to the punishment.[1]

The reviewing authority should properly authenticate the action taken by him in any case by subscribing in his own hand (adding his rank and command, as indicating his legal authority to act) the official statement of the same as written in or upon the record. Impressing the signature by means of a stamp is not favored.[2]

Revision of Proceedings, Finding, or Sentence by the Court.[3]—Where the reviewing officer deems that the proceedings of the court are in any material particular erroneous or ill advised, his proper course in general will be to reconvene the court for the purpose of having the defect corrected, at the same time furnishing it with the grounds of his opinion. Thus if he regards the sentence inadequate, he should, in reassembling the court for a revision of the same, state the reasons why he considers it to be disproportionate to the amount of criminality involved in the offense. But although he cannot compel the court to adopt his views in regard to the supposed defect, he may, in a proper case, express his formal disapprobation of their neglect to do so.[4]

Reconsideration of Action by Reviewing Officer.—Action taken by a reviewing officer upon the proceedings and sentence of a court-martial may be recalled and modified *before* it is published and the party to be affected is duly notified of the same. *After* such notice the action is beyond recall. The power of *remission*, indeed, may be exercised so long as any part of the punishment imposed remains unexecuted. But when the final approval of the sentence (or other action taken) has been once officially communicated to the accused, the function and authority of the reviewing authority *as such*, over and respecting the same, is *exhausted* and cannot be revived. An

[1] Dig. J. A. Gen., 672, par. 3.

[2] Dig. J. A. Gen., 674, par. 6.

[3] See the title "Proceedings in Revision" in the chapter entitled THE INCIDENTS OF THE TRIAL.

[4] *Ibid.*, 673, par. 4. Thus where a court-martial, on being reconvened with a view of giving it an opportunity to modify a sentence manifestly too lenient for the offense found, decided to adhere to the sentence as adjudged, and, on being again reassembled to consider further grounds presented by the reviewing commander for the infliction of a severer penalty, again declined to increase the punishment, *held* that it was within the authority of the reviewing officer, and would be no more than proper and dignified for him, in taking final action upon the case, to reflect upon the refusal of the court as ill judged and as having the effect to impair the discipline and prejudice the interests of the military service. *Ibid.*

In passing upon the findings and sentence of a court-martial, the reviewing officer will properly attach special weight to its conclusions where the testimony has been of a conflicting character. This for the reason that, having the witnesses before it in person, the court was qualified to judge, from their manner in connection with their statements, as to the proper measure of credibility to be attached to them individually.* *Ibid.*, 674, par. 5.

* See the early case of Capt. Weisner, Am. Archiv., 5th Series, vol. ii., p. 895. So civil courts will rarely interfere, except in cases of clear injustice, with verdicts of juries which have turned upon the credibility of witnesses. Wright *vs.* State, 34 Ga., 110; Whitten *vs.* State, 47 *id.*, 297.

approval cannot then be substituted for a disapproval or *vice versa*, nor can an approved punishment be mitigated or commuted.[1]

It is an established principle that when the final action of the reviewing officer has been published in orders to the command and notified to the accused, his power of approval and disapproval in the case is exhausted, and his action cannot be recalled or modified. Where a department commander applied to the War Department for the return of the proceedings of a case in order that he might modify his action thereon, it was held that, as the same had been formally promulgated in orders and had duly taken effect, the power of the reviewing officer over the case was exhausted, and the application could not legally be complied with.[2]

Power to Review Not Subject to Delegation.—A military commander cannot of course delegate to an inferior, or other officer, his function as reviewing authority of the proceedings or sentence of a court-martial, as conferred by the 104th or 109th Article of War or other statute. Nor can he regularly authorize a staff or other officer to write and subscribe for him the action by way of approval, disapproval, etc., which he has decided to take upon such proceedings. An approval purporting to be subscribed by the commander "by" his staff judge-advocate or assistant adjutant-general would be open to question and quite irregular; as would also be any action subscribed by such an officer purporting to be taken "in the absence and by the direction of" the commander.[3]

Power to Review Not Subject to Revision by Higher Authority.—In acting upon the proceedings of a court-martial, the legal reviewing officer acts partly in a judicial and partly in a ministerial capacity. He "decides" and "orders," and the due exercise of his proper functions cannot be revised by superior military authority. It has been held that a reviewing officer who had duly acted upon a sentence and promulgated his action in orders could not be required by a higher commander, or by the Secretary of War, to revoke

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[1] Dig. J. A. Gen., 674, par. 8. But where, after the reviewing commander had approved a sentence in general orders and the court had been dissolved, it was discovered that there was a *fatal defect* in the proceedings in that they did not show that the court or judge-advocate had been sworn in the case, *held* that the commander would properly issue a supplemental order declaring the proceedings a nullity and the original order inoperative and withdrawn on account of the defect. *Ibid.*, 676, par. 15.

[2] *Ibid.*, 675, par. 13. Where the convening commander dissolves a court pending a trial, his power as to that court is exhausted and he cannot revive it as such. He may reconvene the same members as a court martial, but it will be another and distinct tribunal. *Ibid.*, 676, par. 16.

A sentence to forfeit certain pay was approved, and such approval promulgated in orders of Feb. 18, 1865. On March 10th following the reviewing officer "reconsidered" his action, and by another order disapproved the sentence, and this order was also promulgated. *Held* that the latter order was of no effect. The first order executed the forfeiture, making the amount forfeited public money, and exhausted the power of the reviewing authority. *Ibid.*, par. 14.

[3] *Ibid.*, 674, par. 7.

such action. If the sentence be deemed unwarranted or excessive, relief may be extended through the power of pardon or remission.[1]

ARTICLE 105. *No sentence of a court-martial, inflicting the punishment of death, shall be carried into execution until it shall have been confirmed by the President; except in the cases of persons convicted, in time of war, as spies, mutineers, deserters, or murderers, and in the cases of guerrilla marauders convicted, in time of war, of robbery, burglary, arson, rape, assault with intent to commit rape, or of violation of the laws and customs of war; and in such excepted cases the sentence of death may be carried into execution upon confirmation by the commanding general in the field or the commander of the department, as the case may be.*

The history of the first clause of this Article has already been explained.[2] The excepting clause is a modification of the 65th and 89th of the Articles of 1806, in respect to their application to sentences of death and dismissal of officers in time of war. Article 65 of the Code of 1806 conferred authority upon an army or department commander, in time of war, to execute sentences of death or dismissal; Article 89 of the same code conferred authority to "pardon or mitigate" sentences imposed by courts-martial constituted by them, except sentences of death and dismissal, which were authorized to be suspended "until the pleasure of the President" could be known; and such "suspension, together with copies of the proceedings of the court-martial," were to be immediately transmitted to the President for his determination.

The authority thus conferred was restricted in 1862 by the requirement that "no sentence of death or imprisonment in the penitentiary shall be carried into effect until it shall have been approved by the President."[3] By the Act of March 3, 1863, however, so much of the enactment of 1862 as required "the approval of the President to carry into execution the sentence of a court-martial" was repealed in so far as it related to "carrying into execution the sentence of any court-martial against any person convicted as a spy or deserter, or of mutiny or murder." Sentences for these offenses could be carried into effect by the commanding generals of armies in the field.[4] The power thus conferred upon commanding generals of armies in the field was, by the Act of July 2, 1864, conferred upon department commanders, and was extended to sentences imposed by military commissions, as well as by courts-martial, for robbery, arson, burglary, rape, assault with intent to commit rape, and for violations of the laws and customs of war, as well as sentences against spies, mutineers, deserters, and murderers, together with all sentences against guerrilla marauders.[5]

[1] Dig. J. A. Gen., 676, par. 17.
[2] See Article 104, *supra*.
[3] Sec. 5, Act of July 17, 1862 (12 Stat. at Large, 598).
[4] Sec. 21, Act of March 3, 1863 (12 *ibid.*, 735).
[5] Act of July 2, 1864 (13 *ibid.*, 356).

It has thus been seen that the Articles of 1806 and subsequent enactments of similar character conferred authority upon the commanding general of a department, or army in the field, in time of war, to *execute* a sentence of death or dismissal, but *not* to exercise the power of *pardon or mitigation*. This principle was recognized in the enactment of 1864 by a clause conferring upon the officers above named the power to "remit or mitigate" sentences of death or dismissal "during the continuance of the present rebellion." At the close of hostilities, therefore, such power ceased to exist.

The present Article confers express authority upon the "commanding general in the field or the commander of the department, as the case may be," to confirm capital sentences and to carry them into execution in the cases of persons convicted, in time of war, as spies, mutineers, deserters, or murderers, and in the cases of guerrilla marauders convicted, in time of war, of robbery, burglary, arson, rape, assault with intent to commit rape, or of violation of the laws and customs of war. But the corresponding authority to remit or mitigate is not expressly conferred by the terms of the 105th Article. It would thus seem to have been the intention of Congress, in this enactment, to confer upon commanding generals, in time of war, a power to approve and execute such sentences adequate to the strict necessities of discipline and no more. It is clearly essential to discipline and to the maintenance of order in the theatre of active military operations that commanders in the field should have power to carry such sentences into effect. If, however, an occasion arises for clemency, or for an exercise of the pardoning power, it was evidently deemed best by Congress—no urgent question of discipline being involved—to leave the matter in the hands of the Executive, in whom the power to grant pardons is vested by the Constitution; and such power of pardon or mitigation was therefore expressly reserved to the President in the enactment of 1862 above cited, which is now embodied in the first clause of the 112th Article of War.[1]

ARTICLE 106. *In time of peace no sentence of a court-martial directing the dismissal of an officer shall be carried into execution until it shall have been confirmed by the President.*[2]

Article 8, Section 14, of the American Articles of 1776 contained the requirement, derived from the corresponding provision of the British Code of 1774,[3] that "no sentence of a general court-martial shall be put in execution till after a report shall be made of the whole proceedings to Congress, or to the general or commander-in-chief of the forces of the United States, and their or his directions be signified thereupon." Article 2, Section 14, of the Resolution of Congress of May 31, 1786, contained the provision that

[1] Sec. 7, Act of July 17, 1862 (12 Stat. at Large, 598).

[2] See Articles 104, 105, and 106, and the chapter entitled THE REVIEWING AUTHORITY.

[3] Article 10, Section 15.

"no sentence of a general court-martial, in time of peace, extending to the loss of life, the dismission of a commissioned officer, or which shall, either in time of peace or war, respect a general officer, be carried into execution until after the whole proceedings shall have been transmitted to the Secretary at War, to be laid before Congress for their confirmation or disapproval and their orders in the case." This requirement was embodied in the Articles of 1806,[1] substituting the President of the United States for the Congress as the final reviewing authority.

The word "approved" employed by the President in passing upon a sentence of dismissal has been held to be substantially equivalent to "confirmed," the word used in the Article. In practice the two words are used indiffer ently in this connection.[2]

The Article does not expressly require that the confirmation of the sentence shall be signed by the President, nor does it prescribe any form in which the confirmation shall be declared. A written approval, therefore, of a sentence of dismissal authenticated by the signature of the Secretary of War or expressed to be by his order is a sufficient confirmation within the Article; the case being deemed to be governed by the well-established principle that where, to give effect to an executive proceeding, the personal signature of the President is not made essential by law, that of the head of the department to which the subject belongs shall be sufficient for the purpose; the assent of the President to his order or direction being presumed, and his act being deemed in law the act of the President whom he represents.[3]

ARTICLE 107. *No sentence of a court-martial appointed by the commander of a division or of a separate brigade of troops, directing the dismissal of an officer, shall be carried into execution until it shall have been confirmed by the general commanding the army in the field to which the division or brigade belongs.*[4]

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[1] As Article 65.

[2] Dig. J. A. Gen., 128, par. 1.

[3] *Ibid.*, par. 2. This view has been sustained by an opinion of the Attorney-General of June 6, 1877, (15 Opins., 290,) and by a Report of the Judiciary Committee of the Senate of March 3, 1879,—Rep. No. 868, 45th Cong., 3d Ses. (From this report, indeed, two members of the Committee dissented in a subsequent report of April 7, 1879,—Mis. Doc. No. 21, 46th Cong., 1st Ses.)

This subject has been more recently considered by the U. S. Supreme Court in a succession of cases (Runkle *vs.* U. S., 122 U. S., 543; U. S. *vs.* Page, 137 U. S., 673; U. S. *vs.* Fletcher, 148 U. S., 84), the effect of which is that a statement of approval of a sentence of dismissal authenticated by the Secretary of War is legally sufficient provided that it appear, by clear presumption therefrom, that the proceedings have actually been submitted to the President.

In an opinion of the Attorney-General of April 1, 1879, (16 Opins., 298,) it was held that a confirmation of a sentence of dismissal of an officer, though irregularly and unduly authenticated, would be *ratified* by an appointment by the President of another officer to fill the supposed vacancy, and that the appointment thus made would be valid and operative.

[4] See Articles 104, 105, and 106, *supra*.

ARTICLE 108. *No sentence of a court-martial, either in time of peace or in time of war, respecting a general officer shall be carried into execution until it shall have been confirmed by the President.*[1]

ARTICLE 109. *All sentences of a court-martial may be confirmed and carried into execution by the officer ordering the court, or by the officer commanding for the time being, where confirmation by the President, or by the commanding general in the field, or commander of the department, is not required by these articles.*[1]

ARTICLE 110. *No sentence adjudged by a field-officer detailed to try soldiers of his regiment shall be carried into execution until the same shall have been approved by the brigade commander, or, in case there be no brigade commander, by the commanding officer of the post or camp.*[2]

This appeared for the first time in statutory form as Section 7 of the Act of July 17, 1802;[3] its purpose being to provide for the review and approval or confirmation and execution of sentences imposed by the newly constituted field-officer's court. The words "or camp" were added after "post," in the last line of the Article, by the Act of July 27, 1892.[4]

ARTICLE 111. *Any officer who has authority to carry into execution the sentence of death or of dismissal of an officer may suspend the same until the pleasure of the President shall be known; and in such case he shall immediately transmit to the President a copy of the order of suspension, together with a copy of the proceedings of the court.*[5]

An officer suspending the execution of a sentence for the action of the President under this Article should first formally *approve* the same. Simply to forward the proceedings stating that the sentence has been suspended is incomplete and irregular. If the commander *disapproves* the sentence, he cannot of course suspend and transmit under this Article, since there remains nothing for the President to act upon.[6]

Where a case is submitted to the President for his action under this Article, he may approve or disapprove the sentence wholly or in part, and, if approving, may exercise the power of remission or mitigation.[7]

ARTICLE 112. *Every officer who is authorized to order a general court-martial shall have power to pardon or mitigate any punishment adjudged by it, except the punishment of death or of dismissal of an officer. Every officer commanding a regiment or garrison in which a regimental or garrison court-martial may be held, shall have power to pardon or mitigate any punishment which such court may adjudge.*

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[1] See Articles 104, 105, and 106. *supra.*
[2] See Articles 104, 105, and 106 for a history of this provision. See, also, the chapter entitled THE REVIEWING AUTHORITY.
[3] Sec. 7, Act of July 17, 1862 (12 Stat. at Large, 598).
[4] Act of July 27, 1898 (27 Stat. at Large, 278).
[5] For a history of this Article see the 104th and 106th Articles of War.
[6] Dig. J. A. Gen., 129, par. 1.
[7] *Ibid.*, par. 2.

The pardoning power in respect to criminal offenses, military as well as civil, and the authority to remit, mitigate, and commute punishments imposed by military tribunals, which are but incidents of the general power to pardon, are by the English Constitution vested in the sovereign. The early Articles of War requiring the sentences of general courts-martial to be submitted to the sovereign prior to execution[1] were adopted with a view to enable this power to be exercised in cases in which, in the opinion of the sovereign or his constitutional advisers, an act of clemency or mercy was deemed appropriate.[2] This power has been and may still be exercised directly by the crown, or may be conferred upon generals commanding-in-chief by letters under the royal sign manual.

Prior to the adoption of the Federal Constitution, the power to confirm the more important sentences—death and the dismissal of commissioned officers, for example—was vested in the Congress,[3] and was from time to time exercised by that body. There being no executive head to the Government under the Articles of Confederation, the power to pardon was vested in the general or commander-in-chief for the time being, who was authorized to pardon or mitigate "any of the punishments order to be inflicted for any of the offenses mentioned in the foregoing Articles."[4] The corresponding power of pardon and mitigation in respect to regimental courts-martial was by the same Article conferred upon the regimental commander.[5]

By a resolution of Congress of April 14, 1777, the Articles above cited were repealed and replaced by two new Articles, one of which required sentences of general courts-martial to be reported to Congress,[6] as before; the other, however, conferred authority upon Continental general officers to appoint general courts-martial and to "pardon or mitigate all punishments authorized except the sentence of death,"[7] which they were authorized to suspend and report the proceedings in the case to the Congress for its action.[8] By a Resolution of May 27, 1777, the power of pardon and mitigation which had been vested in the "general or commander-in-chief" by the

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[1] See Article 10, Section 15, of the British Codes of 1765 and 1774.

[2] Clode, Mil. Law, 145. The power of commutation, inasmuch as it substituted another and different judgment for that pronounced by the courts, was held in 1727 to be beyond the authority of the sovereign, as an unwarranted exercise of the pardoning power. Authority to commute was therefore conferred upon the crown by the Mutiny Act. 1 Clode, Mil. Forces, 509, 510.

[3] By Article 8, Section 14, of the American Articles of 1776.

[4] See Article 2, Section 18, *ibid.*

[5] *Ibid.*

[6] Article 3, Resolution of Congress of April 14, 1877.

[7] Article 4, *ibid.*

[8] That the authority to commute was not conferred by this enactment or by that of May 27, 1777, is evidenced by the following extract from a letter from Washington to Gates under date of February 14, 1778. "The right of mitigating only extends, in my opinion, to lowering the degree of punishment, in the same species prescribed, and does not imply any authority to change the nature or quality of it altogether." VI. Writings of Washington, 374.

Articles of 1776, but which had been withdrawn by the Resolution of April 14th above cited, was restored; and the power "to execute sentences and to grant pardons therefor, by way of mitigation or remission," was conferred upon "general officers commanding departments" "without being obliged to report the matter to Congress or the commander-in-chief." The subject of approval and confirmation, as well as of pardon and mitigation, in respect to general courts-martial having been thus made the subject of exhaustive legislative regulation, was not mentioned in the Resolutions of Congress of 1786. In the Articles of 1806 the power of confirmation is regulated by the 65th Article; while the power of pardon and mitigation in respect to both general and inferior courts-martial is regulated by the provisions of the 89th Article.[1]

Nature of the Power; Effects of its Exercise.—The President is empowered by the Constitution[2] "to grant pardons for offenses against the United States"; and a pardon, like a deed, must, in order to take effect, be delivered to and accepted by the party to whom it is granted.[3]

It is the effect of the exercise of the pardoning power by the President to relieve the party from all punishment remaining to be suffered. Where, therefore, he remits the unexecuted portion of a term of imprisonment, an additional penalty, which, by the express terms of the sentence, was to be incurred at the end of the adjudged term, (as a dishonorable discharge from the service), cannot be enforced. The pardon having intervened, the sentence ceases to have any effect whatever in law, and the soldier—the remainder of his service being regular—must be honorably discharged.[4]

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[1] Article 60 of the Prince Rupert Code provided that "when sentence is to be given the President shall pronounce it; and, after that the sentence is pronounced, the Provost-Martial shall have warrant to cause execution to be done according to the sentence." Article 59 of the same code contained provision for a regimental provost-marshal who was to "have the same priviledge in his own regiment as the Provost-Martial General hath in the Army or Camp." The King James Articles of 1686 contained similar provisions. Article 12, Section 15, of the British Codes of 1765 and 1774 contains the requirement that no sentence of a regimental or garrison court-martial shall "be executed until the Commanding officer (not being a member of the Court-Martial), or the Governor of the Garrison shall have confirmed the same." This was adopted without change as Article 10, Section 14, of the American Articles of 1776, and as Article 8, Section 14, of the Resolution of Congress of May 31, 1786. In the Articles of 1806 the power to approve and confirm is conveyed by Article 65, the power to pardon and mitigate being conferred by Article 89.

[2] Article 2, Section 2, par. 1.

[3] Dig. J. A. Gen., 551, par. 1. Thus there can be no pardon of a *deceased* officer or soldier; and that the pardon is asked by the party's widow or heir, who is to be pecuniarily benefited thereby, cannot affect the principle. So where, in a case of an officer who had died while under a sentence of suspension from rank, a pardon was asked for the purpose of having the stigma removed from his record in the service, *held* that the case was not one in which the pardoning power could be exercised. *Ibid.* See, also, U. S. *vs.* Wilson, 7 Pet., 150; In matter of DePuy, 3 Benedict, 307; 6 Opin. Att.-Gen., 403.

[4] *Ibid.*, 553, par. 5. It is the effect of a *full pardon* (otherwise of a mere remission of the punishment) to remove all penal consequence (except of course *executed* penalties) and all disabilities attached by U. S. statute (or army regulation) to the offense or

A pardon is not retroactive. It cannot remit an executed punishment, or restore an executed forfeiture resulting either by operation of law or sentence. It cannot, therefore, restore the forfeitures incident upon desertion. Further, it cannot modify past history or reverse or alter the facts of a completed record. From and after the taking effect of a pardon the recipient is innocent in law as to any subsequent contingencies, but the pardon does not annihilate the fact that he was guilty of the offense. The pardon indeed proceeds upon the theory that the party was guilty in fact. The asking for it is an admission of guilt, and the granting of it is a recognition of the fact of guilt.[1]

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to the conviction or sentence.* Thus the pardon of a convicted deserter will relieve him from the loss of the rights of citizenship attached by the Act of March 3, 1865, Secs 1996, 1998, Rev. Sts., to a conviction of desertion.† But a pardon by the President will be ineffectual of course to remove a disqualification incurred by the offender under a State statute ‡ Dig. J. A. Gen., 551, par. 2.

Held that a pardon extended to an enemy for his offense or offenses *as such*, committed during the war, did not entitle him to be paid rent for the occupation of his real estate by the U. S. military authorities while occupying by the right of conquest the region of country in which such estate was situated. *Ibid.*, par. 3.

[1] Dig. J. A. Gen., 556, par. 15. Thus held that the President could not by a pardon remove the charge of desertion from the record of a former soldier, who had long since become a civilian by reason of the muster-out and non-existence of the volunteer army to which he had belonged in the late war; and that the effect of his pardon would not be to give him an honorable discharge. A pardon would not only not remove a charge of desertion, but would in fact confirm it, and constitute an additional reason for retaining it on the record. And a party cannot by an executive act be discharged from the service unless he is *in* the service. *Ibid.*

A pardon by the President will reach and remove a continuing disqualification or disability incident upon the commission of an offense against the United States, or upon a conviction by a United States court or a court-martial, but not a disqualification incurred (as upon conviction of grand larceny) under the laws of a *State*. *Ibid.*, 555, par. 17.

A pardon cannot reach or remit a fully *executed* sentence, though the same may have been unjustly imposed. A pardon cannot of course undo a corporal punishment fully inflicted; § nor can it avail to restore to the army an officer or soldier legally separated therefrom and made a civilian by a duly approved sentence of dismissal, ‖ or by a dishonorable discharge. Nor can it restore a fine paid, or pay forfeited, when the amount of the same has once gone beyond the control of the Executive and been covered into the U. S. treasury and become public funds, ¶ whatever may have been the merits of the case. Otherwise, however, where the money still remains in the hands of a military disbursing officer or other intermediate official.** Where, however, any portion of a punishment remains *unexecuted*, that portion may be remitted by the pardoning power.†† Congress alone can restore pay fully forfeited to the United States, or otherwise pecuniarily indemnify an officer or soldier for the consequences of a legally executed sentence. *Ibid.*, 552, par. 4.

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* *Ex parte* Garland, 4 Wall., 380; 12 Opin. At.-Gen., 81.

† 8 Opins. At.-Gen., 284; 9 *id.*, 478; 14 *id.*, 124. And see People *vs.* Bowen, 43 Cal., 439. That this disability can attach only upon a conviction, see the 47th Article, title *Statutory Consequences of Desertion*, and authorities cited in note.

‡ 7 Opins. At.-Gen., 760.

§ See 8 Opins. At.-Gen., 284.

‖ 12 Opins., 548; *Ex parte* Garland, 4 Wallace, 381.

¶ 2 Opins. At.-Gen., 330; 16 *id.*, 1. This because the same Constitution which conveys the pardoning power contains a provision of "equal efficiency" (Article 1, Sec. 9, § 6) to the effect that money in the public treasury shall not be withdrawn except by an appropriation by Act of Congress. 8 *id.*, 281. Compare, in this connection, Knote *vs.* United States, 5 Otto, 149, where it was held that an executive pardon would not entitle a party to the proceeds of certain personal effects confiscated and sold by the United States as the property of an enemy *after* such proceeds had been duly paid into the treasury.

** 14 Opins. At.-Gen., 601.

†† And the Executive, in the exercise of the pardoning power, "may pardon or remit a portion of the sentence at one time and a different portion at another." 3 Opins. At.-Gen., 418.

Continuing Punishments.—The pardoning power extends to *continuing* punishments, or punishments which are never fully executed,—remitting in each case the punishment from and after the taking effect of the pardon. Of this class is the punishment of disqualification to hold military or public office, as also that of the losing of or reduction in "files" (or relative rank) in the list of officers of the offender's grade; these, being continuing punishments, may be put an end to at any time by a remission by the pardoning power.[1]

Conditional Pardons.—It is settled that a pardon may be *conditional*—may be granted upon a condition precedent or subsequent.[2] Thus where the President, by his proclamation of March 11, 1865, granted a pardon to all deserters "on condition that they duly returned (within a certain time stated) to their regiments, etc., and served the remainder of their original terms and, in addition, a period equal to the time lost by desertion," a soldier who duly returned under this proclamation but, after remaining with his regiment a portion of the period indicated, abandoned the service and went to his home, was held liable (the legal period of limitation fixed by the 103d Article of War not having expired) to be brought to trial for his original desertion; the *condition subsequent* upon which his pardon for the same had been extended not having been performed.[3]

Constructive Pardons.—While to restore to or place upon duty an officer or soldier when under arrest or charges on account of an alleged offense would not probably in this country, to the same extent as in England,[4] be regarded as operating as a condonation of the offense, the promotion of an officer while in arrest under charges has been viewed as a *constructive pardon* of the offense or offenses on account of which he has been arrested.[5] Such a promotion, however, could not operate as a pardon of *other* offenses committed by him, of the commission of which no knowledge was had by the Executive at the date of the promotion.[6]

While ordering or authorizing an officer or soldier when under sentence to exercise a command, or perform any other duty inconsistent with the continued execution of his sentence, has been viewed as a constructive pardon,[7]

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[1] Dig. J. A. Gen., 553. par. 6; 12 Opin. Att.-Gen., 547.

[2] *Ex parte* Wells, 18 How., 307; Com. *vs.* Haggerty, 4 Brewster, 326; 6 Opin. Att.-Gen., 405.

[3] Dig. J. A. Gen., 554, par. 9. In certain cases of military offenders convicted of larceny of public property or conversion of public funds (or who had escaped from military custody while under charges for such offenses), and applying for pardon, *advised* that, even if otherwise thought worthy of pardon, no pardon should be extended to them except upon the *condition precedent* of their making good the funds appropriated or the property stolen or its value. *Ibid.*, par. 10.

[4] See Clode, Mil. Forces of the Crown, vol. 1, p. 173; Prendergast, 244–5, in connection with the cases cited of Sir Walter Raleigh, Lord Lucan, Capt. Achison, etc.

[5] See 8 Opins. Att.-Gen., 237.

[6] Dig. J. A. Gen., 553, par. 7.

[7] 6 Opin. Att.-Gen., 714.

it has been held that, to allow an officer while under a sentence of suspension from rank to perform certain slight duties in closing his accounts with the United States could not be regarded as having any such effect.[1]

Procedure.—The pardoning power here given is not limited in its exercise to the moment of the approving of the sentence, but may be employed as long as there remains any material for its exercise. Under this Article, as interpreted by the usage of the service, a department (or army) commander may in his discretion, remit at any time, and for any cause deemed by him to be sufficient, the unexecuted portion of the sentence of any soldier confined in his command under a sentence imposed by a court-martial convened by him or by a predecessor in the command.[2]

A military commander vested with the power of pardon or mitigation under this Article is not authorized to delegate the same to an inferior. Thus a department commander cannot legally authorize a post commander to remit in part, upon good behavior, the punishment of a soldier, under sentence at the post commanded by the latter, who has been convicted by a general court the proceedings of which have been acted upon by the former.[3]

Remission.—Remission is a partial exercise of the pardoning power, relieving the person from a punishment or the unexecuted portion of a punishment, but not pardoning the offense as such, or removing the disabilities or penal consequences attaching thereto or to the conviction.[4] The pardoning of "punishment," authority for which is vested in certain commanders by the 112th Article of War, is remission. An offender can be completely rehabilitated only by a full pardon granted under the pardoning power of the Constitution.[5]

Mitigation.—The reviewing authority in approving the punishment adjudged by the court and ordering its enforcement, is authorized, if he deems it too severe, to graduate it to the proper measure by reducing it in

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[1] Dig. J. A. Gen., 553, par. 8. *Held* that a withdrawal by a department commander of a pending charge against a soldier, upon his giving a pledge to abstain in the future from the conduct which was the subject of the charge, did not operate as a pardon and could not be pleaded as such. Had it been done by an order of the President, it could have had no further operation than as a *quasi*-conditional pardon, leaving the charge legally renewable upon a repetition of the offense. *Ibid.*, 557, par. 18.

Held that an order issued by competent authority at about the close of the war (December, 1865), by which a military prisoner convicted of larceny by court-martial was simply *released* before the end of his term, from a State penitentiary, was an act of constructive pardon, operating to remit the unexecuted portion of the sentence; and that a formal pardon by the President was not essential to enable the party to exercise the right of suffrage in a State where a conviction of larceny, unpardoned, was a disqualification. *Ibid.*, par. 19.

[2] Dig. J. A. Gen., 130, par. 4.

[3] *Ibid.*, par. 2.

[4] Compare Perkins *vs.* Stevens, 24 Pick., 277; Lee *vs.* Murphy, 22 Grat., 799; 1 Bish. Cr. L., § 763; 2 Opins. Att.-Gen., 329; 5 *id.*, 588; 8 *id.*, 283-4.

[5] *Ibid.*, 657, par. 1; *Ex parte* Garland, 4 Wall., 380.

quantity or quality, without changing its species; this is *mitigation*.[1] Imprisonment, fine, forfeiture of pay, and suspension are punishments capable of mitigation. As an instance of a mitigation both in quantity and quality, a sentence of imprisonment for three years in a penitentiary was held to be mitigable to an imprisonment for two years in a military prison.[2]

A punishment in itself illegal is not capable of mitigation. Thus where a sentence of imprisonment in a penitentiary is not legally authorized, it cannot be made valid by mitigating this imprisonment to confinement in a military prison. In such case the latter will be equally invalid and inoperative with the original punishment.[3]

A punishment cannot be pardoned or mitigated under this Article where it has been once duly executed. Where, however, a sentence has been executed only in part, it may be remitted as to the portion remaining unexecuted.[4]

Where a sentence consists of several punishments, the reviewing officer cannot so exercise the power of mitigation as to exceed in any instance the maximum punishment established by law and orders. Thus he would not be authorized by way of mitigation to reduce a confinement, while at the same time adding to a forfeiture so as to make it in excess of the maximum forfeiture legally allowable for the offense.[5]

Commutation.—Where, as in the case of a sentence of death, dismissal, or dishonorable discharge, there is no lesser form or degree of the same punishment to which a sentence can be reduced by way of mitigation, mercy or clemency can only be shown by way of *commutation*, that is, by a *substitution* of some other punishment for that named in the sentence. The power to commute (or remit) sentences of death or dismissal is, by this Article, reserved to the President, and a military commander cannot exercise such power even where, in time of war, he is authorized to approve such a sentence and carry it into effect.[6]

The substitution of the punishment of confinement for that of dishonorable discharge, imposed by sentence of court-martial, would not of course be authorized by way of *mitigation* (which cannot change the nature of the punishment), but may be effected by a commutation of the sentence by the President accepted by the soldier.[7]

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[1] See opinion of Judge-Advocate General published in G. O. 71, War Department, 1875; 1 Opins. Att.-Gen., 327; 4 *id.*, 444. It may be noted that these early opinions of the Attorney-General inaccurately describe the substitution of a lesser punishment for a *death sentence*, as a *mitigation*; the proceeding being properly *commutation*.

[2] Dig. J. A. Gen., 131, par. 5.

[3] *Ibid*, 132, par. 11.

[4] *Ibid.*, 130, par. 3.

[5] *Ibid.*, 133, par. 19 See, also, *ibid.*, par. 20.

[6] Dig. J. A. Gen., 129, par. 1. See, also, Washington to Gates, Feb. 14, 1778, Vol. VI.; Writings of Washington, 374.

[7] *Ibid.*, 131, par. 8. See, also, par. 7, *ibid.* So *held* that a reviewing commander was not authorized to commute the punishment of dishonorable discharge, and that, as

ARTICLE 113. *Every judge-advocate, or person acting as such, at any general court-martial, shall, with as much expedition as the opportunity of time and distance of place may admit, forward the original proceedings and sentence of such court to the Judge-Advocate General of the Army, in whose office they shall be carefully preserved.*

This requirement originated in a provision of the Mutiny Act of 1750,[1] which required that "every acting judge-advocate should send up the proceedings, with as much expedition as possible, to the Judge-Advocate General in London, to be kept and preserved in his office, to the end that persons entitled thereto might obtain copies thereof, as provided for in the Act."[2] As this requirement formed a part of the Mutiny Act, and so did not appear in the Articles of 1774, it was not embodied in the American Articles of 1776, but appeared for the first time in statutory form, as the last clause of Article 24 of Section 14 as amended by the Resolution of Congress of May 31, 1786. In this form it was re-enacted as the first clause of No. 90 of the Articles of 1806. The Judge-Advocate General of the Army is, by another statute,[3] made the legal custodian of the records of general courts-martial; the Congress, in this respect, having adhered to a practice well established in the British service at the time of the adoption of the Federal Constitution.[4]

ARTICLE 114. *Every party tried by a general court-martial shall, upon demand thereof, made by himself, or by any person in his behalf, be entitled to a copy of the proceedings and sentence of such court.*

The right of an accused person to have a copy of the proceedings in his case was first recognized by statute in England in 1748, in which year a clause was added to the Mutiny Act requiring such a copy to be furnished "to any person tried by the same, at any time not sooner than three nor later than twelve months after the sentence given, and whether such sentence be approved or not."[5] For a reason above stated,[6] this requirement was not embodied in the American Articles of 1776, and appeared first in statutory form as the third clause of Article 24, Section 14, as amended by the Resolution of May 31, 1786. It was re-enacted without change as the last clause of No. 90 of the Articles of 1806.

Procedure under the Article.—Applications for copies under this Article may be and in practice commonly are addressed in the first instance to the Judge-Advocate General, who thereupon furnishes the copy, certified by him

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such punishment was not susceptible of mitigation, it could not legally be reduced under this Article. Dig. J. A. Gen., 131, par. 7.

Dishonorable discharge cannot legally be mitigated to "discharge without a character." The latter is not a recognized punishment. *Ibid.*, 132, par. 14.

[1] 24 Geo. II., ch. 6, sec. 8.

[2] Section 1199, Revised Statutes.

[3] Clode, Mil. Law, 152; *In re* Mansergh, 1 B. & S., 406.

[4] 22 Geo. II., ch. 5, sec. 9.

[5] See Article 113, *supra*.

as correct, at the expense of the United States, provided the application is made by the accused or in his behalf. If not, he can furnish the copy only by the special authority of the Secretary of War. Any person desiring a copy of the record of a court-martial, or of any portion of a record, who is not entitled to be furnished with the same by the terms of this Article, should apply therefor to the Secretary of War, stating the reason for his application, in order that it may appear that he makes the same in good faith and for a proper purpose. If the application is approved by the Secretary, it will be referred to the Judge-Advocate General, who will then have the copy prepared and transmitted.[1]

A person applying for the copy "in behalf" of the accused should exhibit some satisfactory evidence that he duly represents the accused, as his agent, attorney, or otherwise. Where it does not satisfactorily appear that the party is applying for and on behalf of the accused, he cannot be furnished with the copy, as of right, under the Article. A person other than the accused, applying on his own account, is not entitled to the copy.[2]

A copy of the proceedings and sentence cannot properly be furnished under this Article until the same have been finally acted upon and such action has been promulgated in the usual manner.[3]

The accused or other person entitled under this Article to be furnished with a copy of a record of trial is not entitled to be furnished with a copy of a report of the Judge-Advocate General made upon the case. To receive this, special authority must be obtained from the Secretary of War.[4]

The copy of the "proceedings and sentence" of the court, with which the accused is entitled to be furnished under this Article, does not include the action of the reviewing authority as indorsed upon or attached to the record of trial, and it is not the usage to include this in the copy.[5]

The furnishing of a copy of a record of a general court-martial to a

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[1] Dig. J. A. Gen., 134, par. 3. It is an established general rule that a head of a department of the Government will not make public or furnish copies of confidential official reports or papers the disclosure of which will rather prejudice than promote the public interests. In a case of an officer of the Army who, having been dismissed the service by sentence of court-martial, applied to be furnished with copies of, or to be allowed to examine, the report of the Judge-Advocate General and the remarks of the General commanding the Army, in his case *advised* that the application be not acceded to by the Secretary of War, the same being no part of the record of trial of the officer, but confidential communications addressed to the President through the Secretary of War. *Ibid.*, 691, par. 5.

[2] Dig. J. A. Gen., 134, par. 2. The fact that the applicant is a member of the family of the accused does not entitle him to the copy in the absence of evidence that he applies at the instance or in behalf of the accused. A party applying in behalf of "friends and creditors" of the accused *held* not entitled to a copy of the record of his trial. So *held* of one who subscribed his application merely as "attorney at law," without showing that he was authorized to act for the accused. *Ibid.*

This Article does not authorize the furnishing of a copy of the record of trial to the widow of the accused or other person applying after his decease. *Ibid.*, 135, par. 7.

[3] *Ibid.*, 133, par. 1.

[4] *Ibid.*, 134, par. 4; see, also, note 1, *supra*.

[5] *Ibid.*, 135, par. 8.

person other than the accused and not applying in his behalf will, as a general rule, be authorized by the Secretary of War where the application is evidently made in the interest of justice and the copy furnished will clearly subserve a good and desirable purpose. But this must be made certainly to appear.[1]

It is only a party "tried by a general court-martial" who is entitled by the Article to the copy. Parties desiring copies of records of *courts of inquiry*, for use in evidence under Article 121, or for any other purpose, must apply to the Secretary of War, as above indicated. Such copies, however, are rarely accorded, except for use under Article 121.[2]

ARTICLE 115. *A court of inquiry to examine into the nature of any transaction of, or accusation or imputation against, any officer or soldier may be ordered by the President or by any commanding officer; but, as courts of inquiry may be perverted to dishonorable purposes, and may be employed, in the hands of weak and envious commandants, as engines for the destruction of military merit, they shall never be ordered by any commanding officer except upon a demand by the officer or soldier whose conduct is to be inquired of.*

In the early history of courts-martial, not only during the period prior to their statutory recognition by the passage of the Mutiny Act, but for more than a century subsequent to that enactment, the functions of the court-martial and court of inquiry differed so little that they were often combined in the same tribunal for the purpose of prosecuting an investigation which would now be committed to a court of inquiry.[3] Although recognized at an earlier date by custom of service, the first authentic instance of the appointment of a court of inquiry in the English service seems to have been that appointed by the king in 1746 to investigate the disaster to Sir John Cope's command at the battle of Prestonpans during the Rebellion of 1745.[4] Clode, in his Military Law, cites an instance in 1708 in which a court-martial was convened for the purpose of investigating the conduct of an officer of Lord Mark Kerr's Regiment.[5] The order authorizing the appointment of the court in this case was signed by Secretary Walpole, and the report of its proceedings was to be submitted to the Duke of Marlborough as Commander-in-Chief. It is believed that courts-martial retained this jurisdiction, and were empowered to conduct investigations, to detect guilty parties, and to recommend punishments, for a long time after these tribunals had received statutory recognition and had begun to exercise specific jurisdiction as such. This is evidenced by Article 2, Section 16, of the American Articles of 1776, which authorizes courts-martial to be convened in the

[1] Dig. J. A. Gen., 135, par. 5; see, also, note 1, page 554, *ante*.
[2] *Ibid.*, par. 6.
[3] Clode, Mil. Law, 171. See, also, the chapter entitled COURTS OF INQUIRY.
[4] *Ibid.*, 172.
[5] *Ibid.*, 171.

artillery to take jurisdiction over "differences arising amongst themselves, or in matters relating solely to their own corps."

Early in the present century a doubt having arisen in England as to the authority to convene courts-martial for the sole purpose of conducting investigations, the question was referred to the Attorney-General in 1803, and his opinion, based largely upon the requirements of the oath prescribed for members of courts-martial in the Mutiny Act, was adverse to their legality.[1]

The first statutory recognition of these tribunals in the United States service was that contained in Articles 25, 26, and 27 of Section 14 of the Articles of War as amended by the Resolution of Congress of May 31, 1786. These provisions were embodied in the revision of 1806 as Articles 91, 92, and 93. Under the authority thus conferred, however, courts of inquiry could only be convened upon the application of the officer or soldier whose conduct was to be investigated by them; with a view to confer upon the President power to convene such courts at his discretion, an authority which in England had already been recognized as belonging to the crown,[2] a clause to that effect was embodied in the 92d of the Articles of 1806.

Article 115 authorizes the institution of a court of inquiry only in a case of an "officer or soldier," and the word "officer" as employed in the Articles is defined in Section 1342, Revised Statutes, to mean a commissioned officer. A court of inquiry cannot, therefore, be convened on the application, or in the case, of a person who is not an officer (or soldier) of the Army at the time. Such a court cannot be ordered to investigate transactions of, or charges against, a party who, by dismissal, discharge, resignation, etc., has become separated from the military service, although such transactions or charges relate altogether to his acts or conduct while in the army. A court of inquiry cannot be ordered in a case of an "acting assistant surgeon," who is not an officer of the Army, but only a civil employee.[3]

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[1] I. Clode, Mil. Forces, 541.

[2] Prior to the enactment of the Army Act of 1881, courts of inquiry as such were neither authorized nor provided for in the annual Mutiny Acts. They had long been recognized by custom of service, and had been convened from time to time by letters under the royal sign manual with a view to the prosecution of investigations such as are now inquired into by these tribunals. Courts of inquiry were first expressly authorized in the English Articles of 1829.

[3] Dig. J. A. Gen., 135, par. 1. A court of inquiry is not a *court* in the legal sense of the term, but rather a council, commission, or board of investigation. It does not administer justice; no plea or specific issue is presented to it for trial; its proceedings are not a trial of guilt or innocence; it does not come to a verdict or pass a sentence. For purposes of investigation, however, a court of inquiry in this country is clothed with ample powers, and in an important case its opinion may be scarcely less significant or even final than that of a court-martial. Winthrop, Mil. Law, ch. 24.

Though a court of inquiry has sometimes been compared to a grand jury, there is little substantial resemblance between the two bodies. The accused appears and examines witnesses before such a court as freely as before a court-martial, and its proceedings are not required to be kept secret, but may be open at the discretion of the court. Dig. J. A. Gen., 136, par. 3.

A court of inquiry should not in general be ordered by an inferior commander—a post or regimental commander, for example—where the charges required to be investigated are not such as an inferior court-martial could legally take cognizance of. Courts of inquiry convened by such commanders are, however, of rare occurrence in our service.[1]

Although neither Article 88 nor other provision of the code specifically authorizes the challenging of the members of a court of inquiry, yet, in the interests of justice and by the usage of the service in this country, this proceeding is permitted in the same manner as before courts-martial. Article 117 requires that members of courts of inquiry shall be sworn "well and truly to examine and inquire, according to the evidence, without partiality, prejudice," etc.; and it is the sense of the service that their competency to do so should be determined by the same tests as in the case of a court-martial.[2]

A court of inquiry has no power to punish for contempt. Such power of this nature as is conferred by Article 86 is restricted in terms to courts-martial. Moreover a court of inquiry, not being in a proper sense a *court*, cannot exercise the strictly judicial function of punishing contempts.[3]

ARTICLE 116. *A court of inquiry shall consist of one or more officers, not exceeding three, and a recorder, to reduce the proceedings and evidence to writing.*[4]

ARTICLE 117. *The recorder of a court of inquiry shall administer to the members the following oath: "You shall well and truly examine and inquire, according to the evidence, into the matter now before you, without partiality, favor, affection, prejudice, or hope of reward: so help you God." After which the president of the court shall administer to the recorder the following oath: "You, A B, do swear that you will, according to your best abilities, accurately and impartially record the proceedings of the court and the evidence to be given in the case in hearing: so help you God."*[4]

ARTICLE 118. *A court of inquiry, and the recorder thereof, shall have the same power to summon and examine witnesses as is given to courts-martial and the judge-advocates thereof. Such witnesses shall take the same oath which is taken by witnesses before courts-martial, and the party accused shall*

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[1] Dig. J. A. Gen., 136, par. 2.

[2] Dig. J. A. Gen., 136, par. 4. See Macomb, § 204; O'Brien, 292; De Hart, 278. In the Joint Resolution of Congress of Feb. 13, 1874, authorizing the President to convene a certain special court of inquiry, it was "provided that the accused may be allowed the same right of challenge as allowed by law in trials by court-martial." It appears, however, to have been regarded in the debate on this Resolution (see Cong. Rec., vol. 2, Nos. 38, 40) that this provision was unnecessary to entitle the party to the privilege.

[3] Dig. J. A. Gen., 137, par. 5. A loose observation of Hough (Authorities, 10) that "contempts before courts of inquiry are as much punishable as before courts-martial" has been carelessly repeated by several American writers. The recent English writer, Clode, correctly states the law (as to witnesses) in saying (Mil. and Mar. Law, 198) that a court of inquiry "has no power to punish them for contumacy or silence."

[4] See Art. 115, *supra*.

be permitted to examine and cross-examine them, so as fully to investigate the circumstances in question.

The first clause of this Article was made the subject of Congressional enactment in 1863,[1] prior to which date the court had power to summon witnesses only. The requirements of the Article in respect to the oaths to be administered to witnesses and the right of parties to cross-examine them were drawn from the 91st and 93d of the Articles of 1806.

ARTICLE 119. *A court of inquiry shall not give an opinion on the merits of the case inquired of unless specially ordered to do so.*

An opinion given by a court of inquiry is not in the nature of a sentence or adjudication pronounced upon a *trial*. The accused, upon a subsequent trial, by court-martial, of charges investigated by a court of inquiry, cannot plead the proceedings or opinion of the latter as a former trial, acquittal, or conviction.[2]

While it is of course desirable that the members of a court of inquiry, directed to express an opinion, should concur in their conclusions, they are not required to do so by law or regulation.[3] The majority does not govern the minority as in the case of a finding or sentence by court-martial. If a member or a minority of members cannot conscientiously and without a weak yielding of independent convictions agree with the majority, it is better that such member or members should formally disagree and present a separate report (or reports) accordingly. The very disagreement indeed of intelligent minds is a material and important fact in the case, and one of which the reviewing authority is entitled to have the advantage in his consideration of and action upon the same.[4]

Where, as in the majority of cases, the inquiry is instituted with a view of assisting the determination, by the President or a military commander, of the question whether the party should be brought to trial, the opinion of the court will properly be as to whether further proceedings before a court-martial are called for in the case, with the reasons for the conclusions reached. Where no such view enters into the inquiry, but the court is convened to investigate a question of military right, responsibility, conduct, etc., the opinion will properly confine itself to the special question proposed and its legitimate military relations. A court of inquiry, composed as it is

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[1] Section 25, Act of March 3, 1863 (12 Stat. at Large, 754).

[2] Dig. J. A. Gen., 137, par. 1.

[3] In the case of the court of inquiry (composed of seven general officers) on the Cintra Convention, in 1808, the members who dissented from the majority were required by the convening authority to put on record their opinions, and three dissenting opinions were accordingly given. A further instance, in which two of the five members of the court gave each a separate dissenting opinion, is cited by Hough, Precedents, 642. Mainly upon the authority of the former case both Hough (Precedents, 642) and Simmons (§ 339) hold that members non-concurring with the majority are entitled to have their opinions reported in the record.

[4] Dig. J. A. Gen., 137, par. 2.

of military men, will rarely find itself called upon to express an opinion upon questions of a purely legal character.[1]

It is not irregular, but authorized, for a court of inquiry, in a proper case, to reflect, in connection with its opinion, upon any improper language or conduct of the accused, prosecuting witness, or other person appearing before it during the investigation.[2]

ARTICLE 120. *The proceedings of a court of inquiry must be authenticated by the signatures of the recorder and the president thereof, and delivered to the commanding officer.*[3]

ARTICLE 121. *The proceedings of a court of inquiry may be admitted as evidence by a court-martial in cases not capital nor extending to the dismissal of an officer, provided that the circumstances are such that oral testimony cannot be obtained.*[4]

While the proceedings of a court of inquiry cannot be admitted as evidence on the merits upon a trial before a court-martial of an offense for which the sentence of dismissal will be mandatory upon conviction,[4] it has been held that upon the trial of such offense, as upon any other, such proceedings, properly authenticated, would be admissible in evidence for the purpose of impeaching the statements of a witness upon the trial who, it was proposed to show, had made quite different statements upon the hearing before the court of inquiry.[5]

ARTICLE 122. *If, upon marches, guards, or in quarters, different corps of the Army happen to join or do duty together, the officer highest in rank of the line of the Army, Marine Corps, or militia, by commission, there on duty or in quarters, shall command the whole, and give orders for what is needful to the service, unless otherwise specially directed by the President, according to the nature of the case.*[1]

Articles 25, 26, and 27, Section 14, of the British Code of 1774 contain provisions respecting the relative rank of officers of the Household Troops, or personal guards of the sovereign, when serving in conjunction with officers of other regiments of the British military establishment. The principle in respect to the right of command therein prescribed, "that the senior officer present for duty shall command the whole," was embodied in Articles

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[1] Dig. J. A. Gen., 138, par. 3. In an exceptional case, that of the special court of inquiry authorized by Congress in the Joint Resolution of Feb. 13, 1874, the court was required to express an opinion not only upon the "moral" but upon the "technical and legal responsibility" of the officer for the "offenses" charged.

[2] *Ibid.*, par. 4. Thus the court of inquiry on the conduct of the Seminole War adverted in its opinion unfavorably upon certain offensive and reprehensible language employed against each other by the two general officers concerned, the one in his statement to the court and the other in his official communications which were put in evidence. See G. O. 13, Hdqrs. of Army, 1837.

[3] See Article 115, *supra.*

[4] Compare G. O. 33, Dept. of Arizona, 1871.

[5] Dig. J. A. Gen., 139. See this ruling published, as adopted by the President, in G. C. M. O. 40, Hdqrs. of Army, 1880.

25 and 26, Section 13, of the American Code of 1776, and was there applied to the case of troops of the United States serving in connection with those belonging to the several States. In the Articles of 1806, Article 25, Section 13, of the Code of 1776 appears as Article 62 (Article 26 being omitted), to which the provision which is embodied in the last clause of Article 122 was added; the added clause being in substance an express recognition of the constitutional powers of the President as commander-in-chief, but in form an excepting clause containing a direction that the rule of command therein prescribed should not apply "when otherwise specially directed by the President of the United States, according to the nature of the case." [1]

[1] The terms "rank" and "command" have received executive interpretation in paragraphs 7 and 13 of the Army Regulations of 1895.

Military rank is that character or quality bestowed on military persons which marks their station, and confers eligibility to exercise command or authority in the military service within the limits prescribed by law. It is divided into degrees or grades, which mark the relative positions and powers of the different classes of persons possessing it. Par 7, A. R. 1895.

Rank is generally held by virtue of office in a regiment, corps, or department, but may be conferred independently of office, as in the case of retired officers and of those holding it by brevet. Par. 8, A. R. 1895.

The following are the grades of rank of officers and non-commissioned officers:

1. Major-general.
2. Brigadier-general.
3. Colonel.
4. Lieutenant-colonel.
5. Major.
6. Captain.
7. First lieutenant.
8. Second lieutenant.
9. Cadet.
10. Sergeant-major (regimental).
11. Quartermaster-sergeant (regimental).
12. Ordnance, commissary, and post quartermaster-sergeant, hospital steward, first-class sergeant of the Signal Corps, chief musician, principal musician, chief trumpeter, and saddler-sergeant.
13. First sergeant.
14. Sergeant and acting hospital steward.
15. Corporal.

In each grade date of commission, appointment, or warrant determines the order of precedence. Par 9, A. R. 1895.

A determination by the legislative and executive branches of the Government as to the relation or superior authority among military officers is conclusive upon the judiciary. De Celis *vs.* U. S., 13 C. Cls. R., 117.

Command is exercised by virtue of office and the special assignment of officers holding military rank who are eligible by law to exercise command. Without orders from competent authority an officer cannot put himself on duty by virtue of his commission alone, except as contemplated in the 24th and 122d Articles of War. Par. 13, A. R. 1895.

The following are the commands appropriate to each grade:

1. For a captain, a company.
2. For a major or lieutenant-colonel, a battalion or squadron.
3. For a colonel, a regiment.
4. For a brigadier-general, two regiments.
5. For a major-general, four regiments. Par. 14, A. R. 1895.

The functions assigned to any officer in these regulations by title of office devolve upon the officer acting in his place, except when otherwise specified. An officer in temporary command shall not, except in urgent cases, alter or annul the standing orders of the permanent commander without authority from the next higher commander. Par. 15, A. R. 1895.

An officer who succeeds to any command or duty stands in regard to his duties in the same situation as his predecessor. The officer relieved will turn over to his successor all orders in force at the time and all the public property and funds pertaining to his command or duty, and will receive therefor duplicate receipts showing the condition of each article. Par. 16, A. R. 1895.

ARTICLE 123. *In all matters relating to the rank, duties, and rights of officers the same rules and regulations shall apply to officers of the Regular Army and to volunteers commissioned in or mustered into said service, under the laws of the United States, for a limited period.*[1]

This provision first appeared in statutory form as Section 2 of the Act of March 2, 1867.[2] It was embodied without change as Article 123 of the revision of 1874.

ARTICLE 124. *Officers of the militia of the several States when called into the service of the United States shall, on all detachments, courts-martial, and other duty wherein they may be employed in conjunction with the regular or volunteer forces of the United States, take rank next after all officers of the like grade in said regular or volunteer forces, notwithstanding the commissions of such militia officers may be older than the commissions of the said officers of the regular or volunteer forces of the United States.*

The provision embodied in this Article, though derived in its present form from an enactment of relatively recent date,[3] is in substance a re-enactment of a principle well known to British military practice, which regulates the relative rank of officers of the regular establishment when serving with detachments of colonial forces. The provision in question will be found in Section 19 of the British Code of 1774, which relates to the relative rank of the officers of the British troops serving in America in conjunction with the several contingents of troops furnished by the colonies in the wars prior to the outbreak of the Revolution.

ARTICLE 125. *In case of the death of any officer, the major of his regiment, or the officer doing the major's duty, or the second officer in command at any post or garrison, as the case may be, shall immediately secure all his effects then in camp or quarters, and shall make, and transmit to the office of the Department of War, an inventory thereof.*

This provision appeared as the first clause of Article 1, Section 17, of the British Code of 1774, as Article 1, Section 15, of the American Code of 1776, and as No. 94 of the Articles of 1806. This Article, in connection with the two preceding Articles, provides for the securing of the effects of deceased officers and soldiers, making inventory of the same, and accounting for them to the proper legal representative, etc. These Articles have special reference to cases of military persons who die while in active service in the field or at remote military posts, and their provisions apply only to such effects as are left by the deceased "in camp or quarters." An attempt by the commander, etc., to secure effects left elsewhere would not be within

[1] For a discussion of this subject in its application to court-martial procedure, see the chapters entitled respectively THE CONSTITUTION OF COURTS-MARTIAL, THE COMPOSITION OF COURTS-MARTIAL, and THE INCIDENTS OF THE TRIAL. See, also, notes to Article 122, *supra*.

[2] 14 Stat. at Large, 435.

[3] Section 2, Act of March 2, 1862 (14 Stat. at Large, 430).

the authority here given, and might subject the officer to the liability of an administrator; such a proceeding would not, therefore, be advisable.[1] Upon accounting to the duly qualified legal representative, as directed in the Article, the responsibility of the officer is discharged, and it remains for the representative of the deceased to dispose of the property according to the law applicable to the case.[2]

ARTICLE 126. *In case of the death of any soldier, the commanding officer of his troop, battery, or company shall immediately secure all his effects then in camp or quarters, and shall, in the presence of two other officers, make an inventory thereof, which he shall transmit to the office of the Department of War.*

This appeared as Article 2, Section 17, of the British Code of 1774, as Article 2, Section 15, of the American Code of 1776, and as No. 95 of the Articles of 1806.[3]

ARTICLE 127. *Officers charged with the care of the effects of deceased officers or soldiers shall account for and deliver the same, or the proceeds thereof, to the legal representatives of such deceased officers or soldiers. And no officer so charged shall be permitted to quit the regiment or post until he has deposited in the hands of the commanding officer all the effects of such deceased officers or soldiers not so accounted for and delivered.*[4]

ARTICLE 128. *The foregoing articles shall be read and published once in every six months to every garrison, regiment, troop, or company in the service of the United States, and shall be duly observed and obeyed by all officers and soldiers in said service.*

Article 1, Section 20, of the British Code of 1774 contained the requirement that the Articles of War should be read to the troops once in two months, and this provision was embodied as Article 1, Section 19, in the American Code of 1776. The clause requiring the Articles to be read every two months was, in Article 101 of the Code of 1806, modified so as to require such reading once in six months; in this form the Article was embodied in the revison of 1874.

SECTION 1343. All persons who, in time of war, or of rebellion against the supreme authority of the United States, shall be found lurking or acting as spies in or about any of the fortifications, posts, quarters, or encamp-

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[1] Compare Samuel, 659; Hough (Practice), 558.

[2] Dig. J. A. Gen., 139, par. 1. A military employee of the United States service having died in the service, his remains, at the request of his relatives, were sent to them on a Mississippi steamboat. Wages being due to the employee at the time of his death, the disbursing officer paid out of these the charges of the transportation, and turned over the balance to the man's heirs. *Held*, in view of the tenor and effect of this Article, that the disposition of the funds in this case was erroneous, and that the full wages due (without deduction) should have been accounted for to the "legal representatives" of the deceased. *Ibid.*, par. 2.

[3] See Article 125, *supra*.

[4] See Articles 125 and 126, *supra*.

ments of any of the armies of the United States, or elsewhere, shall be triable by a general court-martial or by a military commission, and shall, on conviction thereof, suffer death.

Section 1343 is one of the few provisions of our law authorizing the trial, in time of war, of *civilians* by military courts. The majority, however, of the persons brought to trial as spies during the late war were members of the army of the enemy. The gravamen of the offense of the spy is the treachery or deception practiced—the being in disguise or acting under false pretenses.[1] An officer or soldier of the enemy discovered "lurking" in or near a camp or post of our army disguised in the uniform or overcoat of a United States soldier is *prima facie* a spy, and liable to trial as such. So an officer or soldier of the enemy who without authority and covertly penetrates within our lines, disguised in the dress of a civilian, may ordinarily be presumed to have come in the character of a spy, unless by satisfactory evidence that he came for some comparatively venial purpose, as to visit his family, and not for the purpose of obtaining information, he may rebut the presumption against him and show that his offense was a simple violation of the laws of war.[2]

Where an officer of the enemy's army, arrested while lurking in the State of New York in the disguise of citizen's dress, was shown to have been in the habit of passing, for hostile purposes, to and from Canada, where he held communication with agents of the enemy and conveyed intelligence to them, *held* that he was amenable to trial as a spy before a military court under the statute.[3]

An officer of the enemy's army, having come secretly within our lines, proceeded from Baltimore through a part of the country containing numerous military posts, etc., to Detroit, where he entered Canada, communicated with the enemy's agents there and received from them letters to be conveyed to Richmond. On his return, while traveling under an assumed name, and disguised by citizen's dress and an artificial coloring of the hair, he was recognized and arrested, and upon his arrest destroyed at once his papers. It was held that he might properly be brought to trial and his offense investigated under a charge of being a spy, and that his claim that he was merely a bearer of official dispatches was entitled to but slight consideration in view of the fact that he had taken the first opportunity to destroy the evidence on which such claim was based.[4]

Where a soldier of the enemy's army, separated from it on its retreat from Maryland in 1864, was arrested, after wandering about in disguise within our lines for a month, seeking for an opportunity to make his way to

[1] Halleck, Int. Law, 406–7.
[2] Dig. J. A. Gen., 708, par. 1.
[3] *Ibid.*, par. 2.
[4] *Ibid.*, 709, par. 3.

the enemy's forces and join his regiment, it was held that he was not properly chargeable with the offense of being a spy, but should be treated as a prisoner of war.[1]

A mere violation of the law of war prohibiting intercourse between belligerents, committed by a civilian in coming without authority within our lines from the enemy's country, cannot properly be regarded as attaching to him the character of a spy.[2]

The spy must be taken *in flagrante delicto*. If he succeeds in making his return to his own army or country, the crime, according to a well-settled principle of public law, does not follow him; and if subsequently captured in battle or otherwise, he cannot properly be brought to trial as a spy.[3]

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[1] Dig. J. A. Gen., 709, par. 4.
[2] *Ibid.*, 710, par. 5.
[3] *Ibid.*, par. 6. The leading case on this point in this country is In the Matter of Martin, reported in 45 Barb., 142, and 31 How. Pr., 228.

APPENDICES.

APPENDIX A.

THE PRINCE RUPERT ARTICLES.[1]

ARTICLES AND RULES FOR THE BETTER GOVERNMENT OF HIS MAJESTIES FORCES BY LAND DURING THIS PRESENT WAR.[2]

PUBLISHED BY HIS MAJESTIES COMMAND.

MDCLXXIII.

DUTIES TO ALMIGHTY GOD.

Article 1. All Officers and Souldiers (not having just impediment) shall diligently frequent divine service and sermon, on Sundays, and other days,

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[1] These Articles appear in Volume XV of the Parliamentary Papers, 1867, p 238, accompanied by the following note, presumably by Mr. Clode, the author of the "Military Forces of the Crown":

"These Articles, at the time of their promulgation, gave rise to much controversy in the House of Commons. In the debate on the resolution of the standing army being a grievance, Mr. Secretary Coventry explained the origin of these Articles. 'Martial law,' he said, 'then was the same as it had ever been.'

"'In Lord Stafford's command, and the Earl of Holland's, where he disbanded the northern army and that of Lord Essex's army (we may learn of our enemies), these were compared with all Articles, and the best were extracted, and you will find there no French Articles.' They were only to be executed when the army was abroad, and then the king's name was used.* They were issued by Prince Rupert's authority, and would determine with his commission.† The fact that they were issued by Prince Rupert, and not by the king, received a singular confirmation, from the Articles not being found in the State Paper Office, though I have searched for them in the year 1673. The copy printed here is from what purports to be an original print of the Articles on thirty-one folio pages, and which was brought to the War Office in 1859 by one of the poor brethren of the Charter House.

"These Articles must be distinguished from a 'Proclamation issued by Charles II. by Order in Council of the 6th of December, 1672,' and which was presented as a grievance by the House of Commons. The proclamation was for preventing of disorders that may be committed by soldiers, and is to be found as No. 305 of State Papers Proclamations, 1672.

"The Council Books contain the following entry:

"'At the Court of Whitehall, this 6th Dec. 1672.

"'Present:

"'The King's Most Excellent Mat^ie &c. &c.

"'This day his Ma^tie Proclamation for preventing of disorders that may be committed by soldiers being read at the Board, was approved and signed by his Ma^tie, and accordingly ordered to be printed and published.'" ‡

[2] The "present war" here referred to is that between England and Holland, which began on March 17, 1672, and was terminated by the Treaty of Westminster on February 9, 1674.

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* 4 Parliamentary History, 605.

† *Ibid.*, 619.

‡ See, also, Manual of Military Law, p. 8; Clode, Military Law, p. 15.

especially festivals, or days set apart for publick fasting and humiliation, in such places as shall be appointed for the Regiment wherein they serve. And for those who either wilfully or negligently absent themselves from divine service or sermon, or else, being present, do behave themselves undecently or irreverently during the same; if they be Officers, they shall be severely reprehended at a Court-martial; but if Souldiers, they shall for every such first offence, forfeit each man 12 pence, to be deducted out of his next pay; and for the second offence, shall forfeit 12 pence, and be laid in Irons for 12 hours. And for every like offence afterwards, shall suffer and pay in like manner.

Article 2. During the time of divine service, publick prayer, and sermon, as aforesaid, if any sutler, or seller of ale, beer, wine or any other drinks, bread, victuals, or other Commodities or merchandize whatsoever, attending the Army, shall put or set any such thing to sale, he shall forfeit the full value thereof, for the use of the poor.

Article 3. Whosoever shall use any unlawful Oath or Execration (whether Officer or Souldier) shall incur the same penalty as is exprest in the 1st Article.

Article 4. If any Officer or Souldier, shall presume to blaspheme the holy and undivided Trinity, or the Persons of God the Father, God the Son, or God the Holy Ghost, or shall presume to speak against any known Article of the Christian Faith, he shall have his tongue burned through with a red hot Iron.

Article 5. If any Officer or Souldier shall abuse or prophane any place dedicated to the Worship of God, or shall offer violence to any Chaplain of the Army, or any other Minister of God's Word, he shall suffer such punishment, as shall be inflicted on him by a Court-martial.

But whoever shall take any of the Utensils, or Ornaments, belonging, or dedicated to God's Worship in any Church or Chappel, shall suffer death for the fact.

Article 6. After the service of God Almighty, all Officers and Souldiers shall serve Us faithfully to the best of their skill, power, and understanding. And to that purpose, every one of them, of what quality or condition soever, shall for himself take the following Oath, which shall be administered by such person or persons, and in such places, as Our Self or Our General shall appoint.

DUTIES TO HIS SACRED MAJESTY, AND KINGLY GOVERNMENT.

The Oath of Fidelity, to be taken by every Officer and Souldier in the Army:

I, A. B., do Swear to be true and faithful to my Soveraign Lord King CHARLES, and to His HEIRS and lawful Successors; And to be obedient in

all things to his General or Lieutenant General, for the time being; And will behave myself obediently towards my Superiour Officers, in all they shall command me for His Majesties Service. And I do further Swear, That I will be a true, faithful, and obedient Servant and Souldier, every way performing my best endeavours for His Majesties Service, obeying all Orders, and submitting to all such Rules and Articles of War, as are, or shall be, established by His Majesty.

So help me God, etc.

Article 7. No Officer or Souldier shall use any traiterous words against the sacred Person of the King's most Excellent Majesty, upon pain of death.

Article 8. Whosoever shall hold correspondence with any of Our Enemies, or shall give them advice or intelligence, either by letters, messages, signs, or tokens, or any manner of way whatsoever, shall suffer death for it.

And whatever Regiment, Troop, or Company shall treat with the Enemy, or enter into any condition with them, without Our leave, or leave of Our General, or of the chief Commander in his absence; the Officers of such Regiment, Troop, or Company, who are found guilty, shall dye for it; and of the Souldiers who shall consent thereunto, every tenth man by lot shall be hanged, and the rest shall be punished at the discretion of Our General Court-martial. But whatever Officers or Souldiers can prove, that they did their utmost to resist and avoid such a treaty, and were no way partakers of the crime, they shall not only go free, but shall also be rewarded for their constancy and fidelity.

Article 9. Whoever shall go about to entice or perswade, either Officer or Souldier, to joyn or engage in any traiterous or rebellious act, either against Our Royal Person or Kingly Government, shall suffer death for it: And whoever shall not reveal to his superiour Officer such a conspiracy or intended rebellion, so soon as ever it shall come to his knowledge, shall be judged equally guilty with the contrivers of such a plot or conspiracy, and consequently shall suffer the same penalty.

Article 10. Whoever shall presume to violate Our Safe-guard, Safe-conduct, or Protection (knowing the same) shall suffer death or such other punishment as shall be inflicted upon him by Our General Court-martial.

DUTIES TOWARDS SUPERIOUR OFFICERS AND COMMANDERS.

Article 11. If any Officer or Souldier shall behave himself disrespectfully towards Our General, Lieutenant General, or other Chief Commander of the Army, or speak words tending to his harm or dishonour, he shall be punished according to the nature and quality of the offence, by the Judgment of Our General Court-martial.

Article 12. He, who in the presence of Our General, Lieutenant

General, or other Commander in Chief, shall draw his Sword, with a purpose to do any Officer, or any of his fellow Souldiers, a mischief, shall suffer such punishment as a Court-martial shall think fit to inflict upon him for the same offense.

Article 13. Whoever shall presume to violate any Safe-conduct or Protection, given by Our General, Lieutenant General, or other Commander in Chief of Our Forces (knowing the same) shall suffer death, or such other punishment as shall be inflicted upon him by Our General Court-martial.

Article 14. If any number of Souldiers shall presume to assemble to take council amongst themselves for the demanding their pay, any inferiour Officers accessary thereunto shall suffer death for it, as the heads and ring-leaders of such mutinous and seditious meetings; and the Souldiers shall be punished, either with death or otherwise, at the discretion of Our General Court-martial. And if any Captain, being privy thereunto, shall not suppress the same, or complain of it, he shall likewise be punished with death or otherwise, as Our General Court-martial shall think fit.

Article 15. No officer or Souldier shall use any words tending to sedition, mutiny, or uproar, upon pain of suffering such punishment as shall be inflicted on him by a Court-martial. And whoever shall hear any mutinous or seditious words spoken, and shall not with all possible speed reveal the same to his superiour Officers or Commanders, shall be punished as a Court-martial shall think fit.

Article 16. If any inferiour Officer or Souldier, shall refuse to obey his superiour Officer, or shall quarrel with him, he shall be cashier'd, or suffer such punishment as a Court-martial shall think fit. But if any Souldier shall presume to resist any Officer in the execution of his Office, or shall strike, or lift up his hand to strike, or shall draw, or offer to draw, or lift up any weapon against his superiour Officer, upon any pretense whatsoever, he shall suffer death, or other condign punishment, as our General Court-martial shall think fit.

DUTIES IN MARCHING OR IN ACTION.

Article 17. Every Souldier shall keep silence when the Army is marching, embattelling, or taking up their quarters (to the end that their Officers may be heard, and their Orders executed) upon pain of imprisonment, or such other punishment as a Court-martial shall think fit, according to the circumstances and aggravation of the fact.

Article 18. He who shall in anger draw his sword, whilst his Colours are flying, either in battel, or upon the march, unless it be against the Enemy, shall suffer such punishment as a Court-martial shall think fit.

Article 19. When any march is to be made, every man who is sworn, shall follow his Colours, and whoever shall (without leave) stay behind, or

depart above a mile from the Camp, or out of the Army, without license, shall suffer such punishment as shall be inflicted upon him by a Court-martial.

Article 20. When the Army, or any part of them, shall march through or lodge in the country, none of them shall extort free quarter or money from them, or shall commit any waste or spoil, or cut down fruit-trees, deface walks of trees, parks, warrens, fish-ponds, houses or gardens, tread down or otherwise destroy standing corn in the ear, neither shall they put their horses into meadows without leave from their chief Officer, upon pain of severe punishment. But if any Officer or Souldier shall wilfully burn any house, barn, stack of corn, hay, or straw, or any ship, boat, or carriage, or anything which may serve for the provision of the Army, without order from the Commanding Chief, he shall suffer death for it.

Article 21. When the army, or any part thereof, shall come to engage the Enemy in fight, whoever shall run from his Colours (be he native or stranger) or doth not defend them to the utmost of his power, so long as they are in any danger, shall suffer death for it. And whatsoever Souldiers shall at any other time run away from his Colours, shall suffer death, or such other punishment as Our General Court-martial shall think fit.

ORDERS AND RULES WHEN AN ENEMY IS SUBDUED, ETC.

Article 22. If any Regiment or commanded party, shall not behave themselves in fight against an Enemy as they ought to do, they shall answer for it before Our General Court-martial; and the Officer or Souldier, who shall be found faulty therein, shall suffer such punishment as shall be thought fit to be inflicted on them by Our General Court-martial.

Article 23. When it shall please God that Our forces shall beat the Enemy, every man shall follow his Officer in the chase; but whoever shall presume to pillage or plunder till the Enemy be entirely beaten, and if misfortune happen, he shall suffer death, or such other punishment as shall be pronounced against him by Our General Court-martial, and the pillage so gotten shall be forfeited to the use of the sick and maimed Souldiers.

Article 24. When any Town or place shall be taken (though by assault) no man shall presume to pillage any Church or Hospital (without leave or necessary reason) much less to set fire to any Church Hospital, School, or Mill; neither shall they offer violence to any Churchmen, aged men or women, maids or children, unless they be found actually in arms against them, upon pain of death, or other punishment at the discretion of Our General Court-martial; but whoever shall force a woman to abuse her (whether belonging to the Enemy or not) and the fact be sufficiently proved against him, he shall certainly suffer death for it.

Article 25. In what place soever it shall please God that the Enemy shall be subdued and overcome, all the Ordnance, Ammunition, and Victuals, that shall be there found, shall be secured for Our use, and for the better relief of the Army; and one-tenth part of all the spoil shall be laid apart towards the relief of the sick and maimed Souldiers.

Article 26. Whosoever shall take any General Officers as prisoners, shall present them to Us, or Our General, who will reward them. And they who shall take other prisoners, may keep to themselves the Officers and Voluntiers, giving their names to the Martial General; but shall not put them to ransome, without Our, or Our General's leave. And they are immediately to send all private Souldiers so taken to the Martial General, who is to take them into custody.

DUTIES IN CAMP, OR IN GARRISON.

Article 27. If any Souldiers shall be drunk in the Enemies quarters, before they have wholly laid down their arms and yielded to mercy, and any hurt or mischief ensue thereon, such drunken Souldier shall suffer death for it, or such other punishment as Our General Court-martial shall think fit; but if no damage ensue thereby, they shall be laid in Irons, and live on bread and water for the space of three days.

Article 28. All Officers, whose charge it is, shall see the quarters kept clean and neat, upon pain of severe punishment.

Article 29. No Officer shall lye out all night from the Camp or Garrison, without his superiour Officer's leave obtained for the same, upon pain of being punished for it as a Court-martial shall think fit. Neither shall any Souldier or Officer go any by-way to the Camp, other than the common way laid out for all, upon pain of being punished as aforesaid. But if any Officer shall without leave, be absent from his quarters a week, he shall lose one month's pay; and if longer, he shall be discharged of his Command, or place, as a man unfit to bear Office in the Army.

Article 30. No Souldier shall presume to make any alarm in the quarter, by shooting off his musquet in the night, after the watch is set, unless it be at an Enemy, upon pain of suffering such punishment as a Court-martial shall think fit.

Article 31. No Souldier shall in anger draw his sword in any Camp, Post, or Garrison, upon pain of suffering such punishment as a Court-martial shall think fit to inflict upon him for the same.

Article 32. When warning is given for setting the watch, by beat of drum, or the sound of trumpet or fife, if any Souldier shall absent himself without reasonable cause, he shall be punished by riding a wooden horse, or otherwise, at the discretion of the Commander.

And whatever Souldier shall fail at the beating of a drum, or the sound

of a trumpet or fife, or upon an alarm given, to repair to his Colours, with his arms decently kept and well fix'd (unless there be an evident necessity to hinder him from the same) he shall either be clap'd in Irons for it, or suffer such other punishment as a Court-martial shall think fit.

Article 33. Whoever makes known the Watch-word without order, or gives any other Word but what is given by the Officer, shall suffer death, or such other punishment as Our General Court-martial shall think fit.

Article 34. A Centinel, who is found sleeping in any Post, Garrison, Trench, or the like (while he should be upon his duty) shall suffer death, or such other punishment as Our General Court-martial shall by their sentence inflict for the same.

And if a Centinel or Perdue shall forsake his place, before he be relieved or drawn off, or upon discovery of an Enemy shall not give warning to his quarters according to direction, he shall suffer death, or such other punishment as Our General Court-martial shall think fit.

As likewise, if any Souldier imployed as a Scout, shall not go upon that service so far as he is commanded, or having discovered an ambush or approach of the Enemy, shall not return forthwith to give notice or warning to his quarters, or if he enter into any house, and there or elsewhere be found sleeping or drunk, whilst he should have been upon the service, he shall suffer death, or such other punishment as shall be inflicted upon him by the sentence of Our General Court-martial.

Article 35. Whoever shall do violence to any who shall bring victuals to the Camp or Garrison, or shall take his horse or goods, shall suffer death, or such other punishment as he shall be sentenced to by Our General Court-martial.

If any shall presume to beat or abuse his host, or the wife, child, or servant of his host, where he is quartered or billetted, he shall be put in Irons for it: And if he do it a second time, he shall be further punished, and the party wrong'd shall have amends made him: And if any presume to exact free quarter, without leave of the chief Officer upon the place, they shall be severely punish'd at the discretion of a Court-martial.

Article 36. No Souldier or Officer shall use any reproachful or provoking speech or act to another, upon pain of Imprisonment, and such further punishment as a Court-martial shall think fit.

Neither shall any Officer or Souldier presume to send a challenge to any other Officer or Souldier, to fight a duel:

Neither shall any Souldier or Officer presume to upbraid another for refusing a challenge: for, whoever shall offend in either of these cases, if he be an Officer, he shall lose his place and command, whatever it be; and if a private Souldier, he shall ride the wooden horse, and be further punished as a Court-martial shall think fit.

And if any Corporal, or other Officer, commanding a guard, shall will-

ingly or knowingly, suffer either Souldiers or Officers, to go forth to a duel, or private fight, he shall be punished for it by the sentence of a Court-martial.

Forasmuch as all Officers, of what condition soever, shall have power to part and quell all quarrels, frays, or sudden disorders between Souldiers and Officers, though of another Company, Troop, or Regiment, and to commit the disorder'd persons to prison, until their proper Officers be acquainted therewith: And whoever shall resist such an Officer (though of another Company, Troop, or Regiment) or draw his sword upon him, shall be severely punish'd as Our General Court-martial shall appoint.

But if two or more going into the field to fight a duel, shall draw their swords, or other weapons, and fight, though neither of them fall upon the spot, nor dye afterwards of any wound there received, yet if they be Officers, they shall lose their places; and if common Souldiers, they shall be punish'd with riding the wooden horse, or otherwise as a Court-martial shall direct.

And lastly, in all cases of duels, the seconds shall be taken as principals and punish'd accordingly.

ORDERS AND RULES FOR THE REGULATION OF MUSTERS.

Article 37. None shall be mustered, but such as are completely armed, viz., each horseman to have for his defensive arms, back, breast, and pott, and for his offensive arms, a sword, not under three foot long in the blade, and a case of pistols, the barrels whereof not to be under fourteen inches in length, and each trooper of Our Guards to have a carbine, besides the aforesaid arms; and the foot to have each souldier a sword, or dagger for their musquets, and each pikeman a pike of sixteen foot long and not under; and each musquettier a musquet (with a collar of bandaliers) the barrel of which musquet to be about four foot long, and to contain a bullet, fourteen of which shall make a pound, running into the barrel.

If any borrow arms of another to pass the muster withall, the lender, if he be a souldier, shall forfeit the value of the arms so lent, to be taken out of his pay, and the borrower shall be severely punish'd.

Article 38. None shall be allowed upon any muster, who, by loss of limbs, or otherwise, is unable for Our service, but by order from Us, or Our General.

Article 39. No house-keeper or inhabitant in the usual quarters of Our guards of horse or foot, or in the usual quarters of any other regiment or garrison, shall be received or entertained with Our service and pay, and mustered as a private souldier, without order from Us, or Our General; nor shall any Officer demand or receive directly or indirectly any sum of money whatever, from any under his command, for admitting and entertaining him

into his troop, company, or garrison, upon pain of being cashier'd, and rendered uncapable of ever being imployed again in the Army.

Article 40. No Captain of a troop or company shall, upon pain of being rendered uncapable of ever serving in Our Army any more, be allowed to muster any servant in his troop or company, but those who are not only fit and able for Our service, but also are bound by oath and pay to follow the troop or company, and who duly and constantly appear at every muster in proper arms, unless they have leave to be absent, which is not to be granted, but upon a real and good occasion.

And whatever other person shall present himself or his horse in the muster to mislead the Muster-master, or defraud Us, shall suffer such punishment as Our General Court-martial shall think fit.

Article 41. No man shall presume to present himself to the muster, to be inrolled in the muster-rolls, by a counterfeit or wrong name, or sirname, or place of birth or habitation, upon pain of such punishment as Our General Court-martial shall think fit.

Article 42. No Officer or Souldier shall be allowed or passed the muster, who does not diligently attend his duty, and appear at the muster, unless he be absent by Our permission, or leave from Our General, or the chief Officer commanding the regiment, troop, or company, to which he belongs.

And no Officer or Souldier is to be absent as aforesaid (without leave from Us or Our General) for above two months in a year.

And there are to be always two Commission Officers at least with every troop or company, save only in the troops of horse and companies of foot which are in garrison, of which field-Officers or Captains, in which troops and companies respectively one Commission-Officer (at least) is to be present with them.

Article 43. All passes and licenses for being absent shall be brought to the Muster-master, who is required to enter the same in a book fairly written, to prevent collusion; and whoever is absent longer than the time limited in his pass for his absence, shall be respited and not allowed the muster, without order from Us or Our General.

But if the Commissaries-General, shall upon the muster find too many absent from any troop or company at a time, they are to complain to Us, or Our General.

Article 44. No muster-master shall knowingly let any pass the musters, but such as are qualified according to the precedent articles, upon the penalty of losing his place.

Article 45. Whatever Lieutenant, Cornet, or Ensign, shall discover and make proof, to the General Officer or Colonel, that his Captain hath made false musters, the said Captain shall be cashier'd, and the Lieutenant, or Ensign discovering as aforesaid, shall have the place of his Captain.

And whatever Serjeant or Corporal shall discover and make proof of false

musters as aforesaid, the said Serjeant or Corporal shall have for each time the sum of fifty pounds, payable by the Pay-master at the first muster immediately following the discovery so made.

But if the accusation shall upon examination be found false or malicious, in that case, he shall be immediately cashier'd, and suffer such further punishment as shall be judged fit by Our General Court-martial.

Article 46. If any Souldier shall be sick, wounded, or maimed in Our service, he shall be sent out of the camp to some fit place for his recovery, where he shall be provided for by the Officer appointed to take care of sick and wounded Souldiers, and his wages or pay shall go on, and be duly paid, till it does appear that he can be no longer serviceable in Our Army, and then he shall be sent by pass to the countrey, and the money to bear his charges in his travel.

Article 47. All Captains shall use their utmost endeavours to have their troops and companies compleat and full, and within two days after each general muster, both the Captain and Our Muster-master shall send to the General (if he require it) and to the Treasurer or Pay-master of the Army, a perfect list or roll of all the Officers, Troopers, and Souldiers, or their troops and companies, that are in actual service, punctually expressing at the foot of the rolls, what new Officers, Troopers, and Souldiers have been entertained since the preceding muster, in lieu of such as have been cashier'd or are deceased, with the day when the one dyed or went off, and the other was entertained in his place.

Article 48. All commissions granted by Us, or Our General, to any Officer in pay, shall be brought to the Muster-master, who is to record and enter the same in a book fairly written.

And no Commissioned-Officer shall be allowed in musters, without a commission from Us or Our General, and the same entered with the Commissaries General of the musters, or their Deputies, who are hereby required forthwith, and from time to time, to send the Officers names to the Secretary and Judge Advocate of Our Forces.

Article 49. No Commission Officer after inrollment and being mustered, shall be dismiss'd or cashier'd, without order from Us, or Our General, or Our General Court-martial.

But for Non-commission-Officers, or private Souldiers, their captains, with the approbation of their Colonels, or of the Governour of the Garrison where they are, may discharge them when they find cause, taking other Non-commission-Officer or Souldier in their places. Provided that such Colonel or Governour shall forthwith certifie the Commissaries General of the Musters, that (by their approbation) such Non-commission-Officers or Souldiers were discharged, and others taken in their places respectively.

And in quarters and garrisons, where there are only single troops or companies, the captains certificates are forthwith to be sent and accepted by

the Commissaries General, expressing the day of each Non-commission-Officer or Souldiers discharge, or death, and who was entertained in his place.

Article 50. We do not expressly forbid any Souldier's duty, either of horse or foot, to be done by any other than the Souldier himself; but in case of sickness and disability, or other necessary cause, his Captain may dispence with his absence without causing him to find another to serve in his stead.

Article 51. The Muster-master shall always (the night before) give notice to the Officer in chief commanding any regiment, troop, company, or garrison, of the time and place for their muster, that so the Officers and Souldiers may have time to make ready for the muster.

Upon every muster, three muster-rolls are to be pepared of the respective troops and companies, in which rolls, the names of all private Souldiers are to be written alphabetically; one of which rolls is to be in parchment for the Pay-master, and to be subscribed (together with another roll which the Muster-master is to keep) by two Commission-Officers (at the least) of the respective troops and companies, and the Muster-master; the third muster-roll is to be subscribed only by the muster-master, which the Officer is to keep.

And no rolls are to be allowed by the Muster-master and Pay-master, otherwise than as We have herein directed:

And the said muster-rolls are to be perfected forthwith upon every muster.

Article 52. If a trooper or dragoner shall lose or spoil his horse, or any foot-souldier his arms, or any part thereof, by negligence or gaming, he shall remain in the quality of a pioneer or scavenger, till he be furnished with as good as were lost at his own charge; and if he be not otherwise able, the one half of his pay shall be deducted and set apart for the providing of it, till he be refurnished.

Neither shall any souldier pawn or sell, or negligently or wilfully break his arms, or any part thereof, or any hatchets, spades, shovels, pickaxes, or other necessaries of war, upon pain of severe punishment at the discretion of Our General Court-martial.

And where arms or other necessaries aforesaid shall be pawn'd, they are to be forfeited and seized on for Our use.

Article 53. All Officers and Souldiers, and also the Muster-masters, not duly observing these Orders and Instructions, and every of them respectively, shall be cashier'd or lyable to such other punishment as Our Self, Our General, or a Court-martial shall appoint.

ORDERS CONCERNING VICTUALS AND AMMUNITION.

Article 54. None shall presume to spoil, sell, or convey away any ammunition delivered unto him, upon pain of suffering death, or such other punishment as Our General Court-martial shall think fit.

Article 55. No officer, provider, or keeper of Our Victuals or Ammunition for Our forces, shall imbezzle, or willingly spoil, or give a false accompt upon pain of suffering such punishment as Our General Court-martial shall think fit.

Article 56. No Commissary or Victualler shall bring or furnish unto the Camp any unsound or unsavoury Victuals, of what kind soever, whereby sickness may grow in the Army, or the service be hindered; and if upon examination before Our General Court-martial he shall be found guilty, he shall suffer such punishment as they shall think fit.

Article 57. No Officer or Souldier shall be a Victualler in the Army, without consent and allowance of Our General, or of the Officer in chief of the regiment, upon pain of being punish'd at discretion.

Article 58. No Victualler or Seller of beer, ale, or wine, belonging to the Army, shall entertain any Souldier in his house, booth, tent, or hut, after the warning peece, tattoe, or beat of the drum at night, or before the beating of the revalles in the morning; nor shall any Souldier (within that time) be anywhere, but upon his duty, or in his quarters: upon pain of punishment both to the Souldier, and entertainer, at the discretion of a Court-martial.

ORDERS AND RULES FOR THE ADMINISTRATION OF JUSTICE.

Article 59. The Commission-Officers of every regiment may hold a Court-martial for the regiment, upon all necessary occasions.

There shall also be a Provost-martial of every regiment, who shall have the same privilege in his own regiment as the Provost-martial General hath in the Army or Camp, and such fees also as the Court-martial shall allow.

Article 60. Those who are Judges in Our General Court-martial, or in regimental Court-martials, shall hold the same rank in those Courts as they do in the Army for orders sake; and they shall take oath for the due administration of Justice according to these Articles, or (where these Articles assign no absolute punishment) according to their consciences, the best of their Understanding, and the custome of war in the like cases: and shall demean themselves orderly in the hearing of causes (as becomes the gravity of such a Court); and before giving of sentence, every Judge shall deliver his vote or opinion distinctly; and the sentence is to be according to the plurality of votes; and if there happen to be an equality of votes, the President he is to have a casting voice.

And when sentence is to be given, the President shall pronounce it; and after that the sentence is pronounced, the Provost-martial shall have warrant to cause execution to be done according to the sentence.

Article 61. At Our General Court-martials, there shall be a Clerk, who is to be sworn to make true and faithful records of all the proceedings of the Court; and there shall be also such other Officers appointed, both for that, and also for the regimental Court-martials, as shall be necessary; and Our General Court-martial may appoint and limit the fees of Our Provost-martial General, as they shall think fit.

Article 62. All controversies, either between Souldiers and their Captains or other Officers, or between Souldiers and Souldiers, relating to their military capacities, shall be summarily heard and determined at the next Court-martial of the regiment.

Article 63. In any matter which shall be adjudged in any of the aforesaid regimental Court-martials, either of the parties that finds himself agrieved may appeal to Our General Court-martial; who are to take care, that if the party appealing make not good his suggestion, recompence be made to the other for the trouble and charge of such an appeal.

Article 64. In all criminal causes which concern Our Crown, Our Advocate General, or Judge Advocate of Our Army, shall inform the Court and prosecute on Our behalf.

Article 65. No Officers or Souldiers shall presume to hinder the Provost-martial, his Lieutenant, or servants, in the execution of his Office, upon pain of death, or such other punishment as a Court-martial shall think fit. But on the contrary, all Captains, Officers and Souldiers, shall do their utmost to apprehend and bringing to punishment all Offenders, and shall assist the Officers of Our Army for the purpose, especially the said Provost-martial, his Lieutenant, and servants.

And if the Provost-martial, or his Officers, require the assistance of any Officer or Souldier, in apprehending any person, declaring to them that it is for a capital crime, and the party escape for want of aid and assistance, the party or parties refusing to aid or assist, shall suffer such punishment as a Court-martial shall inflict.

Article 66. The Officer or Souldier, who shall presume to draw his sword in any place of Judicature, while the Court is sitting, shall suffer such punishment as shall be inflicted on him by a Court-martial.

And We do hereby authorize Our Provost-martial General of Our Army, by his own authority, to apprehend such offenders.

And if any Souldier being committed for any offence shall break prison, the said Provost-martial General shall by his own authority apprehend him; and the offender shall suffer death, or such other punishment as Our General Court-martial shall think fit.

Article 67. If any fray shall happen within the camp, or place of garrison, in any of the Souldiers lodgings, or where they meet, it shall be inquired into by the Officers of the regiment, and the beginners and pursuers thereof punish'd according to the quality of the offence.

Article 68. If any inferiour Officer, either of horse or foot, be wrong'd by his Officer, he may complain to his Colonel, or other superiour Officer of the regiment, who is to redress the same, upon due proof made of the wrong done him; but if he fail therein, the party grieved is to apply to the General officer for redress: And if the accusation be false, the complainant is to be punish'd at the discretion of a Court-martial.

Article 69. If any Colonel, or Captain, shall force or take anything away from any private Souldier, that Colonel or Captain shall be punish'd according to the quality of the offence, by the judgment of Our General Court-martial.

But if a Souldier shall be wrong'd, and shall not appeal to the Court, or his superiour Commanders, but take his own satisfaction for it, he shall be punish'd by the Judgment of a Court-martial.

Article 70. If any Souldier dye, no other shall take or spoil his goods, upon pain of restoring double the value to him to whom they belonged, and of such further punishments as a Court-martial shall think fit.

But the Captain of the Company of which such a Souldier was in shall take the said goods into his custody, and dispose of them for paying his quarters, and to keep the overplus (if any be) for the use of those to whom they belong, and who shall claim the same within three months after his death.

And if any Captain or Officer dye, the Chief Commander shall take care of preserving his Estate in like manner.

Article 71. No Provost-martial shall refuse to receive or keep a prisoner sent to his charge by authority, or shall dismiss him without order, upon pain of such punishment as a Court-martial shall think fit.

And if the offense for which the prisoner was apprehended deserv'd death, the Provost-martial failing to receive and keep him as aforesaid shall be lyable to the same punishment.

Article 72. If any person be committed by the Provost-martial's own authority, without other command, he shall acquaint the General, or other chief Commander with the cause thereof, within twenty-four hours, and the Provost-martial shall thereupon dismiss him, unless he have order to the contrary.

Article 73. No man shall presume to use any braving or menacing words, signs, or gestures, where any of the aforesaid Courts of Justice are sitting, upon pain of suffering such punishment as the Court-martial shall think fit.

Article 74. Whatever is to be published, or generally made known, shall be done by beat of drum or the sound of trumpet, that so no man may pretend ignorance thereof.

And after that, whoever shall be found disobedient, or faulty, against what is thus published shall be punish'd according to these Articles, or the quality of the fact.

APPENDIX B.

THE BRITISH ARTICLES OF 1774.

RULES AND ARTICLES FOR THE BETTER GOVERNMENT OF HIS MAJESTY'S HORSE AND FOOT GUARDS, AND ALL OTHER HIS MAJESTY'S FORCES IN GREAT BRITAIN AND IRELAND, DOMINIONS BEYOND THE SEAS AND FOREIGN PARTS, FROM THE 24TH DAY OF MARCH, 1774.

SECTION 1.

DIVINE WORSHIP.

Article 1. All Officers and Soldiers not having just Impediment shall diligently frequent Divine Service and Sermon in the Places appointed for the assembling of the Regiment, Troop or Company to which they belong; such as willfully absent themselves, or, being present, behave indecently or irreverently, shall, if Commissioned Officers, be brought before a Court Martial, there to be publickly, and severely reprimanded by the President; if Non Commissioned Officers or Soldiers every Person so offending shall, for his first offence, forfeit twelve pence to be deducted out of his next Pay; for the second Offence he shall not only forfeit Twelve pence, but be laid in Irons for Twelve Hours, and for every like Offence shall suffer and pay in like manner, which money so forfeited, shall be applied to the Use of the Sick Soldiers of the Troop, or Company, to which the Offender belongs.

Article 2. Whatsoever Officer or Soldier shall use any unlawful Oath or Execration, shall incur the Penalties expressed in the first Article.

Article 3. Whatsoever Officer or Soldier shall presume to speak against any known Article of the Christian Faith shall be delivered over to the Civil Magistrate to be proceeded against according to Law.

Article 4. Whatsoever Officer or Soldier shall profane any Place dedicated to Divine Worship, or shall offer Violence to a Chaplain of the Army, or to any Minister of God's Word, he shall be liable to such Penalty, or Corporal Punishment as shall be inflicted on him by a Court Martial.

Article 5. No Chaplain who is commissioned to a Regiment, Company, Troop, or Garrison, shall absent himself from the said Regiment, Company, Troop, or Garrison (excepting in the case of Sickness or Leave of Absence) upon pain of being brought to a Court Martial and punished as their Judgment and the Circumstances of his Offence may require.

Article 6. Whatsoever Chaplain to a Regiment, Troop, or Garrison shall be guilty of Drunkenness, or of other scandalous or vicious Behaviour derogating from the sacred Character with which he is invested, shall, upon due Proofs before a Court Martial, be discharged from his said Office.

Section 2.

MUTINY.

Article 1. Whatsoever Officer or Soldier shall presume to use traiterous or disrespectful Words against Our Royal Person, or any of Our Royal Family, if a Commissioned Officer, he shall be cashiered; if a Non Commissioned Officer or Soldier, he shall suffer such punishment as shall be inflicted upon him by the sentence of a Court Martial.

Article 2. Any Officer or Soldier who shall behave himself with Contempt or Disrespect towards the General or other Commander in Chief of Our Forces, or shall speak Words tending to his Hurt or Dishonour, shall be punished according to the Nature of his Offence by the Judgment of a Court Martial.

Article 3. Any Officer or Soldier who shall begin, excite, cause, or join in any Mutiny, or Sedition in the Regiment, Troop, or Company, to which he belongs, or in any other Regiment, Troop, or Company, either of Our Land or Marine Forces, or in any other Party, Post, Detachment, or Guard, on any pretence whatsoever, shall suffer death, or, such other punishment, as, by a Court Martial, shall be inflicted.

Article 4. Any Officer, Non Commissioned Officer, or Soldier, who, being present at any Mutiny or Sedition, does not use his utmost Endeavours to surpress the same, or coming to the knowledge of any Mutiny, or intended Mutiny, does not, without Delay, give Information thereof to his Commanding Officer, shall be punished by a Court Martial with Death, or otherwise, according to the Nature of his Offence.

Article 5. Any Officer or Soldier who shall strike his superior Officer, or draw, or offer to draw, or shall lift up any Weapon, or offer any Violence against him, being in the Execution of his Office, on any pretence whatsoever, or shall disobey any lawful Command of his superior Officer, shall suffer Death, or such other punishment as shall, according to the Nature of his Offence, be inflicted upon him by the Sentence of a Court Martial.

SECTION 3.

OF INLISTING SOLDIERS.

Article 1. Every Non Commissioned Officer and Soldier who shall inlist himself in Our Service, shall, at the Time of his so inlisting, or within four Days afterwards, have the Articles against Mutiny and Desertion read to him, and shall, by the Officer who inlisted him, or by the Commanding Officer of the Troop or Company, into which he was inlisted, be taken before the next Justice of the Peace, or Chief Magistrate of any City or Town Corporate (not being an Officer of the Army) or in foreign Parts, where Recourse cannot be had to the Civil Magistrate, before the Judge Advocate, and in his presence take the following Oath "I swear to be true to Our Sovereign Lord KING GEORGE, and to serve him honestly and faithfully in Defence of his Person, Crown and Dignity against all his Enemies, or Opposers whatsoever, and to observe and obey His Majesty's Orders, and the Orders of the General and Officers set over me by His Majesty",—which Justice or Magistrate is to give the Officer a Certificate, signifying that the Man inlisted did take the said Oath, and that the Articles of War were read to him according to the Act of Parliament.

Article 2. After a Non Commissioned Officer or Soldier shall have been duly inlisted and sworn, he shall not be dismissed Our Service without a Discharge in Writing, and no Discharge granted to him shall be allowed of as sufficient which is not signed by a Field Officer of the Regiment into which he was enlisted, or Commanding Officer, where no Field Officer of the Regiment is in Great Britain.

SECTION 4.

MUSTERS.

Article 1. Every Officer commanding a Regiment, Troop, or Company shall, upon the Notice given to him by the Commissary of the Musters, or from one of the Deputies, assemble the Regiment, Troop, or Company, under his Command, in the next convenient Place for their being mustered.

Article 2. Every Colonel or other Field Officer commanding the Regiment, Troop, or Company, and actually residing with it, may give Furloughs to Non Commissioned Officers and Soldiers in such Numbers, and for so long a Time as he shall judge to be most consistent with the good of Our Service; but no Non Commissioned Officer or Soldier shall, by leave of his Captain, or inferior Officer commanding the Troop or Company (his Field Officer not being present) be absent above Twenty Days in six Months; nor shall more than two Private Men be absent at the same time from their Troop or Company, excepting some extraordinary Occasion shall require it; of which

Occasion the Field Officer present with, and commanding the Regiment, is to be the Judge.

Article 3. At every Muster the Commanding Officer of each Regiment, Troop, or Company there present, shall give to the Commissary Certificates signed by himself signifying how long such Officers who shall not appear at the said Muster, have been absent, and the reason of their absence. In like manner the Commanding Officer of every Troop or Company shall give Certificates, signifying the Reasons of the Absence of the Non Commissioned Officers and Private Soldiers, which Reasons and Time of Absence shall be inserted in the Muster Rolls opposite to the Names of the respective absent Officers and Soldiers: The said Certificates shall, together with the Muster Rolls, be remitted to Our Commissary's Office, within Twenty Days after such Muster being taken: On the failure thereof, the Commissary so offending shall be discharged from Our Service.

Article 4. Every Officer who shall be convicted before a General Court Martial of having signed a false Certificate relating to the Absence of either Officer or Private Soldier shall be cashiered.

Article 5. Every Officer who shall knowingly, make a false Muster of Man or Horse, and every Officer and Commissary, who shall willingly sign, direct, or allow the signing of the Muster Rolls, wherein such false Muster is contained, shall, upon Proof made thereof by two Witnesses before a General Court Martial, be cashiered, and suffer such other Penalty as by the Act of Parliament is for that purpose inflicted.

Article 6. Any Commissary who shall be convicted of having taken Money by way of Gratification, on the mustering any Regiment, Troop, or Company, or on the signing of the Muster Rolls, shall be displaced from his Office, and suffer such other Penalty as by the Act of Parliament is inflicted.

Article 7. Any Officer who shall presume to muster any person as a Soldier who is at other Times accustomed to wear a Livery, or who does not actually do his Duty as a Soldier, shall be deemed guilty of having made a false Muster, and shall suffer accordingly.

SECTION 5.

RETURNS.

Article 1. Every Officer who shall, knowingly, make a false Return to Us, to the Commander in Chief of Our Forces, or to any his superior Officer, authorized to call for such Returns, of the State of the Regiment, Troop, or Company, or Garrison, under his Command, or of Arms, Ammunition, Clothing, or other Stores thereunto belonging, shall, by a Court Martial, be cashiered.

Article 2. The Commanding Officer of every Regiment, Troop, or Independent Company, or Garrison in South Britain, shall, in the beginning of

every Month, remit to the Commander in Chief of Our Forces, and to Our Secretary at War, an exact Return of the State of the Regiment, Troop, Independent Company, or Garrison, under his Command, specifying the Names of the Officers not then residing at their Posts, and the Reason for and Time of their Absence. Whoever shall be convicted of having through Neglect or Design omitted the sending such Returns, shall be punished according to the Nature of his Crime by the Judgment of a General Court Martial.

Article 3. Returns shall be made in like Manner of the State of Our Forces in Our Kingdom of Ireland, to the Chief Governor or Governors thereof, as likewise of Our Forces in North Britain, to the Officer there Commanding in Chief; which Returns shall from time to time, be remitted to Us, as it shall be best for Our Service.

Article 4. It is Our Pleasure that exact Returns of the State of Our Garrisons at Gibralter, and Port Mahon, and of Our Regiments, Garrisons, and Independent Companies in Africa, and America, be, by their respective Governors or Commanders there residing, by all convenient Opportunities, remitted to Our Secretary at War, for their being laid before Us.

SECTION 6.

DESERTION.

Article 1. All Officers and Soldiers who, having received Pay, or having been duly inlisted in Our Service, shall be convicted of having deserted the same shall suffer Death, or such other Punishment as by a Court Martial shall be inflicted.

Article 2. Any Non Commissioned Officer or Soldier who shall without leave from his Commanding Officer, absent himself from his Troop, or Company, or from any Detachment, with which he shall be commanded, shall, upon being convicted thereof, be punished according to the Nature of his Offence at the Discretion of a Court Martial.

Article 3. No Non Commissioned Officer or Soldier shall inlist himself in any other Regiment, Troop, or Company without a regular Discharge from the Regiment, Troop, or Company, in which he has last served, on the Penalty of being reputed as a Deserter, and suffering accordingly; and in case any Officer shall knowingly receive and entertain such Non Commissioned Officer or Soldier, or shall not, after his being discovered to be a Deserter, immediately confine him, and give Notice thereof to the Corps in which he last served, He, the said Officer, so offending shall, by a Court Martial, be cashiered.

Article 4. Whatsoever Officer or Soldier shall be convicted of having advised or persuaded any other Officer or Soldier to desert Our Service, shall

suffer such Punishment as shall be inflicted upon him by the sentence of a Court Martial.

SECTION 7.

QUARRELS AND SENDING CHALLENGES.

Article 1. No Officer or Soldier shall use any reproachful or provoking Speeches or Gestures to another upon pain, if an Officer, of being put in Arrest, if a Soldier, imprisoned, and of asking Pardon of the Party offended in the Presence of the Commanding Officer.

Article 2. No Officer or Soldier shall presume to send a Challenge to any other Officer or Soldier, to fight a Duel, upon Pain, if a Commissioned Officer, of being cashiered, if a Non Commissioned Officer or Soldier, of suffering Corporal Punishment, at the Discretion of a Court Martial.

Article 3. If any Commissioned or Non Commissioned Officer commanding a Guard, shall knowingly and willingly suffer any Person whatsoever to go forth to fight a Duel, he shall be punished as a Challenger, and likewise all Seconds, Promoters, and Carriers of Challenges, in order to Duels, shall be deemed as Principals, and be punished accordingly.

Article 4. All Officers of what Condition soever, have Power to Part and quell all Quarrels, Frays, and Disorders, tho' the Persons concerned, shall belong to another Regiment, Troop, or Company, and either to order Officers into Arrest, or Non Commissioned Officers or Soldiers to Prison, 'till their proper superior Officers shall be acquainted therewith; and whoever shall refuse to obey such Officer (tho' of an inferior Rank) or shall draw his Sword upon him, shall be punished at the Discretion of a General Court Martial.

Article 5. Whatsoever Officer or Soldier shall upbraid another for refusing a Challenge, shall, himself, be punished as a Challenger. And We hereby acquit and Discharge all Officers and Soldiers of any Disgrace or Opinion of Disadvantage, which might arise from their having refused to accept of Challenges, as they will only have acted in Obedience to Our Orders, and done their Duty as good Soldiers, who subject themselves to Discipline.

SECTION 8.

SUTTLING.

Article 1. No Suttler shall be permitted to sell any kind of Liquors or Victuals, or to keep their Houses or Shops open for the Entertainment of Soldiers after Nine at Night, or before the Beating of the Reveilles, or upon Sundays, during Divine Service or Sermon, on the Penalty of being dismissed from all future Suttling.

Article 2. All Officers, Soldiers, and Suttlers, shall have full Liberty to bring into any of Our Forts or Garrisons any Quantity or Species of Provi-

sions Eatable or Drinkable, except where any Contract or Contracts are or shall be entered into by Us, or by Our Order, for furnishing Such Provisions, and with respect only to the Species of Provisions so contracted for.

Article 3. All Governors, Lieutenant Governors, and Officers Commanding in Our Forts, Barracks, or Garrisons are hereby required to see that the Persons permitted to suttle, shall supply the Soldiers with good and wholesome Provisions at the Market Price, as they shall be answerable to Us for their Neglect.

Article 4. No Governors or Officers commanding in any of Our Garrisons, Forts, or Barracks, shall, either themselves, exact exorbitant Prices for Houses or Stalls let out to Suttlers, or shall connive at the like Exactions in others, nor by their own Authority and for their Private Advantage, shall they lay any Duty or Imposition upon, or be interested in, the sale of such Victuals, Liquors, or other Necessaries of Life which are brought into the Garrison, Fort, or Barracks, for the use of the Soldiers, on the Penalty of being discharged from Our Service.

Section 9.

QUARTERS.

Article 1. No Officer shall demand Billets for quartering more than his effective Men, nor shall he quarter any Wives, Children, Men or Maid Servants in the Houses assigned for the quartering of Officers or Soldiers without the Consent of the Owners, nor shall he take money for the freeing of Landlords from the quartering of Officers or Soldiers; if a Commissioned Officer so offending, he shall be cashiered; if a Non Commissioned Officer, he shall be reduced to a Private Centinel, and suffer such Corporal Punishment as shall be inflicted upon him by the Sentence of a Court Martial.

Article 2. Every Officer commanding a Regiment, Troop, or Company or Party, whether in settled Quarters, or upon a March, shall take care that his own Quarters, as also the Quarters of every Officer and Soldier under his Command, be regularly cleared at the end of every week, according to the Rules specified by the Act of Parliament now in force; but in case any such Regiment, Troop, or Company, or Party be ordered to march before Money may be come to the Hands of the Commanding Officer aforesaid, he is hereby required to see that the Accounts with all Persons who shall have Money due to them for the quartering of Officers and Soldiers be exactly stated, specifying what sum is then justly due to him, as likewise the Regiment, Troop, or Company, to which the Officers and Soldiers so indebted to him belong, and is, by the first Opportunity, to remit Duplicates of the said Certificates to Our Paymaster General. Any Commanding Officer who shall refuse or neglect the making up of such Accounts, and certifying the same as is above directed, shall be cashiered.

Article 3. The Commanding Officer of every Regiment, Troop, or Company, or Detachment, shall, upon their first coming to any City, Town, or Village, where they are to remain in Quarters cause Public Proclamation to be made signifying that, if the Landlords or other Inhabitants suffer the Non Commissioned Officers or Soldiers to contract Debts beyond what their daily Subsistence will answer, that such Debts will not be discharged. He the said Commanding Officer shall, for refusing or neglecting so to do, be suspended for three Months, during which Time his whole Pay shall be applied to the discharging such Debts as shall have been contracted by the Non Commissioned Officers or Soldiers under his Command, beyond the amount of their daily Subsistence, if there be any overplus remaining it may be returned to him.

Article 4. If after Public Proclamation be made, the Inhabitants shall notwithstanding, suffer the Non Commissioned Officers and Soldiers to contract Debts beyond what the Money issued or to be issued out for their daily Subsistence will answer, it will be at their own Peril, the Officers not being obliged to discharge the said Debts.

Article 5. Every Officer commanding in Quarters, Garrisons, or on a March, shall keep good order, and to the utmost of his power redress all such abuses or Disorders which may be committed by any Officer or Soldier under his Command, if upon Complaint made to him of Officers or Soldiers beating or otherwise ill treating of their Landlords, or of extorting more from them than they are obliged to furnish by Law, of disturbing Fairs or Markets, or of committing any kind of Riots to the disquieting of Our People, he the said Commander who shall refuse or omit to see justice done on the Offender or Offenders, and Reparation made to the Party or Parties injured, as far as Part of the Offender's Pay shall enable him or them, shall, upon the Proof thereof, be punished by a General Court Martial, as if he himself had committed the Crimes or Disorders complained of.

Section 10.

CARRIAGES.

The Commanding Officer of every Regiment, Troop, or Company, or Detachment, which shall be ordered to march, is to apply to the proper Magistrates for the necessary Carriages, and is to pay for them as is directed by the Act of Parliament, taking care not himself to abuse, nor to suffer any Person under his command to beat or abuse the Wagoners, or other Persons attending such Carriages, nor to suffer more than thirty hundred Weight to be loaded on any Wain or Waggon, so furnished, or in Proportion on Carts or Carrs, not to permit Soldiers (except such as are Sick or lame) or Women to ride upon the said Carriages. Whatsoever Officer shall offend herein, or in Case of Failure of Money, shall refuse to grant Certificates specifying the

Sums due for the Use of such Carriages, and the name of the Regiment, Troop, or Company in whose Service they were employed, shall be cashiered, or be otherwise punished according to the Degree of his Offence by a General Court Martial.

Section 11.

OF CRIMES PUNISHABLE BY LAW.

Article 1. Whenever any Officer or Soldier shall be accused of a Capital Crime, or of having used Violence, or committed any Offence against the Persons or Property of Our Subjects, such as is punishable by the known Laws of the Land, the Commanding Officer, and Officers of every Regiment, Troop, or Party to which the Person, or Persons so accused shall belong, are hereby required, upon Application duly made by, or in behalf of the Party or Parties injured, to use his utmost Endeavours to deliver over such accused Person or Persons to the Civil Magistrate: And likewise to be aiding and assisting to the Officers of Justice in apprehending and securing the Person or Persons so accused, in order to bring them to a Trial. If any Commanding Officer or Officers shall willfully neglect or shall refuse, upon the Application aforesaid, to deliver over such accused Person or Persons to the Civil Magistrates, or to be aiding or assisting to the Officers of Justice, in apprehending such Person or Persons, the Officer or Officers so offending shall be cashiered.

Article 2. No Officer shall protect any Person from his Creditors on the Pretence of his being a Soldier, nor any Non Commissioned Officer or Soldier who does not actually do all Duties as such, and no farther than is allowed by the present Act of Parliament and according to the true Intent, and Meaning of the said Act; any Officer offending herein, being convicted thereof before a Court Martial, shall be cashiered.

Section 12.

OF REDRESSING WRONGS.

Article 1. If any Officer shall think himself to be wronged by his Colonel, or the Commanding Officer of the Regiment, and shall upon due application made to him, be refused to be redressed, he may complain to the General commanding in Chief, of Our Forces, in order to obtain Justice, who is hereby required to examine into the said Complaint, and either by himself, or by Our Secretary at War, to make his report to Us thereupon, in order to receive Our further Directions.

Article 2. If any inferior Officer or Soldier shall think himself wronged by his Captain or other Officer commanding the Troop, or Company, to which he belongs, he is to complain thereof to the Commanding Officer of

the Regiment, who is hereby required to summon a Regimental Court Martial, for the doing Justice to the Complainant, from which Regimental Court Martial, either Party may, if he thinks himself still aggrieved, appeal to a General Court Martial: But if upon a second Hearing the appeal shall appear to be vexatious and groundless, the Person so appealing, shall be punished at the Discretion of the said General Court Martial.

SECTION 13.

OF STORES, AMMUNITION, ETC.

Article 1. Whatsoever Commissioned Officer, Store-keeper or Commissary, shall be convicted at a General Court Martial of having sold (without a proper Order for that purpose), embezzled, misapplied, or willfully, or through neglect, suffered any of Our Provisions, Forage, Arms, Cloathing, Ammunition, or other Military Stores to be spoiled or damaged, the said Officer, Store-keeper or Commissary so offending, shall at his own charge, make good the loss or Damage, and be dismissed from Our Service, and suffer such other Penalty as by the Act of Parliament is inflicted.

Article 2. Whatsoever Non Commissioned Officer or Soldier shall be convicted at a Regimental Court Martial, of having sold, or designedly or through neglect, wasted the ammunition delivered out to him to be employed in Our Service, shall, if a Non Commissioned Officer, be reduced to a Private Centinel, and shall besides, suffer Corporal Punishment in the same manner as a Private Centinel so offending at the Discretion of a Regimental Court Martial.

Article 3. Every Non Commissioned Officer or Soldier who shall be convicted at a Court Martial of having sold, lost or spoiled thro' Neglect, his Horse, Arms, Cloaths or Accoutrements, shall undergo such weekly Stoppages (not exceeding the half of his Pay) as a Court Martial shall judge sufficient for repairing the Loss or Damage, and shall suffer Imprisonment, or such other Corporal Punishment as his Crime shall deserve.

Article 4. Every Non Commissioned Officer who shall be convicted at a General or Regimental Court-Martial, of having embezzled, or misapplied any Money with which he may have been entrusted for the Payment of the Men under his Command, or for enlisting Men into Our Service, shall be reduced to serve in the Ranks as a Private Soldier, be put under Stoppages until the Money be made good, and suffer such Corporal Punishment (not extending to Life or Limb) as the Court Martial shall think fit.

Article 5. Every Captain of a Troop or Company is charged with the Arms, Accoutrements, Ammunition, Cloathing or other Warlike Stores belonging to the Troop, or Company under his Command, which he is to be accountable for to his Colonel, in Case of their being lost, spoiled or damaged, not by unavoidable Accidents, or on actual Service.

Section 14.

OF DUTIES IN QUARTERS, IN GARRISON, OR IN THE FIELD.

Article 1. All Non Commissioned Officers and Soldiers who shall be found One Mile from the Camp, without Leave in Writing from their Commanding Officer, shall suffer such Punishment as shall be inflicted upon them by the Sentence of a Court Martial.

Article 2. No Officer or Soldier shall lye out of his Quarters, Garrison, or Camp, without leave from his superior Officer, upon penalty of being punished according to the Nature of his Offence by the Sentence of a Court-Martial.

Article 3. Every Non Commissioned Officer and Soldier shall retire to his Quarters or Tent at the Beating of the Retreat: In default of which he shall be punished according to the Nature of his Offence, by the Commanding Officer.

Article 4. No Officer, Non Commissioned Officer, or Soldier shall fail of repairing at the Time fixed to the Place of Parade of Exercise, or other Rendezvous appointed by the Commanding Officer, if not prevented by Sickness, or some other evident Necessity, or shall go from the said Place of Rendezvous, or from his Guard, without Leave from his Commanding Officer, before he shall be regularly dismissed or relieved, on the Penalty of being punished according to the Nature of his Offence by the Sentence of a Court Martial.

Article 5. Whatsoever Commissioned Officer shall be found Drunk on his Guard, Party, or other Duty under Arms, shall be cashiered for it; any Non Commissioned Officer or Soldier so offending shall suffer such Corporal Punishment as shall be inflicted by the Sentence of a Court Martial.

Article 6. Whatever Centinel shall be found sleeping upon his Post, or shall leave it before he shall be regularly relieved, shall suffer Death, or such other Punishment as shall be inflicted by the Sentence of a Court Martial.

Article 7. No Soldier belonging to any of Our Troops, or Regiments of Horse, or Foot Guards, or to any other Regiment of Horse, Foot, or Dragoons in Our Service, shall hire another to do his Duty for him, or be excused from Duty, but in Case of Sickness, Disability or Leave of Absence, and every such Soldier found guilty of hiring his Duty, as also the Party so hired to do another's Duty, shall be punished at the next Regimental Court Martial.

Article 8. And every Non Commissioned Officer conniving at such hiring of Duty as aforesaid shall be reduced for it; and every Commissioned Officer knowing and allowing of such ill practices in Our Service, shall be punished by the Judgment of a General Court Martial.

Article 9. Any Person belonging to Our Forces employed in any of Our Dominions beyond the Seas, or in Foreign Parts, who, by discharging of Fire

Arms, drawing of Swords, beating of Drums, or by any other means whatever, shall occasion false Alarms in Camp, Garrison, or Quarters, shall suffer Death, or such other Punishment as shall be ordered by the Sentence of a General Court Martial.

And whosoever shall be found guilty of the said offence in Great Britain or Ireland, Jersey, Guernsey, Alderney, Sark, or Man, shall be punished at the Discretion of a General Court Martial.

Article 10. Any Officer or Soldier who shall, without urgent Necessity, or without Leave of his superior Officer, quit his Platoon, or Division, shall be punished according to the Nature of his Offence by the Sentence of a Court Martial.

Article 11. No Officer or Soldier shall do Violence to any Person who brings Provisions or other Necessaries to the Camp, Garrison, or Quarters of Our Forces, employed in Foreign Parts on Pain of Death.

Article 12. Whatsoever Officer or Soldier shall misbehave himself before the enemy, or shamefully abandon any Post committed to his Charge, or shall speak Words inducing others to do the like shall suffer Death.

Article 13. Whatsoever Officer or Soldier shall misbehave himself before the Enemy, and run away, or shamefully abandon any Fort, Post, or Guard, which he or they shall be commanded to defend, or speak Words inducing others to do the like, or who, after Victory, shall quit his Commanding Officer or Post to plunder and pillage, every such Offender being duly convicted thereof, shall be reputed a Disobeyer of Military Orders, and shall suffer Death, or other such Punishment as by a General Court Martial shall be inflicted on him.

Article 14. Any Person belonging to Our Forces employed in Foreign Parts who shall cast away his Arms and Ammunition shall suffer Death, or other such Punishment as shall be ordered by the Sentence of a General Court Martial.

And Whosoever shall be found guilty of the said Offence in Great Britain, Ireland, Jersey, Guernsey, Alderney, Sark, or Man, shall be punished at the Discretion of a General Court Martial.

Article 15. Any Person belonging to Our Forces employed in Foreign Parts who shall make known the Watch-Word to any Person who is not entitled to receive it, according to the Rules and Discipline of War, or shall presume to give a Parole or Watch-Word different from what he received shall suffer Death, or such other Punishment as shall be ordered by the Sentence of a General Court Martial.

And Whosoever shall be found guilty of the said offence in Great Britain, Ireland, Jersey, Guernsey, Alderney, Sark, or Man, shall be punished, at the Discretion of a General Court Martial.

Article 16. All Officers and Soldiers are to behave themselves orderly in Quarters, and on their March; and whosoever shall commit any Waste or

Spoil either in Walks of Trees, Parks, Warrens, Fish Ponds, Houses or Gardens, Corn Fields, Inclosures or Meadows, or shall maliciously destroy any Property whatsoever belonging to any of Our Subjects, unless by Order of the then Commander in Chief of Our Forces, to annoy Rebels or other Enemies in Arms against Us, he or they that shall be found guilty of offending herein shall (besides such Penalties as they are liable to by law) be punished according to the Nature and Degree of the Offence, by the Judgment of a Regimental or General Court Martial.

Article 17. Whatsoever of Our Forces employed in Foreign Parts shall force a Safe-Guard shall suffer Death.

Article 18. Whosoever shall relieve the Enemy with Money, Victuals, or Ammunition, or shall knowingly harbour or protect an Enemy shall suffer Death, or such other Punishment as by a Court Martial shall be inflicted.

Article 19. Whosoever shall be convicted of holding Correspondence with, or giving Intelligence to the Enemy, either directly or indirectly shall suffer Death, or such other Punishment as by a Court Martial shall be inflicted.

Article 20. All Public Stores taken in the Enemies' Camp, Towns, Forts, or Magazines, whether of Artillery, Ammunition, Cloathing, Forage, or Provisions shall be secured for Our Service, for the Neglect of which Our Commanders in Chief are to be answerable.

Article 21. If any Officer or Soldier shall leave his Post or Colours to go in search of Plunder, he shall upon being convicted thereof, before a General Court Martial, suffer Death, or such other Punishment as by a Court Martial shall be inflicted.

Article 22. If any Governor or Commandant of any Garrison, Fortress or Post, shall be compelled by the Officers or Soldiers under his Command, to give up to the Enemy, or to abandon it, the Commission Officers, Non Commission Officers, or Soldiers who shall be convicted of having so offended, shall suffer Death, or such other Punishment as may be inflicted upon them by the sentence of a Court Martial.

Article 23. All Suttlers and Retainers to a Camp, and all Persons whatsoever, serving with Our Armies in the Field, though no inlisted Soldiers, are to be subject to Orders according to the Rules and Discipline of War.

Article 24. Officers having Brevetts or Commissions of a prior Date to those of the Regiment in which they now serve, may take place in Courts Martial, and on Detachments, when composed of different Corps, according to the Rank given them in their Brevetts or Dates of their former Commissions. But in the Regiment, Troop, or Company to which such Brevett Officers, and those who have Commissions of a prior Date, do belong, they shall do Duty and take Rank both on Courts Martial and on Detachments, which shall be composed only of their own Corps according to the Commissions by which they are mustered in the said Corps.

Article 25. If upon Marches, Guards, or in Quarters, any of Our Troops of Horse Guards, Grenadier Guards, or Regiment of Horse Guards, shall happen to join or to do Duty together, the eldest Officer by Commission there on Duty, or in Quarters, shall command the whole, and give out Orders for what is needful to Our Service, Regard being always had to the several Ranks of those Corps, and the Posts they usually occupy.

Article 26. And in like manner also if any Regiments, Troops, or Detachments of Our Horse or Foot Guards, shall happen to march with, or be encamped or quartered with any Bodies or Detachments of Our other Troops, the eldest Officer, without respect to Corps, shall take upon him the Command of the whole, and give the necessary Orders to Our Service.

Article 27. When Our Regiment of Foot Guards, or Detachments from Our said Regiments, shall do Duty together, unmixed with other Corps, they shall be considered as one Corps, and the Officers shall take Rank, and do Duty according to the Commissions by which they are mustered.

SECTION 15.

ADMINISTRATION OF JUSTICE.

Article 1. A General Court Martial in Our Kingdoms of Great Britain or Ireland shall not consist of less than thirteen Commissioned Officers, and the President of such Court Martial shall not be the Commander in Chief, or Governor of the Garrison where the Offender shall be tryed, nor be under the Degree of a Field Officer.

Article 2. A General Court Martial held in Our Garrison of Gibralter, Island of Minorica, or in any other place beyond the Seas (except within the Garrisons of Goree and Senegal, or upon any Detachments made therefrom) shall not consist of less than thirteen Commissioned Officers: But in the said Garrisons of Goree and Senegal, or upon any Detachments made therefrom a General Court Martial may consist of any Number of Commissioned Officers not less than five, and the President shall not be under the Degree of a Field Officer, unless where a Field Officer cannot be had, nor shall in any Case whatever be the Commander in Chief or Governor of the Garrison where the Offender shall be tried, nor under the Degree of a Captain.

Article 3. Whereas these Our Rules and Articles are to be observed by, and do in all Respects regard Our Troops and Regiments of Horse and Foot Guards, as well as Our other Forces, and that several Disputes have arisen, and may arise, between the Officers of Our Horse and Foot Guards, in relation to their holding of Courts Martial, and also among the Officers of Our Troops of Horse Guards, Grenadier Guards, and Regiments of Horse Guards, on that and other Points of Duty: We do therefore herein declare it to be Our Will and Pleasure, that, when any Officer or Soldier belonging

to Our said Troops of Horse Guards, Grenadier Guards, or Regiment of Horse Guards, shall happen to be brought before a General Court Martial for Differences arising purely among themselves, or for Crimes relating to Discipline, or Breach of Orders, such Courts Martial shall be composed of Officers serving in any or all of those Corps of Horse Guards (as they may then happen to lie for their being most conveniently assembled) where the Officers are to take Post according to the Dates and Degrees of Rank granted them in their respective Commissions, without regard to the Seniority of Corps, or other formerly pretended Privileges.

Article 4. In like manner also the Officers of Our Three Regiments of Foot Guards, when appointed to hold Courts Martial for Differences, or Crimes as aforesaid, shall, of themselves, compose Courts Martial, and take Rank according to their Commissions: But for all Disputes or Differences which may happen between Officers or Soldiers belonging to Our said Corps of Horse Guards, and other Officers and Soldiers belonging to Our Regiments of Foot Guards, or between any Officers or Soldiers belonging to either of those Corps of Horse or Foot Guards, and Officers and Soldiers of Our other Troops, the Courts Martial to be appointed in such Cases shall be equally composed of Officers belonging to the Corps in which the Parties complaining and complained of, do then serve, and the President to be ordered by Turns, beginning first by an Officer of one of Our Troops of Horse Guards, and so on in course out of the other Corps.

Article 5. The Members both of General and Regimental Courts Martial shall, when belonging to different Corps take the same Rank which they hold in the Army; but when Courts Martial shall be composed of Officers of one Corps, they shall take their Ranks according to the Dates of the Commissions by which they are mustered in the said Corps.

Article 6. The Judge Advocate General, or some Person deputed by him, shall prosecute in His Majesty's Name; and in all Trials of Offenders by General Courts Martial administer to each Member the following Oaths. "You shall well and truly try and determine according to your Evidence, the Matter now before You, between Our Sovereign Lord the King's Majesty, and the Prisoner to be tried."

I, A. B., do swear that I will duly administer Justice according to the Rules and Articles for the better Government of His Majesty's Forces, and according to an Act of Parliament now in Force for the Punishment of Mutiny and Desertion, and other Crimes therein mentioned, without Partiality, Favour or affection; and if any Doubt shall arise which is not explained by the said Articles or Act of Parliament, according to my Conscience, the best of my Understanding, and the Custom of War in the like Cases. And I do further swear that I will not divulge the Sentence of the Court, until it shall be approved of by His Majesty, or by some Person duly authorized by him. Neither will I, upon any Account at any Time what-

soever, disclose or discover the Vote or Opinion of any particular Member of the Court Martial unless required to give Evidence thereof as a witness by a Court of Justice in a due course of Law.

And as soon as the said Oath shall have been administered to the respective Members, the President of the Court shall administer to the Judge Advocate, or Person officiating as such, an Oath in the following Words.

I, A. B., do swear that I will not upon any Account, at any Time whatsoever, disclose or discover the Vote or Opinion of any Particular Member of the Court Martial, unless required to give Evidence thereof as a Witness by a Court of Justice in a due Course of Law.

Article 7. All the Members of a Court Martial are to behave with Decency, and in the giving of their Votes, are to begin with the Youngest.

Article 8. All Persons who give Evidence before a General Court Martial are to be examined upon Oath, and no Sentence of Death shall be given against any Offender by any General Court Martial, except in the Garrisons of Goree and Senegal, or upon any Detachments made therefrom, unless Nine Officers present shall concur therein, nor shall such Sentence be given in any Case where a Court Martial shall consist of more Officers than thirteen, nor within the Garrison of Goree and Senegal, or upon any Detachment made therefrom when a Court Martial shall consist of a lesser Number of Officers without the concurrence of two thirds of the Officers present.

Article 9. No Field Officer shall be tried by any Person under the Degree of a Captain, nor shall any Proceedings or Trials be carried on, excepting between the Hours of Eight in the Morning and Three in the Afternoon, except in Cases which require an immediate Example.

Article 10. No Sentence of a General Court Martial shall be put in Execution till after a Report shall be made of the whole Proceedings to Us, or to Our Commander in Chief, or some other Person duly authorized by Us, under Our Sign Manual to confirm the same; and Our or his Directions shall be signified thereupon, excepting in Ireland where the Report is to be made to the Lord Lieutenant, and to Our Chief Governor or Governors of that Kingdom, and his or their Directions are to be received thereupon.

Article 11. For the more equitable Decision of Disputes which may arise between Officers and Soldiers belonging to different Corps, whether they be of Our Troops or Regiment of Horse Guards, Our Three Regiments of Foot Guards, or Our other Regiments of Horse and Foot.

We direct that the Courts Martial shall be equally composed of Officers belonging to the Corps which the Parties in Question do then serve, and that the President shall be taken in Turns beginning with that Corps which shall be eldest in Rank.

Article 12. The Commissioned Officers of every Regiment may, by the Appointment of their Colonel or Commanding Officer, hold Regimental

Courts Martial for the enquiring into such Disputes or criminal Matters as may come before them, and for the inflicting Corporal Punishments for small Offences, and shall give Judgment by the Majority of Voices; but no Sentence shall be executed till the Commanding Officer (not being a Member of the Court Martial) or the Governor of the Garrison shall have confirmed the same.

Article 13. No Regimental Court Martial shall consist of less than Five Officers, excepting in Cases where the Number cannot be conveniently assembled, when three may be sufficient, who are likewise to determine upon the Sentence by the Majority of Voices, which Sentence is to be confirmed by the Commanding Officer not being a Member of the Court Martial.

Article 14. Every Officer commanding in any of Our Forts, Castles or Barracks, or elsewhere, where the Corps under his Command consists of Detachments from different Regiments, or of Independent Companies, may assemble Courts Martial for the Trial of Offenders in the same Manner as if they were Regimental, whose Sentence is not to be executed till it shall be confirmed by the said Commanding Officer.

Article 15. No Commissioned Officer shall be cashiered or dismissed from Our Service excepting by an Order from Us, or by the Sentence of a General Court Martial approved by Us, or by some Person having Authority from Us, under Our Sign Manual; but Non Commissioned Officers may be discharged as Private Soldiers. And by the Order of the Colonel of the Regiment, or by the Sentence of a Regimental Court Martial, be reduced to Private Centinels.

Article 16. No Person whatsoever shall use menacing Words, Signs, or Gestures in the Presence of a Court Martial, then sitting, or shall cause any Disorder or Riot, so as to disturb their Proceedings on the Penalty of being Punished at the Discretion of the said Court Martial.

Article 17. To the End that Offenders may be brought to Justice, We hereby direct that whenever any Officer or Soldier shall commit a Crime deserving Punishment, he shall, by his Commanding Officer, if an Officer, be put in Arrest, if a Non Commissioned Officer or Soldier, be imprisoned till he shall be either tried by a Court Martial or shall be lawfully discharged by a proper Authority.

Article 18. No Officer or Soldier who shall be put in Arrest or Imprisonment shall continue in his Confinement more than Eight Days, or till such time as a Court Martial can be conveniently assembled.

Article 19. No Officer commanding a Guard, or Provost Marshal, shall refuse to receive or keep any Prisoner committed to his Charge by any Officer belonging to Our Forces, which Officer shall at the same Time, deliver an account in Writing signed by himself of the Crime with which the said Prisoner is charged.

Article 20. No Officer commanding a Guard, or Provost Marshal, shall presume to release any Prisoner committed to his Charge, without proper authority for so doing, nor shall he suffer any Prisoner to escape on the Penalty of being punished for it by the Sentence of a Court Martial.

Article 21. Every Officer or Provost Marshal to whose Charge Prisoners shall be committed, is hereby required within Twenty-four hours after such Commitment, or as soon as he shall be relieved from his Guard, to give in Writing to the Colonel of the Regiment to whom the Prisoner belongs (where the Prisoner is confined upon the Guard belonging to the said Regiment, and that his Offence only relates to the Neglect of Duty in his own Corps) or to the Commander in Chief, their Names, their Crimes, and the Names of the Officers who committed them, on the Penalty of his being punished for his Disobedience or Neglect at the Discretion of a Court Martial.

Article 22. And if any Officer under Arrest shall leave his Confinement before he is set at Liberty by the Officer who confined him, or by a superior Power, he shall be cashiered for it.

Article 23. Whatsoever Commissioned Officer shall be convicted before a General Court Martial of behaving in a scandalous infamous Manner, such as is unbecoming the Character of an Officer and a Gentleman shall be discharged from Our Service.

Section 16.

ENTRY OF COMMISSIONS.

All Commissions granted by Us, or by any of Our Generals having Authority from Us, shall be entered in the Books of Our Secretary at War, and the Commissary General, otherwise they will not be allowed of at the Musters.

Section 17.

EFFECTS OF THE DEAD.

Article 1. When any Commissioned Officer shall happen to die or be killed in Our Service, the Major of the Regiment, or the Officer doing the Major's Duty in his Absence, shall immediately secure all his Effects, or Equipage then in Camp or Quarters, and shall before the next Regimental Court Martial make an Inventory thereof, and forthwith transmit the same to the Office of Our Secretary at War, to the End that his Executors may after Payment of his Debts and Quarters, and Interment, receive the Overplus, if any be, to his or their Use.

Article 2. When any Non Commissioned Officer or Private Soldier shall happen to die, or be killed in Our Service, the then Commanding Officer of the Troop or Company shall, in the Presence of two other Commissioned Officers take an Account of whatever Effects he dies possessed of, above his Regimental Cloathing, Arms, and Accoutrements, and transmit the same to the Office of Our Secretary at War; which said Effects are to be accounted for and paid to the Representative of such deceased Non Commissioned Officer or Soldier. And in Case any of the Officers so authorized to take care of the Effects of Dead Officers and Soldiers, should, before they have accounted to their Representatives for the same, have occasion to leave the Regiment by preferment, or other wise, they shall, before they be permitted to quit the same, deposit in the hands of the Commanding Officer, or of the Agent of the Regiment, all the Effects of such deceased Non Commissioned Officers and Soldiers, in order that the same may be secured for and paid to their respective Representatives.

Section 18.

ARTILLERY.

Article 1. All Officers, Conductors, Gunners, Matrosses, Drivers, or any other Persons whatsoever receiving Pay or Hire in the Service of Our Artillery, shall be governed by the aforesaid Rules, and Articles, and shall be subject to be tried by Courts Martial in like Manner with the Officers and Soldiers of Our other Troops.

Article 2. For Differences arising among themselves or in Matters relating solely to their Own Corps, the Courts Martial may be composed of their own Officers; but where a Number sufficient of such Officers cannot be assembled, or in Matters wherein other Corps are interested, the Officers of Artillery shall sit in Courts Martial with the Officers of Our other Corps, taking their Rank according to the Dates of their respective Commissions and no otherwise.

Section 19.

AMERICAN TROOPS.

Article 1. The Officers and Soldiers of any Troops which are or shall be raised in America, being mustered, and in Pay, shall, at all Times, and in all Places, when joined and acting in conjunction with Our British Forces, be governed by these Rules and Articles of War, and shall be subject to be tried by Courts Martial in like Manner with the Officers and Soldiers of Our British Troops.

Article 2. Whereas notwithstanding the Regulations which We were pleased to make for settling the Rank of Provincial * * General and Field

Officers in North America, Difficulties have arisen with regard to the Rank of the said Officers when acting in conjunction with Our Regular Forces. And We being Willing to give due Encouragement to Officers serving in Our Provincial Troops; It is Our Will and Pleasure, that, for the future, all General Officers and Colonels serving by Commission from any of the Governors, Lieutenant or Deputy Governors, or President of the Council for the Time being of Our Provinces and Colonies in North America, shall, on all Detachments, Courts Martial, or other Duty, wherein they may be employed in Conjunction with Our Regular Forces, take Rank next after all Colonels serving by Commissions signed by Us, though the Commissions of such Provincial Generals and Colonels should be of elder Date, and in like Manner that Lieutenant Colonels, Majors, Captains, and other inferior Officers serving by Commission from the Governors, Lieutenant or Deputy Governors or Presidents of the Council for the time being of Our said Provinces and Colonies in North America, shall, on all Detachments, Courts-Martial or other Duty wherein they may be employed in Conjunction with Our Regular Forces, have Rank next after all Officers of the like Rank, serving by Commissions signed by Us, or by Our General Commanding in Chief in North America, though the Commissions of such Lieutenant Colonels, Majors, Captains, and other inferior Officers should be of elder Date to those of the like Rank signed by Us, or by Our said General.

Section 20.

Relating to the foregoing Articles.

Article 1. The foregoing Articles are to be read and published once in every two Months at the Head of every Regiment, Troop, or Company mustered or to be mustered in Our Service, and are to be duly observed and exactly obeyed by all Officers and Soldiers who are or shall be in Our Service (excepting in what relates to the Payment of Soldiers Quarters, and to Carriages, which is in Our Kingdom of Ireland to be regulated by the Lord Lieutenant or Chief Governor or Governors thereof) and in Our Islands, Provinces and Garrisons beyond the Seas by the respective Governors of the same according as the different Circumstances of the said Islands, Provinces or Garrisons may require.

Article 2. Notwithstanding its being directed in the eleventh Section of these Our Rules and Articles, that every Commanding Officer is required to deliver up to the Civil Magistrate all such Persons under his Command who shall be accused of any Crimes which are punishable by the known Laws of the Land; yet in Our Garrison of Gibralter, and Island of Minorca, where Our Forces now are, or in any other Place beyond the Seas to which any of Our Troops are or may be hereafter commanded, and where there is no

Form of Our Civil Judicature in Force, the Generals, or Governors, or Commanders respectively, are to appoint General Courts-Martial to be held, who are to try all Persons guilty of wilful Murder, Theft, Robbery, Rapes, Coining or Clipping the Coin of Great Britain, or of any Foreign Coin current in the Country or garrison, and all other Capital Crimes, or other Offences, and punish Offenders with Death, or otherwise as the Nature of their Crimes shall deserve.

Article 3. All Crimes not Capital and all Disorders and Neglects which Officers and Soldiers may be guilty of to the Prejudice of good Order and Military Discipline, though not mentioned in the above Articles of War are to be taken Cognizance of by a General or Regimental Court Martial, according to the Nature and Degree of the Offence, and be punished at their Discretion.

(Initd.) G. R.

APPENDIX C.

AMERICAN ARTICLES OF 1876.[1]

Resolved, That from and after the publication of the following Articles, in the respective armies of the United States, the Rules and Articles by which the said armies have heretofore been governed shall be, and they are hereby, repealed:

SECTION I.

Article 1. That every officer who shall be retained in the army of the United States, shall, at the time of his acceptance of his commission, subscribe these rules and regulations.

Article 2. It is earnestly recommended to all officers and soldiers diligently to attend divine service; and all officers and soldiers who shall behave indecently, or irreverently, at any place of divine worship, shall, if commissioned officers, be brought before a general court-martial, there to be publicly and severely reprimanded by the president; if non-commissioned officers or soldiers, every person so offending shall, for his first offence, forfeit $\frac{1}{9}$th of a dollar, to be deducted out of his next pay; for the second offence, he shall not only forfeit a like sum, but be confined for twenty-four hours; and, for every like offence, shall suffer and pay in like manner; which money, so forfeited, shall be applied to the use of the sick soldiers of the troop or company to which the offender belongs.

Article 3. Whatsoever non-commissioned officer or soldier shall use any prophane oath or execration, shall incur the penalties expressed in the foregoing article; and if a commissioned officer be thus guilty of prophane cursing or swearing, he shall forfeit and pay, for each and every such offence, two-thirds of a dollar.

Article 4. Every chaplain who is commissioned to a regiment, company, troop, or garrison, and shall absent himself from the said regiment, com-

[1] Enacted by Resolution of Congress, September 20, 1876. For a history of these Articles see the chapter entitled THE ARTICLES OF WAR. This set replaced the Articles enacted by Resolution of Congress, June 30, 1775, and the additional Articles similarly enacted on November 7, 1775. They were amended by the Resolution of Congress of May 31, 1786, and were replaced by the Articles of War adopted by Congress on April 10, 1806.

pany, troop, or garrison, (excepting in case of sickness or leave of absence,) shall be brought to a court-martial, and be fined not exceeding one month's pay, besides the loss of his pay during his absence, or be discharged, as the said court-martial shall judge most proper.

Section II.

Article 1. Whatsoever officer or soldier shall presume to use traitorous or disrespectful words against the authority of the United States in Congress assembled, or the legislature of any of the United States in which he may be quartered, if a commissioned officer, he shall be cashiered; if a non-commissioned officer or soldier, he shall suffer such punishment as shall be inflicted upon him by the sentence of a court-martial.

Article 2. Any officer or soldier who shall behave himself with contempt or disrespect towards the general, or other commander-in-chief of the forces of the United States, or shall speak words tending to his hurt or dishonor, shall be punished according to the nature of his offence, by the judgment of a court-martial.

Article 3. Any officer or soldier who shall begin, excite, cause or join, in any mutiny or sedition, in the troop, company, or regiment to which he belongs, or in any other troop or company in the service of the United States, or in any part, post, detachment or guard, on any pretence whatsoever, shall suffer death, or such other punishment as by a court-martial shall be inflicted.

Article 4. Any officer, non-commissioned officer, or soldier, who, being present at any mutiny or sedition, does not use his utmost endeavor to suppress the same, or coming to the knowledge of any intended mutiny, does not, without delay, give information thereof to his commanding officer, shall be punished by a court-martial with death, or otherwise, according to the nature of the offence.

Article 5. Any officer or soldier who shall strike his superior officer, or draw, or shall lift up any weapon, or offer any violence against him, being in the execution of his office, on any pretence whatsoever, or shall disobey any lawful command of his superior officer, shall suffer death, or such other punishment as shall, according to the nature of his offence, be inflicted upon him by the sentence of a court-martial.

Section III.

Article 1. Every non-commissioned officer and soldier, who shall inlist himself in the service of the United States, shall at the time of his so inlisting, or within six days afterwards, have the articles for the government of the forces of the United States read to him, and shall, by the officer who

inlisted him, or by the commanding officer of the troop or company into which he was inlisted, be taken before the next justice of the peace, or chief magistrate of any city or town-corporate, not being an officer of the army, or, where recourse cannot be had to the civil magistrate, before the judge advocate, and, in his presence, shall take the following oath, or affirmation, if conscientiously scrupulous about taking an oath:

I swear, or affirm, (as the case may be,) to be true to the United States of America, and to serve them honestly and faithfully against all their enemies or opposers whatsoever; and to observe and obey the orders of the Continental Congress, and the orders of the generals and officers set over me by them.

Which justice or magistrate is to give the officer a certificate, saying that the man inlisted did take the said oath or affirmation.

Article 2. After a non-commissioned officer or soldier shall have been duly inlisted and sworn, he shall not be dismissed the service without a discharge in writing; and no discharge, granted to him, shall be allowed of as sufficient, which is not signed by a field officer of the regiment into which he was inlisted, or commanding officer, where no field officer of the regiment is in the same state.

Section IV.

Article 1. Every officer commanding a regiment, troop, or company, shall, upon the notice given to him by the commissary of musters, or from one of his deputies, assemble the regiment, troop, or company, under his command, in the next convenient place for their being mustered.

Article 2. Every colonel or other field officer commanding the regiment, troop, or company, and actually residing with it, may give furloughs to non-commissioned officers and soldiers, in such numbers, and for so long a time, as he shall judge to be most consistent with the good of the service; but, no non-commissioned officer or soldier shall, by leave of his captain, or inferior officer, commanding the troop or company (his field officer not being present) be absent above twenty days in six months, nor shall more than two private men be absent at the same time from their troop or company, excepting some extraordinary occasion shall require it, of which occasion the field officer, present with, and commanding the regiment, is to be the judge.

Article 3. At every muster, the commanding officer of each regiment, troop, or company, there present, shall give to the commissary, certificates signed by himself, signifying how long such officers, who shall not appear at the said muster, have been absent, and the reason of their absence; in like manner, the commanding officer of every troop or company shall give certificates, signifying the reasons of the absence of the non-commissioned officers and private soldiers; which reasons, and time of absence, shall be

inserted in the muster-rolls, opposite to the names of the respective absent officers and soldiers: The said certificates shall, together with the muster-rolls, be remitted by the commissary to the Congress, as speedily as the distance of place will admit.

Article 4. Every officer who shall be convicted before a general court-martial of having signed a false certificate, relating to the absence of either officer or private soldier, shall be cashiered.

Article 5. Every officer who shall knowingly make a false muster of man or horse, and every officer or commissary who shall willingly sign, direct, or allow the signing of the muster-rolls, wherein such false muster is contained, shall, upon proof made thereof by two witnesses before a general court-martial, be cashiered, and shall be thereby utterly disabled to have or hold any office or employment in the service of the United States.

Article 6. Any commissary who shall be convicted of having taken money, or any other thing, by way of gratification, on the mustering of any regiment, troop, or company, or on the signing the muster-rolls, shall be displaced from his office, and shall be thereby utterly disabled to have or hold any office or employment under the United States.

Article 7. Any officer who shall presume to muster any person as a soldier, who is, at other times, accustomed to wear a livery, or who does not actually do his duty as a soldier, shall be deemed guilty of having made a false muster, and shall suffer accordingly.

SECTION V.

Article 1. Every officer who shall knowingly make a false return to the Congress, or any committee thereof, to the commander in chief of the forces of the United States, or to any his superior officer authorized to call for such returns, of the state of the regiment, troop, or company, or garrison, under his command, or of arms, ammunition, clothing, or other stores thereunto belonging, shall, by a court-martial, be cashiered.

Article 2. The commanding officer of every regiment, troop, or independent company, or garrison of the United States, shall, in the beginning of every month, remit to the commander in chief of the American forces, and to the Congress, an exact return of the state of the regiment, troop, independent company, or garrison under his command, specifying the names of the officers not then residing at their posts, and the reason for, and time of, their absence: Whoever shall be convicted of having, through neglect or design, omitted the sending such returns, shall be punished according to the nature of his crime, by the judgment of a general court-martial.

Section VI.

Article 1. All officers and soldiers, who having received pay, or having been duly inlisted in the service of the United States, shall be convicted of having deserted the same, shall suffer death, or such other punishment as by a court-martial shall be inflicted.

Article 2. Any non-commissioned officer or soldier, who shall, without leave from his commanding officer, absent himself from his troop or company, or from any detachment with which he shall be commanded, shall, upon being convicted thereof, be punished, according to the nature of his offence, at the discretion of a court-martial.

Article 3. No non-commissioned officer or soldier shall inlist himself in any other regiment, troop or company, without a regular discharge from the regiment, troop or company, in which he last served, on the penalty of being reputed a deserter, and suffering accordingly: And in case any officer shall, knowingly, receive and entertain such non-commissioned officer or soldier, or shall not, after his being discovered to be a deserter, immediately confine him, and give notice thereof to the corps in which he last served, he, the said officer so offending, shall, by a court-martial, be cashiered.

Article 4. Whatsoever officer or soldier shall be convicted of having advised or persuaded any other officer or soldier to desert the service of the United States, shall suffer such punishment as shall be inflicted upon him by the sentence of a court-martial.

Section VII.

Article 1. No officer or soldier shall use any reproachful or provoking speeches or gestures to another, upon pain, if an officer, of being put in arrest; if a soldier, imprisoned, and of asking pardon of the party offended, in the presence of his commanding officer.

Article 2. No officer or soldier shall presume to send a challenge to any other officer or soldier, to fight a duel, upon pain, if a commissioned officer, of being cashiered, if a non-commissioned officer or soldier, of suffering corporeal punishment, at the discretion of a court-martial.

Article 3. If any commissioned or non-commissioned officer commanding a guard, shall, knowingly and willingly, suffer any person whatsoever to go forth to fight a duel, he shall be punished as a challenger: And likewise all seconds, promoters, and carriers of challenges, in order to duels, shall be deemed as principals, and be punished accordingly.

Article 4. All officers, of what condition soever, have power to part and quell all quarrels, frays and disorders, though the persons concerned should belong to another regiment, troop or company; and either to order officers into arrest, or non-commissioned officers or soldiers to prison, till their proper

superior officers shalt be acquainted therewith; and whosoever shall refuse to obey such officer (though of an inferior rank) or shall draw his sword upon him, shall be punished at the discretion of a general court-martial.

Article 5. Whatsoever officer or soldier shall upbraid another for refusing a challenge, shall himself be punished as a challenger; and all officers and soldiers are hereby discharged of any disgrace, or opinion of disadvantage, which might arise from their having refused to accept of challenges, as they will only have acted in obedience to the orders of Congress, and done their duty as good soldiers, who subject themselves to discipline.

Section VIII.

Article 1. No suttler shall be permitted to sell any kind of liquors or victuals, or to keep their houses or shops open, for the entertainment of soldiers, after nine at night, or before the beating of the reveilles, or upon Sundays, during the divine service, or sermon, on the penalty of being dismissed from all future suttling.

Article 2. All officers, soldiers and suttlers, shall have full liberty to bring into any of the forts or garrisons of the United American States, any quantity or species of provisions, eatable or drinkable, except where any contract or contracts are, or shall be entered into by Congress, or by their order, for furnishing such provisions, and with respect only to the species of provisions so contracted for.[1]

Article 3. All officers, commanding in the forts, barracks, or garrisons of the United States, are hereby required to see, that the persons permitted to suttle, shall supply the soldiers with good and wholesome provisions at the market price, as they shall be answerable for their neglect.

Article 4. No officers, commanding in any of the garrisons, forts, or barracks of the United States, shall either themselves exact exorbitant prices for houses or stalls let out to suttlers, or shall connive at the like exactions in others; nor, by their own authority and for their private advantage, shall they lay any duty or imposition upon, or be interested in the sale of such victuals, liquors or other necessaries of life, which are brought into the garrison, fort, or barracks, for the use of the soldiers, on the penalty of being discharged from the service.

Section IX.

Article 1. Every officer commanding in quarters, garrisons, or on a march, shall keep good order, and, to the utmost of his power, redress all such abuses or disorders which may be committed by any officer or soldier under his command; if, upon complaint made to him of officers or soldiers

[1] Repealed and replaced by Resolution of Congress of April 14, 1777.

beating, or otherwise ill-treating any person; of disturbing fairs or markets, or of committing any kind of riots to the disquieting of the good people of the United States; he the said commander, who shall refuse or omit to see justice done on the offender or offenders, and reparation made to the party or parties injured, as far as part of the offenders pay shall enable him or them, shall, upon proof thereof, be punished, by a general court-martial, as if he himself had committed the crimes or disorders complained of.

Section X.

Article 1. Whenever any officer or soldier shall be accused of a capital crime, or of having used violence, or committed any offence against the persons or property of the good people of any of the United American States, such as is punishable by the known laws of the land, the commanding officer and officers of every regiment, troop, or party, to which the person or persons so accused shall belong, are hereby required, upon application duly made by or in behalf of the party or parties injured, to use his utmost endeavors to deliver over such accused person or persons to the civil magistrate; and likewise to be aiding and assisting to the officers of justice in apprehending and securing the person or persons so accused, in order to bring them to a trial. If any commanding officer or officers shall wilfully neglect or shall refuse, upon the application aforesaid, to deliver over such accused person or persons to the civil magistrates, or to be aiding and assisting to the officers of justice in apprehending such person or persons, the officer or officers so offending shall be cashiered.

Article 2. No officer shall protect any person from his creditors, on the pretence of his being a soldier, nor any non-commissioned officer or soldier who does not actually do all duties as such, and no farther than is allowed by a resolution of Congress, bearing date the 26th day of December, 1775. Any officer offending herein, being convicted thereof before a court-martial, shall be cashiered.

Section XI.

Article 1. If any officer shall think himself to be wronged by his colonel, or the commanding officer of the regiment, and shall, upon due application made to him, be refused to be redressed, he may complain to the general, commanding in chief the forces of the United States, in order to obtain justice, who is hereby required to examine into the said complaint, and, either by himself, or the board of war, to make report to Congress thereupon, in order to receive further directions. [1]

[1] Repealed and replaced by Resolution of Congress of April 14, 1777.

Article 2. If any inferior officer or soldier shall think himself wronged by his captain, or other officer commanding the troop or company to which he belongs, he is to complain thereof to the commanding officer of the regiment, who is hereby required to summon a regimental court-martial, for the doing justice to the complainant; from which regimental court-martial either party may, if he thinks himself still aggrieved, appeal to a general court-martial; but if, upon a second hearing, the appeal shall appear to be vexatious and groundless, the person so appealing shall be punished at the discretion of the said general court-martial.

Section XII.

Article 1. Whatsoever commissioned officer, store-keeper, or commissary, shall be convicted at a general court-martial of having sold (without a proper order for that purpose) embezzled, misapplied, or wilfully, or through neglect, suffered any of the provisions, forage, arms, clothing, ammunition, or other military stores belonging to the United States, to be spoiled or damaged, the said officer, store-keeper, or commissary so offending, shall, at his own charge, make good the loss or damage, shall moreover forfeit all his pay, and be dismissed from the service.

Article 2. Whatsoever non-commissioned officer or soldier shall be convicted, at a regimental court-martial, of having sold, or designedly, or through neglect, wasted the ammunition delivered out to him to be employed in the service of the United States, shall, if a non-commissioned officer, be reduced to a private sentinel, and shall besides suffer corporeal punishment in the same manner as a private sentinel so offending, at the discretion of a regimental court-martial.

Article 3. Every non-commissioned officer or soldier who shall be convicted at a court-martial of having sold, lost or spoiled, through neglect, his horse, arms, clothes or accoutrements shall undergo such weekly stoppages (not exceeding the half of his pay) as a court-martial shall judge sufficient for repairing the loss or damage; and shall suffer imprisonment, or such other corporeal punishment, as his crime shall deserve.

Article 4. Every officer who shall be convicted at a court-martial of having embezzled or misapplied any money with which he may have been entrusted for the payment of the men under his command, or for inlisting men into the service, if a commissioned officer, shall be cashiered and compelled to refund the money, if a non-commissioned officer, shall be reduced to serve in the ranks as a private soldier, be put under stoppages until the money be made good, and suffer such corporeal punishment, (not extending to life or limb) as the court-martial shall think fit.

rticle 5. Every captain of a troop or company is charged with the arms, accoutrements, ammunition, clothing, or other warlike stores belong-

ing to the troop or company under his command, which he is to be accountable for to his colonel, in case of their being lost, spoiled, or damaged, not by unavoidable accidents, or on actual service.

SECTION XIII.

Article 1. All non-commissioned officers and soldiers, who shall be found one mile from the camp, without leave, in writing, from their commanding officer, shall suffer such punishment as shall be inflicted upon them by the sentence of a court-martial.

Article 2. No officer or soldier shall lie out of his quarters, garrison, or camp, without leave from his superior officer, upon penalty of being punished according to the nature of his offence, by the sentence of a court-martial.

Article 3. Every non-commissioned officer and soldier shall retire to his quarters or tent at the beating of the retreat; in default of which he shall be punished, according to the nature of his offence, by the commanding officer.

Article 4. No officer, non-commissioned officer, or soldier, shall fail of repairing, at the time fixed, to the place of parade or exercise, or other rendezvous appointed by his commanding officer, if not prevented by sickness, or some other evident necessity; or shall go from the said place of rendezvous, or from his guard, without leave from his commanding officer, before he shall be regularly dismissed or relieved, on the penalty of being punished according to the nature of his offence, by the sentence of a court-martial.

Article 5. Whatever commissioned officer shall be found drunk on his guard, party, or other duty under arms, shall be cashiered for it; any non-commissioned officer or soldier so offending, shall suffer such corporeal punishment as shall be inflicted by the sentence of a court-martial.

Article 6. Whatever sentinel shall be found sleeping upon his post, or shall leave it before he shall be regularly relieved, shall suffer death, or such other punishment as shall be inflicted by the sentence of a court-martial.

Article 7. No soldier belonging to any regiment, troop, or company, shall hire another to do his duty for him, or be excused from duty, but in case of sickness, disability, or leave of absence; and every such soldier found guilty of hiring his duty, as also the party so hired to do another's duty, shall be punished at the next regimental court-martial.

Article 8. And every non-commissioned officer conniving at such hiring of duty as aforesaid, shall be reduced for it; and every commissioned officer, knowing and allowing of such ill-practices in the service, shall be punished by the judgment of a general court-martial.

Article 9. Any person, belonging to the forces employed in the service of the United States, who, by discharging of fire-arms, drawing of swords,

beating of drums, or by any other means whatsoever, shall occasion false alarms in camp, garrison, or quarters, shall suffer death, or such other punishment as shall be ordered by the sentence of a general court-martial.

Article 10. Any officer or soldier who shall, without urgent necessity, or without the leave of his superior officer, quit his platoon or division, shall be punished, according to the nature of his offence, by the sentence of a court-martial.

Article 11. No officer or soldier shall do violence to any person who brings provisions or other necessaries to the camp, garrison, or quarters of the forces of the United States employed in parts out of said states, on pain of death, or such other punishment as a court-martial shall direct.

Article 12. Whatsoever officer or soldier shall misbehave himself before the enemy, or shamefully abandon any post committed to his charge, or shall speak words inducing others to do the like, shall suffer death.

Article 13. Whatsoever officer or soldier shall misbehave himself before the enemy, and run away, or shamefully abandon any fort, post or guard, which he or they shall be commanded to defend, or speak words inducing others to do the like; or who, after victory, shall quit his commanding officer, or post, to plunder and pillage: Every such offender, being duly convicted thereof, shall be reputed a disobeyer of military orders; and shall suffer death, or such other punishment, as, by a general court-martial, shall be inflicted on him.

Article 14. Any person, belonging to the forces of the United States, who shall cast away his arms and ammunition, shall suffer death, or such other punishment as shall be ordered by the sentence of a general court-martial.

Article 15. Any person belonging to the forces of the United States, who shall make known the watch-word to any person who is not entitled to receive it according to the rules and discipline of war, or shall presume to give a parole or watch-word different from what he received, shall suffer death, or such other punishment as shall be ordered by the sentence of a general court-martial.

Article 16. All officers and soldiers are to behave themselves orderly in quarters, and on their march; and whosoever shall commit any waste or spoil, either in walks of trees, parks, warrens, fish-ponds, houses or gardens, corn-fields, enclosures or meadows, or shall maliciously destroy any property whatsoever belonging to the good people of the United States, unless by order of the then commander in chief of the forces of the said states, to annoy rebels or other enemies in arms against said states, he or they that shall be found guilty of offending herein, shall (besides such penalties as they are liable to by law) be punished according to the nature and degree of the offence, by the judgment of a regimental or general court-martial.

Article 17. Whosoever, belonging to the forces of the United States, employed in foreign parts, shall force a safe-guard, shall suffer death.

Article 18. Whosoever shall relieve the enemy with money, victuals, or ammunition, or shall knowingly harbor or protect an enemy, shall suffer death, or such other punishment as by a court-martial shall be inflicted.

Article 19. Whosoever shall be convicted of holding correspondence with, or giving intelligence to the enemy, either directly or indirectly, shall suffer death, or such other punishment as by a court-martial shall be inflicted.

Article 20. All public stores taken in the enemy's camp, towns, forts, or magazines, whether of artillery, ammunition, clothing, forage, or provisions, shall be secured for the service of the United States, for the neglect of which the commanders in chief are to be answerable.

Article 21. If any officer or soldier shall leave his post or colors to go in search of plunder, he shall upon being convicted thereof before a general court-martial, suffer death, or such other punishment as by a court-martial shall be inflicted.

Article 22. If any commander of any garrison, fortress, or post, shall be compelled by the officers or soldiers under his command, to give up to the enemy, or to abandon it, the commissioned officers, non-commissioned officers, or soldiers, who shall be convicted of having so offended, shall suffer death, or such other punishment as shall be inflicted upon them by the sentence of a court-martial.

Article 23. All suttlers and retainers to a camp, and all persons whatsoever serving with the armies of the United States in the field, though no inlisted soldier, are to be subject to orders, according to the rules and discipline of war.

Article 24. Officers having brevets, or commissions of a prior date to those of the regiment in which they now serve, may take place in courts-martial and on detachments, when composed of different corps, according to the ranks given them in their brevets or dates of their former commissions; but in the regiment, troop, or company to which such brevet officers and those who have commissions of a prior date do belong, they shall do duty and take rank both on court-martial and on detachments which shall be composed only of their own corps, according to the commissions by which they are mustered in the said corps.

Article 25. If upon marches, guards, or in quarters, different corps shall happen to join or do duty together, the eldest officer by commission there, on duty, or in quarters, shall command the whole, and give out orders for what is needful to the service; regard being always had to the several ranks of those corps, and the posts they usually occupy.

Article 26. And in like manner also, if any regiments, troops, or detachments of horse or foot shall happen to march with, or be encamped or

quartered with any bodies or detachments of other troops in the service of the United States, the eldest officer, without respect to corps, shall take upon him the command of the whole, and give the necessary orders to the service.

SECTION XIV.[1]

Article 1. A general court-martial in the United States shall not consist of less than thirteen commissioned officers, and the president of such court-martial shall not be the commander-in-chief or commandant of the garrison where the offender shall be tried, nor be under the degree of a field officer.

Article 2. The members both of general and regimental courts-martial shall, when belonging to different corps, take the same rank which they hold in the army; but when courts-martial shall be composed of officers of one corps, they shall take their ranks according to the dates of the commissions by which they are mustered in the said corps.

Article 3. The judge-advocate general, or some person deputed by him, shall prosecute in the name of the United States of America; and in trials of offenders by general courts-martial, administer to each member the following oaths:

"You shall well and truly try and determine, according to your evidence, the matter now before you, between the United States of America, and the prisoners to be tried. So help you God.

"You A. B. do swear, that you will duly administer justice according to the rules and articles for the better government of the forces of the United States of America, without partiality, favor, or affection; and if any doubt shall arise, which is not explained by the said articles, according to your conscience, the best of your understanding, and the custom of war in the like cases. And you do further swear, that you will not divulge the sentence of the court, until it shall be approved of by the general, or commander in chief; neither will you, upon any account, at any time whatsoever, disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof as a witness by a court of justice, in a due course of law. So help you God."

And as soon as the said oath shall have been administered to the respective members, the president of the court shall administer to the judge advocate, or person officiating as such, an oath in the following words:

"You A. B. do swear, that you will not, upon any account, at any time whatsoever, disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof, as a witness, by a court of justice, in a due course of law. So help you God."

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[1] Replaced by a new section by Resolution of Congress of May 31, 1786. See page 619, *post*.

Article 4. All the members of a court-martial are to behave with calmness and decency; and in the giving of their votes, are to begin with the youngest in commission.

Article 5. All persons who give evidence before a general court-martial, are to be examined upon oath; and no sentence of death shall be given against any offender by any general court-martial, unless two-thirds of the officers present shall concur therein.

Article 6. All persons called to give evidence, in any cause, before a court-martial, who shall refuse to give evidence, shall be punished for such refusal, at the discretion of such court-martial: The oath to be administered in the following form, viz:

"You swear the evidence you shall give in the cause now in hearing, shall be the truth, the whole truth, and nothing but the truth. So help you God."

Article 7. No field officer shall be tried by any person under the degree of a captain; nor shall any proceedings or trials be carried on excepting between the hours of eight in the morning and of three in the afternoon, except in cases which require an immediate example.

Article 8. No sentence of a general court-martial shall be put in execution, till after a report shall be made of the whole proceedings to Congress, or to the general or commander in chief of the forces of the United States, and their or his directions be signified thereupon.[1]

Article 9. For the more equitable decision of disputes which may arise between officers and soldiers belonging to different corps, it is hereby directed, that the courts-martial shall be equally composed of officers belonging to the corps in which the parties in question do then serve; and that the presidents shall be taken by turns, beginning with that corps which shall be eldest in rank.

Article 10. The commissioned officers of every regiment may, by the appointment of their colonel or commanding officer, hold regimental courts-martial for the enquiring into such disputes, or criminal matters, as may come before them, and for the inflicting corporeal punishments for small offences, and shall give judgment by the majority of voices; but no sentence shall be executed till the commanding officer (not being a member of the court-martial) or the commandant of the garrison, shall have confirmed the same.

Article 11. No regimental court-martial shall consist of less than five officers, excepting in cases where that number cannot conveniently be assembled, when three may be sufficient; who are likewise to determine upon the sentence by the majority of voices; which sentence is to be confirmed by the commanding officer of the regiment, not being a member of the court-martial.

[1] Repealed and replaced by Resolution of Congress of April 14, 1777.

Article 12. Every officer commanding in any of the forts, barracks, or elsewhere, where the corps under his command consists of detachments from different regiments, or of independent companies, may assemble courts-martial for the trial of offenders in the same manner as if they were regimental, whose sentence is not to be executed until it shall be confirmed by the said commanding officer.

Article 13. No commissioned officer shall be cashiered or dismissed from the service, excepting by an order from the Congress, or by the sentence of a general court-martial; but non-commissioned officers may be discharged as private soldiers, and, by the order of the colonel of the regiment, or by the sentence of a regimental court-martial, be reduced to private sentinels.

Article 14. No person whatever shall use menacing words, signs, or gestures, in the presence of a court-martial then sitting, or shall cause any disorder or riot, so as to disturb their proceedings, on the penalty of being punished at the discretion of the said court-martial.

Article 15. To the end that offenders may be brought to justice, it is hereby directed, that whenever any officer or soldier shall commit a crime deserving punishment, he shall, by his commanding officer, if an officer, be put in arrest; if a non-commissioned officer or soldier, be imprisoned till he shall be either tried by a court-martial, or shall be lawfully discharged by a proper authority.

Article 16. No officer or soldier who shall be put in arrest or imprisonment, shall continue in his confinement more than eight days, or till such time as a court-martial can be conveniently assembled.

Article 17. No officer commanding a guard, or provost-martial, shall refuse to receive or keep any prisoner committed to his charge, by any officer belonging to the forces of the United States; which officer shall, at the same time, deliver an account in writing, signed by himself, of the crime with which the said prisoner is charged.

Article 18. No officer commanding a guard, or provost-martial, shall presume to release any prisoner committed to his charge without proper authority for so doing; nor shall he suffer any prisoner to escape, on the penalty of being punished for it by a sentence of a court-martial.

Article 19. Every officer or provost-martial to whose charge prisoners shall be committed, is hereby required within twenty-four hours after such commitment, or as soon as he shall be relieved from his guard, to give in writing to the colonel of the regiment to whom the prisoner belongs (where the prisoner is confined upon the guard belonging to the said regiment, and that his offence only relates to the neglect of duty in his own corps) or to the commander in chief, their names, their crimes, and the names of the officers who committed them, on the penalty of his being punished for his disobedience or neglect, at the discretion of a court-martial.

Article 20. And if any officer under arrest, shall leave his confinement

before he is set at liberty by the officer who confined him, or by a superior power, he shall be cashiered for it.

Article 21. Whatsoever commissioned officer shall be convicted, before a general court-martial, of behaving in a scandalous, infamous manner, such as is unbecoming the character of an officer and a gentleman, shall be discharged from the service.

Article 22. In all cases where a commissioned officer is cashiered for cowardice, or fraud, it shall be added in the punishment, that the crime, name, place of abode, and punishment of the delinquent, be published in the newspapers, and in and about the camp, and of that particular state from which the offender came, or usually resides: After which, it shall be deemed scandalous for any officer to associate with him.

SECTION XV.

Article 1. When any commissioned officer shall happen to die, or be killed in the service of the United States, the major of the regiment, or the officer doing the major's duty in his absence, shall immediately secure all his effects, or equipage, then in camp or quarters; and shall, before the next regimental court-martial, make an inventory thereof, and forthwith transmit the same to the office of the board of war, to the end, that his executors may, after payment of his debts in quarters and interment, receive the overplus, if any be, to his or their use.

Article 2. When any non-commissioned officer or soldier shall happen to die, or to be killed in the service of the United States, the then commanding officer of the troop or company, shall, in the presence of two other commissioned officers, take an account of whatever effects he dies possessed of, above his regimental clothing, arms, and accoutrements, and transmit the same to the office of the board of war; which said effects are to be accounted for and paid to the representative of such deceased non-commissioned officer or soldier. And in case any of the officers, so authorized to take care of the effects of dead officers and soldiers should, before they shall have accounted to their representatives for the same, have occasion to leave the regiment, by preferment or otherwise, they shall, before they be permitted to quit the same, deposite in the hands of the commanding officer or of the agent of the regiment, all the effects of such deceased non-commissioned officers and soldiers, in order that the same may be secured for, and paid to their respective representatives.

SECTION XVI.

Article 1. All officers, conductors, gunners, matrosses, drivers, or any other persons whatsoever, receiving pay or hire in the service of the

artillery of the United States, shall be governed by the aforesaid rules and articles, and shall be subject to be tried by courts-martial, in like manner with the officers and soldiers or the other troops in the service of the United States.

Article 2. For differences arising amongst themselves, or in matters relating solely to their own corps, the courts-martial may be composed of their own officers; but where a sufficient number of such officers cannot be assembled, or in matters wherein other corps are interested, the officers of artillery shall sit in courts-martial with the officers of the other corps, taking their rank according to the dates of their respective commissions, and no otherwise.

Section XVII.

Article 1. The officers and soldiers of any troops, whether minute-men, militia, or others, being mustered and in continental pay, shall, at all times, and in all places, when joined, or acting in conjunction with the regular forces of the United States, be governed by these rules or articles of war, and shall be subject to be tried by courts-martial in like manner with the officers and soldiers in the regular forces, save only that such courts-martial shall be composed entirely of militia officers of the same provincial corps with the offender.

That such militia and minute-men as are now in service, and have, by particular contract with the respective States, engaged to be governed by particular regulations while in continental service, shall not be subject to the above articles of war.

Article 2. For the future, all general officers and colonels, serving by commission from the authority of any particular State, shall, on all detachments, courts-martial, or other duty wherein they may be employed in conjunction with the regular forces of the United States, take rank next after all generals and colonels serving by commissions from Congress, though the commissions of such particular generals and colonels should be of elder date; and in like manner lieutenant-colonels, majors, captains, and other inferior officers, serving by commission from any particular State, shall, on all detachments, courts-martial or other duty, wherein they may be employed in conjunction with the regular forces of the United States, have rank next after all officers of the like rank serving by commissions from Congress, though the commissions of such lieutenant-colonels, majors, captains, and other inferior officers should be of elder date to those of the like rank from Congress.

Section XVIII.

Article 1. The aforegoing articles are to be read and published once in every two months, at the head of every regiment, troop or company,

mustered, or to be mustered in the service of the United States; and are to be duly observed and exactly obeyed by all officers and soldiers who are or shall be in the said service.

Article 2. The general, or commander in chief for the time being, shall have full power of pardoning or mitigating any of the punishments ordered to be inflicted, for any of the offences mentioned in the foregoing articles; and every offender convicted as aforesaid, by any regimental court-martial, may be pardoned, or have his punishment mitigated by the colonel, or officer commanding the regiment.[1]

Article 3. No person shall be sentenced to suffer death, except in the cases expressly mentioned in the foregoing articles; nor shall more than one hundred lashes be inflicted on any offender, at the discretion of a court-martial.

That every judge-advocate, or person officiating as such, at any general court-martial, do, and he is hereby required to transmit, with as much expedition as the opportunity of time and distance of place can admit, the original proceedings and sentence of such court-martial to the secretary at war, which said original proceedings and sentence shall be carefully kept and preserved in the office of said secretary, to the end that persons entitled thereto may be enabled, upon application to the said office, to obtain copies thereof.

That the party tried by any general court-martial, shall be entitled to a copy of the sentence and proceedings of such court-martial, upon demand thereof made by himself, or by any other person or persons, on his behalf, whether such sentence be approved or not.

Article 4. The field officers of each and every regiment are to appoint some suitable person belonging to such regiment, to receive all such fines as may arise within the same, for any breach of any of the foregoing articles, and shall direct the same to be carefully and properly applied to the relief of such sick, wounded or necessitous soldiers as belong to such regiments; and such person shall account with such officer for all fines received and the application thereof.

Article 5. All crimes not capital, and all disorders and neglects which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the above articles of war, are to be taken cognizance of by a general or regimental court-martial, according to the nature and degree of the offence, and be punished at their discretion.

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[1] Repealed and replaced by Resolution of Congress of April 14, 1777.

APPENDIX D.

AMERICAN ARTICLES OF MAY 31, 1786.[1]

Whereas crimes may be committed by officers and soldiers serving with small detachments of the forces of the United States, and where there may not be a sufficient number of officers to hold a general court-martial, according to the rules and articles of war, in consequence of which criminals may escape punishment, to the great injury of the discipline of the troops and the public service;

Resolved, That the 14th Section of the Rules and Articles for the better government of the troops of the United States, and such other Articles as relate to the holding of courts-martial and the confirmation of the sentences thereof, be and they are hereby repealed;

Resolved, That the following Rules and Articles for the administration of justice, and the holding of courts-martial, and the confirmation of the sentences thereof, be duly observed and exactly obeyed by all officers and soldiers who are or shall be in the armies of the United States.

Administration of Justice.

Article 1. General courts-martial may consist of any number of commissioned officers from 5 to 13 inclusively; but they shall not consist of less than 13, where that number can be convened without manifest injury to the service.

Article 2. General courts-martial shall be ordered, as often as the cases may require, by the general or officer commanding the troops. But no sentence of a court-martial shall be carried into execution until after the whole proceedings shall have been laid before the said general or officer commanding the troops for the time being; neither shall any sentence of a general court-martial in time of peace, extending to the loss of life, the dismission of a commissioned officer, or which shall either in time of peace or war respect a general officer, be carried into execution, until after the whole proceedings shall have been transmitted to the secretary at war, to be laid

[1] Replaces Section 14 of the Articles of 1776.

before Congress for their confirmation, or disapproval, and their orders on the case. All other sentences may be confirmed and executed by the officer ordering the court to assemble, or the commanding officer for the time being, as the case may be.

Article 3. Every officer commanding a regiment or corps, may appoint of his own regiment or corps, courts-martial, to consist of 3 commissioned officers, for the trial of offences not capital, and the inflicting corporeal punishments, and decide upon their sentences. For the same purpose, all officers commanding any of the garrisons, forts, barracks, or other place, where the troops consist of different corps, may assemble courts-martial, to consist of 3 commissioned officers, and decide upon their sentences.

Article 4. No garrison or regimental court-martial shall have the power to try capital cases, or commissioned officers; neither shall they inflict a fine exceeding one month's pay, nor imprison, nor put to hard labor, any non-commissioned officer or soldier, for a longer time than one month.

Article 5. The members of all courts-martial shall, when belonging to different corps, take the same rank in court which they hold in the army. But when courts-martial shall be composed of officers of one corps, they shall take rank according to the commissions by which they are mustered in the said corps.

Article 6. The judge advocate, or some person deputed by him, or by the general or officer commanding the army, detachment or garrison, shall prosecute in the name of the United States of America; but shall so far consider himself as counsel for the prisoner, after the said prisoner shall have made his plea, as to object to any leading question, to any of the witnesses, or any question to the prisoner, the answer to which might tend to criminate himself; and administer to each member the following oaths, which shall also be taken by all members of regimental and garrison courts-martial :

"You shall well and truly try and determine, according to evidence, the matter now before you, between the United States of America, and the prisoner to be tried. So help you God."

"You A. B. do swear, that you will duly administer justice, according to the rules and articles for the better government of the forces of the United States of America, without partiality, favor or affection; and if any doubt shall arise, which is not explained by said articles, according to your conscience, the best of your understanding, and the custom of war in the like cases. And you do further swear, that you will not divulge the sentence of the court, until it shall be published by the commanding officer. Neither will you, upon any account, at any time whatsoever, disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof, as a witness, by a court of justice, in a due course of law. So help you God."

And as soon as the said oaths shall have been administered to the respective members, the president of the court shall administer to the judge advocate, or person officiating as such, an oath in the following words :

" You A. B. do swear, that you will not, upon any account, at any time whatsoever, disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof as a witness, by a court of justice, in a due course of law. So help you God."

Article 7. All the members of a court-martial are to behave with decency and calmness; and in giving their votes, are to begin with the youngest in commission.

Article 8. All persons who give evidence before a court-martial, are to be examined on oath, or affirmation, as the case may be, and no sentence of death shall be given against any offender by any general court-martial, unless two-thirds of the members of the court shall concur therein.

Article 9. Whenever an oath or affirmation shall be administered by a court-martial, the oath or affirmation shall be in the following form :

" You swear (or affirm, as the case may be) the evidence you shall give in the case now in hearing, shall be the truth, the whole truth, and nothing but the truth. So help you God."

Article 10. On the trials of cases not capital, before courts-martial, the depositions of witnesses, not in the line or staff of the army, may be taken before some justice of the peace, and read in evidence, provided the prosecutor and person accused are present at the taking the same.

Article 11. No officer shall be tried but by a general court-martial, nor by officers of an inferior rank if it can be avoided. Nor shall any proceedings or trials be carried on, excepting between the hours of 8 in the morning and 3 in the afternoon, except in cases which, in the opinion of the officer appointing the court, require immediate example.

Article 12. No person whatsoever shall use menacing words, signs or gestures in the presence of a court-martial, or shall cause any disorder or riot to disturb their proceedings, on the penalty of being punished at the discretion of the said court-martial.

Article 13. No commissioned officer shall be cashiered, or dismissed from the service, excepting by order of Congress, or by the sentence of a general court-martial; and no non-commissioned officer or soldier shall be discharged the service, but by the order of Congress, the secretary at war, the commander-in-chief, or commanding officer of a department, or by the sentence of a general court-martial.

Article 14. Whenever any officer shall be charged with a crime, he shall be arrested and confined to his barracks, quarters or tent, and deprived of his sword by his commanding officer. And any officer who shall leave his

confinement before he shall be set at liberty by his commanding officer, or by a superior power, shall be cashiered for it.

Article 15. Non-commissioned officers and soldiers, who shall be charged with crimes, shall be imprisoned until they shall be tried by a court-martial, or released by proper authority.

Article 16. No officer or soldier, who shall be put in arrest or imprisonment, shall continue in his confinement more than 8 days, or until such time as a court-martial can be assembled.

Article 17. No officer commanding a guard, or provost-marshal, shall refuse to receive or keep any prisoner committed to his charge by any officer belonging to the forces of the United States, provided the officer committing shall, at the same time, deliver an account in writing signed by himself, of the crime with which the said prisoner is charged.

Article 18. No officer commanding a guard, or provost-marshal, shall presume to release any person committed to his charge, without proper authority for so doing; nor shall he suffer any person to escape on penalty of being punished for it by the sentence of a court-martial.

Article 19. Every officer, or provost-marshal, to whose charge prisoners shall be committed, shall, within 24 hours after such commitment, or as soon as he shall be relieved from his guard, make report in writing, to the commander-in-chief, or commanding officer, of their names, their crimes and the names of the officers who committed them, on the penalty of his being punished for disobedience or neglect at the discretion of a court-martial.

Article 20. Whatever commissioned officer shall be convicted before a general court-martial, of behaving in a scandalous and infamous manner, such as is unbecoming an officer and a gentleman, shall be dismissed the service.

Article 21. In cases where a court-martial may think it proper to sentence a commissioned officer to be suspended from command, they shall have power also to suspend his pay and emoluments for the same time, according to the nature and heinousness of the offence.

Article 22. In all cases where a commissioned officer is cashiered for cowardice or fraud, it shall be added in the sentence, that the crime, name, place of abode, and punishment of the delinquent be published in the newspapers, in and about camp, and of the particular State from which the offender came, or usually resides; after which it shall be deemed scandalous for any officer to associate with him.

Article 23. The commanding officer of any post or detachment, in which there shall not be a number of officers adequate to form a general court-martial, shall, in cases which require the cognizance of such a court, report to the commanding officer of the department, who shall order a court to be assembled at the nearest post or detachment, and the party accused,

with the necessary witnesses, to be transported to the place where the said court shall be assembled.

Article 24. No person shall be sentenced to suffer death, except in the cases expressly mentioned in the foregoing articles; nor shall more than 100 lashes be inflicted on any offender at the discretion of a court-martial.

Every judge advocate, or person officiating as such, at any general court-martial, shall transmit, with as much expedition as the opportunity of time and distance of place can admit, the original proceedings and sentence of such court-martial, to the secretary at war, which said original proceedings and sentence, shall be carefully kept and preserved, in the office of the said secretary, to the end, that persons entitled thereto may be enabled, upon application to the said office, to obtain copies thereof.

The party tried by any general court-martial, shall be entitled to a copy of the sentence and proceedings of such court-martial after a decision on the sentence, upon demand thereof made by himself, or by any person or persons in his behalf, whether such sentence be approved or not.

Article 25. In such cases where the general or commanding officer may think proper to order a court of inquiry, to examine into the nature of any transaction, accusation or imputation against any officer or soldier, the said court shall be conducted conformably to the following regulations: It may consist of one or more officers, not exceeding 3, with the judge advocate or a suitable person as a recorder, to reduce the proceedings and evidences to writing, all of whom shall be sworn to the faithful performance of their duty. This court shall have the same power to summon witnesses as a court-martial, and to examine them on oath. But they shall not give their opinion on the merits of the case, excepting they shall be thereto specially required. The parties accused shall also be permitted to cross-examine and interrogate the witnesses, so as to investigate fully the circumstances in question.

Article 26. The proceedings of a court of inquiry must be authenticated by the signature of the recorder and the president, and delivered to the commanding officer; and the said proceedings may be admitted as evidence, by a court-martial, in cases not capital or extending to the dismission of an officer; provided, that the circumstances are such that oral testimony cannot be obtained. But, as courts of inquiry may be perverted to dishonorable purposes, and may be considered as engines of destruction to military merit, in the hands of weak and envious commandants, they are hereby prohibited, unless demanded by the accused.

Article 27. The judge advocate, or the recorder, shall administer to the members the following oath:

"You shall well and truly examine and inquire, according to your evidence, into the matter now before you, without favor or affection. So help you God."

After which the president shall administer to the judge advocate, or recorder, the following oath:

"You A. B. do swear, that you will, according to your best abilities, accurately and impartially record the proceedings of the court, and the evidences to be given in the case in hearing. So help you God."

The witnesses shall take the same oath as is directed to be administered to witnesses sworn before a court-martial.

Resolved, That when any desertion shall happen from the troops of the United States, the officer commanding the regiment or corps to which the deserters belonged, shall be responsible, that an immediate report of the same be made to the commanding officer of the forces of the United States present.

Resolved, That the commanding officer of any of the forces in the service of the United States, shall, upon report made to him of any desertions in the troops under his orders, cause the most immediate and vigorous search to be made after the deserter or deserters, which may be conducted by a commissioned or non-commissioned officer, as the case shall require. That, if such search should prove ineffectual, the officer commanding the regiment or corps to which the deserter or deserters belonged, shall insert, in the nearest gazette or newspaper, an advertisement, descriptive of the deserter or deserters, and offering a reward, not exceeding ten dollars, for each deserter, who shall be apprehended and secured in any of the gaols in the neighboring states. That the charges of advertising deserters, the reasonable extra expenses incurred by the person conducting the pursuit, and the reward, shall be paid by the secretary at war, on the certificate of the commanding officer of the troops.

APPENDIX E.

AMERICAN ARTICLES OF 1806.[1]

SECTION 1. *Be it enacted, by the Senate and House of Representatives of the United States of America, in Congress assembled*, That, from and after the passing of this act, the following shall be the rules and articles by which the armies of the United States shall be governed:

Article 1. Every officer now in the army of the United States shall, in six months from the passing of this act, and every officer who shall hereafter be appointed shall, before he enters on the duties of his office, subscribe these rules and regulations.

Article 2. It is earnestly recommended to all officers and soldiers diligently to attend divine service; and all officers who shall behave indecently or irreverently at any place of divine worship shall, if commissioned officers, be brought before a general court-martial, there to be publicly and severely reprimanded by the president; if non-commissioned officers or soldiers, every person so offending shall, for his first offence, forfeit one-sixth of a dollar, to be deducted out of his next pay; for the second offence, he shall not only forfeit a like sum, but be confined twenty-four hours; and for every like offence, shall suffer and pay in like manner; which money, so forfeited, shall be applied, by the captain or senior officer of the troop or company, to the use of the sick soldiers of the company or troop to which the offender belongs.

Article 3. Any non-commissioned officer or soldier who shall use any profane oath or execration, shall incur the penalties expressed in the foregoing article; and a commissioned officer shall forfeit and pay, for each and every such offence, one dollar, to be applied as in the preceding article.

Article 4. Every chaplain commissioned in the army or armies of the United States, who shall absent himself from the duties assigned him (excepting in cases of sickness or leave of absence), shall, on conviction thereof before a court-martial, be fined not exceeding one month's pay, besides the loss of his pay during his absence; or be discharged, as the said court-martial shall judge proper.

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[1] Act of April 10, 1806 (2 Stat. at Large, 259).

Article 5. Any officer or soldier who shall use contemptuous or disrespectful words against the President of the United States, against the Vice-President thereof, against the Congress of the United States, or against the Chief Magistrate or Legislature of any of the United States, in which he may be quartered, if a commissioned officer, shall be cashiered, or otherwise punished, as a court-martial shall direct; if a non-commissioned officer or soldier, he shall suffer such punishment as shall be inflicted on him by the sentence of a court-martial.

Article 6. Any officer or soldier who shall behave himself with contempt or disrespect toward his commanding officer, shall be punished, according to the nature of his offence, by the judgment of a court-martial.

Article 7. Any officer or soldier who shall begin, excite, cause, or join in, any mutiny or sedition, in any troop or company in the service of the United States, or in any party, post, detachment, or guard, shall suffer death, or such other punishment as by a court-martial shall be inflicted.

Article 8. Any officer, non-commissioned officer, or soldier, who, being present at any mutiny or sedition, does not use his utmost endeavor to suppress the same, or, coming to the knowledge of any intended mutiny, does not, without delay, give information thereof to his commanding officer, shall be punished by the sentence of a court-martial with death, or otherwise, according to the nature of his offense.

Article 9. Any officer or soldier who shall strike his superior officer, or draw or lift up any weapon, or offer any violence against him, being in the execution of his office, on any pretense whatsoever, or shall disobey any lawful command of his superior officer, shall suffer death, or such other punishment as shall, according to the nature of his offense, be inflicted upon him by the sentence of a court-martial.

Article 10. Every non-commissioned officer or soldier, who shall enlist himself in the service of the United States, shall, at the time of his so enlisting, or within six days afterward, have the Articles for the government of the armies of the United States read to him, and shall, by the officer who enlisted him, or by the commanding officer of the troop or company into which he was enlisted, be taken before the next justice of the peace, or chief magistrate of any city or town corporate, not being an officer of the army,[1] or where recourse cannot be had to the civil magistrate, before the judge advocate, and in his presence shall take the following oath or affirmation : "I, A. B., do solemnly swear, or affirm (as the case may be), that I will bear true allegiance to the United States of America, and that I will serve them honestly and faithfully against all their enemies or opposers whatsoever; and observe and obey the orders of the President of the United States, and the

[1] By Sec. 11, Act of August 3, 1861, the oath of enlistment and re-enlistment may be administered by any commissioned officer of the Army.

orders of the officers appointed over me, according to the Rules and Articles for the government of the armies of the United States." Which justice, magistrate, or judge advocate is to give to the officer a certificate, signifying that the man enlisted did take the said oath or affirmation.

Article 11. After a non-commissioned officer or soldier shall have been duly enlisted and sworn, he shall not be dismissed the service without a discharge in writing; and no discharge granted to him shall be sufficient which is not signed by a field officer of the regiment to which he belongs, or commanding officer, where no field officer of the regiment is present; and no discharge shall be given to a non-commissioned officer or soldier before his term of service has expired, but by order of the President, the Secretary of War, the commanding officer of a department, or the sentence of a general court-martial; nor shall a commissioned officer be discharged the service but by order of the President of the United States, or by sentence of a general court-martial.

Article 12. Every colonel, or other officer commanding a regiment, troop, or company, and actually quartered with it, may give furloughs to non-commissioned officers or soldiers, in such numbers, and for so long a time, as he shall judge to be most consistent with the good of the service; and a captain, or other inferior officer, commanding a troop or company, or in any garrison, fort, or barrack of the United States (his field officer being absent), may give furloughs to non-commissioned officers or soldiers, for a time not exceeding twenty days in six months, but not to more than two persons to be absent at the same time, excepting some extraordinary occasion should require it.

Article 13. At every muster, the commanding officer of each regiment, troop, or company, there present, shall give to the commissary of musters, or other officer who musters the said regiment, troop, or company, certificates signed by himself, signifying how long such officers, as shall not appear at the said muster, have been absent, and the reason of their absence. In like manner, the commanding officer of every troop or company shall give certificates, signifying the reasons of the absence of the non-commissioned officers and private soldiers; which reasons and time of absence shall be inserted in the muster-rolls, opposite the names of the respective absent officers and soldiers. The certificates shall, together with the muster-rolls, be remitted by the commissary of musters, or other officer mustering, to the Department of War, as speedily as the distance of the place will admit.

Article 14. Every officer who shall be convicted before a general court-martial of having signed a false certificate relating to the absence of either officer or private soldier, or relative to his or their pay, shall be cashiered.

Article 15. Every officer who shall knowingly make a false muster of man or horse, and every officer or commissary of musters who shall willingly sign, direct, or allow the signing of muster-rolls wherein such false muster

is contained, shall, upon proof made thereof, by two witnesses, before a general court-martial, be cashiered, and shall be thereby utterly disabled to have or hold any office or employment in the service of the United States.

Article 16. Any commissary of musters, or other officer, who shall be convicted of having taken money, or other thing, by way of gratification, on mustering any regiment, troop, or company, or on signing muster-rolls, shall be displaced from his office, and shall be thereby utterly disabled to have or hold any office or employment in the service of the United States.

Article 17. Any officer who shall presume to muster a person as a soldier who is not a soldier, shall be deemed guilty of having made a false muster, and shall suffer accordingly.

Article 18. Every officer who shall knowingly make a false return to the Department of War, or to any of his superior officers, authorized to call for such returns, of the state of the regiment, troop, or company, or garrison, under his command; or of the arms, ammunition, clothing, or other stores thereunto belonging, shall, on conviction thereof before a court-martial, be cashiered.

Article 19. The commanding officer of every regiment, troop, or independent company, or garrison, of the United States, shall, in the beginning of every month, remit, through the proper channels, to the Department of War, an exact return of the regiment, troop, independent company, or garrison, under his command, specifying the names of the officers then absent from their posts, with the reasons for and the time of their absence. And any officer who shall be convicted of having, through neglect or design, omitted sending such returns, shall be punished, according to the na ture of his crime, by the judgment of a general court-martial.

Article 20. All officers and soldiers who have received pay, or have been duly enlisted in the service of the United States, and shall be convicted of having deserted the same, shall suffer death, or such other punishment as, by sentence of a court-martial, shall be inflicted.

Article 21. Any non-commissioned officer or soldier who shall, without leave from his commanding officer, absent himself from his troop, company, or detachment, shall, upon being convicted thereof, be punished according to the nature of his offence, at the discretion of a court-martial.

Article 22. No non-commissioned officer or soldier shall enlist himself in any other regiment, troop, or company, without a regular discharge from the regiment, troop, or company in which he last served, on the penalty of being reputed a deserter, and suffering accordingly. And in case any officer shall knowingly receive and entertain such non-commissioned officer or soldier, or shall not, after his being discovered to be a deserter, immediately confine him, and give notice thereof to the corps in which he last served, the said officer shall, by a court-martial, be cashiered.

Article 23. Any officer or soldier who shall be convicted of having ad-

vised or persuaded any other officer or soldier to desert the service of the United States, shall suffer death, or such other punishment as shall be inflicted upon him by the sentence of a court-martial.

Article 24. No officer or soldier shall use any reproachful or provoking speeches or gestures to another, upon pain, if an officer, of being put in arrest; if a soldier, confined, and of asking pardon of the party offended, in the presence of his commanding officer.

Article 25. No officer or soldier shall send a challenge to another officer or soldier, to fight a duel, or accept a challenge if sent, upon pain, if a commissioned officer, of being cashiered; if a non-commissioned officer or soldier, of suffering corporeal punishment, at the discretion of a court-martial.

Article 26. If any commissioned or non-commissioned officer commanding a guard shall knowingly or willingly suffer any person whatsoever to go forth to fight a duel, he shall be punished as a challenger; and all seconds, promoters, and carriers of challenges, in order to duels, shall be deemed principals, and be punished accordingly. And it shall be the duty of every officer commanding an army, regiment, company, post, or detachment, who is knowing to a challenge being given or accepted by any officer, non-commissioned officer, or soldier, under his command, or has reason to believe the same to be the case, immediately to arrest and bring to trial such offenders.

Article 27. All officers, of what condition soever, have power to part and quell all quarrels, frays, and disorders, though the persons concerned should belong to another regiment, troop, or company; and either to order officers into arrest, or non-commissioned officers or soldiers into confinement, until their proper superior officer shall be acquainted therewith; and whosoever shall refuse to obey such officer (though of an inferior rank), or shall draw his sword upon him, shall be punished at the discretion of a general court-martial.

Article 28. Any officer or soldier who shall upbraid another for refusing a challenge, shall himself be punished as a challenger; and all officers and soldiers are hereby discharged from any disgrace or opinion of disadvantage which might arise from their having refused to accept of challenges, as they will only have acted in obedience to the laws, and done their duty as good soldiers who subject themselves to discipline.

Article 29. No sutler shall be permitted to sell any kind of liquors or victuals, or to keep their houses or shops open for the entertainment of soldiers, after nine at night, or before the beating of the reveille, or upon Sundays, during divine service or sermon, on the penalty of being dismissed from all future sutling.

Article 30. All officers commanding in the field, forts, barracks, or garrisons of the United States, are hereby required to see that the persons

permitted to suttle shall supply the soldiers with good and wholesome provisions, or other articles, at a reasonable price, as they shall be answerable for their neglect.

Article 31. No officer commanding in any of the garrisons, forts, or barracks of the United States, shall exact exorbitant prices for houses or stalls, let out to sutlers, or connive at the like exactions in others; nor by his own authority, and for his private advantage, lay any duty or imposition upon, or be interested in, the sale of any victuals, liquors, or other necessaries of life brought into the garrison, fort or barracks, for the use of the soldiers, on the penalty of being discharged from the service.

Article 32. Every officer commanding in quarters, garrisons, or on the march, shall keep good order, and, to the utmost of his power, redress all abuses or disorders which may be committed by any officer or soldier under his command; if, upon complaint made to him of officers or soldiers beating or otherwise ill-treating any person, or disturbing fairs or markets, or of committing any kind of riots, to the disquieting of the citizens of the United States, he, the said commander, who shall refuse or omit to see justice done to the offender or offenders, and reparation made to the party or parties injured, as far as part of the offender's pay shall enable him or them, shall, upon proof thereof, be cashiered, or otherwise punished, as a general court-martial shall direct.

Article 33. When any commissioned officer or soldier shall be accused of a capital crime, or of having used violence, or committed any offense against the person or property of any citizen of any of the United States, such as is punishable by the known laws of the land, the commanding officer and officers of every regiment, troop, or company to which the person or persons so accused shall belong, are hereby required, upon application duly made by, or in behalf of, the party or parties injured, to use their utmost endeavors to deliver over such accused person or persons to the civil magistrate, and likewise to be aiding and assisting to the officers of justice in apprehending and securing the person or persons so accused, in order to bring him or them to trial. If any commanding officer or officers shall wilfully neglect, or shall refuse upon the application aforesaid, to deliver over such accused person or persons to the civil magistrates, or to be aiding and assisting to the officers of justice in apprehending such person or persons, the officer or officers so offending shall be cashiered.

Article 34. If any officer shall think himself wronged by his Colonel, or the commanding officer of the regiment, and shall, upon due application being made to him, be refused redress, he may complain to the General commanding in the State or Territory where such regiment shall be stationed, in order to obtain justice; who is hereby required to examine into said complaint, and take proper measures for redressing the wrong complained of,

and transmit, as soon as possible, to the Department of War, a true state of such complaint, with the proceedings had thereon.

Article 35. If any inferior officer or soldier shall think himself wronged by his Captain or other officer, he is to complain thereof to the commanding officer of the regiment, who is hereby required to summon a regimental court-martial, for the doing justice to the complainant; from which regimental court-martial either party may, if he thinks himself still aggrieved, appeal to a general court-martial. But if, upon a second hearing, the appeal shall appear vexatious and groundless, the person so appealing shall be punished at the discretion of the said court-martial.

Article 36. Any commissioned officer, store-keeper, or commissary, who shall be convicted at a general court-martial of having sold, without a proper order for that purpose, embezzled, misapplied, or wilfully, or through neglect, suffered any of the provisions, forage, arms, clothing, ammunition, or other military stores belonging to the United States to be spoiled or damaged, shall, at his own expense, make good the loss or damage, and shall, moreover, forfeit all his pay, and be dismissed from the service.

Article 37. Any non-commissioned officer or soldier who shall be convicted at a regimental court-martial of having sold, or designedly, or through neglect, wasted the ammunition delivered out to him, to be employed in the service of the United States, shall be punished at the discretion of such court.

Article 38. Every non-commissioned officer or soldier who shall be convicted before a court-martial of having sold, lost, or spoiled, through neglect, his horse, arms, clothes, or accoutrements, shall undergo such weekly stoppages (not exceeding the half of his pay) as such court-martial shall judge sufficient, for repairing the loss or damage; and shall suffer confinement, or such other corporeal punishment as his crime shall deserve.

Article 39. Every officer who shall be convicted before a court-martial of having embezzled or misapplied any money with which he may have been intrusted, for the payment of the men under his command, or for enlisting men into the service, or for other purposes, if a commissioned officer, shall be cashiered, and compelled to refund the money; if a non-commissioned officer, shall be reduced to the ranks, be put under stoppages until the money be made good, and suffer such corporeal punishment as such court-martial shall direct.

Article 40. Every captain of a troop or company is charged with the arms, accoutrements, ammunition, clothing, or other warlike stores belonging to the troop or company under his command, which he is to be accountable for to his Colonel in case of their being lost, spoiled, or damaged, not by unavoidable accidents, or on actual service.

Article 41. All non-commissioned officers and soldiers who shall be found one mile from the camp without leave, in writing, from their com-

manding officer, shall suffer such punishment as shall be inflicted upon them by the sentence of a court-martial.

Article 42. No officer or soldier shall lie out of his quarters, garrison, or camp without leave from his superior officer, upon penalty of being punished according to the nature of his offense, by the sentence of court-martial.

Article 43. Every non-commissioned officer and soldier shall retire to his quarters or tent at the beating of the retreat; in default of which he shall be punished according to the nature of his offense.

Article 44. No officer, non-commissioned officer, or soldier shall fail in repairing, at the time fixed, to the place of parade, of exercise, or other rendezvous appointed by his commanding officer, if not prevented by sickness or some other evident necessity, or shall go from the said place of rendezvous without leave from his commanding officer, before he shall be regularly dismissed or relieved, on the penalty of being punished, according to the nature of his offense, by the sentence of a court-martial.

Article 45. Any commissioned officer who shall be found drunk on his guard, party, or other duty, shall be cashiered. Any non-commissioned officer or soldier so offending shall suffer such corporeal punishment as shall be inflicted by the sentence of a court-martial.

Article 46. Any sentinel who shall be found sleeping upon his post, or shall leave it before he shall be regularly relieved, shall suffer death, or such other punishment as shall be inflicted by the sentence of a court-martial.

Article 47. No soldier belonging to any regiment, troop, or company shall hire another to do his duty for him, or be excused from duty but in cases of sickness, disability, or leave of absence; and every such soldier found guilty of hiring his duty, as also the party so hired to do another's duty, shall be punished at the discretion of a regimental court-martial.

Article 48. And every non-commissioned officer conniving at such hiring of duty aforesaid, shall be reduced; and every commissioned officer knowing and allowing such ill-practices in the service, shall be punished by the judgment of a general court-martial.

Article 49. Any officer belonging to the service of the United States, who, by discharging of fire-arms, drawing of swords, beating of drums, or by any other means whatsoever, shall occasion false alarms in camp, garrison, or quarters, shall suffer death, or such other punishment as shall be ordered by the sentence of a general court-martial.

Article 50. Any officer or soldier who shall, without urgent necessity, or without the leave of his superior officer, quit his guard, platoon, or division, shall be punished, according to the nature of his offense, by the sentence of a court-martial.

Article 51. No officer or soldier shall do violence to any person who brings provisions or other necessaries to the camp, garrison, or quarters of

the forces of the United States, employed in any parts out of the said States, upon pain of death, or such other punishment as a court-martial shall direct.

Article 52. Any officer or soldier who shall misbehave himself before the enemy, run away, or shamefully abandon any fort, post, or guard which he or they may be commanded to defend, or speak words inducing others to do the like, or shall cast away his arms and ammunition, or who shall quit his post or colors to plunder and pillage, every such offender, being duly convicted thereof, shall suffer death, or such other punishment as shall be ordered by the sentence of a general court-martial.

Article 53. Any person belonging to the armies of the United States who shall make known the watchword to any person who is not entitled to receive it according to the rules and discipline of war, or shall presume to give a parole or watchword different from what he received, shall suffer death, or such other punishment as shall be ordered by the sentence of a general court-martial.

Article 54. All officers and soldiers are to behave themselves orderly in quarters and on their march; and whoever shall commit any waste or spoil, either in walks of trees, parks, warrens, fish-ponds, houses, or gardens, corn-fields, inclosures of meadows, or shall maliciously destroy any property whatsoever belonging to the inhabitants of the United States, unless by order of the then commander-in-chief of the armies of the said States, shall (besides such penalties as they are liable to by law) be punished according to the nature and degree of the offense, by the judgment of a regimental or general court-martial.

Article 55. Whosoever, belonging to the armies of the United States in foreign parts, shall force a safeguard, shall suffer death.

Article 56. Whosoever shall relieve the enemy with money, victuals, or ammunition, or shall knowingly harbor or protect an enemy, shall suffer death, or such other punishment as shall be ordered by the sentence of a court-martial.

Article 57. Whosoever shall be convicted of holding correspondence with, or giving intelligence to, the enemy, either directly or indirectly, shall suffer death, or such other punishment as shall be ordered by the sentence of a court-martial.

Article 58. All public stores taken in the enemy's camp, towns, forts, or magazines, whether of artillery, ammunition, clothing, forage or provisions, shall be secured for the service of the United States; for the neglect of which the commanding officer is to be answerable.

Article 59. If any commander of any garrison, fortress, or post shall be compelled, by the officers and soldiers under his command, to give up to the enemy, or to abandon it, the commissioned officers, non-commissioned officers, or soldiers who shall be convicted of having so offended, shall suffer

death, or such other punishment as shall be inflicted upon them by the sentence of a court-martial.

Article 60. All sutlers and retainers to the camp, and all persons whatsoever, serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war.

Article 61. Officers having brevets or commissions of a prior date to those of the regiment in which they serve, may take place in courts-martial and on detachments, when composed of different corps, according to the ranks given them in their brevets or dates of their former commissions; but in the regiment, troop, or company to which such officers belong, they shall do duty and take rank both in courts-martial and on detachments which shall be composed of their own corps, according to the commissions by which they are mustered in the said corps.

Article 62. If, upon marches, guards, or in quarters, different corps of the army shall happen to join, or do duty together, the officer highest in rank of the line of the army, marine corps, or militia, by commission, there on duty or in quarters, shall command the whole, and give orders for what is needful to the service, unless otherwise specially directed by the President of the United States, according to the nature of the case.

Article 63. The functions of the engineers being generally confined to the most elevated branch of military science, they are not to assume, nor are they subject to be ordered on any duty beyond the line of their immediate profession, except by the special order of the President of the United States; but they are to receive every mark of respect to which their rank in the army may entitle them respectively, and are liable to be transferred, at the discretion of the President, from one corps to another, regard being paid to rank.

Article 64. General courts-martial may consist of any number of commissioned officers, from five to thirteen, inclusively; but they shall not consist of less than thirteen where that number can be convened without manifest injury to the service.

Article 65. Any general officer commanding an army, or Colonel commanding a separate department, may appoint general courts-martial whenever necessary. But no sentence of a court-martial shall be carried into execution until after the whole proceedings shall have been laid before the officer ordering the same, or the officer commanding the troops for the time being; neither shall any sentence of a general court-martial, in the time of peace, extending to the loss of life, or the dismission of a commissioned officer, or which shall, either in time of peace or war, respect a general officer, be carried into execution, until after the whole proceedings shall have been transmitted to the Secretary of War, to be laid before the President of the United States for his confirmation or disapproval, and orders in

the case. All other sentences may be confirmed and executed by the officer ordering the court to assemble, or the commanding officer for the time being, as the case may be.

Article 66. Every officer commanding a regiment or corps may appoint, for his own regiment or corps, courts-martial, to consist of three commissioned officers, for the trial and punishment of offenses not capital, and decide upon their sentences. For the same purpose, all officers commanding any of the garrisons, forts, barracks, or other places where the troops consist of different corps, may assemble courts-martial, to consist of three commissioned officers, and decide upon their sentences.

Article 67. No garrison or regimental court-martial shall have the power to try capital cases or commissioned officers; neither shall they inflict a fine exceeding one month's pay, nor imprison, nor put to hard labor, any non-commissioned officer or soldier for a longer time than one month.

Article 68. Whenever it may be found convenient and necessary to the public service, the officers of the marines shall be associated with the officers of the land forces, for the purpose of holding courts-martial, and trying offenders belonging to either; and, in such cases, the orders of the senior officer of either corps who may be present and duly authorized, shall be received and obeyed.

Article 69. The judge-advocate, or some person deputed by him, or by the general, or officer commanding the army, detachment, or garrison, shall prosecute in the name of the United States, but shall so far consider himself as counsel for the prisoner, after the said prisoner shall have made his plea, as to object to any leading question to any of the witnesses or any question to the prisoner, the answer to which might tend to criminate himself; and administer to each member of the court, before they proceed upon any trial, the following oath, which shall also be taken by all members of the regimental and garrison courts-martial.

"You, A. B., do swear that you will well and truly try and determine, according to evidence, the matter now before you, between the United States of America and the prisoner to be tried, and that you will duly administer justice, according to the provisions of 'An act establishing Rules and Articles for the government of the armies of the United States,' without partiality, favor, or affection; and if any doubt should arise, not explained by said Articles, according to your conscience, the best of your understanding, and the custom of war in like cases; and you do further swear that you will not divulge the sentence of the court until it shall be published by the proper authority; neither will you disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof, as a witness, by a court of justice, in a due course of law. So help you God."

As soon as the said oath shall have been administered to the respective

members, the president of the court shall administer to the judge advocate, or person officiating as such, an oath in the following words:

"You, A. B., do swear, that you will not disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof, as a witness, by a court of justice, in due course of law; nor divulge the sentence of the court to any but the proper authority, until it shall be duly disclosed by the same. So help you God."

Article 70. When a prisoner, arraigned before a general court-martial, shall, from obstinacy and deliberate design, stand mute, or answer foreign to the purpose, the court may proceed to trial and judgment as if the prisoner had regularly pleaded not guilty.

Article 71. When a member shall be challenged by a prisoner, he must state his cause of challenge, of which the court shall, after due deliberation, determine the relevancy or validity, and decide accordingly; and no challenge to more than one member at a time shall be received by the court.

Article 72. All the members of a court-martial are to behave with decency and calmness; and in giving their votes are to begin with the youngest in commission.

Article 73. All persons who give evidence before a court-martial are to be examined on oath or affirmation, in the following form:

"You swear, or affirm (as the case may be), the evidence you shall give in the cause now in hearing shall be the truth, the whole truth, and nothing but the truth. So help you God."

Article 74. On the trials of cases not capital, before courts-martial, the deposition of witnesses, not in the line or staff of the Army, may be taken before some justice of the peace, and read in evidence; provided the prosecutor and person accused are present at the taking the same, or are duly notified thereof.

Article 75. No officer shall be tried but by a general court-martial, nor by officers of an inferior rank, if it can be avoided. Nor shall any proceedings of trials be carried on, excepting between the hours of eight in the morning and three in the afternoon, excepting in cases which, in the opinion of the officer appointing the court-martial, require immediate example.

Article 76. No person whatsoever shall use any menacing words, signs, or gestures, in presence of a court-martial, or shall cause any disorder or riot, or disturb their proceedings, on the penalty of being punished at the discretion of the said court-martial.

Article 77. Whenever any officer shall be charged with a crime, he shall be arrested and confined in his barracks, quarters, or tent, and deprived of his sword by the commanding officer. And any officer who shall leave his confinement before he shall be set at liberty by his commanding officer, or by a superior officer, shall be cashiered.

Article 78. Non-commissioned officers and soldiers, charged with crimes,

shall be confined until tried by a court-martial, or released by proper authority.

Article 79. No officer or soldier who shall be put in arrest shall continue in confinement more than eight days, or until such time as a court-martial can be assembled.

Article 80. No officer commanding a guard, or provost marshal, shall refuse to receive or keep any prisoner committed to his charge by an officer belonging to the forces of the United States; provided the officer committing shall, at the same time, deliver an account in writing, signed by himself, of the crime with which the said prisoner is charged.

Article 81. No officer commanding a guard, or provost marshal, shall presume to release any person committed to his charge without proper authority for so doing, nor shall he suffer any person to escape, on the penalty of being punished for it by the sentence of a court-martial.

Article 82. Every officer or provost marshal, to whose charge prisoners shall be committed, shall, within twenty-four hours after such commitment, or as soon as he shall be relieved from his guard, make report in writing, to the commanding officer, of their names, their crimes, and the names of the officers who committed them, on the penalty of being punished for disobedience or neglect, at the discretion of a court-martial.

Article 83. Any commissioned officer convicted before a general court-martial of conduct unbecoming an officer and a gentleman, shall be dismissed the service.

Article 84. In cases where a court-martial may think it proper to sentence a commissioned officer to be suspended from command, they shall have power also to suspend his pay and emoluments for the same time, according to the nature and heinousness of the offense.

Article 85. In all cases where a commissioned officer is cashiered for cowardice or fraud, it shall be added in the sentence, that the crime, name, and place of abode, and punishment of the delinquent, be published in the newspapers in and about the camp, and of the particular State from which the offender came, or where he usually resides; after which it shall be deemed scandalous for an officer to associate with him.

Article 86. The commanding officer of any post or detachment, in which there shall not be a number of officers adequate to form a general court-martial, shall, in cases which require the cognizance of such a court, report to the commanding officer of the department, who shall order a court to be assembled at the nearest post or department, and the party accused, with necessary witnesses, to be transported to the place where the said court shall be assembled.

Article 87. No person shall be sentenced to suffer death but by the concurrence of two-thirds of the members of a general court-martial, nor except in the cases herein expressly mentioned; nor shall more than fifty lashes be

inflicted on any offender, at the discretion of a court-martial; and no officer, non-commissioned officer, soldier, or follower of the Army, shall be tried a second time for the same offense.

Article 88. No person shall be liable to be tried and punished by a general court-martial for any offense which shall appear to have been committed more than two years before the issuing of the order for such trial, unless the person, by reason of having absented himself, or some other manifest impediment, shall not have been amenable to justice within that period.

Article 89. Every officer authorized to order a general court-martial shall have power to pardon or mitigate any punishment ordered by such court, except the sentence of death, or of cashiering an officer; which, in the cases where he has authority (by Article 65) to carry them into execution, he may suspend, until the pleasure of the President of the United States can be known; which suspension, together with copies of the proceedings of the court-martial, the said officer shall immediately transmit to the President for his determination. And the colonel or commanding officer of the regiment or garrison where any regimental or garrison court-martial shall be held, may pardon or mitigate any punishment ordered by such court to be inflicted.

Article 90. Every judge-advocate, or person officiating as such, at any general court-martial, shall transmit, with as much expedition as the opportunity of time and distance of place can admit, the original proceedings and sentence of such court-martial to the Secretary of War; which said original proceedings and sentence shall be carefully kept and preserved in the office of said Secretary, to the end that the persons entitled thereto may be enabled, upon application to the said office, to obtain copies thereof.

The party tried by any general court-martial shall, upon demand thereof, made by himself, or by any person or persons in his behalf, be entitled to a copy of the sentence and proceedings of such court-martial.

Article 91. In cases where the general, or commanding officer may order a court of inquiry to examine into the nature of any transaction, accusation, or imputation against any officer or soldier, the said court shall consist of one or more officers, not exceeding three, and a judge advocate, or other suitable person, as a recorder, to reduce the proceedings and evidence to writing; all of whom shall be sworn to the faithful performance of their duty. This court shall have the same power to summon witnesses as a court-martial, and to examine them on oath. But they shall not give their opinion on the merits of the case, excepting they shall be thereto specially required. The parties accused shall also be permitted to cross-examine and interrogate the witnesses, so as to investigate fully the circumstances in the question.

Article 92. The proceedings of a court of inquiry must be authenticated by the signature of the recorder and the president, and delivered to the

commanding officer, and the said proceedings may be admitted as evidence by a court-martial, in cases not capital, or extending to the dismission of an officer, provided that the circumstances are such that oral testimony cannot be obtained. But as courts of inquiry may be perverted to dishonorable purposes, and may be considered as engines of destruction to military merit, in the hands of weak and envious commandants, they are hereby prohibited, unless directed by the President of the United States, or demanded by the accused.

Article 93. The judge advocate or recorder shall administer to the members the following oath:

"You shall well and truly examine and inquire, according to your evidence, into the matter now before you, without partiality, favor, affection, prejudice, or hope of reward. So help you God."

After which the president shall administer to the judge advocate or recorder the following oath:

"You, A. B., do swear that you will, according to your best abilities, accurately and impartially record the proceedings of the court, and the evidence to be given in the case in hearing. So help you God."

The witnesses shall take the same oath as witnesses sworn before a court-martial.

Article 94. When any commissioned officer shall die or be killed in the service of the United States, the major of the regiment, or the officer doing the major's duty in his absence, or in any post or garrison, the second officer in command, or the assistant military agent, shall immediately secure all his effects or equipage, then in camp or quarters, and shall make an inventory thereof, and forthwith transmit the same to the office of the Department of War, to the end that his executors or administrators may receive the same.

Article 95. When any non-commissioned officer or soldier shall die, or be killed in the service of the United States, the then commanding officer of the troop or company shall, in the presence of two other commissioned officers, take an account of what effects he died possessed of, above his arms and accoutrements, and transmit the same to the office of the Department of War, which said effects are to be accounted for, and paid to the representatives of such deceased non-commissioned officer or soldier. And in case any of the officers, so authorized to take care of the effects of deceased officers and soldiers, should, before they have accounted to their representatives for the same, have occasion to leave the regiment or post, by preferment or otherwise, they shall, before they be permitted to quit the same, deposit in the hands of the commanding officer, or of the assistant military agent, all the effects of such deceased non-commissioned officers and soldiers, in order that the same may be secured for, and paid to, their respective representatives.

Article 96. All officers, conductors, gunners, matrosses, drivers, or other persons whatsoever, receiving pay or hire in the service of the artillery, or

corps of engineers of the United States, shall be governed by the aforesaid Rules and Articles, and shall be subject to be tried by courts-martial, in like manner with the officers and soldiers of the other troops in the service of the United States.

Article 97. The officers and soldiers of any troops, whether militia or others, being mustered and in pay of the United States, shall, at all times and in all places, when joined, or acting in conjunction with the regular forces of the United States, be governed by these rules and articles of war, and shall be subject to be tried by courts-martial in like manner with the officers and soldiers in the regular forces; save only that such courts-martial shall be composed entirely of militia officers.

Article 98. All officers serving by commission from the authority of any particular State, shall, on all detachments, courts-martial, or other duty, wherein they may be employed in conjunction with the regular forces of the United States, take rank next after all officers of the like grade in said regular forces, notwithstanding the commissions of such militia or State officers may be elder than the commissions of the officers of the regular forces of the United States.

Article 99. All crimes not capital, and all disorders and neglects which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing articles of war, are to be taken cognizance of by a general or regimental court-martial, according to the nature and degree of the offense, and be punished at their discretion.

Article 100. The President of the United States shall have power to prescribe the uniform of the army.

Article 101. The foregoing articles are to be read and published, once in every six months, to every garrison, regiment, troop, or company, mustered, or to be mustered, in the service of the United States, and are to be duly observed and obeyed by all officers and soldiers who are, or shall be, in said service.

SECTION 2. *And be it further enacted*, That in time of war, all persons not citizens of, or owing allegiance to, the United States of America, who shall be found lurking as spies in or about the fortifications or encampments of the armies of the United States, or any of them, shall suffer death, according to the law and usage of nations, by sentence of a general court-martial.

SECTION 3. *And be it further enacted*, That the rules and regulations by which the armies of the United States have heretofore been governed, and the resolves of Congress thereunto annexed, and respecting the same, shall henceforth be void and of no effect, except so far as may relate to any transactions under them prior to the promulgation of this act, at the several posts and garrisons respectively, occupied by any part of the army of the United States.

APPENDIX F.

FORMS OF CHARGES.

General Considerations.—The subject of charges and specifications, and the conditions to be observed in their preparation and submission, have already been discussed. In the general forms which follow, the several offenses known to military law are charged in conformity to the Articles of War to which they relate.

Charges.—The charge proper is a specific allegation of the violation of a particular Article of War, and as such may be expressed in any form of words which will clearly and sufficiently accomplish that purpose. An offense may therefore be legally charged as a violation of a particular Article, by number; as, for example, "Violation of the 21st Article of War"; or the charge may be stated in terms of the offense created by the Article; as, "Disobedience of orders," "Sleeping on post," and the like. The best form of allegation, however, results from a combination of the two methods above described; as, "Disobedience of orders, in violation of the 21st Article of War"; "Sleeping on post, in violation of the 39th Article of War," etc. This form is to be preferred because in some instances several offenses are described in a single Article, and the mere allegation of violating the Article fails, in such a case, to convey to the accused precise knowledge of the offense for which he is to be tried, and against which he must prepare his defense. Charges are numbered serially, and in general are arranged in the order of their importance or gravity.

Specifications.—It has been seen that the specification should set forth the particular act or omission which constitutes an offense under the Article to which it relates. As military offenses are, as a rule, strictly statutory in character, the offense should be stated, as nearly as may be, in the words of the Article violated. Each specification should set forth a single act or omission, provided that such act or omission constitutes a complete offense under the Article in question; an incomplete offense is in general not chargeable, or, if triable, should be charged under the general terms of the 62d Article. If the offense has been repeated, or if more than one offense has been committed under the Article (as may be the case under Articles 60, 61, and 62), or if the offense is a violation of more than one

Article (as of the 60th and 61st, or the 60th and 62d Articles), each separate offense should be made the subject of an independent specification. Specifications are also serially numbered, those under each charge constituting separate series.

Allegations of Time and Place.—If either time or place constitutes an essential element of the offense, it should be specially alleged in the specification; otherwise they are embodied in the final clause of the specification, under the form "This at ————, on the —th day of ———, 189—;" where these elements, or either of them, are not susceptible of exact allegation and proof, the form "This at or near ————, on or about the —th day of ———, 189—," may be used. Time is always an essential element to the extent of determining whether the offense falls within the statute of limitations.

If the offense depends for its criminal character or completeness upon the existence or continuance of a particular status, as of war or peace, for example, the existence of the status should be alleged in the specification; this is the case with offenses under the 58th Article, and with the offenses of forcing a safeguard, being a spy, and the like. Some offenses, in order to be triable, must be committed in "foreign parts" or "in territory of the United States in rebellion"; the doing of violence to a person bringing provisions to the camp is an example of the former; forcing a safeguard is an example of the latter.

Allegations of Intent.—Military offenses, being created by statute, the particular statutory intent described in the Article, if there be one, must be alleged in the specification. The enlistments prohibited in the 3d Article, for example, must have been "knowingly" made in order to constitute an offense under the statute. It is similarly essential to the offenses described in the 8th and 14th Articles that they be "knowingly" committed; offenses under the 15th and 16th Articles must have been committed "willfully, or through neglect"; an officer quitting his post, on tender of resignation must do so "with intent to remain permanently absent therefrom" to be triable for the offense described in the 49th Article; and an officer who refuses or "willfully neglects" to deliver an offender to the civil authority, upon application duly made by or in behalf of the party injured, subjects himself by such willful neglect to the penalty set forth in the 59th Article.

If the offense charged is a crime at common law, the words descriptive of the intent at common law must be alleged in the specification. In some instances, however, as in the offenses described in the 31st, 34th, 35th, and 39th Articles, no statutory intent is set forth in the Article, and none need be alleged in the specification. In other cases, while no intent is embodied in the Article, a particular intent is necessary to the completeness of the offense, and, though not set forth in the specification, must be established in evidence; such is the case with respect to the offense of desertion, the intent

being not to return; and the offense of holding correspondence with the enemy under the 45th Article, and relieving the enemy with victuals, ammunition, etc., must, in order to be complete, be proven to have been committed "unlawfully."

The Language Used.—It has been seen that as military offenses are statutory in character they should in general be stated and charged in the language used to describe the offenses in the Articles which create them: this for the reason that the intent of the legislature, in making use of certain words or clauses to describe a criminal offense, is to restrict the operation of the statute to the particular acts or omissions therein made criminal. If, therefore, other and different words be employed in the preparation of specifications, the offense thus alleged may differ, in some material respect, from that contemplated by the legislature in the enactment of the statute.

While no particular form of words is necessary in the description of a military offense, the language used must be such as to describe the offense clearly and completely, as to the elements which are essential to its criminality, and no words which are essential to such description can be safely omitted. Care should be taken to avoid redundancy, and matter in the nature of evidence merely should be carefully excluded. What is known as argumentativeness should also be avoided; that is, the introduction of reasoning, or the drawing of conclusions either of fact or law, in respect to the facts alleged in the specification.

In conclusion, the admirable statement by Attorney-General Cushing of the conditions essential to the validity of a military charge are earnestly recommended to those whose duty it may become to prepare charges and specifications in the military service. "Trials by court-martial are governed by the nature of the service, which demands intelligible precision of language, but regards the substance of things rather than their forms. * * * * * The most bald statement of the facts alleged as constituting the offense, provided the legal offense itself be distinctively and accurately described in such terms of precision as the rules of military jurisprudence require, will be tenable in court-martial proceedings, and will be adequate groundwork for conviction and sentence."[1]

ARTICLE 3.

Charge.—Making a prohibited enlistment (or muster), in violation of the 3d Article of War.

Specification.—In that Captain R—— I——, —th Regiment of Cavalry, having been duly authorized to recruit for the military service (or to muster

[1] VII. Opinions of the Attorney-General, 603. "All that is necessary in a military charge is that it be sufficiently clear to inform the accused of the military offense for which he is to be tried, and to enable him to prepare his defense." Attorney-General Wirt, 1 Opin., 286; Tytler, 209; Kennedy, 69.

troops into the military service), did knowingly enlist (or muster) into the military service of the United States one C—— D——, a minor under the age of sixteen years (or a minor over the age of sixteen years, without the written consent of his parent or guardian).

Or, did knowingly enlist, etc., E—— F——, an intoxicated person;

Or, did knowingly enlist, etc., G—— H——, an insane person;

Or, did knowingly enlist, etc., I—— J——, a deserter from the military (or naval) service of the United States;

Or, did knowingly enlist, etc., K—— L——, who had been convicted of an infamous offense, to wit, the offense of perjury; the said enlistment being prohibited by law.

This at ————, ————, on the —th day of ————, 189—.

ARTICLE 5.

Charge.—Mustering as a soldier a person not a soldier, in violation of the 5th Article of War.

Specification. — In that Captain H—— G——, —th Regiment of Cavalry, U. S. Army, having been duly authorized to muster Company E, —th Regiment of Cavalry, for the month of June, 189— (or "to muster-in the —th Regiment of Infantry, Illinois Volunteers, or militia), did unlawfully muster one S—— F——, a civilian, as a musician in said company, well knowing that the said S—— F—— was not a duly enlisted soldier at the time of said muster.

This at————, ———— on the —th day of ————, 189—.

ARTICLE 6.

Charge.—Receiving money by way of gratification at muster, in violation of the 6th Article of War.

Specification. — In that Captain G—— H——, —th Regiment of Artillery, U. S. Army, having been duly authorized to muster Company D, —th Regiment of Infantry for the month of June, 189—, and having mustered the said company in pursuance of such authority, did receive from Captain T—— Y——, commanding said company, a sum of money, to wit, one hundred dollars ($100.00), for mustering said company.

This at Fort ————, ————, on the —th day of ————, 189—.

ARTICLE 7.

Charge.—Omitting to send a monthly return of his company, in violation of the 7th Article of War.

Specification.—In that First Lieutenant G—— J——, —th Regiment of Artillery, U. S. Army, being in command of Light Battery F, —th Regiment of Artillery, U. S. Army, did, knowingly and willfully (or through

neglect) fail and omit to prepare and send to the Department of War a monthly return of the said light battery for the month of June, 189—.

This at Fort ————, ————.

ARTICLE 8.

Charge.—Making a false return, in violation of the 8th Article of War.

Specification.—In that First Lieutenant T—— Y——, —d Regiment of Artillery, being in command of Light Battery G, —d Regiment of Artillery, U. S. Army, and being required, as such commanding officer, to make a quarterly return of quartermaster's stores to the Quartermaster General of the Army, an officer authorized by law and by the General Regulations of the Army, to call for such returns of stores, furnished the said Lieutenant Y—— for use in the military service, did submit to the said Quartermaster-General a return of quartermaster's stores for the quarter ending on the 30th day of June, 189—, setting forth that there were on hand in the said Light Battery G eighty-two public horses, which return was in part false, and was well known by the said Lieutenant Y—— to be false in part, in that there were but eighty public horses on hand at the date above specified.

This at ————, ————, on the —th day of ————, 189—.

ARTICLE 13.

Charge.—Signing a false certificate, in violation of the 13th Article of War.

Specification.—In that Captain A—— D——, commanding Company G, —th Regiment of Infantry, U. S. Army, did sign a certificate attached to and forming a part of the muster-roll of the said company for the month of ————, 18—, the said certificate being to the effect that (here state the contents of the certificate), which certificate was false (or in part false), in that (here set forth the particulars of the false certificate).

This at ————, ————.

ARTICLE 14.

Charge.—Making a false muster, in violation of the 14th Article of War.

Specification.—In that Major J—— T——, —th Regiment of ————, U. S. Army, having been duly appointed to muster the troops stationed at Fort ————, ————, for the month of February, 189—, did knowingly and falsely muster one F—— H——, a civilian, as an artificer of Company G, —th Regiment of Infantry, U. S. Army, he, the said Major J—— T——, well knowing that the said F—— H——, was not a member of the said company (or "of the military establishment").[1]

This at Fort ————, ————.

[1] This offense may be committed by the officer whose command is presented for muster, and by whom or under whose direction the muster-rolls have been prepared, as well as by the mustering officer, as indicated in the form of charge above given. In

ARTICLE 15.

Charge.—Suffering military stores to be damaged, in violation of the 15th Article of War.

Specification.—In that Captain D—— T——, Commissary of Subsistence, U. S. Army, Depot Commissary of Subsistence at ————, ————, being accountable for a quantity of subsistence stores and supplies, furnished for use in the military service, did willfully fail and omit to cause the said stores and supplies to be adequately protected from the weather and, through such neglect, did suffer a large quantity of the said stores, to wit, sixty-two (62) sacks of flour and twenty-seven (27) sacks of corn-meal to be spoiled (or damaged) by the elements, thereby causing a pecuniary loss to the United States to the amount of ——— dollars.

This at ————, ————, on or about the —th day of ———, 189—.

ARTICLE 16.

(SELLING AMMUNITION, ETC.)

Charge.—Selling ammunition, in violation of the 16th Article of War.

Specification.—In that Private Y—— T——, Troop H, —th Regiment of Cavalry, U. S. Army, having had delivered to him a quantity of ammunition for use in the military service, did unlawfully and without authority sell a portion of the same, to wit, one hundred and fifty rounds of ammunition for the Colt's revolver, model of 1894, for which Captain W—— H——, —th Regiment of Cavalry, was responsible.[1]

This at ————, ————, on the —th day of ———, 189—.

ARTICLE 16.

(WASTING AMMUNITION, ETC.)

Charge.—Wasting ammunition, in violation of the 16th Article of War.

Specification.—In that Sergeant H—— R——, Troop D, —th Regiment of Cavalry, U. S. Army, having had delivered to him a quantity of ammunition for use in the military service, did willfully (or through neglect) waste a portion of the same, to wit, forty-eight rounds of ammunition for

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such a case the specification should take the following form: "In that Captain —— Y——, commanding Company E, —th Regiment of Infantry, U. S. Army, did prepare or cause to be prepared, and did sign and submit to the mustering officer, Major F—— D——, —th Regiment of Cavalry, a muster-roll of the said Company E, upon which the name of A—— B—— was borne as a musician, which entry was false, and was well known by the said Captain T—— Y—— to be false, in that the said A—— B—— was not a musician in the said Company E, but a civilian, not connected with the military service.

[1] The offense described in this Article is susceptible of being charged under the more general terms of the ninth clause of Article 60. To bring an offense within the scope of Article 16 the ammunition sold must have been issued to the soldier for use in the military service, as a part of his equipment for service in garrison or in the field. See notes to Article 60, *post*.

the U. S. magazine carbine, model of 1896 by firing it away (or by casting it away, at drill, or on the march, etc.), without orders or authority for such expenditure (or for such disposition) of the same.

This at Camp ———, ———, on the —th day of ———, 189—.

ARTICLE 17.

(SELLING CLOTHING, ETC.)

Charge.—Selling clothing, in violation of the 17th Article of War.

Specification.—In that Private A—— B——, Company F, —th Regiment of Infantry, U. S. Army, did sell the following articles of uniform clothing issued to him, for use in the military service, viz.: one forage-cap, value $———; one woolen blanket, value $———; one campaign hat, value $———; total value of articles sold, $———.

This at ———, ———, on the —th day of ———, 189—.

ARTICLE 17.

(LOSING OR SPOILING ARMS, CLOTHING, ETC., THROUGH NEGLECT.)

Charge.—Losing accoutrements, in violation of the 17th Article of War.

Specification.—In that Private C—— D——, Company F, —th Regiment of Infantry, U. S. Army, did, through neglect, lose (or spoil) the following articles (of clothing or accoutrements) issued to him for use in the military service, viz.: one pistol-holster, value $———; one sabre-belt, value $———; total value of articles lost (or spoiled), $———.

This at ———, ———, on the —th day of ———, 189—

ARTICLE 18.

(LAYING A DUTY OR IMPOSITION.)

Charge.—Laying an imposition, in violation of the 18th Article of War.

Specification.—In that Major T—— Y——, —th Regiment of Artillery, U. S. Army, being in command of the post of ———, ———, did, without authority and for his private advantage, require one R—— H——, a civilian engaged in bringing fruit and vegetables into the said post, for the use of the soldiers serving thereat, to pay over to him, the said Major T—— Y——, a sum of money, to wit, twenty-five dollars ($25.00), for the privilege of bringing said articles into the said post for the use of the soldiers constituting the garrison of the same.[1]

This at ———, ———, on the —th day of ———, 189—.

[1] This Article contemplates two distinct offenses: (1) Laying a duty or imposition upon the *bringing in* of victuals, etc.; (2) Being interested *in the sale* of provisions, and the like. The first offense may be committed by a commanding officer who without proper authority lays a duty or imposition upon articles of the kind described which are brought into a garrison for the use of the soldiers, and it is not necessary to allege or

ARTICLE 18.

(BEING INTERESTED IN THE SALE OF ARTICLES.)

Charge.—Being interested in the sale of liquors, in violation of the 18th Article of War.

Specification.—In that Captain B—— G——, —th Regiment of Infantry, U. S. Army, commanding Fort ————, ————, did exact and receive from one S—— T——, a civilian (or from a person, or persons, acting in his behalf), a sum of money, to wit, one hundred and ten dollars ($110.00), in consideration of his having allowed (or allowing) the said S—— T—— (or persons acting in his interest and behalf) to bring in and sell wine and beer for the use of the soldiers constituting the garrison of the same.

This at ————, ————, on the —th day of ————, 189—.

ARTICLE 19.

Charge.—Using disrespectful words against the President of the United States.

Specification.—In that Major R—— T——, —th Regiment of Cavalry, U. S. Army, did publicly make use of the following disrespectful words against the President of the United States, to wit (here insert the language used, exactly as uttered, if printed or published, otherwise in substance, but with sufficient precision to enable the court to determine its character).

This at ————, ————, on the —th day of ————, 189—.

ARTICLE 20.

Charge.—Disrespectful behavior toward his commanding officer, in violation of the 20th Article of War.

Specification.—In that Captain T—— Y——, —th Regiment of Infantry, U. S. Army, did behave himself disrespectfully toward his commanding officer, Colonel H—— W——, —th Regiment of U. S. Infantry, by saying to him (here insert the disrespectful language—the exact words employed, if possible, otherwise the substance of the language used. If the disrespect consists in words or utterances, not addressed *to* the commanding officer of the accused, but of words used *about* or *referring to* such commanding officer, the specification should be correspondingly modified and should read "by saying about him," or "did make use of the following language in referring to him," etc.).

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prove that such articles were brought in for the purpose of being sold, or that they were sold or otherwise disposed of. The second offense consists in being interested in the *sale* of the victuals, liquors, or other necessaries of life thus brought into a post, garrison, or camp for the use of the troops of the United States.

Or, by addressing to him the following communication in writing (here insert the written communication).

Or, by publishing in the ———, a newspaper published in ———, ———, the following article, to wit (here set forth the article as published).[1]

This at ———, ———, on the —th day of ———, 189—.

ARTICLE 21.

(STRIKING A SUPERIOR OFFICER.)

Charge.—Striking his superior officer, in violation of the 21st Article of War.

Specification.—In that Private W—— M——, Company F, —th Regiment of Cavalry, did strike his superior officer, Captain C—— B——, —th Regiment of Cavalry, with ———: (here set forth, fully, the circumstances of the assault, describing the weapon or instrument used in inflicting the injury; as with the fist, or with a stick, club, firearm, sword, knife, bayonet, etc., together with the location of the injury, and in an important case the amount of bodily harm inflicted, as causing death or the like. Should the striking be accompanied by abusive, threatening, or insulting language, such language should be embodied in the specification, preceded by the words "which action was accompanied by most abusive," or "most insulting," or "highly threatening" "language," etc.). The said Captain C—— B—— being at the time in the execution of his office.

This at ———, ———, on the —th day of ———, 189—.

ARTICLE 21.

(DRAWING OR LIFTING A WEAPON.)

Charge.—Drawing a sabre against his superior, in violation of the 21st Article of War.

Specification.—In that Private R—— G——, Troop G, —th Regiment of Cavalry, U. S. Army, did draw his sabre and did raise the same against his superior officer, Lieutenant W—— M——, —d Regiment of Cavalry, U. S. Army, the said Lieutenant W—— M—— being at the time in the execution of his office.[2]

This at ———, ———, on the —th day of ———, 189—.

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[1] Where the disrespectful conduct consists in behavior only, the particular acts or omissions constituting such behavior are to be fully set forth and described.

[2] Three offenses involving either actual or intended violence are described and created in this Article: (1) Striking a superior officer; (2) Drawing or lifting up a weapon against him; (3) Offering violence against him. The offenses thus created have a single element in common—the officer against whom the violence is directed must be "in the execution of his office"—a status in general equivalent to that of being "on duty," in the ordinary acceptation of that term. The first of the offenses above named, that of

ARTICLE 21.

(OFFERING VIOLENCE TO SUPERIOR.)

Charge.—Offering violence to his superior, in violation of the 21st Article of War.

Specification.—In that Private R—— T——, Company E, —th Regiment of Infantry, U. S. Army, did offer violence to his superior, Lieutenant H—— G——, —th Regiment of Infantry, the said Lieutenant H—— G—— being in the execution of his office, by (here set forth the circumstances of the assault or offer of violence; as, by attempting to strike the superior, pointing a firearm, or shaking the fist at him, accompanied by threats or menaces; attempting to interfere with or obstruct his movements, or impeding or hindering him in the performance of his duty. If the offer to do violence be accompanied by threatening, insulting, or abusive language, the fact that such language was used should be embodied in the specification, preceded by the words "which action was accompanied by threatening or highly abusive language"; if specific threats were employed, they should be incorporated in the specification, the exact language used being stated, or its substance set forth with sufficient accuracy to enable the court to determine its character and importance as an element of the offense).[1]

This at ————, ————, on the —th day of ————, 189—.

ARTICLE 21.

(DISOBEDIENCE OF VERBAL ORDER.)

Charge.—Disobedience of orders, in violation of the 21st Article of War.

Specification.—In that Private T—— Y——, Company G, —th Regiment of Infantry, U. S. Army, having received a lawful command from his superior officer, Second Lieutenant K—— T——, —th Regiment of Infantry, to (here insert order exactly as given or transmitted, or in substance), did willfully disobey the said order.

This at ————, ————, on the —th day of ————, 189—.

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striking a superior officer, corresponds to the criminal offense of "assault and battery," and it is essential to its existence that actual violence, it matters not how slight, should be inflicted. The second constitutes a particular form of "assault" as that term is known to the common law; that is, an offer of violence which stops short of the actual infliction of physical injury. While it was probably contemplated in the framing of this Article that the "weapons" used would be those appropriate to, or such as are commonly used in the military service, it is sufficient to constitute an offense under this clause of the Article if any weapon, of whatever character, be drawn or lifted up against a superior officer. The third offense, that of offering violence to a superior officer, is more general in character than that last described, and includes all "assaults," technically speaking; that is, all attempts to do violence, of whatever character, which fall short of the actual infliction of physical injury. While, as has been seen, mere abusive words do not of themselves constitute an assault or offer of violence, under the terms of the Article, language of a threatening or menacing character, if accompanied by a present capacity and intention to carry the threats or menaces into effect, is chargeable under the Article equally with other offers of violence.

[1] See note to preceding form.

ARTICLE 21.

(DISOBEDIENCE OF WRITTEN ORDER.)

Charge.—Disobedience of orders, in violation of the 21st Article of War.

Specification.—In that Captain G—— H——, —d Regiment of Cavalry, U. S. Army, having received from his superior officer, Colonel T—— R——, —d Regiment of Cavalry, a lawful command in writing in the following words and figures, to wit (here insert the order in writing), did willfully disobey the same.

This at ————, ————, on the —th day of ————, 189—.

ARTICLE 22.

(CAUSING A MUTINY.)

Charge.—Causing a mutiny, in violation of the 22d Article of War.

Specification.—In that Sergeant J—— L——, Troop L, —th Regiment of Cavalry, U. S. Army, being present with his troop, did begin, excite, cause, and join in a mutiny against the authority of Captain H—— J——, —th Regiment of Cavalry, commanding the said troop, by placing himself at the head of a portion of the said troop, and seizing, or causing to be seized and unlawfully imprisoned or confined, the person of Captain H—— J——, commanding the said Troop L, —th Regiment of Cavalry.

This on the North Platte River, near Sidney, Nebraska, on the —th day of ————, 189—.

ARTICLE 22.

(JOINING IN A MUTINY.)[1]

Charge.—Joining in a mutiny, in violation of the 22d Article of War.

Specification.—In that Sergeant T—— R——, Corporal Y—— H——, Troop L, —th Regiment of Cavalry, U. S. Army, Private E—— T——, Troop L, —th Regiment of Cavalry, U. S. Army, Private R—— I——,

[1] Where a single offense is committed by several persons, as principals or accessories, with a joint intent and a common purpose, the offenders in their several degrees may be joined in the charges and specifications, and may be jointly tried. The words necessary to accomplish such joinder in the several allegations of the specifications are "they and each of them"—as "that A. B., C. D., E. F., G. H., I. J., and each of them, did," etc.; in later references to the joint accused in the specification they may be referred to as "they and each of them" or "them and each of them." The findings and sentence should also be similarly framed; as for example, that "the court, having maturely considered the evidence adduced, finds the accused A. B., C. D., E. F., and G. H., and each of them, as follows: Of the first specification, guilty," etc.; and in the sentence "and the court does therefore sentence them [where the sentence is the same in each case] and each of them to be," etc. If the sentences are not the same in all cases, each of the accused should be awarded a separate sentence.*

* Accused persons will not be joined in the same charge, nor tried on joint charges, unless for concert of action in an offense. To warrant the joining of several persons in the same charge, the offense must be such as requires for its commission a combination, and must have been committed in concert, in pursuance of a common intent. Manual for Courts-martial, 16, par. 6.

Troop L, —th Regiment of Cavalry, etc. (here name all participants in the mutinous act), and each of them, while engaged in the pursuit of hostile Indians, did join in a mutiny against the authority of Captain H—— J——, —th Regiment of Cavalry, commanding Troop L, —th Regiment of Cavalry, U. S. Army, and did seize or assist in seizing, and did unlawfully confine and restrain, or assist in confining and restraining, the person of Captain H—— J——, —th Regiment of Cavalry, the commanding officer of the said troop.

This at ————, ————, on the —th day of ————, 189—

ARTICLE 23.

Charge.—Failing to suppress a mutiny, in violation of the 23d Article of War.

Specification.—In that Sergeant E—— T——, Troop C, —th Regiment of Cavalry, being in charge of the herd guard of the said troop, and being present at a mutiny against the authority of Captain H—— J——, —th Regiment of Cavalry, commanding said troop, did fail to use his utmost endeavor to suppress the same, but did assemble the herd guard under his command and did cause the same to quit the place and vicinity of the said mutiny by conducting the herd under his charge to the grazing-grounds of the said troop.

This at ————, ————, on the —th day of ————, 189—.

ARTICLE 24.

Charge.—Disobedience of orders, in violation of the 24th Article of War.

Specification.—In that First Lieutenant T—— Y——, —d Regiment of Infantry, U. S. Army, being present at and participating in a serious fray in the barracks of Company D, —d Regiment of Infantry, and having utterly failed and neglected to use the authority vested in him by law for the suppression of said fray, and having, in consequence of such participation in said fray, been ordered to his quarters in arrest by Second Lieutenant E—— J——, —th Regiment of Cavalry, did refuse to obey such lawful order (or to observe the arrest thus lawfully imposed.) [1]

This at ————, ————, on the —th day of ————, 189—.

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[1] A somewhat extreme case is indicated in the form of charge above given. The operation of the 24th Article is to eliminate, in a case of emergency, all distinctions of rank among officers in respect to the duty of parting and quelling quarrels, frays, and disorders, and to confer upon all officers, commissioned and non-commissioned, the power to arrest officers, which is in all other cases restricted by the operation of the 65th Article to commanding officers alone. The 24th Article, therefore, confers upon a senior the right to arrest an officer of inferior rank and, in a proper case of emergency, operates to authorize an inferior to place an officer of superior rank in arrest. See, also, Article 24, in the chapter entitled THE ARTICLES OF WAR.

The 24th Article, while it provides a method of parting frays and quarrels and of repressing disorders, does not give to such acts the character of specific offenses or confer

ARTICLE 25.

This Article forbids, in express terms, the use of reproachful or insulting speeches and gestures, and provides a method of procedure with a view to put an instant end to the conduct thus prohibited. The Article stops short, however, of creating a separate offense which shall be chargeable as a violation of this particular Article of War. Conduct of the character which is prohibited in the Article will, if it be regarded as prejudicial to military discipline, be chargeable under the 62d Article.[1]

ARTICLE 26.[2]

(SENDING A CHALLENGE.)

Charge.—Sending a challenge to fight a duel, in violation of the 26th Article of War.

Specification.—In that Captain A—— B——, —th Regiment of Infantry, U. S. Army, did send a challenge to fight a duel to Lieutenant C—— H——, —d Regiment of Artillery, U. S. Army; the said challenge being in substance a verbal invitation to repair to ————, ————, on a day named, for the purpose of giving to him, the said Captain A—— B——, satisfaction for an injury alleged to have been received at the hands of the said Lieutenant C—— H——; the said invitation being conveyed to the said Lieutenant C—— H—— by Lieutenant H—— M——, of the Corps of Engineers.

This at or near ————, ————, on or about the —th day of ————, 189—.

Or, if the challenge be in writing, the following form may be used: "did send, or cause to be sent, to Lieutenant H—— C——, —d Regiment of Artillery, U. S. Army, a challenge, in writing, to fight a duel, in the following words and figures, to wit:" (Here insert the written challenge.)

This at ————, ————, on the —th day of ————, 189—.

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jurisdiction for their trial upon any one of the several military tribunals. The offense of creating, inciting, or taking part in a quarrel, fray, or disorder, being prejudicial to military discipline, is chargeable as such under the 62d Article. The last clause of the Article, however, creates a specific offense of disobedience, which is triable under the 24th Article.

[1] For forms of charges, etc., see Article 62.

[2] The offense of fighting a duel is neither specifically described nor explicitly made punishable in the Articles of War. The offense committed by those who engage in a duel will be determined by the circumstances, and to some extent by the consequences, in each case. Participation in a voluntary fight or duel, being conduct prejudicial to military discipline, is chargeable under the 62d Article. If death results, the offense is by statute in most jurisdictions either murder or manslaughter. Murder being a capital offense is not triable under the 62d Article, and the offense, if chargeable as such, can only be tried by a civil court of competent jurisdiction. In time of war duelling, if it results in homicide, is chargeable under the 58th Article.

ARTICLE 26.

Charge.—Accepting a challenge to fight a duel, in violation of the 26th Article of War.

Specification.—In that Captain H—— R——, —d Regiment of Artillery, U. S. Army, having been challenged by Lieutenant R—— G——, —th Regiment of Artillery, to fight a duel (or, having received a challenge in writing to fight a duel, in the following words and figures, to wit: here insert the written challenge), did accept the same, in a verbal message sent to the said Lieutenant R—— G—— by the hands of Captain T—— C——, —d Regiment of Cavalry (or, did accept the same, by sending or causing to be sent to the said Captain G—— an acceptance of the same, in writing, in the following words and figures, to wit: here insert the written acceptance).

This at ———, ———, on the —th day of ———, 189—.

ARTICLE 27.

Charge.—Suffering a person to go forth to fight a duel, in violation of the 27th Article of War.

Specification.—In that Captain C—— D——, —th Regiment of Infantry, being post officer of the day at Fort ———, ———, on the —th day of ———, 189—, and, as such officer of the day, being the commander of the guard at the said Fort ———, did permit Lieutenant T—— H——, —d Regiment of Artillery, U. S. Army, to go forth from the said post of ———, ———, for the purpose of fighting a duel.

This at ———, ———, on the — day of ———, 189—.

ARTICLE 28.

Charge.—Upbraiding another officer for refusing a challenge, in violation of the 28th Article of War.

Specification.—In that Captain J—— S——, —th Regiment of Cavalry, U. S. Army, did upbraid and reproach Lieutenant T—— A——, —d Regiment of Artillery, for refusing to accept a challenge to fight a duel. (If the communication be in writing it should be inserted as indicated in the forms given under the 26th and 27th Articles of War.)

This at Fort ———, ———, on the —th day of ———, 189—.

ARTICLE 31.

Charge.—Lying out of quarters, in violation of the 31st Article of War.

Specification.—In that Sergeant G—— S——, Company G, —th Regiment of Infantry, U. S. Army, did, without leave from his superior officer,

lie out of his quarters at Fort ———, ———, on the night of the —th day of ———, 189—.

This at ———, ———. (Here insert the place at which the offense was committed.)

ARTICLE 32.

Charge.—Absence without leave, in violation of the 32d Article of War.

Specification.—In that Private F—— H——, Battery D, —th Regiment of Artillery, U. S. Army, did absent himself from his company, without leave from his commanding officer, from — A.M. on ——— —th, 1892, to — P.M. on ——— —th, 1892.[1]

This at ———, ———.

ARTICLE 32.

(OVERSTAYING PASS.)

Charge.—Absence without leave, in violation of the 32d Article of War.

Specification.—In that Private F—— R——, Light Battery D, —th Regiment of Artillery, U. S. Army, having received permission to be absent from his battery from 9 A.M. August 2d, 1896, until 2 P.M. August 3d, 1896, did fail to return at the expiration of said permission, and did absent himself from his company, without leave from his commanding officer, from 2 P.M. August 3d, 1896, until 3 A.M. August 4th, 1896.

This at or near ———, ———.

ARTICLE 33.

Charge.—Failing to repair to place of rendezvous, in violation of the 33d Article of War.

Specification.—In that Private W—— H——, Company G, —th Regiment of Infantry, U. S. Army, not being prevented by sickness or other necessity, did fail to repair to the place of rendezvous appointed by his commanding officer, Captain W—— S——, —th Regiment of Infantry, U. S. Army, for the retreat roll-call of his company.

This at ———, ———, on the —th day of ———, 189—.

ARTICLE 34.

Charge.—Being found one mile (or more than one mile) from camp, without leave in writing from his commanding officer, in violation of the 34th Article of War.

Specification.—In that Private E—— R——, Company E, —th Regiment of Infantry, U. S. Army, was found at ———, one mile (or more

[1] It will be observed that the offense here described can be committed by enlisted men only. Absence without leave, in whatever form it may assume, is, if committed by a commissioned officer, chargeable under the 62d Article.

than one mile) from camp, without leave in writing from his commanding officer.

This at ———, ———, on the —th day of ———, 189—.

ARTICLE 35.

Charge.—Failing to retire to his tent at the beating of retreat, in violation of the 35th Article of War.

Specification.—In that Private L—— G——, Company —, —th Regiment of Infantry, U. S. Army, did fail to retire to his tent in the camp of his company on the North Fork of the Republican River, Kansas, at the beating of retreat on the —th day of ———, 189—.

This at ——— ———.

ARTICLE 36.

(HIRING ANOTHER TO DO DUTY.)

Charge.—Hiring another to do his duty, in violation of the 36th Article of War.

Specification.—In that Private T—— M——, Company D, —th Regiment of Infantry, U. S. Army, having been regularly detailed as a member of the kitchen police of his company, did hire Private C—— K——, Company D, —th Regiment of Infantry, U. S. Army, to do his duty for him, as a member of the said kitchen police, in consideration of the sum of one dollar paid to the said Private C—— K——.

This at Fort ———, ———, on the —th day of ———, 189—.

ARTICLE 36.

(BEING HIRED TO DO DUTY.)

Charge.—Being hired to do duty, in violation of the 36th Article of War.

Specification.—In that Private C—— K——, Company D, —th Regiment of Infantry, U. S. Army, having agreed with Private T—— M——, Company D, —th Regiment of Infantry, U. S. Army, in consideration of the sum of one dollar, to perform duty for the said Private T—— M—— as kitchen police, did perform the said duty, in pursuance of the said agreement with Private T—— M——.

This at Fort ———, ———, on the —th day of ———, 189—.

ARTICLE 37.

(CONNIVING AT HIRING OF DUTY.)

Charge.—Conniving at hiring of duty, in violation of the 37th Article of War.

Specification.—In that Sergeant R—— W——, Company D, —th Regiment of Infantry, U. S. Army, being in charge of the company mess, did connive at an unlawful hiring by authorizing Private T—— M——, Company D, —th Regiment of Infantry, to agree with Private C—— K——, Company D, —th Regiment of Infantry, to perform his duty as a member of the kitchen police of the said Company D, —th Regiment of Infantry, which duty was actually performed by the said Private C—— K—— in pursuance of such unlawful agreement.

This at Fort ————, ————, on the —th day of ————, 189—.

ARTICLE 37.

(ALLOWING HIRING OF DUTY.)

Charge.—Allowing hiring of duty, in violation of the 37th Article of War.

Specification.—In that Captain N—— Y——, commanding Company D, —th Regiment of Infantry, U. S. Army, having been informed, officially, by First Sergeant G—— A——, Company D, —th Regiment of Infantry, that the practice of hiring duty existed among the enlisted men of Company D, —th Regiment of Infantry, and it having further been officially reported to him, by Sergeant T—— U——, that, upon at least one occasion, Private T—— M——, of the said company, had hired Private C—— K—— to do duty for him as a member of the kitchen police, did fail to put a stop to the said practice, but, knowing of its existence, did allow it to continue.

This at Fort ————, ————, on the —th day of ————, 189—.

ARTICLE 38.

(DRUNK ON DUTY AS COMMANDING OFFICER.)

Charge.—Drunkenness on duty, in violation of the 38th Article of War.

Specification.—In that Major T—— R——, —d Regiment of Artillery, U. S. Army, being in command of the military post of Fort ————, ————, did become drunk.[1]

This at Fort ————, ————, on the —th day of ————, 189—.

[1] The offense described in this Article is the definite one of "being found drunk on duty"—that is, discovered to be drunk while engaged in the performance of the particular duty set forth in the charges and specifications; as on guard, at drill inspection, parade, muster, the performance of extra or daily duty, or even at a roll-call. If the accused appears at the preliminary formation for the duty, as at the formation of the guard detail or at a formation for parade or drill, so much under the influence of liquor as to be incapacitated for its performance, he should not be permitted to enter upon the execution of the duty in question,* but should be proceeded against, under the 62d Article, for appearing at such formation so much under the influence of intoxicating liquors as to be thereby incapacitated for the performance, or proper performance, of the specified duty. If, however, his condition is such as not to attract notice at the preliminary formation, and he is permitted to enter upon the performance of the duty, and is afterwards found to have become drunk prior to entering upon the duty, that fact will not avail in defense,* and need not be considered by the court as a mitigating circumstance.

* Dig. J. A. Gen., 36, par. 1; Manual for Courts-martial, 16, par. 5.

ARTICLE 38.

(DRUNK ON DUTY AS SURGEON, OR STAFF OFFICER.)

Charge.—Drunkenness on duty, in violation of the 38th Article of War.

Specification.—In that Captain W—— H——, Assistant Surgeon, Medical Department, U. S. A., having been duly assigned to duty as post surgeon at Fort ————, ————, and being in execution of the duties of that office, did become drunk.

This at Fort ————, ————, on the —th day of ————, 189—.

ARTICLE 38.

Charge.—Drunkenness on duty, in violation of the 38th Article of War.

Specification.—In that Private W—— E——, Company F, —th Regiment of Infantry, U. S. Army, while on duty (or, being on duty) as a member of the post guard (or, while on duty as stable guard; or while at drill, etc.), was found drunk.[1]

This at Fort ————, ————, on the —th day of ————, 189—.

ARTICLE 39.

(SLEEPING ON POST.)

Charge.—Sleeping on post, in violation of the 39th Article of War.

Specification.—In that Private R—— Y——, Troop D, —th Regiment of Cavalry, U. S. Army, being on duty as a member of the post guard (or stable guard; or camp guard; or outpost or picket guard, as the case may be), and having been duly posted as a sentinel, was found sleeping upon his post.[1]

This at — o'clock P.M., on the —th day of ————, 189—.

ARTICLE 39.

(LEAVING POST.)

Charge.—Leaving post, in violation of the 39th Article of War.

Specification.—In that Private E—— N——, Company G, —th Regiment of Infantry, U. S. Army, being a member of the post guard (or camp or stable guard, etc.), and having been duly posted as a sentinel, did leave his post before he was regularly relieved.

This at Fort ————, ————, at — A.M., on the —th day of ————, 189—.

[1] The form sometimes used in charging this offense, that the accused was "regularly detailed" as a member of a particular guard, though correct, is unnecessary, the regularity of the detail not being essential as an allegation in the specification.

ARTICLE 40.

Charge.—Quitting his guard, in violation of the 40th Article of War.

Specification.—In that Corporal G—— H——, Light Battery G, —th Regiment of Artillery, U. S. Army, being a member of the post (stable or picket) guard (or, being on guard), did, without urgent necessity, quit his guard without leave from his superior officer.

This at Fort ————, ————, on the —th day of ————, 189—.

ARTICLE 41.

Charge.—Creating (or occasioning) a false alarm, in violation of the 41st Article of War.

Specification.—In that Sergeant R—— T——, Troop F, —th Regiment of Cavalry, U. S. Army, did create a false alarm in camp by causing the "general" to be sounded, without authority.

This in the camp of a detachment of the —th Regiment of Cavalry, on the North Fork of the Canadian River, Texas, on the —th day of ————, 189—.

ARTICLE 42.

(COWARDICE, MISBEHAVIOR, ETC.)

Charge.—Misbehavior before the enemy, in violation of the 42d Article of War.

Specification.—In that Captain R—— O——, —th Regiment of Cavalry, U. S. Army, being in command of Troop A, —th Regiment of Cavalry, and engaged in a reconnaissance (or, "conducting a reconnaissance") against the enemy, did misbehave himself by retiring from the position occupied by his troop, in contact with the enemy (or did run away from the position occupied by his command, etc.), to a safe position in the rear, from which it was impossible for him to direct the movements of his command in its operations against the enemy.

This at ————, ————, on the —th day of ————, 189—.

ARTICLE 42.

(ABANDONING A POST, ETC.)

Charge.—Shamefully abandoning a post, in violation of the 42d Article of War.

Specification.—In that Major W—— B——, —th Regiment of Infantry, U. S. Army, having been duly assigned to command the cantonment of ————, a most important and critically situated post, with instructions to resolutely defend the same (or, to defend the same until relieved; or, to

defend the same to the last extremity), did, in violation of his duty and of the trust reposed in him, shamefully abandon the post which he was commanded to defend, by moving his command from the said cantonment, without orders, or authority from, or consultation with, superior military authority.

This at Cantonment ———, ———, on the —th day of ———, 189—.

Article 43.

Charge.—Compelling a surrender, in violation of the 43d Article of War.[1]

Specification.—In that Captain H—— R——, commanding Company A, —th Regiment of Infantry, U. S. Army; Captain T—— R——, commanding Company C, —th Regiment of Infantry, U. S. Army; Captain F—— W——, commanding Company D, —th Regiment of Infantry, U. S. Army; and First Lieutenant C—— Y——, commanding Light Battery D, —th Regiment of Artillery, U. S. Army, they and each of them, being engaged, as company commanders, in the defense of the post of Fort ———, ———, which post was, at the time, besieged by the enemy, did each of them make use of violent threats and menances against Colonel H—— D——, —th Regiment of Infantry, U. S. Army, commanding the said post of Fort ———, ———, and they and each of them did declare and say to the said Colonel D——, commanding, that if the defense of the said post was continued, that they, and each of them, would withdraw their commands from the place, or places, which they and each of them had been duly assigned to defend, and did, further, violently and forcibly demand of the said commander that, unless he did, forthwith, enter into communication with the enemy, with a view to the immediate surrender of the post under his command, that they and each of them would withdraw their commands from the place which they and he had been appointed to defend (or, that they and each of them would, with force and arms, compel and require the said Colonel H—— D——, commanding the said post, to surrender the same to the enemy), in consequence of which compulsion by force the said Colonel H—— D—— was compelled to surrender and did surrender the post of Fort ———, ———, to the enemy.

This at Fort ———, ———, on the —th day of ———, 189—.

Article 44.

Charge.—Making known the watchword, in violation of the 44th Article of War.

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[1] The allegation of criminality above given is in form a joint charge. For an explanation of joint charges see note to Article 22, page 651, *ante*.

Specification.—In that Sergeant F—— T——, Company F, —th Regiment of Infantry, U. S. Army, being a member of the guard, did make known the countersign to T—— Y——, a civilian, not entitled, by the rules and discipline of war, to receive the same.

This at ————, ————, on the —th day of ————, 189—.

ARTICLE 44.

Charge.—Giving a parole different from that which he received, in violation of the 44th Article of War.

Specification.—In that Captain D—— M——, —th Regiment of Infantry, U. S. Army, being officer of the day at the camp of his regiment in the field, did presume to give to First Lieutenant G—— H——, —th Regiment of Infantry, U. S. Army, the officer of the guard in the said camp of the —th Regiment of Infantry, a parole differing from that furnished officially to the said Captain D—— M—— by the commanding officer of his regiment.

This at ————, ————, on the —th day of ————, 189—.

ARTICLE 45.

(RELIEVING THE ENEMY.)

Charge.—Relieving the enemy, in violation of the 45th Article of War.

Specification.—In that Major T—— G——, —th Regiment of Cavalry, U. S. Army, being in the field engaged in operations against the enemy, did relieve the said enemy with victuals by furnishing, or causing, or allowing him to be furnished with a quantity of provisions, to wit, with two thousand (2000) pounds of hard bread.

This at ————, ————, on the —th day of ————, 189—.

ARTICLE 45.

(HARBORING AN ENEMY.)

Charge.—Harboring an enemy, in violation of the 45th Article of War.

Specification.—In that Major T—— Y——, —th Regiment of Cavalry, commanding an outpost in the presence of the enemy, did knowingly harbor and protect an enemy, by receiving and entertaining in his camp, and afterward permitting to return to his own lines, one Captain R—— E——, an officer in the military service of ————, with which the United States were at war.

This at ————, ————, on the —th day of ————, 189—.

ARTICLE 46.

Charge.—Corresponding with the enemy, in violation of the 46th Article of War.

Specification.—In that Captain G—— H——, —th Regiment of Cavalry, being in command of an outpost in the presence of the enemy, did without authority send, by means of a flag of truce, a communication in writing to the commanding officer of the enemy in his immediate front, the said communication being in the following words and figures, to wit (here insert the written communication), and, in reply to the same, did receive from the said enemy a communication in writing, in the following words and figures, to wit (here insert the written reply).

This at ——— ———, on the —th day of ———, 189—.

ARTICLE 47.

Charge.—Desertion, in violation of the 47th Article of War.

Specification.—In that Private A—— B——, Company —, —th U. S. Infantry, a soldier in the service of the United States,[1] did desert the same at ———, on or about the —— of ———, 18—, and did remain absent in desertion until he was apprehended (or until he surrendered himself), at ——, on or about the —— of ———. 18—.[2]

ARTICLE 49.

Charge.—Quitting his post, on tender of resignation, in violation of the 49th Article of War.

Specification.—In that Lieutenant L—— H——, —th Regiment of Cavalry, U. S. Army, having tendered the resignation of his commission as a first lieutenant in the —th Regiment of Cavalry, U. S. Army, did on the —th day of ———, 189—, without leave from proper authority, and prior to due notice having been received of the acceptance of the same, quit his

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[1] This form is applicable either in case a soldier has "received pay" or has been "duly enlisted." In either case the "statement of service" will enable the court to determine as to the statute of limitation and proper punishment. See Manual for Courts-martial, page 82, par. 10, and page 53.

[2] If a soldier deserts and enlists in another troop he should be charged with desertion under the 47th Article, and also with "fraudulent enlistment, to the prejudice of good order and military discipline," under the 62d.* The specification to the latter charge should read as follows:

"In that Private A—— B——, Company —, —th Infantry, a soldier in the service of the United States, did, without a discharge from said regiment of infantry, fraudulently enlist in Troop ——, —— U. S. Cavalry, at ——, on the —— of ——, 18—, under the name of ——."

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* See 50th A. W. and G. O. 57, A. G. O., 1892. For definition of "fraudulent enlistment," see Manual for Courts-martial, page 12, note 4.

post and proper duties, with the intent to remain permanently absent therefrom. (If the absence was terminated by the arrest or surrender of the offender, add "and did remain absent in desertion until ———, ——, 189—, when he was apprehended at ———"; or "surrendered himself at ———, ——.")

This at ———, ———.

ARTICLE 50.

(RECEIVING OR ENTERTAINING A DESERTER.)

Charge.—Enlisting a deserter, in violation of the 50th Article of War.

Specification.—In that First Lieutenant J—— T——, —th Regiment of Infantry, U. S. Army, post recruiting officer at Fort Y———, ———, did enlist C—— H—— in Troop G, —th Regiment of Cavalry, knowing the said C—— H—— to be a deserter from Light Battery D, —th Regiment of Artillery, U. S. Army.

This at Fort ———, ——— on the —th day of ———, 189—.

ARTICLE 50.

(FAILING TO CONFINE DESERTER, ETC.)

Charge.—Failing to confine deserter, in violation of the 50th Article of War.

Specification.—In that First Lieutenant J—— T——, —th Regiment of Infantry, U. S. Army, having been informed that Private C—— H——, an enlisted man under his command, was a deserter from Light Battery D, —th Regiment of Artillery, U. S. Army, did wholly fail and neglect to cause the said deserter to be confined, and did also fail and neglect to give notice thereof to the corps in which the said deserter last served.

This at ——— ———, on the —th day of ———, 189—.

ARTICLE 51.

(ADVISING TO DESERT.)

Charge.—Advising desertion, in violation of the 51st Article of War.

Specification.—In that Private R—— T——, Company E, —th Regiment of Infantry, U. S. Army, did advise Private F—— W——, Company F, —th Regiment of Infantry, to desert the military service of the United States.

This at ———, ———, on the —th day of ———, 189—.

ARTICLE 51.

(PERSUADING TO DESERT.)

Charge.—Persuading a soldier to desert, in violation of the 51st Article of War.

Specification.—In that Private R—— Y——, Company D, —th Regiment of Infantry, U. S. Army, did advise and persuade Private E—— M——, Company F, —th Regiment of Infantry, a duly enlisted soldier, to desert the military service of the United States, in consequence of which advice and persuasion the said Private E—— M—— did, subsequently, to wit, on the —th day of ———, 189—, desert the said military service.

This at ————, ———, on the —th day of ———, 189—.

ARTICLE 52.

The procedure under this Article is summary in character. The offense, if committed by an officer, may have been observed by the commanding officer himself, in which case no investigation would seem to be necessary; or, it may have been brought to the attention of the commanding officer in the form of a report submitted, in the usual manner, by a commissioned officer of the army, in which event the matter should be made the subject of proper official inquiry. If the fact that an offense under the Article has been committed is substantiated by the inquiry, a statement of such fact should be submitted, by the proper commander, to a general court-martial, if such a tribunal be in session at the post. The duty of framing and administering the reprimand devolves, under the Article, on the president of the court; and is administered, in the presence of the court, at one of its regular sessions, or at a special session convened for the purpose. The record should set forth the nature and character of the offense, as shown by the statement made to the court by the commanding officer, and a literal copy of the reprimand administered; it should also show that the accused was present during the administration of the reprimand. The procedure in the case of an enlisted man is fully set forth in the text of the Article.

ARTICLE 54.

Charge.—Refusing (or omitting) to see justice done, in violation of the 54th Article of War.

Specification.—In that Major J—— K——, —th Regiment of Infantry, U. S. Army, being in command of a detachment of troops of the United States Army on the march, and complaint having been duly made to him, by (or in behalf of) A—— B——, a citizen of the United States, that cer-

tain members of his command, to wit: (the offenders should be named and identified, if practicable, otherwise the specification should allege that the offenders were "to the complainant unknown") had beaten, robbed, and otherwise ill-treated him, did wholly fail and omit (or did refuse) to see justice done to the said complainant (or reparation made to the said complainant).

This at ————, ————, on the —th day of ————, 189—.

ARTICLE 55.

(COMMITTING WASTE.)

Charge.—Committing waste, in violation of the 55th Article of War.

Specification.—In that Sergeant T—— Y——, Troop A, —th Regiment of Cavalry, U. S. Army, being in command of a detachment of the —th Regiment of Cavalry, acting as train-guard, did commit waste in an inclosure belonging to A—— B. C——, an inhabitant of the United States, by cutting down and destroying a quantity of standing timber in the said inclosure, the said waste not being committed by the order of a general officer commanding a separate army in the field.

This at ————, ————, on the —th day of ————, 189—.

ARTICLE 55.

(SPOLIATION.)

Charge.—Spoliation, in violation of the 55th Article of War.

Specification.—In that Captain C—— H——, commanding Troop D, —th Regiment of U. S. Cavalry in the field, did commit spoil (or did despoil) the grain fields belonging to A—— G——, an inhabitant of the United States, by causing the horses of his company to be turned into the said grain fields, and by causing the enlisted men of his command to throw down the stacks of grain in the said fields, the said spoliation not being committed by order of a general officer commanding a separate army in the field.

This at ————, ————, on the —th day of ————, 189—.

ARTICLE 55.

(MALICIOUS DESTRUCTION.)

Charge.—Malicious destruction of property, in violation of the 55th Article of War.

Specification.—In that First Lieutenant C—— G——, —th Regiment of Infantry, U. S. Army, being in command of a detachment of his regiment on outpost duty, did, without authority, enter the house of A—— G——, an inhabitant of the United States, and did maliciously destroy, and did cause the enlisted men of his command to destroy, certain personal

property, belonging to the said A—— G——, to wit, certain furniture, pictures, curtains, and tableware, the said destruction of property not having been ordered by a general officer commanding a separate army in the field.

This at ————, ———, on the —th day of ———, 189—.

ARTICLE 56.

Charge.—Doing violence to a person bringing provisions to the camp, in violation of the 56th Article of War.

Specification.—In that Sergeant G—— Y——, Company F, —th Regiment of Infantry, U. S. Army, being on duty with the camp guard of his regiment, in foreign parts, did assault and beat with his rifle one A—— H——, a person bringing provisions to the camp.

This at ————, ———, on the —th day of ———, 189—.

ARTICLE 57.

Charge.—Forcing a safeguard, in violation of the 57th Article of War.

Specification.—In that Private F—— R——, Company I, —th Regiment of Infantry, U. S. Army, being in foreign parts (or "being at a place within the United States during rebellion against the supreme authority of the United States"), did enter the premises of A—— H——, a person, to whom a safeguard had been furnished by Major-General G—— N——, commanding the Army of ———, and, having been duly informed by the said A—— H—— that a safeguard had been furnished him (or that the premises were protected by a safeguard), (or, "the said safeguard having been exhibited to him by the said A —— H——"), did, in contempt of the said authority, feloniously take, steal, and carry away a quantity of grain belonging to the said A—— H——, to wit, one hundred pounds of oats.

This at ————, ———, on the —th day of ———, 189—.

ARTICLE 58.

(LARCENY.)

Charge.—Larceny, in violation of the 58th Article of War.

Specification.—In that Private R—— Y——, Company I, —th Regiment of Infantry, U. S. Army, did, in time of war (or in time of insurrection, or rebellion, etc.), feloniously steal, take, and carry away (here describe the article of personal property which was made the subject of the larceny), of the value of ——— dollars ($———), the property of the United States, furnished for use in the military service, (or, if belonging to a private owner, "the property of F—— G——").

This at ————, ———, on the —th day of ———, 189—.

ARTICLE 58.

(BURGLARY.)

Charge.—Burglary, in violation of the 58th Article of War.

Specification.—In that Corporal Y—— R——, Company E, —th Regiment of Infantry, U. S. Army, did, in time of war (or of insurrection, etc.), feloniously and burglariously break and enter the dwelling-house of R—— S——, in the night-time, with intent to commit a felony therein—to wit, (here insert the offense, as larceny, robbery, etc.).

This at ————, ————, on the —th day of ————, 189—.

ARTICLE 58.

(ROBBERY.)

Charge.—Robbery, in violation of the 58th Article of War.

Specification.—In that Corporal E—— M——, Battery E, —th Regiment of Artillery, U. S. Army, did, in time of war (insurrection, etc.), feloniously and forcibly take from the person (or "in the presence") of H—— D—— (here describe the article of personal property which was made the subject of the forcible taking), to the value of ———— dollars ($————).

This at ————, ————, on the —th day of ————, 189—.

ARTICLE 58.

(ARSON.)

Charge.—Arson, in violation of the 58th Article of War.

Specification.—In that Private T—— M——, Troop M, —th Regiment of Cavalry, U. S. Army, did, in time of war (insurrection, etc.), willfully, maliciously, and feloniously set fire to and burn the house (or outhouse, shed, or other outbuilding within the curtilage, or inclosure, pertaining thereto), of A—— B—— (if not occupied by the owner in fee, the premises should be described as "occupied by T—— Y——, a tenant for years," or "a monthly tenant," as the case may be); (if the building be public property, it should be described as "a dwelling-house belonging to the United States and occupied by Captain F—— E——, —th Regiment of Infantry, as his quarters").

This at ————, ————, on the —th day of ————, 189—.

ARTICLE 58.

(MAYHEM.)

Charge.—Mayhem, in violation of the 58th Article of War.

Specification.—In that Corporal T—— H——, Light Battery B, —th Regiment of Artillery, U. S. Army, did, in time of war, assault Private

R—— H——, Light Battery B, —th Regiment of Artillery, with a knife, and did willfully and feloniously wound, maim, injure, and disable the said Private R—— H—— for service as a soldier.

This at ———, ———, on the —th day of ———, 189—.

ARTICLE 58.

(MANSLAUGHTER.)

Charge.—Manslaughter, in violation of the 58th Article of War.

Specification.—In that Private W—— T——, Company A, —th Regiment of Infantry, U. S. Army, did, in time of war, willfully and feloniously kill one E—— P——, by striking and beating him on the head with his rifle, thereby causing his death (or, if death does not immediately ensue, "thereby inflicting a mortal wound upon the person of the said E—— P——, in consequence of which" (or, "from the effects of which") "wound or injury he, the said E—— P——, died on the —th day of ———, 189—").

This at ———, ———, on the —th day of ———, 189—.

ARTICLE 58.

(MURDER.)

Charge.—Murder, in violation of the 58th Article of War.

Specification.—In that Private R—— O——, Company D, —th Regiment of Infantry, U. S. Army, did, in time of war, willfully, feloniously, and with malice aforethought, murder and kill R—— Y——, by (here set forth the manner of killing, as by shooting him with a pistol, stabbing with a sword, bayonet, dagger, etc.; or by striking, or beating with a club, rifle, gun; or by shooting, etc., together with a description of the injury inflicted, as to its character, as mortal, etc., its location, etc.; or by administering poison, or by neglect to care for a person under tutelage, as a child, or minor, or a pauper or insane person, and the like), thereby causing his death; (where death does not immediately ensue, it should be alleged that a mortal wound was inflicted, on a day certain, in consequence of which (or, from the effects of which) the injured person died on a day specified).

This at ———, ———, on the —th day of ———, 189—.

ARTICLE 58.

(ASSAULT AND BATTERY WITH INTENT TO KILL.)

Charge.—Assault and battery with intent to kill, in violation of the 58th Article of War.

Specification.—In that Private E—— T——, Company G, —th Regiment of Infantry, U. S. Army, did, in time of war, make a violent assault

upon one Y—— G——, a citizen, by shooting him with a pistol loaded with powder and ball (or, "by striking him repeatedly on the head with his sabre," etc.), with intent then and there feloniously, willfully, and with malice aforethought, to kill and murder the said Y—— G——.

This at ———, ———, on the —th day of ———, 189—.

ARTICLE 58.

RAPE.

Charge.—Rape, in violation of the 58th Article of War.

Specification.—In that Private T—— H——, Troop E, —th Regiment of Cavalry, U. S. Army, did, in time of war, feloniously make an assault, and by force and violence and against her will, did ravish and carnally know one R—— J——.

This at ———, ———, on the —th day of ———, 189—.

ARTICLE 58.

(ASSAULT AND BATTERY WITH INTENT TO COMMIT RAPE.)

Charge.—Assault and battery with intent to commit rape, in violation of the 58th Article of War.

Specification.—In that Private E—— T——, Battery E, —th Regiment of Artillery, U. S. Army, did, in time of war, feloniously and with force and violence, assault one M—— G——, and her did beat, bruise, wound and ill-treat with intent, violently and against her will, feloniously to ravish and carnally know the said M—— G——.

This at ———, ———, on the —th day of ———, 189—.

ARTICLE 59.

Charge.—Neglect (or refusal) to surrender a soldier to the civil magistrate, in violation of the 59th Article of War.

Specification.—In that Major T—— Y——, commanding the —th Regiment of Infantry, U. S. Army, application having been duly made to him, in time of peace, by (or in behalf of) R—— W——, a citizen of the United States, for the apprehension and delivery to the civil magistrate, of Private R—— J——, Battery D, —th Regiment of Artillery, an enlisted man under the command of the said Major T—— Y——, charged with a violation of the law of the land, to wit, with larceny, in violation of the law of the State of ———, committed against the property of the said R—— W——, did refuse (or willfully neglect) to deliver over the said offender to the civil magistrate (or "did refuse" or "did willfully neglect to aid the officers of justice in apprehending") the said Private R—— J——, charged with crime as aforesaid.

This at ———, ———, on the —th day of ———, 189—.

ARTICLE 60.

(MAKING A FRAUDULENT CLAIM.)

Charge.—Making a fraudulent claim against the United States, in violation of the 60th Article of War.

Specification.—In that First Lieutenant G—— W——, —th Regiment of Infantry, U. S. Army, Acting Assistant Quartermaster, U. S. Army, at Fort ———, did present, or did cause to be presented for payment to Captain H—— T——, Assistant Quartermaster, U. S. Army, Depot Quartermaster at ————, ———, a claim against the United States—to wit, a pay-roll for the payment of ———dollars ($———), to A—— B——, C—— D——, E—— F——, and G—— H——, for services alleged to have been rendered by them as civilian employees of the United States at the post of ————, ———, during the month of September, 189—, which claim was false and fraudulent, and was well known by the said First Lieutenant G—— W—— to be false and fraudulent.

This at ————, ———, on the —th day of ———, 189—.

ARTICLE 60.

(PRESENTING A FRAUDULENT CLAIM.)

Charge.—Presenting a fraudulent claim, in violation of the 60th Article of War.

Specification.—In that First Lieutenant P—— F——, —th Regiment of Cavalry, U. S. Army, did prepare or cause to be prepared and did present to Colonel H—— D——, 6th Regiment of Cavalry, for approval (or did present to Captain G—— K——, Assistant Quartermaster, Depot Quartermaster at ————, ———, for payment) a claim against the United States, amounting to two hundred and eighty dollars ($280.00), the said claim being a voucher for the payment of certain civilian employees of the United States, at the post of Fort ————, ———, for services alleged to have been rendered during the month of September, 189—, the said voucher being in the following words and figures, to wit: (here insert the fraudulent instrument in writing) well knowing the said claim to be false, fictitious, and fraudulent.

This at ————, ———, on the —th day of ———, 189—.

ARTICLE 60.

(CONSPIRING TO OBTAIN PAYMENT OR ALLOWANCE OF CLAIM.)

Charge.—Entering into an agreement, (or conspiring) to defraud the United States, by obtaining the allowance of a fraudulent claim, in violation of the 60th Article of War.

Specification.—In that First Lieutenant F—— P——, —th Regiment of Cavalry, U. S. Army, did enter into an agreement (or did conspire) with one W—— G——, a citizen, to cheat and defraud the United States by

obtaining, or aiding and assisting to obtain, the payment or allowance of a false and fraudulent claim for services alleged to have been rendered by E—— F——, G—— H——, I—— J——, K—— W——, and W—— R——, as civilian employees of the United States, at the post of ————, ————, during the month of September, 189—.

This at ————, ————, on the —th day of ————, 189—.

ARTICLE 60.

Charge.—Making a false statement in writing, in violation of the 60th Article of War.

Specification.—In that First Sergeant H—— Y——, Company D, —th Regiment of Infantry, U. S. Army, did, for the purpose of obtaining the allowance or payment of a claim against the United States, make or cause to be made an instrument in writing purporting to be the final statement in the case of Private W—— S——, Company D, —th Regiment of Infantry, in the following words and figures, to wit (here insert the fraudulent instrument in writing), which final statement was well known by the said First Sergeant H—— Y—— to be false and fraudulent.

This at ————, ————, on the —th day of ————, 189—.

ARTICLE 60.

Charge.—Signing a certificate without knowledge of its correctness, in violation of the 60th Article of War.

Specification.—In that Captain D—— F——, Assistant Quartermaster, U. S. Army Depot Quartermaster at ————, ————, being authorized as such to make and deliver receipts for property furnished for the military service, did make or cause to be made and delivered to C—— G——, a contractor for furnishing forage, under a contract with the United States dated ———— —th, 189—, a certificate to the effect that he, the said Captain D—— F——, had received from the said contractor a quantity of forage, to wit, one hundred thousand pounds (100,000 lbs.) of corn and one hundred and fifty thousand pounds (150,000 lbs.) of oats, for the use of the said military service, which certificate was given by the said Captain D—— F—— without having full knowledge of the truth of the statements therein contained, and with intent to defraud the United States.

This at ————, ————, on the —th day of ————, 189—.

ARTICLE 60.

(MAKING SHORT PAYMENT.)[1]

Charge.—Making a false payment, in violation of the 60th Article of War.

[1] Where a disbursing officer having caused a creditor of the United States to sign a receipt in blank paid him a less sum than was due him, and afterwards inserted the

Specification.—In that Captain G—— H——, as Assistant Quartermaster, U. S. Army, Post Quartermaster at Fort ————, ————, and as such being in charge and custody of certain money and property of the United States furnished and intended for the military service thereof, did make and deliver or cause to be made and delivered to R—— H——, a contractor for the supply of forage at the said post of ————, a voucher purporting to account for the purchase of a quantity of forage, to wit, one hundred tons of hay, amounting to eight hundred dollars ($800.00), and did cause and require the said R—— H—— to sign a receipt attached to and forming a part of the said voucher in the following words and figures, to wit (here insert the receipt), the said receipt purporting to be given for the payment of eight hundred dollars ($800.00), which receipt was false, in that the sum of five hundred dollars only was actually paid to and received by the said R—— H——, in consideration of the delivery to the United States of the stores aforesaid.

This at Fort ————, ————, on the —th day of ————, 189—.

ARTICLE 60.

(PURCHASING AMMUNITION, ETC.)[1]

Charge.—Purchasing ammunition, in violation of the 60th Article of War.

Specification.—In that Corporal T—— G——, Company G, —th Regiment of Cavalry, did, without authority, purchase from Private E—— R——, Company A, —th Regiment of Infantry, a quantity of ammunition, to wit, one hundred and fifty (150) rounds of carbine cartridges, calibre 45, the said ammunition being the property of the United States, for which Captain F—— K——, —th Regiment of Infantry, was responsible, and did give to the said Private E—— R—— in payment therefor the sum of one

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true amount due in the receipt so as to obtain credit with the United States for the greater sum, *held* that he was chargeable with the offense defined in the 7th paragraph of this Article. Dig. J. A. Gen., 56, par. 5.

Where an officer by collusion with a contractor who had contracted for the delivery of military supplies received for a pecuniary consideration from the latter a less amount of supplies than the United States was entitled to under the contract, while at the same time giving him a voucher certifying on its face the delivery of the whole amount, *held* that such officer was chargeable with an offense of the class defined in the 8th paragraph of this Article. *Ibid.*, par. 6.

Where an officer allowed to an enlisted man and paid to him out of certain public funds consisting of the proceeds of a public sale of condemned quartermaster stores an amount of ten per centum on the total of such proceeds as a compensation for the services of such man as auctioneer at the sale, *held* that such payment was illegal and unauthorized,* and constituted an embezzlement of public money chargeable under the 60th or the 62d Article. *Ibid.*, 60, par. 20.

[1] The unlawful sale or purchase of arms, ammunition, or equipments not issued to enlisted men as a part of their equipment for service should be charged under the 60th Article.

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* So, also, held by the Second Comptroller of the Treasury in the same case. See opinion published in Circ. No. 3 (H. A.), 1894.

dollar and fifty cents ($1.50), which sale was fraudulent, the said ammunition being furnished to Private E—— R——, Company A, —th Regiment of Infantry, for use in the military service, and he having no lawful right to dispose of the same.

This at ———, ———, on the —th day of ———, 189—.

ARTICLE 60.

(EMBEZZLEMENT.)[1]

Charge.—Embezzlement, in violation of the 60th Article of War.

Specification.—In that Captain G—— L——, Commissary of Subsistence, U. S. Army, Depot Commissary of Subsistence at ———, ———, having in his official capacity as such depot commissary of subsistence received officially the sum of one hundred and eighty dollars ($180.00), moneys of the United States (here state the source from which the funds were received, as from sales to officers, sales at auction, and the like), furnished and intended for the military service thereof, did fraudulently, unlawfully, and feloniously convert to his own use and did embezzle the same. (Or "did unlawfully and wholly fail to account to the United States for the said sum or any part thereof, but did convert the same to his own use.")

This at ———, ———, on the —th day of ———, 189—.

ARTICLE 60.

(MISAPPLICATION.)

Charge.—Misapplication of public property, in violation of the 60th Article of War.

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[1] In a case of embezzlement of public funds* or property charged under this Article it is not necessary to allege in terms or to prove an *intent to defraud* the United States. It is the *act* of legal embezzlement which is made the offense, irrespective of the purpose or motive of such act. Dig. J. A. Gen., 56, par. 7. See, also, par. 9, *ibid.*

In order to determine whether certain acts or conduct may properly be charged as constituting embezzlement of public money under the 9th paragraph of this Article, the sections of the Revised Statutes, especially those contained in Chapter 6 of Title LXX, may properly be recurred to. Acts here specified as constituting embezzlements in law may, when committed by officers of the Army, be charged as embezzlements under this Article, and the rules of evidence established by these sections may also be applied where apposite to military cases.† But as to the *penalties* prescribed in the same, these, though useful as going to indicate a reasonable measure of punishment when imprisonment or fine is proposed to be adjudged, are of course in no respect obligatory upon military tribunals, and any approved military penalty or penalties, such as dismissal, suspension, etc., may be imposed by courts-martial upon conviction of embezzlement, either alone or in connection with imprisonment or fine. So a term of confinement or a fine (or forfeiture of pay) in *excess* of the penalties authorized for civil offenders may legally be adjudged by such courts. *Ibid.*, par. 8.

* "All money lawfully in the hands of a public officer, and for which he is accountable, is money of the United States." United States *vs.* Watkins, 3 Cranch C. C., 441.

† See cases in which embezzlements of this class were charged against officers of the Army in G. O. 1, War Dept., 1861; G. C. M. O. 43, 86, Hdqrs. of Army, 1868; do. 21, War Dept., 1871; do. 27, 34, *id.*, 1872; do. 81, *id.*, 1874; do. 52, Hdqrs. of Army, 1877.

Specification.—In that First Lieutenant R—— T——, —th Regiment of Infantry, U. S. Army, being on duty as Post Quartermaster at Fort ————, ————, and having in his capacity as such post quartermaster received a quantity of lumber (to wit, eight hundred feet), the property of the United States, furnished for the use of the military service thereof, did knowingly and willfully misappropriate the same by causing it to be manufactured into articles of household furniture for the personal use of the officers serving at Fort ———— (or, "did knowingly and wilfully convert a portion of the same, to wit, three hundred feet, more or less, to his own use by causing it to be manufactured into articles of furniture for his personal use).

This at Fort ————, ————, on the —th day of ————, 189—.

ARTICLE 60.

(PLEDGING GOVERNMENT PROPERTY.)

Charge.—Receiving arms in pledge, in violation of the 60th Article of War.

Specification.—In that Sergeant R—— W——, Light Battery D, —th Regiment of Artillery, did receive from Private R—— F——, Troop E, —th Regiment of U. S. Cavalry, one Colt's revolver, pattern of 1894, in pledge for the payment of a loan of two dollars and fifty cents ($2.50), made by him to the said Private R—— F——, the said revolver being the property of the United States, issued to him for use in the military service, and for which Captain F—— Y——, —th U. S. Cavalry, was responsible, and which the said Private R—— F—— had no lawful right to pledge.

This at ————, ————, on the —th day of ————, 189—.

ARTICLE 61.[1]

Charge.—Conduct unbecoming an officer and gentleman, in violation of the 61st Article of War.

Specification.—In that Captain R—— Y——, Subsistence Department,

[1] To constitute an offense under this Article the conduct need not be "scandalous and infamous." These words, contained in the original Article of 1775, were dropped in the form adopted in 1806. Nor is it *essential* that the act should compromise the *honor* of the officer.* It is only necessary that the conduct should be such as is at once disgraceful or disreputable, and manifestly unbefitting both an officer of the Army and a gentleman.† An act, however, which is only slightly discreditable is not in practice made the subject of a charge under this Article. The Article, in making the punishment of dismissal imperative in all cases, evidently contemplates that the conduct, while unfitting the party for the society of men of a scrupulous sense of decency and honor,

* G. O. 25, Dept. of the Missouri, 1867.

† "An officer of the Army is bound by the law to be a gentleman." Atty.-Gen. Cushing, 6 Opins. 417. See definitions or partial definitions of the class of offenses contemplated by this Article in G. O. 45, Army of the Potomac, 1864; do. 29, Dept. of California, 1865; do. 7, Dept. of the Lakes, 1872; G. C. M. O. 69, Dept. of the East, 1870; do. 41, Hdqrs. of Army, 1879.

U. S. Army, did (here set forth the facts constituting the alleged violation of the Article).

This at ———, ———, on the —th day of ———, 189—.

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shall exhibit him as unworthy to hold a commission in the Army. Dig. J. A. Gen., 61, par. 1.

The following acts committed in a particular case *held* to be offenses within this Article: preferring false accusations against an officer; attempting to induce an officer to join in a fraud upon the United States; attempt at subornation of perjury. *Ibid.*, 62, par. 3. Knowingly making to a superior a false official report, *held* chargeable under this Article. So of a deliberately false official certificate as to the truth or correctness of an official voucher, roll, return, etc. So of any deliberately false official statement, written or verbal, of a material character. *Ibid.*, par. 2.

The violation by an officer of a promise or pledge on honor, given by him to a superior in consideration of the withdrawal by the latter of charges preferred for drunkenness. *Ibid.*, 62, par. 6. Engaging when intoxicated in a fight with another officer in the billiard-room at a post-trader's establishment in the presence of other officers and of civilians, *held* an offense within this Article. So *held* of an engaging in a disorderly and violent altercation and fight with another officer in a public place at a military post in sight of officers and soldiers. So *held* of an exhibition of himself by an officer in a public place in a grossly drunken condition. *Ibid.*, 63, par. 8. Gambling with enlisted men in a public place, *held* an offense within this Article. And so of frequenting in uniform a disreputable gambling-house and gambling with gamesters. *Ibid.*, par. 9.

To justify a charge under this Article it is not necessary that the act or conduct of the officer should be immediately connected with or should *directly* affect the military service. It is sufficient that it is morally wrong and of such a nature that, while dishonoring or disgracing him as a gentleman, it compromises his character and position as an officer of the Army.* *Ibid.*, par. 10.

Thus, though a mere neglect on the part of an officer to satisfy his private pecuniary obligations will not ordinarily furnish sufficient ground for charges against him, yet where the debt has been dishonorably incurred—as where money has been borrowed under false promises or representations as to payment or security, or where the non payment has been accompanied by such circumstances of fraud, deceit, evasion, denial of indebtedness, etc., as to amount to dishonorable conduct—the continued non-payment in connection with the facts or circumstances rendering it dishonorable may properly be deemed to constitute an offense chargeable under this Article.† *Ibid.*, par. 11.

The following acts held to constitute offenses under this Article: fraudulently procuring a divorce from his wife by an officer; failure on the part of an officer to support his wife and child without adequate excuse therefor; procuring or allowing himself by a retired officer to be placed by legal proceedings under a conservator as a habitual drunkard. *Ibid.*, 65, par. 20.

The use of abusive language toward a commanding officer may constitute an offense under this Article. *Ibid.*, par. 21.

The duplication of a "pay-roll" or claim for monthly pay is always an offense under this Article.‡ It is no defense that the transfer was made before the pay was actually due and payable, *i.e.*, before the end of the month. While such a transfer may be inoperative in view of par. 1300, A. R. of 1895, in so far as that the Government may refuse to recognize it, it is valid as between the officer and the party, and to allow the former to shelter himself behind the regulation would be to permit him to take advantage of his own wrongful and fraudulent act. *Ibid.*, par. 23. It has also been held that a continued neglect without adequate excuse to satisfy a pecuniary obligation long overdue after specific assurances given of speedy payment was a dishonorable act constituting an offense under this Article.§ *Ibid.*, 66, par. 26.

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* See, also, G. C. M. O. 27, A. G. O., 1888; 8 *ibid.*, 1890; G. O. 106, A. G. O., 1893; 56 *id.*, 1894.

† Cases of officers made amenable to trial by court-martial under this Article for the non-fulfilment of pecuniary obligations to other officers, enlisted men, post-traders, and civilians are found in the following General Orders of the War Dept. and Hdqrs. of Army: No. 87 of 1866; do. 3, 55, 64 of 1869; do. 15 of 1870; do. 17 of 1871; do. 22, 46 of 1872; do. 10 of 1873; do. 25, 50, 68, 82 of 1874; do. 25 of 1875; do. 100 of 1876; do. 46 of 1877. See, also, G. C. M. O. 27, A. G. O., 1888; 3 *ibid.*, 1889; 85 *id.*, 1891; G. O. 56, 65, and 106, A. G. O., 1893; 53 *id.*, 1894; 20 *id.*, 1895; 38 *id.*, 1896.

‡ See G. C. M. O. 27, A. G. O., 1888; 20 *ibid.*, 1890; G. C. M. O. 8, A. G. O., 1893.

§ See the recent ruling to a similar effect by the Supreme Court in Fletcher *vs.* U. S., 148 U. S., 91, 92; also the same case in 26 Ct. Cl., 541.

ARTICLE 62.[1]

Charge.—Neglect of duty, in violation of the 62d Article of War.

Specification.—In that First Lieutenant K—— L——, —th Regiment of Artillery, U. S. Army, being officer of the day at Fort ————, ————, did wholly fail and neglect to inspect the guard under his charge, after midnight, as required by paragraph ——, of the authorized Manual of Guard Duty.[2]

This at Fort ————, ————, on the —th day of ————, 189—.

ARTICLE 62.

Charge.—Creating a disorder (or "provoking a quarrel"), in violation of the 62d Article of War.

Specification.—In that Private T—— H——, Light Battery E, —th Regiment of Artillery, U. S. Army, did create a disorder (or provoke a quarrel) in the quarters of Light Battery E, —th Regiment of Artillery, by (here set forth the acts or words which caused the disorder or provoked the quarrel).

This at ————, ————, on the —th day of ————, 189—.

ARTICLE 62.

Charge.—Absence without leave, in violation of the 62d Article of War.

Specification.—In that Captain G—— K——, 2d Regiment of Artillery, U. S. Army, did absent himself from his company and duty without

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[1] For forms of charges in the case of certain crimes at common law, such as larceny, burglary, mayhem, etc., see the 58th Article. For the conditions to be fulfilled by an offense in order to authorize its trial under this Article, see Dig. J. A. Gen., 67, pars. 1 and 2.

[2] A crime, disorder, or neglect cognizable under this Article may be charged either by its name simply as "larceny," "drunkenness," "neglect of duty," etc., or by its name with the addition of the words "to the prejudice of good order and military discipline," or simply as "conduct to the prejudice of good order and military discipline," or as "violation of the 62d Article of War." It is immaterial in which form the charge is expressed, provided the specification sets forth facts constituting an act *prima facie* prejudicial to good order and military discipline. Whenever the charge and specification *taken together* make out a statement of an act clearly thus prejudicial, etc., the pleading will be regarded as substantially sufficient under this general Article. Dig. J. A. Gen., 72, par. 8.

A charge of "conduct to the prejudice," etc., with a specification setting forth merely trials and convictions of the accused for previous offenses is not a pleading of an offense under this Article or of any military offense. So of a charge of "habitual drunkenness to the prejudice," etc., with a specification setting forth instances in which the accused has been sentenced for acts of drunkenness. Such charges indeed are in contravention of the principle that a party shall not be twice tried for the same offense. So, a specification under the charge of "conduct to the prejudice," etc., which sets forth not a distinct offense, but simply the result of an aggregation of similar offenses, is insufficient in law. Where the specifications to such a charge in a case of an officer set forth that the accused was "frequently" drunk, "frequently" absented himself without authority from his command, etc., *held* that these specifications were properly struck out by the court on the motion of the accused. In such a case the only correct pleading is a general charge under this Article, with specifications setting forth, each separately, some particular and specific instance of offense. *Ibid.*, par. 9.

authority, from —— A.M., ——— —th, 189—, until —— P.M., on ——— —th, 189—.

This at ———, ———.

ARTICLE 62.

(MAKING USE OF REPROACHFUL SPEECHES, ETC.)

Charge.—Making use of reproachful speeches or gestures, in violation of the 62d Article of War.

Specification.—In that Corporal H—— R——, Troop D, —th Regiment of Cavalry, U. S. Army, did address the following reproachful (or "provoking") speeches (or gestures) to Private G—— Y——, Troop D, —th Regiment of Cavalry (here insert the language used, literally or in substance), or did make use of provoking gestures toward Private G—— Y——, Troop D, —th Regiment of Cavalry, by (here describe the gestures or other provoking conduct).

This at ———, ———, on the —th day of ———, 189—.

ARTICLE 62.

(NEGLECT OF DUTY.)

Charge.—Neglect of duty, to the prejudice of good order and military discipline.

Specification.—In that Private A—— B——, Co. ——, —th U. S. Infantry, being on duty as ———, and it being his duty as such to ———, did fail and neglect to perform said duty.

This at ———, ———, on the —th day of ———, 189—.

ARTICLE 62.

(PERJURY.)

Charge.—Perjury,[1] to the prejudice of good order and military discipline.

Specification.—In that Private A—— B——, Co. ——, —th U. S. Infantry, having been duly sworn, at his own request, as a witness in his own defense before a ——— court-martial, convened at ———, by ——— order No. ——, dated ———, 189—, for his trial, did willfully, falsely, and corruptly testify as follows:

[1] "Perjury before courts-martial is by statute made indictable in most jurisdictions; but even when a statute does not apply, the weight of authority is that it is perjury at common law." (Wharton, Crim. Law, § 1259.) It is a statutory crime under section 5392, Revised Statutes of the United States. So that false swearing before a court-martial, if it possesses the other elements of perjury, is perjury, and can be tried as such by court-martial under the 62d Article of War. The rules of evidence in regard to perjury will then apply. When any of the elements of perjury are lacking, the offense will properly be charged as "false swearing," *e.g.*, when the matter is *not* material to the issue. Manual for Courts-martial, 116. See, also, Dig. J. A. Gen., pp. 585, 586.

Question by judge-advocate: —— ——?

Answer: —— ——.

Which testimony was false in that (*specify in what respects*), and which testimony was known by him, the said A—— B——, to be false, was material to the issue then being tried, and was given with intent to deceive the court.

This at ———, ———, on the —th day of ———, 189—.[1]

ARTICLE 62.

(FRAUDULENT ENLISTMENT.)

Charge.—Fraudulent enlistment, in violation of the 62d Article of War.

Specification.—In that Private A—— B——, Co. ——, —th Infantry, a soldier in the service of the United States, did, without a discharge from said regiment of infantry, fraudulently enlist in Troop ——, —th U. S. Cavalry, at ———, on the —th day of ———, 189—, under the name of C—— D——.[2]

ARTICLE 62.

(FRAUDULENT ENLISTMENT.)

Charge.—Fraudulent enlistment, in violation of the 62d Article of War.[3]

Specification.—In that Private A—— B——, Co. ——, —th U. S. Infantry, did, at ———, on the —th day of ———, 189—, fraudulently enlist as a soldier in the service of the United States, by falsely representing that he had never been discharged from the United States service by sentence of a military court and by deliberately and willfully concealing from the recruiting officer, ———, the fact of his dishonorable discharge from ———, on ———, pursuant to sentence of court-martial; and that he has at ———, since said enlistment, received pay and allowances thereunder.

Or,

Specification.—In that Private A—— B——, Co. ——, —th U. S. Infantry, did, at ———, on the —th day of ———, 189—, he being a minor, fraudulently enlist as a soldier in the service of the United States by falsely representing himself to be over 21 years, to wit, —— years and —— months of age; and that he has at ———, since said enlistment, received pay and allowances thereunder.

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[1] For forms of charges in other crimes, see the 58th Article, *supra*.

[2] If a soldier deserts and enlists in another troop he should be charged with desertion under the 47th Article and also with "fraudulent enlistment to the prejudice of good order and military discipline" under the 62d.*

[3] This form should be used when the person offending is a citizen and the fraud alleged was committed at enlistment.

* See Article 50, and G. O. 57, A. G. O., 1892.

ARTICLE 62.

(DRUNKENNESS, ETC.)

Charge.—Drunkenness and disorderly conduct, to the prejudice of good order and military discipline.

Specification.—In that Private A—— B——, Co. ——, —th U. S. Infantry, was drunk and disorderly in ———.

This at ———, ———, about ———, on the —th day of ———, 189—.

ARTICLE 62.

(NEGLECT OF DUTY.)

Charge.—Suffering a prisoner to escape, to the prejudice of good order and military discipline.

Specification.—In that Private A—— B——, Co. ——, —th U. S. Infantry, while on duty as a sentinel, did, through neglect, suffer Private C—— D——, Co. ——, —th U. S. Infantry, a prisoner under his charge, to escape.

This at ———, ———, on the —th day of ———, 189—.

ARTICLE 65.

(BREACH OF ARREST, IN QUARTERS.)

Charge.—Breach of arrest, in violation of the 65th Article of War.

Specification.—In that Captain T—— R——, —th Regiment of Artillery, U. S. Army, having been lawfully placed in arrest by his commanding officer, Major E—— C——, —th Regiment of Artillery, did, without authority (or "not having been released from such arrest by competent authority"), leave his quarters (or tent), and did visit ——— (here specify the place visited by the accused).

This at ——— ———, on the —th day of ———, 189—.

ARTICLE 65.

(BREACH OF ARREST, ON THE MARCH.)

Charge.—Breach of arrest, in violation of the 65th Article of War.

Specification.—In that First Lieutenant G—— T——, —th Regiment of Infantry, U. S. Army, having been lawfully placed in arrest by his commanding officer, Major T—— F——, —th Regiment of Infantry, and having been ordered, by the said commanding officer, to march in rear of his company, did, without authority (or "not having been released from such arrest by competent authority"), leave the place assigned him in column and did visit ——— (or "did advance to the head of the column of his

regiment," or "did fall back from the place assigned him in column and join the stragglers in rear of the command").

This at or near ——— , ———, on the —th day of ———, 189—.

ARTICLE 62.

(REPROACHFUL SPEECHES OR GESTURES. SEE ARTICLE 25.)

Charge.—Conduct prejudicial to good order and military discipline, in violation of the 62d Article of War.

Specification.—In that Private T—— R——, Troop F, —th Regiment of Cavalry, did make use of reproachful speeches toward Private E—— D——, Troop F, —th Regiment of Cavalry, by calling him a d——d coward. (If gestures were used, they should be accurately described.)

This at Fort ———, ———, on the —th day of ———, 189—.

ARTICLE 68.

Charge.—Failing to report the confinement of a prisoner, in violation of the 68th Article of War.

Specification.—In that First Lieutenant G—— S——, —th Regiment of Infantry, U. S. Army, being officer of the guard at Fort ———, ——, and a prisoner—to wit, Private E—— Y——, Troop D, —th Regiment of Cavalry—having been lawfully committed to his charge, did wholly fail and neglect, upon being relieved from duty as such officer of the guard, or within twenty-four hours after such commitment, to submit a report in writing of the said confinement to his commanding officer, Colonel T—— K——, —th Regiment of Infantry, U. S. Army.

This at Fort ———, ———, on the —th day of ———, 189—.

ARTICLE 69.

(RELEASING A PRISONER.)

Charge.—Releasing a prisoner without authority, in violation of the 69th Article of War.

Specification.—In that Second Lieutenant R—— G——, —th Regiment of Infantry, U. S. Army, being officer of the guard at Fort ———, ———, and a prisoner, to wit, Private F—— W——, Battery F, —th Regiment of Artillery, having been lawfully committed to his custody by Captain K—— G——, —th Regiment of Artillery, did, without authority, presume to release the said prisoner.

This at Fort ———, ———, on the —th day of ———, 189—.

ARTICLE 69.

(SUFFERING A PRISONER TO ESCAPE.)

Charge.—Suffering a prisoner to escape, in violation of the 69th Article of War.

Specification.—In that Second Lieutenant G—— I——, —th Regiment of Artillery, U. S. Army, being officer of the guard at Fort ————, ————, and a prisoner, to wit, Private R—— H——, Troop D, —th Regiment of Cavalry, having been lawfully committed to his custody, did, through negligence, suffer the said prisoner to escape.

This at Fort ————, ————, on the —th day of ————, 189—.

(BEING A SPY.)

Charge.—Being a spy, in violation of Section 1343, Revised Statutes.

Specification.—In that J—— H——, a citizen, did deliberately, willfully, secretly, and in disguise, to wit, in the dress and garb of an enlisted man of the United States Army, come within the lines of the United States Army, in time of war, for the purpose of obtaining intelligence of the said forces with intent to convey the said intelligence to the enemy, and did secretly, furtively, and covertly obtain information with respect to the said forces and did attempt to convey the same to the enemy.

This at ———— ————, on the —th day of ————, 189—.

STATEMENT OF SERVICE.[1]

Statement of service of —— ——, Company ——, —th Regiment ——.
(Required by paragraph 927, Army Regulations.)

FORMER SERVICE.

Date of Enlistment.	Date of Discharge.	Character on Discharge.

Date of present enlistment ———— —, 189—.

Date of confinement under present charges ———— —, 189—.

—— ——,
Commanding ——.

———— ———— (Place.)

———— — —— (Date.)

[1] Required by paragraph 927, Army Regulations of 1895.

SURGEON'S REPORT ON ALLEGED DESERTER.[1]

FORT ———, ———,
——— —, 18—.

SIR: In compliance with paragraph 121, Army Regulations of 1895, I have the honor to report that I have critically examined —— ——, an alleged deserter, and find him fit for service; (*or*) unfit for service on account of ——.

—— ——,
Post Surgeon.

To the Post Adjutant.

[1] Required by paragraph 121, Army Regulations of 1895.

APPENDIX G.

FORMS OF PLEAS.

PLEA TO THE JURISDICTION.

GENERAL COURT-MARTIAL ROOMS,
FORT ———, ———,
May —, 189—.

May it please the Court:

The undersigned, W—— H——, having heard the charges and specifications read, in which it is alleged that he is a private in Company D, —th Regiment of Cavalry, U. S. Army, says that he is not now and never has been an enlisted man in the company or regiment aforesaid, or a member of the military establishment of the United States, but that he is a citizen, not connected with the military service; and this he is ready to verify.[1]

W—— H——.

RECORD OF DECISION.

And the court, having maturely considered the plea and statement of the accused (together with the evidence submitted in its support[2]) and the statement of the judge-advocate in opposition thereto, sustains the plea of the accused (or, "finds that the accused is not a member of the military establishment of the United States), and directs that he be excused from making further answer to the charges and specifications aforesaid (or, "overrules the plea and directs that the defendant make further answer to the charges and specifications").

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[1] If the plea be based upon the claim that the offense charged is not a military offense, the following form of words should be used: "says that the offense alleged against him in the aforesaid charge and specification is not an offense under the —th Article of War aforesaid. Wherefore he prays judgment of the said charge and specification, and that he may be discharged from further answer to the said charge and specification."

[2] If testimony is submitted in connection with the plea, it is recorded in the usual form. The accused, having the burden of proof cast upon him by the rules of evidence, presents his testimony in support of the plea, and this is followed by testimony in rebuttal, if any there be. The accused, having the affirmative of the issue raised by the plea, is entitled to the opening and closing address.

FORMER ACQUITTAL OR CONVICTION.

GENERAL COURT-MARTIAL ROOMS,
FORT ———, ———,
June —, 189—.

May it please the Court:

The undersigned, Captain H—— J——, —th Regiment of Infantry, U. S. Army, having heard the charges and specifications read, says that the United States ought not further to prosecute the —d specification of the —d charge against him, because on ——— —th, 189—, he was brought before a general court-martial, convened at Fort ———, ———, by virtue of Special Orders Number 3, Headquarters Department of ———, dated at ———, ———, on the —th day of ———, 189—, and was then and there duly tried and lawfully convicted (or acquitted), of the offense charged in the charge and specification aforesaid; and this the undersigned is ready to verify. Wherefore he prays that he may be discharged from making further answer to the —d specification of the —d charge aforesaid.

H—— J——,
Captain —th Regiment of Infantry,
United States Army.

RECORD OF DECISION.

The court having maturely considered the plea of the accused and the testimony submitted in its support,[1] together with the statement of the judge-advocate in opposition thereto, sustains the plea and orders that the defendant be excused from making further answer to the —d specification of the —d charge (or, if the plea be not sustained, the record should state, after the word support, "overrules the same and directs the defendant to make further answer to the —d specification of the —d charge").

PARDON.

GENERAL COURT-MARTIAL ROOMS,
FORT ———, ———,
——— —, 189—.

May it please the Court:

The undersigned, Major T—— L——, —th Regiment of Infantry, U. S. Army, having heard the charges and specifications read, says that the United States ought not to prosecute the —d specification of the —d charge against him because the offense was pardoned by Brigadier-General K—— H——, commanding the Department of the ———, the said pardon being contained in a letter restoring the said defendant to duty without trial,

[1] See note 1, page 683, *ante*.

which letter was in the following words and figures, to wit (here insert the letter); and this the undersigned is ready to verify. He therefore prays that he may be discharged from making further answer to the said —d specification of the —d charge aforesaid.

T—— L——,
Major —th Regiment of Infantry,
United States Army.

RECORD OF DECISION.

The court, having maturely considered the plea of the accused (together with the evidence submitted in its support), and the statement of the judge-advocate in opposition thereto, sustains the plea and orders that the defendant be excused from making further answer to the —d specification of the —d charge (or if the plea be not sustained, the record should state, after the word thereto, "overrules the same and directs the defendant to make further answer to the —d specification of the —d charge").

STATUTE OF LIMITATIONS.

GENERAL COURT-MARTIAL ROOMS,
FORT ———, ———,
——— —, 189—.

May it please the Court:

The undersigned, First Lieutenant J—— K——, Corps of Engineers, U. S. Army, having heard the charges and specifications read, says that he ought not to be compelled to answer to the —d specification of the —d charge, because he says that the offense therein alleged was committed on the —th day of ———, 189—, more than two years previous to the date of the order convening the court for his trial, upon the charge and specification aforesaid (or, "more than two years previous to the date upon which the charges against him were referred to the court for trial"); and this the defendant is ready to verify. Wherefore he prays judgment that the —d specification of the —d charge be quashed.

J—— K——,
First Lieutenant, Corps of Engineers,
United States Army.

RECORD OF DECISION.

The court having maturely considered the plea and statement of the accused (together with the evidence submitted in its support), and the statement of the judge-advocate in opposition thereto, sustains the plea and directs that the said —d specification of the —d charge be quashed (or, "overrules the plea and directs that the accused make further answer to the —d specification of the —d charge").

PLEA IN ABATEMENT—MISNOMER.

GENERAL COURT-MARTIAL ROOMS,
FORT ———, ———,
May —, 189—.

May it please the Court:

The undersigned, Private Henry Rhind, Battery D, —th Regiment of Artillery, U. S. Army, having heard the charges and specifications read, in which he is charged by the name of Henry Ryan, alleges that his name is Henry Rhind, and that he now is and from his earliest childhood has been known by the name of Henry Rhind; and this he is ready to verify.

HENRY RHIND,
Private Battery D, —th Regiment of Artillery,
United States Army.

PLEA IN ABATEMENT—MISNOMER IN CHRISTIAN NAME.

GENERAL COURT-MARTIAL ROOMS,
FORT ———, ———,
June —, 189—.

May it please the Court:

The undersigned, Sergeant Samuel Jones, Troop F, —th Regiment of Cavalry, U. S. Army, having heard the charges and specifications read, in which he is charged by the name of William Jones, alleges that he was baptized by the name of Samuel, to wit, in the town of ———, county of ———, State of ———, and that he has always since his baptism been called and known by the Christian name of Samuel, and that he has hitherto never been called by the name of William as by the said charges and specifications is supposed; and this the undersigned is ready to verify.

SAMUEL JONES,
Sergeant Troop F, —th Regiment of Cavalry,
United States Army.

RECORD OF DECISION.

And the court, having maturely considered the plea and statement of the accused (together with the evidence submitted in its support), and the statement of the judge-advocate in opposition thereto, finds the true name of the defendant to be Samuel Jones. It is therefore ordered that Samuel Jones, the true name of the said defendant, be entered on the record and that all further proceedings against him be conducted in that name.

FORMS OF SENTENCES.

DEATH BY SHOOTING.

Form: And the court does therefore sentence him, Private H—— G——, Company D, —th Regiment of Infantry, to be shot to death with

musketry at such time and place as the reviewing authority may direct, two thirds of the members concurring therein.

DEATH BY HANGING.

And the court does therefore sentence him, Private R—— T——, Troop D, —th Regiment of Cavalry, to be hung by the neck until he is dead, at such time and place as the reviewing authority may direct, two thirds of the members concurring therein.

DISMISSAL.

And the court does therefore sentence him, Captain T—— Y——, —th Regiment of Artillery, to be dismissed the service.

DISMISSAL AND IMPRISONMENT.

And the court does therefore sentence him, Captain H—— Y——, Corps of Engineers, to be dismissed the service and to be confined at hard labor in such place as the reviewing authority may direct for the period of ——— years.

DISMISSAL AND FINE.

And the court does therefore sentence him, Captain G—— T——, Ordnance Department, to be dismissed the service, and to pay to the United States a fine of ——— dollars, the amount of his embezzlement.[1]

DISMISSAL, IMPRISONMENT AND FINE.

And the court does therefore sentence him, Major T—— R——, Paymaster U. S. Army, to be dismissed; to be imprisoned at hard labor in such place as the reviewing authority may direct for the period of ten years; and thereafter to be further imprisoned in such place as the reviewing authority may direct until he shall refund to the United States the amount of his embezzlement, ———— dollars and —— cents ($———).[2]

REDUCTION IN RANK.

And the court does therefore sentence him, Captain H—— T——, Signal Department, U. S. Army, to be reduced in rank so that his name shall be placed at the foot of the list of captains in the Signal Department (or, "to be reduced in rank so that his name shall appear in the list of captains in the Signal Department next below that of Captain R—— S——").

[1] This form of sentence is usually imposed in cases in which the United States has suffered a considerable pecuniary loss in consequence of the embezzlement, larceny, or misappropriation of public money or property.

[2] See note to form next preceding.

SUSPENSION.

And the court does therefore sentence him, First Lieutenant H—— I——, —th Regiment of Artillery, to be suspended from rank (or "from rank and command," or "from rank, command, and pay") for the period of ——— years.

FORFEITURE OF PAY.

And the court does therefore sentence him, Lieutenant-Colonel Y—— E——, —th Regiment of Cavalry, U. S. Army, to forfeit to the United States seventy-five dollars per month of his pay (or, "all pay except ——— dollars per month") for a period of ——— months (or, "to forfeit to the United States all of his pay, except ——— dollars per month, for a period of ——— months").

CONFINEMENT TO LIMITS.

And the court does therefore sentence him, Major T—— G——, Ordnance Department, U. S. Army, to be confined to the limits of the United States Arsenal at ———, ———, for the period of ——— years (or, "to the limits of the Military Reservation of Fort ———, ———, for the period"), etc.

REDUCTION.

* * * "to be reduced to the ranks."[1]

CONFINEMENT.

* * * "to be confined at hard labor, under charge of the post guard (or, "at the place where his company may be serving[2]"), for ——— (—) days."

FORFEITURE.

* * * "to forfeit ——— (—) dollars of his pay."[3]

CONFINEMENT AND FORFEITURE.

* * * "to be confined at hard labor, under charge of the post guard, for ——— (—) months, and to forfeit ——— (—) dollars per month for the same period."[2]

---

[1] In the Engineer, Ordnance, and Signal Departments, where privates of the first and second class are authorized, a private of the first class may be reduced to the second class, the form being "to be reduced to a second-class private"

[2] If it be intended that the prisoner shall change station with his company, the clause above indicated may be added: "at the place where his company may be serving."

[3] *Detention* of pay is no longer authorized, and the Act of June 16, 1890, providing for *retention* of four dollars per month of a soldier's pay during first year of enlistment was repealed by the Act of February 12, 1895.

DISHONORABLE DISCHARGE AND FORFEITURE OF PAY AND ALLOWANCES.

* * * "to be dishonorably discharged the service of the United States, forfeiting all pay and allowances due him."[1]

DISHONORABLE DISCHARGE, FORFEITURE OF PAY AND ALLOWANCES, AND CONFINEMENT.

* * * "to be dishonorably discharged the service of the United States, forfeiting all pay and allowances due him, and to be confined at hard labor at such post (or in such penitentiary) as the reviewing authority may direct, for ——— (—) years."

If the period of confinement is less than one year, such a sentence should read: * * * "and be confined at hard labor, under charge of the post guard, for ——— (—) months."[2]

---

[1] The clause "or to become due," so frequently added after "allowances due," in such sentences is superfluous, for the reason that the forfeiture takes effect on the date of the order promulgating the sentence. See Dig. J. A. Gen., 423, par. 20.

[2] See note 2, page 688, *ante*.

APPENDIX H.

FORMS OF RECORDS.

RECORD OF A GENERAL COURT-MARTIAL.

FORM FOR RECORD.[1]

Page 1.[2]
(*In Margin.*)[2]

CASE 1.

Proceedings of a general court-martial which convened at ———, ———, pursuant to the following order:[3]

(*Here insert a literal copy of the order appointing the court, and, following it, copies of any subsequent orders modifying the detail.*)

HEADQUARTERS DEPARTMENT OF ———,
——— —, 189—.

SPECIAL ORDERS }
No. ——. }

A general court-martial is appointed to meet at ———, ———, at —.M., on ——— —, 189—, or as soon thereafter as practicable, for the trial of Captain E—— R——, —th Regiment of Artillery (or, "of Captain E—— R——, —th Regiment of Artillery, and such other persons as may be properly brought before it"), (or "of such persons as may be properly brought before it").

---

[1] See the chapter entitled THE RECORD, and the title "Record of Proceedings" in the Manual for Courts-martial. The record will be clear and legible, and if practicable, without erasure or interlineation. If a typewritten record is prepared, but one side of the sheet should be used.

[2] The pages of the record will be numbered and margins of one inch will be left at the top, bottom, and left side of each page. Manual for Courts-martial, 119, note 1.

[3] Words inclosed in parentheses ( ) or brackets [ ] are simply explanatory, and will not be copied in the record. *Ibid.*, note 2.

[4] "Every party tried by a general court-martial shall, upon demand thereof, made by himself or by any person in his behalf, be entitled to a copy of the proceedings and sentence of such court." (114th Article of War.) Applications for copies under this Article will be addressed to the Judge-Advocate General. Par. 894, A. R. of 1895.

DETAIL FOR THE COURT.

Major....., 5th Cavalry.
Captain....., 2d Artillery.
Captain....., Assistant Surgeon.
1st Lieutenant....., 10th Infantry.
1st Lieutenant....., 5th Cavalry.
2d Lieutenant....., 2d Artillery.
2d Lieutenant....., 10th Infantry.
1st Lieutenant....., 5th Cavalry, judge-advocate.

(*If less than thirteen members are detailed, the order will state:*)

A greater number of officers cannot be assembled without manifest injury to the service.

(*If the case be one requiring an immediate example, the following clause should be inserted at this point:*)

The court is authorized to sit without regard to hours.[1]

(*In case travel is necessary, the following sentence will be added:*)

The journeys required in complying with this order are necessary for the public service.

By command of Brigadier-General —— ——.

—— ——,
Assistant Adjutant-General.

FORT ———, ———.
———, 189—.

The court met pursuant to the foregoing order at —— o'clock —.M.[1]

PRESENT.[2]

Major....., 5th Cavalry.
Captain....., Assistant Surgeon.
1st Lieutenant....., 10th Infantry.
1st Lieutenant....., 5th Cavalry.
2d Lieutenant....., 2d Artillery.
1st Lieutenant....., 5th Cavalry, judge-advocate.

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[1] "Proceedings of trials shall be carried on only between the hours of eight in the morning and three in the afternoon, except in cases which, in the opinion of the officer appointing the court, require immediate example." 94th Article of War.

[2] In the record of the proceedings of a court-martial at its organization for the trial of a case the officers detailed as members and judge-advocate will be noted by name as present or absent. In the record of the proceedings of subsequent sessions the following form of words will be used, subject to such modifications as the facts may require: "Present, all the members of the court and the judge-advocate." When the absence of an officer who has not qualified, or who has been relieved or excused as a member, has been accounted for, no further note will be made of it.*

* Manual for Courts-martial, p. 120; Dig. J. A. Gen., 641, par. *d*; 642, par. *e*.

ABSENT.

Captain....., 2d Artillery.
2d Lieutenant....., 10th Infantry.

(*If the cause of absence is known, it will be recorded; if unknown, it will be so stated.*)[1]

The court then proceeded to the trial of Private —— ——, Battery —, —th U. S. Artillery, who, having been brought before the court, stated that he did not desire counsel; (*or*) introduced —— —— as counsel.

[REPORTER.][2]

—— —— was duly sworn as reporter.[3]

The order convening the court was read to the accused, and he was asked if he objected to being tried by any member present named therein; to which he replied in the negative.

[CHALLENGES.]

(*or*) that he objected to —— —— on the following grounds:

(*Insert objections.*)

The challenged member stated:

(*Insert the statement of the challenged member, who should always be requested to respond to the challenge and inform the court upon its merits. Should the accused, after this statement, desire to put the challenged member upon his voir dire, the record should continue:*)

The accused having requested that the challenged member be sworn upon his *voir dire*,[4] —— —— was duly sworn by the judge-advocate and testified as follows:[5]

(*At the close of the examination of the member, if the court desires the testimony to be read, or if the member so requests, the record should continue:*)

The testimony of the challenged member was read to him, and was by him pronounced correct.

(*or*) corrected as follows:

(*Insert corrections.*)

---

[1] It is the duty of the judge-advocate to ascertain if possible the cause of absence. If a member is absent by order, the number and date of order will be given; if absent sick, a surgeon's certificate of sickness and inability to attend will be furnished by the absent member and appended to the record. Manual for Courts-martial, 121, note 1.

[2] To facilitate reference to the record, sub-heads entitled "reporter," "challenge," etc., are inserted and followed by vertical marginal lines. To use form in case no reporter is employed, follow form to "reporter," and then omit as far as the vertical marginal line under "reporter" extends. In like manner omit when necessary for other sub-heads. *Ibid.*, note 2.

[3] The reporter must be sworn in each case. For form of oath, see p. 29, par. 4, Manual for Courts-martial. *Ibid.*, note 3.

[4] For form of oath see page 29, par. 6, Manual for Courts-martial.

[5] The form of examination should be similar to that given for witness for the prosecution, page 694, *infra*. The accused should first question the member, after which the judge-advocate and court may put such questions as they may deem pertinent. *Ibid.*, 122, note 1.

The challenged member, the accused, and judge-advocate then withdrew, and the court was closed, and on being opened the president announced in their presence that the objection of the accused was not sustained;[1] (*or*) that the objection was sustained. —— —— then withdrew.

The accused was asked if he objected to any other member present;[2] to which he replied in the negative; (*or*) that he objected to —— —— on the following grounds:

(*Insert objection in full and record as before.*)

The members of the court and the judge-advocate were then duly sworn.[3]

[INTERPRETER.]

(*If an interpreter is required, he should now be introduced, and sworn to the faithful performance of his duties.*)

[DELAY.]

(*If delay is desired for cause known, application should now be made for a continuance under Article 93, and the proceedings of the court thereon recorded. If no delay is requested, the record should continue:*)

The accused was then arraigned upon the following charges and specifications:

Charge I. —— ——.

Specification 1st. —— ——

Specification 2d. —— ——

Charge II. —— ——.

[PLEA IN BAR.]

To which the accused submitted the following special plea in bar of trial:[4]

(*or*)

To which the accused pleaded as follows:

To the 1st specification, 1st charge: "Guilty;" (*or*) "Not guilty."

To the second specification, 1st charge: "Guilty;" (*or*) "Not guilty."

To the 1st charge: "Guilty;" (*or*) "Not guilty."

To the first specification, 2d charge, etc.

Sergeant John Jones, Co. ——, —— Infantry, a witness for the prosecution, was duly sworn and testified as follows:

---

[1] In case of a tie vote, the motion to excuse not being sustained, the challenged member is not excused.

[2] Only one member at a time can be challenged, and a record of the proceedings in each case will be made in the form indicated above. Manual for Courts-martial 122, note 5.

[3] Whenever the same court-martial tries more than one prisoner on separate and distinct charges, the court will be sworn at the commencement of each trial and separate proceedings in each case will be prepared. *Ibid.*, note 6.

[4] If a special plea is made, the plea, the reply of the judge-advocate, and the action of the court thereon will be fully stated and recorded. If the plea is submitted in writing, it will be signed by the accused and attached to the record as an appendix. For forms of the several pleas, see Appendix G.

DIRECT EXAMINATION.

Questions by the judge-advocate:

Q. Do you know the accused? If so, state who he is.

A. I do; Private —— ——, Battery ——, —— Artillery.

(*The succeeding questions of the judge-advocate and their answers should follow in order.*)[1]

CROSS-EXAMINATION.

Questions by the accused:

Q. —— ——?

A. —— ——.

(*If the accused declines to cross-examine the witness, the record should state:*)

The accused declined to cross-examine the witness.

RE-EXAMINATION.

Questions by the judge-advocate:

Q. —— ——?

A. —— ——.

EXAMINATION BY THE COURT.

Q. —— ——?

A. —— ——.

[OBJECTION TO QUESTION.][2]

Question by a member: ——?

To this question the accused (or party objecting) objected as follows:

(*Insert objection.*)

To which the member replied:

(*Insert reply.*)

The accused and judge-advocate withdrew and the court was closed, and on being opened the president announced in their presence that the objection was sustained. (*or*) was not sustained.

(*In the latter case the record should continue:*)

The question was then repeated by the judge-advocate.

A. —— ——.

---

[1] The record should set forth fully all the *testimony* introduced upon the trial, the oral portion as nearly as practicable in the precise words of the witness. If the court should decide to expunge any part, it will not be literally expunged or omitted from the record, but will not be thereafter considered as part of the evidence. Dig. J. A. Gen., 644, par. h.

[2] If a question put by a member is objected to by another member, or by the judge-advocate or the accused, and the objection is sustained, it will be *recorded as a question by a member*, and *not* answered; if the objection is not sustained, it will be *recorded as a question by the court*, repeated by the judge-advocate, and *must* be answered. If a question is objected to by any one, at any time during the trial, the above method of recording the action of the court will be followed. Manual for Courts-martial, 124, note 1.

(*If the court deems it proper to hear the testimony of the witness read, or if the witness request such reading, the fact will be noted in the record as follows:*[1])

By direction of the court (or "at the request of the witness") the testimony of the witness was read over to him, and was by him pronounced correct.

(*or*) corrected as follows:[2]

(*State corrections.*)

(*When the testimony in behalf of the prosecution has all been received, the record should continue:*)

The judge-advocate announced that the prosecution here rested.

(*If the court adjourns to meet the following day* (*or on a subsequent day*), *the record should continue:*)

The court then, at —— o'clock —.M., adjourned to meet at —— o'clock —.M., to-morrow (or at —— o'clock —.M., on ——— the —th instant.

C—— D——,
1st Lieut. —— ——,
Judge-Advocate.[3]

FORT —— ——,
—— ——, 189—.

The court met, pursuant to adjournment, at —— o'clock, —.M.

PRESENT.

(*If the entire membership be present the record should continue.*)

All the members of the court and the judge-advocate.[4]

The accused, his counsel, and the reporter were also present.

(*If the proceedings of the previous day are required by the court to be read,*[5] *the fact will be recorded in the following form:*)

The proceedings of ——— were read[6] and approved.

(*or*) were corrected as follows:

---

[1] The reading over of the testimony to the witness after his examination has been completed is no longer required. See Circular No. 27, A. G. O. 1897; see, also, note 2, *post*.

[2] If the witness finds that his testimony has been erroneously recorded, the court will permit him to make such corrections therein as are necessary to make the testimony as recorded conform to the testimony as given. If the witness desires to *modify* his testimony in a material particular, the court may, in its discretion, permit him to do so; but the original testimony will not be expunged, and the matter submitted in the way of modification or explanation will be so recorded as to show in what particulars the testimony as originally given has been modified. See Dig. J. A. Gen., 753, par. 14.

[3] The proceedings of each day are authenticated by the signature of the Judge-Advocate. Paragraph 954, Army Regulations of 1895.

[4] If there are absentees the form indicated at the beginning of the trial should be read. See note 2, page 691, *supra*.

[5] The reading over of the testimony taken on the previous day is no longer required. See Circular No. 27, A. G. O. 1897, which contains the requirement that, "the reading of previous proceedings and of testimony for approval will be dispensed with, unless, for special reason, such reading be considered necessary by the court."

(*In the latter case enumerate corrections, giving the page and line in which they occur.*)

Corporal John Smith, Co. ——, —th Infantry, a witness for the defense, was duly sworn and testified as follows:

DIRECT EXAMINATION.

Question by the judge-advocate: Do you know the accused? If so, state who he is.[1]

A. —— ——.

Questions by the accused:

Q. —— ——?

A. —— ——.

(*The examination should be conducted as in case of a witness for the prosecution, the judge-advocate cross-examining, and the accused, if he so desires, re-examining the witness.*)

(*Should the accused wish to testify in his own behalf, the record will continue:*)

The accused, at his own request, was duly sworn as a witness, and testified as follows:

Q. —— ——?

A. —— ——.

(*The examination of the accused should be conducted in the same manner as that of any other witness.*)

(*If the accused has no other witness to call, the record should continue:*)

The accused had no further testimony to offer and no statement to make.

(*or*) having no further testimony to offer, made the following verbal statement in his defense.

(*or*) having no further testimony to offer, submitted a written statement in his defense, which was read to the court, and is hereto appended and marked A.[2]

(*or*) requested until ——— o'clock —.M. to prepare his defense.

(*If the court takes a recess during the time asked for, the record will continue:*)

The court then took a recess until ——— o'clock —.M.; at which hour the members of the court, the judge-advocate, the accused, his counsel, and the reporter resumed their seats.

---

[1] Though this is a witness for the defense, the judge-advocate will ask the preliminary question for the purpose of determining his identification of the accused.

[2] All documents and papers made part of the proceedings, or copies of them, will be appended to the record in the order of their introduction, after the space left for the remarks of the reviewing authority, and marked in such a manner as to afford easy reference. It is not necessary to encumber a record by spreading upon it documents or other writings, or matter excluded by the court. The record should simply specify the character of the writings and the grounds upon which they were excluded by the court. Dig. J. A. Gen., 651, par. 14.

(*Or, if the court has other business before it, the record may continue:*)

The court then proceeded to other business, and at ——— o'clock —.M. resumed the trial of this case; at which hour, etc.

The accused submitted his defense, which was read to the court, and is hereto appended and marked B.[1]

The judge-advocate submitted the case without remark.

(*or*) replied as follows:[2]

(*Insert reply.*)

(*or*) submitted and read to the court a written reply, which is hereto appended and marked C.

The accused and his counsel and judge-advocate then withdrew and the court was closed, and finds the accused, Private —— ——, Battery —, —th U. S. Artillery:

Of the 1st specification, 1st charge: "Guilty;" (*or*) "Not guilty."

Of the 2d specification, 1st charge: "Guilty, except the words '—— ——,' and of the excepted words Not guilty."

Of the first charge: "Guilty;" (*or*) "Not guilty;" (*or*) "Not guilty, but guilty of, etc., —— ——."

Of the 1st specification, 2d charge, etc.

[PREVIOUS CONVICTIONS WHERE THE ACCUSED IS FOUND GUILTY.]

(*If the offense is of such character as to admit of evidence of previous convictions, and the accused is found guilty, the record should continue:*)

The judge-advocate and accused were then recalled and the court opened; the judge-advocate then stated that he had no evidence of previous convictions to submit.

(*or*) the judge-advocate then read the evidence of previous convictions[3] hereto appended and marked D, E, etc.

(*If the accused has any statement to make in regard to his previous convictions, it will be recorded.*)

The accused and judge-advocate then withdrew and the court was closed, and sentences him, Private —— ——, Battery ——, —th U. S. Artillery, ———

---

[1] The statement of the accused, or argument in his defense, and all pleas in bar of trial or in abatement, when in writing, should be signed by the accused, referred to in the proceedings as having been submitted by him, and appended to the record, whether he is defended by counsel or not. For forms of pleas see pp. 683-686, *ante*.

[2] The judge-advocate is entitled by usage to sum up the case and present an argument at the conclusion of the trial, even though the accused declines to make an argument or to submit a statement. Dig. J. A. Gen., 711, par. 4.

[3] See "Previous Convictions," p. 147, *supra*. When the proof produced is the copy furnished to the company or other commander, in accordance with par. 932, A. R. of 1895, it will be returned to him and a copy of it attached to the record of the general, regimental, or garrison court trying the case. Par. 929, A. R. of 1895.

[No Previous Convictions, or Accused Acquitted.]

(*If the offense is not of such character as to admit of evidence of previous convictions, or if the accused is acquitted, the record, after the findings are stated, should continue:*)

And the court does therefore sentence him, etc.

(*or*) does therefore acquit him, Private —— ——, Battery ——, —th U. S. Artillery.

The judge-advocate was then recalled and the court at ——— —.M. proceeded to other business.

(*or*) adjourned until ——— —M., the — inst.

(*or*) adjourned to meet at the call of the president.[1]

(*or, on completion of the trial of the last case before the court*), adjourned *sine die*.

A—— B ——,
Major ——,
President.

C—— D——,
1st Lieut. ——,
Judge-Advocate.

(*At least two blank pages will be left after the adjournment for the decision and orders of the reviewing authority.*)

Form of Brief.

(*The papers forming the complete record will be fastened together at the top, and the record folded in four folds, and briefed on the first fold as follows:*)[2]

——— ———.
Private, Co. ——, ——.

Trial by general court-martial
at ——— ——— ——;
commencing ———, 18—;
ending ———, 18—.
President:
Major —— ——,
—— ——.
Judge-Advocate:
1st Lieut. —— ——,
—— ——.

[1] The hour of adjournment will be stated, unless the court is authorized to sit without regard to hours.

[2] When the record is completed, the judge-advocate will forward it without delay to the convening authority. Par. 955, A. R. of 1895.

FORM FOR REVISION OF RECORD.[1]

FORT ———, ———,
——— —, 189—.

The court reconvened at ——— o'clock —.M., pursuant to the following order:

(*Insert copy of order.*)

(*or*) pursuant to the following indorsement

(*Insert copy of indorsement.*)

PRESENT.[2]

—— ——.

ABSENT.

(*Insert names of absentees, and state cause of absence, if known.*)

The judge-advocate read to the court the foregoing order.

(*or*) the foregoing indorsement of the convening authority.

The judge-advocate then withdrew, and the court was closed and, having revoked its former findings, finds the accused, etc.

(*or*) revokes its former sentence, and sentences the accused, etc.

(*or*) respectfully adheres to its former findings and sentence.

(*or*) amends the record by, etc.[3]

The judge-advocate was then recalled and the court at ——— —.M., etc.

A—— B——,
Major ——,
President.

C—— D——,
1st Lieut. ——,
Judge-Advocate.

(*The record of revision will be appended to the original proceedings and the whole indorsed and forwarded as before.*)

---

[1] See "Revision of Record," pp. 158–160, *supra.*

[2] If the findings and sentence are to be considered, all the members who voted on them should be present if possible. At least five members of the court who acted upon the trial must, and the judge-advocate should, be present at the proceedings in revision; but it is in general neither necessary nor desirable that the accused should be present. Manual for Courts-martial, p. 130, note 2.

[3] For method of amending the record, see p. 159, *supra.*

This form is intended to answer the purposes of a charge sheet, which, when completed by the Summary Court and the commanding officer, will become the complete record of the trial. The officer preferring the charges will enter on this form the name of the accused, the list of witnesses, and the charges as called for by the headings, together with his signature thereto; and, in proper cases, the accused will be required to sign the statement showing whether or not he consents to trial by summary court—the necessary alteration being made in the certificate if he does not consent. The case will then be submitted in the usual way for trial. Each sheet is intended for one case only, and will be given a serial number in the order of trial; and they will be bound in numerical order in books of convenient size, each case being added to the book when completed by pasting or other method, the margin at the left being intended for this purpose. Paper binding will be sufficient, a good quality of tough and heavy paper being used therefor.

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APPENDIX I.

RECORD OF A SUMMARY COURT.

FORM FOR RECORD.

No. of Case——

Record of a summary court at ————, ———, appointed by ————
Orders No. ——, Headquarters ————, ————, 190—.

Name, Rank, Company, and Regiment, and List of Witnesses.	Article of War Violated.	Specification, with Signature of Officer Preferring Charges.	Finding.	Number of Previous Convictions.	Sentence, with Signature of Trial Officer, and Consent to Trial, if Given.	Action of Commanding Officer, with Date and Signature.
Witnesses:		.... *Reg't*....			I hereby consent to trial by Summary Court on these charges. ..... *Private Co* ...	

NOTE.—This form may be used to furnish copies of the record, the same to be certified to be "a true copy" by the post commander or adjutant.

MONTHLY REPORT OF SUMMARY-COURT CASES.

Report of cases tried by summary court at ————, ———, *for the month of* ———, *189*—.

Number.	Name, Rank, Company, and Regiment.	Article of War Violated.	Synopsis of Specification.	Finding.	Number of Previous Convictions.	Sentence. (If mitigated, give sentence as mitigated only. Signature of trial officer not to be copied.)

APPENDIX K.

GARRISON AND REGIMENTAL COURTS.

RECORD OF A GARRISON COURT-MARTIAL.[1]

CASE ——.

Proceedings of a garrison court-martial convened at —— ——, pursuant to the following order:

FORT —— ——,
——— —, 18—.

ORDERS, No. ——.

A garrison court-martial will convene at this post at ——— o'clock A.M., on ——— —, 189—, or as soon thereafter as practicable, for the trial of Private —— ——, Company ——, —th Infantry, he having objected to trial by summary court.

(*or*) the post (or other) commander being the accuser and the only officer present with the command.[2]

DETAIL FOR THE COURT.

Captain —— ——.
1st Lieutenant —— ——.
2d Lieutenant —— ——.
2d Lieutenant —— ——, judge-advocate.

By order of —— ——.
(Signed) —— ——.
1st Lieutenant ——,
Post Adjutant.

FORT —— ——,
——— —, 18—.

The court met, pursuant to the foregoing order, at ——— o'clock —.M.[3]

---

[1] The form of record for a garrison court-martial differs from that for a general court-martial only in respect to the form of the order appointing the court. The form here given is that for a case in which a plea of "Guilty" is entered; if the prisoner pleads "Not Guilty," or makes a special plea, the form for record of a general court will be followed. Manual for Courts-martial, 184, note 1.

[2] See page 213, *supra*.

[3] If the order contains the clause, "The court may sit without regard to hours," the hours of meeting and adjournment need not be recorded.

PRESENT.

Captain —— ——.
1st Lieutenant —— ——.
2d Lieutenant —— ——.
2d Lieutenant —— ——, judge-advocate.

The court then proceeded to the trial of Private —— ——, Company ——, —th Infantry, who was brought before the court, and having heard the order convening it read, was asked if he had any objection to being tried by any member named therein; to which he replied in the negative.

The members of the court and the judge-advocate were then duly sworn, and the accused was arraigned upon the following charge and specification:

Charge. —— ——.

Specification. —— ——.

To which the prisoner pleaded:

To the specification: "Guilty."

To the charge: "Guilty."

The judge-advocate announced that the prosecution here rested.

The prisoner stated that he had no testimony to offer or statement to make.

The accused and judge-advocate then withdrew, and the court was closed and finds the accused, Private —— ——, Company ——, —th Infantry:

Of the specification: "Guilty."

Of the charge: "Guilty."

The judge-advocate and the accused were then recalled and the court opened; the judge-advocate stated that he had no evidence of previous convictions to submit.

(*or*) read the evidence of previous convictions hereto appended and marked A, B, etc.

The accused and judge-advocate then withdrew, and the court was closed and sentences him, Private —— ——, Company ——, —th Infantry, etc.

The judge-advocate was then recalled, and the court at ——— —.M., etc.

A—— B——,
Captain ——,
President.

C—— D——,
2d Lieut. ——,
Judge-Advocate.

(*A sine die adjournment will be added to the last case before the court, and the record of each case folded and indorsed in the same manner as that for a general court-martial.*)

REMARKS ON THE RECORD.

1. The decision and orders of the post commander, properly dated and over his official signature, will follow immediately after the sentence, adjournment, or other final proceeding of the court in the case.

2. "The complete proceedings of a garrison or regimental court will be transmitted without delay by the post or regimental commander to department headquarters."[1]

RECORD OF A REGIMENTAL COURT-MARTIAL.[2]

CASE ——.

Proceedings of a regimental court-martial convened at ——— ———, pursuant to the following order:

FORT ———, ———,
——— —, 189—.

ORDERS, }
No. ——. }

A regimental court-martial will convene at this post at ——— o'clock A.M., on ——— —, 189—, or as soon thereafter as practicable, for the trial of Private ——— ——, Company ——, —th Infantry, he having objected to trial by summary court.

(*or*) the post (or other) commander being the accuser and the only officer present with the company.[3]

DETAIL FOR THE COURT.

(*Complete record as in case of a garrison or general court.*)

FORM FOR ORDER OF PROMULGATION.

CASE OF A COMMISSIONED OFFICER.

HEADQUARTERS OF THE ARMY,
ADJUTANT-GENERAL'S OFFICE,
WASHINGTON ——— —, 189—.

GENERAL ORDERS, }
No. ——. }

1. Before a general court-martial which convened at Fort ———, ———, pursuant to paragraph 1, Special Orders No. 36, Headquarters Department of ———, dated ——— —, 189—, and of which Colonel T—— R——, —th Regiment of Artillery, was President, and Lieutenant Colonel R—— E——, Deputy Judge-Advocate General, was judge-advocate, was arraigned and tried:

Captain G—— R. T——, —th Regiment of Infantry.

---

[1] Par. 956, A. R. of 1895.

[2] The form of record for a regimental court differs from that for a garrison or a general court only in respect to the order convening the court.

[3] See page 216, *supra*.

Charge.
Specification 1st.
Specification 2d.
etc.

Here insert the charges and specifications in full. If for any reason it appears to be improper to publish a specification, on account of its subject-matter, the entry can be made, opposite the number, that "this specification will not be published."

PLEA.

Charge I.

To the 1st Specification: "Not guilty."
To the 2d Specification: "Not guilty."
To the 3d Specification: "Guilty."
To the 4th Specification: "In bar of trial."
To the 5th Specification: "Guilty."
To the Charge: "Not guilty."

Charge II.

To the 1st Specification: "Not guilty."
To the 2d Specification: "Not guilty."
To the 3d Specification: "Not guilty," etc.
To the Charge: "Not guilty," etc.

FINDING.

The court, having maturely considered the evidence adduced, finds the accused Captain G—— R. T——, —th Regiment of Infantry, as follows:

Charge I.

Of the 1st Specification: "Not guilty."
Of the 2d Specification: "Guilty."
Of the 3d Specification: "Guilty."
Of the 4th Specification: "Plea in bar of trial sustained by the court."
Of the 5th Specification: "Guilty."
Of the Charge: "Guilty."

Charge II.

Of the 1st Specification: "Guilty."
Of the 2d Specification: "Guilty."
Of the 3d Specification: "Not guilty," etc.
Of the Charge: "Guilty."

SENTENCE.

And the court does therefore sentence him, Captain G—— R. T——, —th Regiment of Infantry, "To be dismissed the service."

The record of the proceedings of the general court-martial in the foregoing case of Captain G—— R. T——, —th Regiment of Infantry, having

been forwarded for the action of the President, the following are his orders thereon (here follows the executive order in which the action of the President is embodied).

2. By direction of the Secretary of War (here follows such action of the War Department as is necessary to carry the orders of the President into effect, closing, if such action be desired, with a clause dissolving the court).

By command of Major-General M——;

S—— B——,

Adjutant-General.

CASE OF AN ENLISTED MAN.

HEADQUARTERS DEPARTMENT OF ——,

——— —, 18—.

SPECIAL ORDERS, No. ——.

* * * * * * * *

3. Recruit —— ——, General Service, U. S. Army, having been tried by a general court-martial convened at ———, ———, and found guilty of fraudulent enlistment, in violation of the 62d Article of War, was sentenced "to be dishonorably discharged the service of the United States, forfeiting all pay and allowances due him, and to be confined at hard labor at such post as the reviewing authority may direct, for the period of one (1) year."

The sentence is approved and will be duly executed. The prisoner will be ———.

* * * * * * * *

By command of Brig. Gen. —— ——.

—— ——,

Assistant Adjutant-General.

APPENDIX L.

FORM OF RECORD: RETIRING BOARD.

Proceedings of an Army Retiring Board convened at ——— by virtue of the following orders:

HEADQUARTERS OF THE ARMY,
ADJUTANT-GENERAL'S OFFICE,
WASHINGTON, ———, ——.

SPECIAL ORDERS, No. ——.

The following order has been received from the War Department:

WAR DEPARTMENT, WASHINGTON, ———, 189—.

By direction of the President, and in accordance with Section 1245, Revised Statutes, an Army Retiring Board is hereby appointed to meet, at the call of the president thereof, at ————, for the examination of such officers as may be ordered before it.

DETAIL FOR THE BOARD.

Colonel ....., 10th Infantry;
Lieutenant-Colonel ....., 3d Infantry;
Major ....., Surgeon;
Captain ....., Assistant Surgeon;
Captain ....., Assistant Surgeon;
First Lieutenant ....., 5th Cavalry, recorder.

—— ——,
Secretary of War.

By command of Major-General —— ——.

—— ——,
Adjutant-General.

————, ———, 1899.

The Board met pursuant to the foregoing order at —— o'clock.

PRESENT:

Colonel ....., 10th Infantry;
Lieutenant-Colonel ....., 3d Infantry;
Major ....., Surgeon;
Captain ....., Assistant Surgeon;
Captain ....., Assistant Surgeon;
First Lieutenant ....., 5th Cavalry, recorder.

Captain —— —— appeared before the Board pursuant to par. ——, Special Orders No. ——, Adjutant-General's Office, dated ————, 1899, and stated that he did not desire counsel (*or*, introduced —— ——, as counsel).

The order convening the Board was then read, and Captain —— —— was asked if he had any objection to offer to any member present; to which he replied in the negative. (*Or*, that he objected to —— ——, on the following grounds:)

(*Insert objection.*)

The challenged member stated:

(*Insert the statement of the challenged member, who should be requested to respond to the challenge and inform the Board upon its merits. Should the officer before the Board for examination desire to put the challenged member on his* voir dire, *the record should continue:*)

Captain —— —— having requested that the challenged member be sworn on his *voir dire*, —— —— was then duly sworn by the recorder, [for form of oath see p. 510, *ante*,] and testified as follows:

* * * * * * * *

The Board was then closed, and on being opened its decision was announced that the objection was not sustained (*or*, that the objection was sustained). (*In the latter case the record should state that the challenged member then withdrew.*)

Captain —— —— was then asked whether he objected to any other member; to which, (etc. as before).

(*Five being, under Section* 1246, *R. S., the minimum number of members of a retiring board, it must when reduced below that number by challenge, or if the board is left without the proportion of medical officers required by said section, adjourn and report the facts to the convening authority.*)

The members of the Board and the recorder were then duly sworn.

(*If the officer desires to be retired, the record will continue:*)

Captain —— —— was then asked whether he desired to be retired, and answered in the affirmative. He was then duly sworn as a witness, and testified as follows:

Q. Please state the nature of your disability and its cause, and how long you have suffered from it.

A. (*The officer can here make an oral statement, or submit a written one. If a written statement is submitted, the record will so state.*)

The witness submitted a written statement, which was read to the Board, and is hereto attached, marked "A."

Q. Is the statement submitted by you correct?

A. Yes.

(*The Board may then ask further questions.*)

Q. Do you desire to make any further statement?

A. —— ——.

(*When the officer objects to retirement, he will not be examined at this stage of the proceedings, but may introduce evidence or make a statement as hereafter indicated.*)

Major —— ——, Surgeon, a member of the Board, was then duly sworn, and testified as follows:

Q. Please submit to the Board the result of your examination of Captain —— ——.

The witness submitted a written report signed by himself and Assistant Surgeon —— ——, also a member of the Board, which was read to the Board and is attached, marked "B."

Q. From what cause does Captain —— ——'s disability proceed?

A. —— ——.

Q. Is that disability permanent?

A. —— ——.

Q. Is Captain —— ——'s disability such as to incapacitate him for active service?

A. —— ——.

* * * * * * * * *

(*The examination of the witness should be conducted so as to bring out all material facts on the lines indicated.*)

Captain —— —— stated that he had no questions to ask (or, asked the following questions).

* * * * * * * * *

(*The other medical member of the Board should then be similarly interrogated.*)

The recorder then submitted certain papers, referred to the Board from the Adjutant-General's Office, which were read to the Board and are attached, marked ——.

Captain —— —— had no further evidence to submit nor statement to make. (*When there is such evidence or statement the record will duly set it forth.*)

The Board was then closed for deliberation, and, having maturely considered the case, finds that Captain —— —— is incapacitated for active service, and that the cause of said incapacity is .....

.....

And the Board further finds that said incapacity is (*or*, is not) an incident of service.

The Board then adjourned.

(*Or when the Board wishes to hear the record read:*)
The Board then adjourned to meet at —— o'clock — M., on ——, 1899.

—— ——,
Recorder.

SECOND DAY'S PROCEEDINGS.

—— ——,
—— A.M.—— 1899.

The Board met pursuant to adjournment.
Present: All the members and the recorder.
The foregoing proceedings were read and approved.

—— ——,
—— ——,
President of the Board.

—— ——,
—— ——,
Recorder.

APPENDIX M.

FORM OF RECORD: BOARD OF EXAMINATION.

(Under Par. III., G. O. 128, A. G. O., 1890, and G. O. 41, A. G. O., 1897.)

Proceedings of a Board of Officers convened at ——— ———, pursuant to the following order:

(*Here insert copy of order appointing the Board.*[1])

FORT ———, ———,
——— —, 189—, A.M.

The Board met pursuant to the foregoing order.[2]

PRESENT.

(*Here insert names of members present and recorder.*)

.....
.....
....
.....

The Board then proceeded to the examination of Captain ———, who appeared before the Board in pursuance of par. ——, Special Orders No. —, Adjutant-General's Office, dated ——— —, 1899. The order convening the

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[1] *Composition of Examining Boards.*—The examination of all officers of the Army below the rank of major shall be conducted by boards selected in accordance with laws approved October 1, 1890, and July 27, 1892, published in G. O. No. 116, 1890, and G. O. No. 57, 1892, respectively, and composed as follows:

Officer of the Line.—The board will consist of five members and a recorder. Two of the members will be medical officers and three will be line officers senior in rank to, and, as far as practicable, from the same arm of service as, the officer to be examined.

Officers of the Corps of Engineers, the Signal Corps, the Ordnance, Quartermaster's, and Subsistence Departments.—The board will consist of five members, two of whom will be medical officers, and three of the same corps or department, when practicable, as the officer to be examined, and senior to him in rank, the junior of whom will act as recorder.

Medical Officers.—The board will consist of three medical officers, senior in rank to the officer to be examined, the junior of whom will act as recorder; provided, that whenever a medical officer is found to be physically disqualified the board will report to the Adjutant-General and adjourn, pending appointment of two additional members, who may be from any line or staff officers available, senior in rank to the officer to be examined. The board will then proceed under the rules governing retiring boards. G. O. 41, A. G. O., 1897.

The medical officers should constitute two fifths of the board, so that when it proceeds as a retiring board its composition will conform to that of a retiring board.

[2] All public proceedings will be in the presence of the officer under examination; the conclusions reached and the recommendations entered in each case will be regarded as confidential.

Board was then read and Captain ——— was asked if he had any objection to offer to any member present; to which he replied in the negative.

(*Or*, that he objected to ——— on the following grounds:)

(*Here insert objections to the challenged member.*)

The challenged member stated:

(*Insert the statement of the challenged member, who should be requested to respond to the challenge upon its merits. Should the officer before the Board for examination desire to put the challenged member on his* voir dire, *the record should continue:*)

Captain ——— having requested that the challenged member be sworn on his *voir dire*, ——— ——— was then duly sworn by the recorder, [*for form of oath see p.* 510, *ante*,] and testified as follows:

Question .....

Answer.....

The Board was then closed, and on being opened its decision was announced that the objection was not sustained (*or*, that the objection was sustained). (*In the latter case the record should show that the challenged member then withdrew.*)

Captain ——— was then asked whether he objected to any other member; to which (etc., as before).[1]

The members of the Board and the recorder were then duly sworn.

(*Before proceeding with the physical examination, the officer about to be examined will be required to submit, for the information of the Board, a certificate as to his physical conidtion. In the event of there being no cause or disqualification existing, the certificate will take the following form:*

"*I certify, to the best of my knowledge and belief, I am not affected with any form of disease or disability which will interfere with the performance of the duties of the grade for promotion to which I am undergoing examination.*")

The record will continue:

Captain ——— then submitted a certificate as to his physical qualifications for promotion, which is hereto appended, marked "A."

---

[1] The organization of boards will conform to that of retiring boards, the recorder swearing the several members, including the medical officers, faithfully and impartially to examine and report upon the officer about to be examined, and the president of the board then swearing the recorder to the faithful performance of his duty. Proceedings will be made separately in each case. G. O. 41, A. G. O., 1897.

Previously to the swearing of the board, members thereof may be challenged, for cause stated to the board, the relevancy and validity of which shall be determined by the full board, according to the procedure of courts-martial in like cases. The record will show that the right to challenge was accorded. If the number of members is reduced by challenge or otherwise, the board will adjourn, and report the facts to the Adjutant-General, through the president of the board, for the action of the War Department. Medical officers will not take part in the professional examination except in the cases of assistant surgeons. They will make the necessary physical examination of all officers and report their opinion in writing to the board. All questions relating to the physical condition of an officer shall be determined by the full board. G. O. 41, A. G. O., 1897.

The medical officers of the Board then retired with Captain ——— for the purpose of making the physical examination required by law; and the Board having reassembled, and all the members being present, reported that they found Captain ——— physically qualified for promotion.[1] The written report was then read to the Board and is hereto appended, marked "B."

(*If the members of the Board, or the officer undergoing examination, desire to question the medical officers in respect to the physical examination, their questions and answers will be recorded in the form prescribed for a retiring board*[2] [*page* 710, *ante*]; *if there be no questions, the record will continue:*)

The Board then found Captain ——— physically capacitated for service and fit for promotion (*or* physically incapacitated for service and unfit for promotion).[3]

.....
President.

.....
.....
....
....
Recorder.

(*When the officer has been found physically capacitated for promotion, the Board, except the medical members, will proceed to the professional examination of the officer.*)

[During oral and practical examinations all the members, excepting the medical officers, will be present.

Written examinations may be conducted in the presence of one member of the board, or the recorder, for which purpose the board may be divided into committees, before whom the examination shall be conducted from day to day until completed; after which the board will reassemble to consider its finding.

---

[1] The report will show the physical condition of the officer undergoing examination as to capacity or incapacity for service, and, in case of incapacity, its cause, and whatever further information may be necessary to an understanding of the case.

[2] If anything should arise during the examination requiring the introduction of evidence, the inquiry shall proceed upon written interrogatories as far as possible, the board determining to whom questions shall be forwarded. When, in the opinion of the board, it becomes essential to take oral testimony, the facts should be reported to the War Department for the necessary orders in regard to witnesses to be summoned from a distance. Witnesses examined orally will be sworn by the recorder. G. O. 41, A. G. O., 1897.

[3] The record in each case where an officer is found physically disqualified shall be authenticated by all the members, including medical officers, and the recorder. In all other cases the medical officers will not be required to sign the proceedings. If any member dissents from the opinion of the board, it will be so stated.—G. O. 41, A. G.O., 1897.

Papers should be given out so that everything in the hands of the officer being examined may be answered before a recess or adjournment. A statement showing that such was the procedure during the written examinations will be embodied in the record. The number and value will be entered on the margin of questions used for the written examination. Original questions prepared by the board will, for convenience of the reviewing authority, indicate where answers may be found.

To secure some degree of uniformity of examination of line officers, boards will be furnished by the Adjutant-General with lists of questions, with values attached. Boards will not, however, be confined to the questions contained in these lists, and are authorized to ask any questions, selected from the publications recommended herein for study, deemed necessary during the progress of the oral, written, or practical examinations. Where blackboard or other illustrations will facilitate the oral and practical examinations, their use is authorized. Examinations will be conducted in a sufficiently exhaustive manner to determine not only that the subject is thoroughly comprehended, but the degree of proficiency of the officer being examined, and until the board is positively satisfied as to his ability to impart instruction in the various subjects. In case of unpropitious weather, practical exercises may be postponed from day to day, but never omitted or materially curtailed.

Whenever the oral examination of any line officer is unsatisfactory in any subject the board will at once proceed with a written examination in that subject, and in case the officer is not found proficient, the questions and answers will be attached to the proceedings.[1]

At the conclusion of his examination, each officer will sign and submit a certificate in his own handwriting to the effect that he has not received assistance from any unauthorized source, or communicated or transcribed any of the questions or problems submitted for his use during the examination.

In written examinations a numerical value will be given to each question. In the oral and practical examinations a numerical value will be given to each subject. Where both oral and practical examinations are required in the same subject the board will allot the value to be credited to each part.

In the lists prepared for the use of boards, values of 5, 10, and 15 have been assigned to the questions. Corresponding values will be given by the board to any original questions. It is assumed that an average of twenty

---

[1] Commanding officers of posts at or in the vicinity of which boards may be appointed to meet will, without further instructions, furnish, upon request of the board, such available troops and material as may be required by boards in the execution of this order When it is not practicable to obtain the requisite troops and material for the complete practical examination as prescribed for artillery, oral and written examinations will be substituted by the board for the portion omitted. G. O. 41, A. G. O. 1897.

questions will be asked in each subject, but the board is not limited to that number. The total values and relative weights of all subjects for which questions are furnished by the Adjutant-General shall be as follows:

Subject.	Total value.	Relative weight.
I. Administration	200	1
II Drill regulations	200	3
III. Exterior ballistics, etc.	200	2
IV. Fire discipline	200	2
V. Hippology	200	2
VI. Military field-engineering	200	2
VII. Military law	200	1
VIII Military topography	200	2
IX. Minor tactics	200	3

In computing the examination, find the percentage in the various subjects, multiply each by the relative weight of that subject, then divide the sum of these products by the sum of the relative weights of the subjects included in the examination of each officer.

The numerous questions embraced in each list, together with such original questions as may be formulated by the board, admit of considerable variation, and make it possible to arrange examinations radically different as regards particular questions, but essentially the same in respect to scope and character. It is desirable that the questions be selected indiscriminately in each case, to the end that each officer undergoing examination may have a different arrangement of questions, even when simultaneous examinations of a similar character are being conducted.

For the present, questions furnished for the use of examining boards by the Adjutant-General will be prepared from Army Regulations, General Orders, Circulars, Drill Regulations, and the following publications:

Abridgment of Military Law.—*Winthrop.*
Ballistics, Exterior, Handbook of Problems in.—*Ingalls.*
Ballistic Machines.—*Ingalls.*
Defense of the Seacoast of the United States.—*Abbot.*
Explosives, Lectures on.—*Walke.*
Gunmaking.—*Birnie.*
Gunnery.—*Mackinlay.*
Horses, Saddles, and Bridles.—*Carter.*
Infantry Fire: Its use in battle.—*Batchelor.*
Manual of Field-engineering.—*Beach.*
Manual of Heavy Artillery.—*Tidball.*
Military Topography and Sketching.—*Root.*
Organization and Tactics.—*Wagner.*
The Service of Security and Information.—*Wagner.*

Under these conditions they are recommended for special study by officers preparing for examination for promotion.

No officer will be passed who fails to obtain 75 per cent in each of the written, oral, and practical examinations.

Graduating diplomas of the Infantry and Cavalry School, and the Artillery School, dated not more than five years anterior to examination, shall be accepted as evidence of proficiency, except for physical examination.[1]] (G. O. 41, A. G. O. 1897.)

When the examination as to professional capacity has been completed, the record will continue, in the case of an officer found to be qualified for promotion:

CAPTAIN.

The Board is of opinion that —— ——, — Regiment of ———, United States Army, has the physical, moral, and professional qualifications to perform efficiently all the duties of the grade to which he will next be eligible, and recommends his promotion thereto.

(*In cases where the officer is found to be qualified for promotion, the proceedings will be authenticated by the signatures of all the members, except the medical members, and the recorder. If any member dissents from the opinion of the Board, it will be so stated.*)

The Board then adjourned *sine die* (*or*, until —— A. M. —— ——, 1899; *or*, to meet at the call of the president).

—— ——

—— ——

President.

—— ——

—— ——

Recorder.

[1] For scope of examination in the cases of officers of the line and of the several staff departments, see G. O. 41, A. G. O. 1897.

APPENDIX N.

FORMS OF RETURN TO WRIT OF HABEAS CORPUS.

1. WHERE WRIT ISSUES FROM A STATE COURT.

FORM 1.

PERSON HELD UNDER WARRANT OF ATTACHMENT.

In re —— ——. (*Name of party held.*)—Writ of habeas corpus—return of respondent.

To the ——.[1]

The respondent, Major —— ——, —th U. S. Infantry, upon whom has been served a writ of habeas corpus for the production of —— ——, respectfully makes return and states that he holds the said —— —— by authority of the United States, pursuant to a warrant of attachment issued under section 1202 of the Revised Statutes of the United States by a judge-advocate of a lawfully convened general court-martial and duly directed to him, the said respondent, for execution; that he is diligently and in good faith engaged in executing said warrant of attachment, and that he respectfully submits the same for the inspection of the court, together with the original subpœna and proof of service of the same, and a certified copy of the order convening said general court-martial.

And said respondent further respectfully makes return that he has not produced the body of the said —— ——, because he holds him by authority of the United States, as above set forth, and that —— ——[2] is without jurisdiction in the premises, and he respectfully refers to the decisions of the Supreme Court of the United States in Ableman *v.* Booth, 21 Howard 506, and Tarble's Case, 13 Wallace, 397, as authority for his action, and prays —— ——[2] to dismiss the writ.

—— ——,
Major, —th U. S. Infantry.

Dated ————, ————,
———— —, 18—.

---

[1] "Court" or "judge," as the case may be.
[2] "This court" or "your honor," as the case may be.

FORM 2.

PERSON HELD AS A DESERTER.

The respondent, —— —— respectfully makes return and states that he holds the said —— —— by authority of the United States, as a deserter from the U. S. Army, under circumstances as follows:

That the said —— —— was duly enlisted as a soldier in the service of the United States at ————, ————, on ———— —, 189—, for a term of —— years.

That the said —— —— deserted said service at ————, on ———— —, 189—, and remained absent in desertion until he was apprehended at ————, ————, on ———— —, 189—, by —— ——, and was thereupon committed to the custody of the respondent as commanding officer of the post of ————, ————.

That charges for said desertion, a copy of which is annexed, have been preferred against the said —— ——, and that he will be brought to trial thereon as soon as practicable before a court-martial to be convened by the commanding general of the Department of ————.

(*or*) convened by Special Orders No. —, dated Headquarters Department of ————, 189—, a copy of which order is hereto annexed.

And the said respondent further makes return, etc.

(*Conclude with last paragraph of form 1.*)

---

2. WHERE WRIT ISSUES FROM A UNITED STATES COURT.

RETURN TO WRIT.

(*Make return as in case of writ by a State court, except as to last paragraph, for which substitute as follows:*)

In obedience, however, to the said writ of habeas corpus the respondent herewith produces before the court the body of the said —— ——, but for the reasons set forth prays this honorable court to dismiss the said writ.

—— ——,

Major, —th U. S. Infantry.

Dated ————, ————,

———— —, 189—.

APPENDIX O.

MISCELLANEOUS FORMS.

SUBPŒNAS, SUMMONS, ETC.

SUMMONS FOR A MILITARY WITNESS.

FORT —— ——,
——— —, 18.

To —— ——,
— *Infantry.*

SIR: You are hereby summoned to appear on the — of ———, 189—, at ——— o'clock —.M., before a general court-martial, convened at —— ——, by Special Orders, No. ——, from ——, as a witness in the case of Private A—— B——, Company —, —th Infantry.

C—— D——,
—— ——,
Judge-Advocate.

SUBPŒNA FOR CIVILIAN WITNESS.

UNITED STATES
vs.
—— ——
} *Subpœna.*

The President of the United States, to —— ——, *greeting:*

You are hereby summoned and required to be and appear in person on the —th day of ———, 189—, at ——— o'clock —.M., before a general court-martial of the United States, convened at —— ——, by Special Orders, No.——, Headquarters —— ——, dated ——— —, 189—, then and there to testify and give evidence as a witness for the ——— in the above-named case. And have you then and there this precept.

Dated at ———, ———, this —th day of ———, 189—.

—— ——,
Judge-Advocate of the Court-Martial.

SUBPŒNA DUCES TECUM.

(*Civilian witness.*)

UNITED STATES
vs.
—— ——
} *Subpœna.*

The President of the United States, to —— ——, *greeting:*

You are hereby summoned and required to be and appear in person on the —th day of ———, 189—, at ——— o'clock —.M., before a general court-martial of the United States, convened at ——— by Special Orders, No. ——, Headquarters ———, dated ——— —, 189—, then and there to testify and give evidence as a witness for the ——— in the above-named case; and you are hereby required to bring with you, to be used in evidence in said case, the following described documents, to wit: ——— ———. And have you then and there this precept.

Dated at ———, ———, this —th day of ———, 189—.

—— ——,
Judge-Advocate of the Court-Martial.

RETURN OF SERVICE.

(*Indorsement of preceding writs.*)[1]

UNITED STATES
vs.
—— ——.

——— —, 18.

I certify that I made the service of the within subpœna on —— ——, the witness named therein, by personally delivering to him in person a duplicate of the same at ———, on the —th day of ———, 189—.

—— ——.

—— ——,
—— ——,
} *ss.*

—— ——, being duly sworn, on his oath states that the foregoing certificate is true. —— ——.

Subscribed and sworn to this —th day of ———, 189—, before me.[2]

—— ——.

---

[1] On the back of each form of writ are forms for both certificate and affidavit. It is not necessary to make the affidavit unless the witness be in default and it is proposed to issue process to compel attendance. In such case the affidavit can be filled out from the certificate made at the time of service. Manual for Courts-martial, 139, note 1.

[2] After service, as above indicated, the original subpœna should be at once returned to the judge-advocate of the court; if the witness cannot be found, the judge-advocate should be so informed. If a civilian witness be summoned from a distance, pars. 6 and 7, page 714, *infra*, will be copied on back of subpœna to enable witness to keep a proper memorandum of expenses.

WARRANT OF ATTACHMENT.

UNITED STATES }
vs.
—— ——. }

The President of the United States, to —— ——,[1] *greeting:*

WHEREAS —— ——, of ————, ————, was on the —th day of ————, 189—, at ——, duly subpœnaed to appear and attend at ——, ——, on the —th day of ————, at ———— o'clock —.M., before a general court-martial duly convened by Special Orders, No. ——, dated Headquarters Department of ————, ———— —, 189—, to testify on the part of the ———— in the above-entitled case; and whereas he has failed to appear and attend before said general court-martial to testify as by said subpœna required, and whereas he is a necessary and material witness in behalf of the ———— in the above-entitled case;

Now, therefore, by virtue of the power vested in me, the undersigned, as judge-advocate of said general court-martial, by section 1202 of the Revised Statutes of the United States, you are hereby commanded and empowered to apprehend and attach the said —— ——, wherever he may be found within the —— of ——,[2] and forthwith bring him before the said general court-martial assembled at ————, ————, to testify as required by said subpœna.[3]

—— ——,
—— ——,
Judge-Advocate of said General Court-martial.

Dated ————, ————,
———— —, 189—.

---

[1] Here insert the name and designation of the officer or non-commissioned officer designated by proper authority to serve the writ.

[2] State, Territory, or District where the court sits.

[3] See the article "Witnesses," pp. 245–250, in the chapter entitled EVIDENCE. See, also, p. 460, *ante*.

ACCOUNT OF CIVILIAN WITNESS.

The United States to —— ——, Dr.

189—.	Expenses as witness before a military court convened under annexed order.	Dolls.	Cts.
For civilian witness NOT IN Government employ.	From —— ——, 189—, to —— ——, 189—.....		
	For mileage from —— —— to —— —— and return, being —— miles, at 5 cents per mile.....		
	For allowance while travelling to and from said court, between the above dates inclusive, —— days, at $1.50 per day.....		
	For allowance while in attendance on said court, from—— ——, 189—, to —— ——, 189—, as per judge-advocate's certificate hereon, —— days, at $1.50 per day.....		
	Total.....		
For civilian witness IN Government employ.	From —— ——, 189—, to —— ——, 189—.....		
	For actual cost of travel from —— —— to —— —— and return, as per memorandum annexed...		
	For actual cost of meals and rooms while travelling to and from said court, between above dates inclusive, —— days....		
	For actual cost of meals and rooms while in attendance on said court, from —— ——, 189—, to —— ——, 189—, as per judge-advocate's certificate hereon, —— days.....		
	Total.....		

I solemnly swear that the above account is correct; that I have not been furnished with Government transportation for any part of the journey for which travel fare is charged, and that the journey was performed without unnecessary or avoidable delay.

—— ——, *Witness.*

Sworn to and subscribed before me at ———— on this —th day of ———, 189—.

—— ——,

—— ——,

Judge-Advocate.

Received this —th day of ———, 189—, of Major —— ——, paymaster, U. S. Army, ——— dollars, in full of the above account, by check No. ——, on ———.

—— ——, *Witness.*

[In duplicate.]

JUDGE-ADVOCATE'S CERTIFICATE.

(*On back of form.*)

I certify that —— ——, a civilian, has been in attendance as a material witness from ——— —, 189—, to ——— —, 189—, inclusive, before a

general court-martial duly convened at this place, and that he was duly summoned thereto from ————, ———.

——— ———,

——— ———,

Judge-Advocate.

Place, ————, ————.

Date, ——— —, 189—.

(NOTE.—*If the witness be "in Government employ," these words will be inserted in the above certificate after the word "civilian."*)

RULES GOVERNING ACCOUNTS OF CIVILIAN WITNESSES.

The Paymaster-General is, under paragraphs 962–966, Army Regulations, governed by the following rules in the treatment of vouchers for travel expenses of civilian witnesses before military courts:

1. The voucher must be accompanied by a copy of the order convening the court, with the original summons in the case, or, if the attendance was authorized by military order, by the original order. In the absence of the original order or summons, certified copies of the same will be accepted.

2. The affidavit of the witness (on face of voucher) and the judge-advocate's certificate (on back of voucher) are required in all cases. The voucher and all accompanying papers must be in duplicate.

3. The items of expenditure authorized in paragraphs 962 and 963, Army Regulations of 1895, will be set forth in detail in a memorandum which will be attached to each voucher. No other items will be allowed. The correctness of the items will be attested by the affidavit of the witness, to be made, when practicable, before the judge-advocate.

4. The certificate of the judge-advocate will be evidence of the fact and period of attendance, and will be made on the voucher.

5. Upon execution of the affidavit and certificate the witness will be paid upon his discharge from attendance, without waiting for completion of return travel. The charges for return journeys will be made upon the basis of the actual charges allowed for travel to the court.

6. A civilian witness *not in Government employ* will receive 5 cents a mile for going from his place of residence to the place of trial or hearing and 5 cents a mile for returning, distances to be calculated by the shortest usually travelled route. He will also receive $1.50 for each day actually and unavoidably consumed in attendance upon the court under the summons. No other items will be allowed.

7. Civilian witnesses *in Government employ* will be reimbursed as follows:

(*a*) Amount actually paid for cost of transportation or travel fare.

(*b*) Amount actually paid for cost of transfers to and from railway stations, not exceeding 50 cents for each transfer.

(*c*) Amount actually paid for cost of one double berth in sleeping-cars or on steamers, where an extra charge is made therefor.

(*d*) The *actual cost* of meals and rooms at a rate *not exceeding* $3 per day for each day actually and unavoidably consumed in travel or in attendance upon the court.

8. Travel must be estimated by the shortest available usually travelled route; the charge for cost of travel (items *a*, *b*, *c*) by established lines of railroad, stage, or steamer should not exceed the usual rates in like cases, the time occupied to be determined by the official schedules, reasonable allowance being made for customary unavoidable detention.

9. The summons, or order for attendance, will be presumed to show in all cases, by indorsement or otherwise, if transportation in kind or commutation of rations has been furnished. Transportation in kind will, for any distance covered thereby, be a bar to payment of item *a*. Indorsements of transportation furnished will be scrutinized to ascertain if any part of item *c* has been included.

Commutation of rations will be a bar to payment of item *d*. Transportation and commutation of rations will be a bar to any payment.

10. No per diem allowance can be made where the attendance upon the court does not require the witness to leave his station. (This applies to civilians *in Government employ*.)

11. Compensation to civilians *in* or *out of Government employ*, for attendance upon *civil courts*, is payable only by the civil authorities.

12. If a witness is *in Government employ* the judge-advocate will state the fact. If it does not appear in the certificate or elsewhere in the papers, and is not known to the paymaster, it will be assumed that the witness is *not in Government employ*.

13. Whenever needed, judge-advocates can procure blank accounts for civilian witnesses from any army paymaster or from the Paymaster-General's Office. The accounts may then be made out upon a witness' discharge from attendance. If no paymaster be present at the place where the court sits, the accounts, authenticated as above directed, may be transmitted to any paymaster for payment, with confidence that the witness will receive his pay without unnecessary delay.

INTERROGATORIES AND DEPOSITIONS.

INTERROGATORIES.

THE UNITED STATES } To ——— ———. (*Name of officer who is to cause the*
vs. } *deposition to be taken.*)
——— ———

Interrogatories and cross-interrogatories to be propounded under the 91st Article of War to ——— ———, a witness for the ——— (*prosecution or*

defense) in the above-entitled case, now pending and to be tried before the general court-martial, convened at ————, ———, by paragraph ——, Special Orders, No. ——, Headquarters Department of ———, dated —— —th, 189—.

1st interrogatory: ——— ———?
2d interrogatory: ——— ———?
Etc.
1st cross-interrogatory: ——— ———?
2d cross-interrogatory: ——— ———?
Etc.

—— ——.[1]
—— ——.

DEPOSITION.

—— ——, the witness above named, being first duly sworn, doth depose and say for full answers to the foregoing interrogatories, as follows:

To the 1st interrogatory: ——— ———?
To the 2d interrogatory: ——— ———?
Etc.

—— ——.
(*Signature of witness.*)

Subscribed and sworn to before me, this —th day of ———, 189—.

—— ——.[2]
—— ——.

———, 189—.

I, —— ——, the officer designated to cause the deposition of the said —— —— to be taken on the foregoing interrogatories and cross-interrogatories, do certify that it was duly made and taken under oath.

—— ——,
—— ——.

---

[1] To be signed by the parties or party propounding the interrogatories and cross-interrogatories. If the witness is for the prosecution and there are no cross-interrogatories, the judge-advocate will certify that the defense had an opportunity to propound them. (See 91st Article of War.) With the consent of the opposite party the depositions of a witness residing *within* the State, Territory, or District in which the court sits may be taken and read in evidence. A simple consent entered on this form will be sufficient. Manual for Courts-martial, 141, note 1.

[2] The jurat to be signed by the officer administering the oath, who will add his official designation. If the oath is administered by a notary public, his seal will be affixed to the deposition. *Ibid.*, note 2.

APPENDIX P.

MAXIMUM LIMITS OF PUNISHMENT.

The Act of September 27, 1890,[1] provides that "whenever by any of the Articles of War for the government of the Army the punishment on conviction of any military offense is left to the discretion of the court-martial, the punishment therefor shall not, in time of peace, be in excess of a limit which the President may prescribe." The last order of the President prescribing limits of punishment is as follows:[2]

EXECUTIVE MANSION, *March* 30, 1898.

The Executive order, dated March 20, 1895, establishing limits of punishment for enlisted men of the Army, under an Act of Congress approved September 27, 1890, and which was published in General Orders, No. 16, 1895, Headquarters of the Army, is amended so as to prescribe as follows, to take effect thirty days after the date of this order:

ARTICLE I.

In all cases of desertion the sentence may include dishonorable discharge and forfeiture of pay and allowances.

Subject to the modifications authorized in Section 3 of this article the limit of the term of confinement (at hard labor) for desertion shall be as follows:

SECTION 1. In case of surrender—

(*a*) When the deserter surrenders himself after an absence of not more than thirty days, one year.

(*b*) When the surrender is made after an absence of more than thirty days, eighteen months.

SEC. 2. In case of apprehension—

(*a*) When at the time of desertion the deserter shall not have been more than six months in the service, eighteen months.

(*b*) When he shall have been more than six months in the service, two and one-half years.

---

[1] 26 Stat. at Large, 491.

[2] General Orders No. 16, A. G. O. 1898.

SEC. 3. The foregoing limitations are subject to modification under the following conditions:

(*a*) The punishment of a deserter may be increased by one year of confinement at hard labor in consideration of each previous conviction of desertion.

(*b*) The punishment for desertion when joined in by two or more soldiers in the execution of a conspiracy, or for desertion in the presence of an outbreak of Indians or of any unlawful assemblage which the troops may be opposing, shall not exceed dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for five years.

ARTICLE II.

Except as herein otherwise indicated punishments shall not exceed the limits prescribed in the following table:

Offenses.	Limits of Punishment.
UNDER 17TH ARTICLE OF WAR.	
Selling horse or arms, or both.....	Dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for three years.
Selling accoutrements.....	Four months' confinement at hard labor and forfeiture of $10 per month for the same period; for non-commissioned officer, reduction in addition thereto.[1]
Selling clothing.....	Two months' confinement at hard labor and forfeiture of $10 per month for the same period; for non-commissioned officer, reduction in addition thereto.
Losing or spoiling horse or arms through neglect.	Four months' confinement at hard labor and forfeiture of $10 per month for the same period; for non-commissioned officer, reduction in addition thereto.
Losing or spoiling accoutrements or clothing through neglect.	One month's confinement at hard labor and forfeiture of $10; for non-commissioned officer, reduction in addition thereto.
UNDER 20TH ARTICLE OF WAR.	
Behaving himself with disrespect to his commanding officer.	Six months' confinement at hard labor and forfeiture of $10 per month for the same period; for non-commissioned officer, reduction in addition thereto.
UNDER 24TH ARTICLE OF WAR.	
Refusal to obey or using violence to officer or non-commissioned officer while quelling quarrels or disorders.	Dishonorable discharge, with forfeiture of all pay and allowances and confinement at hard labor for two years.

[1] EXECUTIVE MANSION, *August* 10, 1896.

To the present schedule of punishments for enlisted men, established under Act of Congress approved September 27, 1890, and announced in Executive order of March 20, 1895, as promulgated in General Orders, No. 16, of 1895, from the Headquarters of the Army, is added: "First-class privates of Engineers and Ordnance may be reduced to second-class privates of those corps, respectively, in all cases where for like offenses on the part of non-commissioned officers their reduction in grade is now authorized."

GROVER CLEVELAND.

Offenses.	Limits of Punishment.
UNDER 32D ARTICLE OF WAR.	
Absence without leave:[1]	
One hour or less.....	Forfeiture of $1; corporal, $2; sergeant, $3; 1st sergeant or non-commissioned officer of higher grade, $4.
For more than one to six hours, inclusive.	Forfeiture of $2; corporal, $3; sergeant, $4; 1st sergeant or non-commissioned officer of higher grade, $5.
For more than six to twelve hours, inclusive.	Forfeiture of $3; corporal, $4; sergeant, $6; 1st sergeant or non-commissioned officer of higher grade, $7.
For more than twelve to twenty-four hours, inclusive.	Forfeiture of $5; corporal, $6; sergeant, $7; 1st sergeant or non-commissioned officer of higher grade, $10.
For more than twenty-four to forty-eight hours, inclusive.	Forfeiture of $6 and five days' confinement at hard labor. For corporal, forfeiture of $8; sergeant, $10; 1st sergeant or non commissioned officer of higher grade, $12, or, for all non-commissioned officers, reduction.
For more than two to ten days, inclusive.	Forfeiture of $10 and ten days' confinement at hard labor; for non-commissioned officer, reduction in addition thereto.
For more than ten to thirty days, inclusive.	Forfeiture of $20 and one month's confinement at hard labor; for non-commissioned officer, reduction in addition thereto.
For more than thirty to ninety days, inclusive.	Three months' confinement at hard labor and forfeiture of $10 per month for same period; for non-commissioned officer, roduction in addition thereto.
For more than ninety days..... ...	Dishonorable discharge and forfeiture of all pay and allowances and six months' confinement at hard labor.
UNDER 33D ARTICLE OF WAR.	
Failure to repair at the time fixed, or the place appointed, etc.—	
For reveille or retreat roll-call and 11 p. m. inspection.	Forfeiture of $1; corporal, $2; sergeant, $3; 1st sergeant, $4.
For assembly of guard detail	Forfeiture of $5; corporal, $8; sergeant, $10.
For guard-mounting (by musician detailed for guard).	
For guard-mounting (by musician not detailed for guard).	Forfeiture of $2; corporal, $3; sergeant, $5.
For assembly of fatigue detail.....	
For dress parade..... ...	
For inspection and muster, weekly or monthly inspection.	
For target practice.	
For drill	
For stable duty.....	
For athletic exercises.....	

[1] Upon trial for desertion and conviction of absence without leave only, the court may, in addition to the limit prescribed for such absence, award a stoppage of the amount paid for apprehension, and for transportation of himself and guard.

Offenses.	Limits of Punishment.
UNDER 38TH ARTICLE OF WAR.	
Found drunk—	
On guard	Six months' confinement at hard labor and forfeiture of $10 per month for the same period; for non-commissioned officer, reduction in addition thereto.
On duty as head cook	Forfeiture of $20.
On extra or special duty At formation of company for drill or on drill. At target-practice At formation of company for dress parade or on dress parade. At reveille or retreat roll-call At inspection and muster, weekly or monthly inspection. At inspection of company guard detail or at guard-mounting. At stable duty On fatigue	Forfeiture of $12; for non-commissioned officer, reduction and forfeiture of $20.
UNDER 40TH ARTICLE OF WAR.	
Quitting guard	Six months' confinement at hard labor and forfeiture of $10 per month for the same period; for non-commissioned officer, reduction in addition thereto.
UNDER 51ST ARTICLE OF WAR.	
Persuading soldiers to desert	Dishonorable discharge, forfeiture of all pay and allowances, and one year's confinement at hard labor.
UNDER 60TH ARTICLE OF WAR.	Dishonorable discharge, forfeiture of all pay and allowances, and four years' confinement at hard labor.
UNDER 62D ARTICLE OF WAR.	
Manslaughter	Dishonorable discharge, forfeiture of all pay and allowances, and ten years' confinement at hard labor.
Assault, with intent to kill	Dishonorable discharge, forfeiture of all pay and allowances, and ten years' confinement at hard labor.
Burglary	Dishonorable discharge, forfeiture of all pay and allowances, and five years' confinement at hard labor.
Forgery	Dishonorable discharge, forfeiture of all pay and allowances, and four years' confinement at hard labor.
Perjury	Dishonorable discharge, forfeiture of all pay and allowances, and four years' confinement at hard labor.
False swearing	Dishonorable discharge, forfeiture of all pay and allowances, and two years' confinement at hard labor.
Robbery	Dishonorable discharge, forfeiture of all pay and allowances, and six years' confinement at hard labor.

Offenses.	Limits of Punishment.
UNDER 62D ARTICLE OF WAR—*Cont'd.*	
Larceny or embezzlement of property—[1]	
Of the value of more than $100 ...	Dishonorable discharge, forfeiture of all pay and allowances, and four years' confinement at hard labor.
Of the value of $100 or less and more than $50.	Dishonorable discharge, forfeiture of all pay and allowances, and three years' confinement at hard labor.
Of the value of $50 or less and more than $20.	Dishonorable discharge, forfeiture of all pay and allowances, and two years' confinement at hard labor.
Of the value of $20 or less.....	Dishonorable discharge, forfeiture of all pay and allowances, and one year's confinement at hard labor.
Fraudulent enlistment, procured by false representation or concealment of a fact in regard to a prior enlistment or discharge, or in regard to conviction of a civil or military crime.	Dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for one year.
Fraudulent enlistment, other causes of.	Dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for six months.
Disobedience of orders, involving willful defiance of the authority of a non-commissioned officer in the execution of his office.	Six months' confinement at hard labor and forfeiture of $10 per month for the same period; for non-commissioned officer, reduction in addition thereto.
Using threatening or insulting language or behaving in an insubordinate manner to a non-commissioned officer while in the execution of his office.	One month's confinement at hard labor and forfeiture of $10; for non-commissioned officer, reduction in addition thereto.
Absence from fatigue duty.....	Forfeiture of $4; corporal, $5; sergeant, $6.
Absence from extra or special duty ...	Forfeiture of $4; corporal, $5; sergeant, $6.
Absence from duty as company, general mess, or hospital head cook.	Forfeiture of $10.
Introducing liquor into post, camp, or quarters in violation of standing orders.	Forfeiture of $3; for non-commissioned officer, reduction and forfeiture of $5.
Drunkenness at post or in quarters...	Forfeiture of $3; for non-commissioned officer, reduction and forfeiture of $5.
Drunkenness and disorderly conduct, causing the offender's arrest and conviction by civil authorities at a place within 10 miles of his station.	Forfeiture of $10 and seven days' confinement at hard labor; for non-commissioned officer, reduction and forfeiture of $12.
Noisy or disorderly conduct in quarters.	Forfeiture of $4; corporal $7; sergeant, $10.
Drunk and disorderly in post or quarters.	Forfeiture of $7; for non-commissioned officer, reduction and forfeiture of $10.
Abuse by non-commissioned officer of his authority over an inferior.	Reduction, three months' confinement at hard labor, and forfeiture of $10 per month for the same period.
Non-commissioned officer encouraging gambling.	Reduction and forfeiture of $5.
Non-commissioned officer making false report	Reduction, forfeiture of $8, and ten days' confinement at hard labor.
Sentinel allowing a prisoner under his charge to escape through neglect.	Six months' confinement at hard labor and forfeiture of $10 per month for the same period.
Sentinel willfully suffering prisoner under his charge to escape.	Dishonorable discharge, forfeiture of all pay and allowances, and one year's confinement at hard labor.

[1] In specifications to charges of larceny or embezzlement the value of the property shall be stated.

Offenses.	Limits of Punishment.
UNDER 62D ARTICLE OF WAR—*Cont'd.*	
Sentinel allowing a prisoner under his charge to obtain liquor.	Two months' confinement at hard labor and forfeiture of $10 per month for the same period.
Sentinel or member of guard drinking liquor with prisoners.	Two months' confinement at hard labor and forfeiture of $10 per month for the same period.
Disrespect or affront to a sentinel.....	Two months' confinement at hard labor and forfeiture of $10 per month for the same period; for non-commissioned officer, reduction in addition thereto.
Resisting or disobeying sentinel in lawful execution of his duty.	Six months' confinement at hard labor and forfeiture of $10 per month for the same period; for non-commissioned officer, reduction in addition thereto.
Lewd or indecent exposure of person .. Committing nuisance in or about quarters.	Three months' confinement at hard labor and forfeiture of $10 per month for the same period; for non-commissioned officer, reduction in addition thereto.

ARTICLE III.

The introduction and use of evidence of previous convictions is subject to the following regulations:

1. Such evidence shall be limited to previous convictions by courts-martial of an offense or offenses within one year preceding the arraignment and during the current enlistment. These convictions must be proved by the records of previous trials and convictions, or by duly authenticated copies of such records, or by duly authenticated copies of the orders promulgating such trials and convictions. Charges forwarded to the authority competent to order a general court-martial, or submitted to a summary, garrison, or regimental court-martial, must be accompanied by the proper evidence of previous convictions.

2. Whenever a soldier is convicted of an offense for which a discretionary punishment is authorized, the court will receive evidence of previous convictions, if there be any. General, regimental, and garrison courts-martial will, after a finding of guilty, be opened for the purpose of ascertaining whether there is such evidence, and, if so, of receiving it.

3. *Previous convictions in connection with inferior court offenses.*—When a soldier is convicted of an offense the punishment for which under Article II of this order or the custom of the service does not exceed that which an inferior court-martial may adjudge, the punishment so authorized may, upon proof of four or less previous convictions within the prescribed period, be increased one-half for each of such previous convictions; provided that upon proof of five or more such previous convictions the limit of punishment shall be dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for three months.

4. *Previous convictions in connection with general court-martial offenses.*—When the conviction is for an offense punishable under Article II of this order or the custom of the service with a greater punishment, than an inferior court can award, such punishment, if it includes dishonorable discharge, shall not be increased by reason of previous convictions, but evidence thereof, whatever their number within the prescribed period, will be submitted to the court to aid it in determining upon the proper measure of punishment, subject to the limit already authorized.

If the authorized punishment under Article II of this order or the custom of the service exceeds what an inferior court can award and does not include dishonorable discharge, such punishment shall not be increased on account of previous convictions if less than five are considered; but if there be five or more, the court may adjudge dishonorable discharge and forfeiture of all pay and allowances with the authorized confinement, and when this confinement is less than three months, it may be increased to three months.

5. On a conviction of desertion, evidence of convictions of previous desertions may also be introduced, irrespective of the period which may have elapsed since such conviction or convictions.

6. When a non-commissioned officer is convicted of an offense not punishable with reduction, he may, upon proof of one previous conviction within the prescribed period, be sentenced to reduction in addition to the punishment already authorized.

ARTICLE IV.

When a soldier shall, on one arraignment, be convicted of two or more offenses, none of which is punishable under Article II of this order or the custom of the service with dishonorable discharge, but the aggregate term of confinement for which may exceed six months, dishonorable discharge with forfeiture of pay and allowances may be awarded in addition to the authorized confinement.

ARTICLE V.

This order prescribes the *maximum* limit of punishment for the offenses named, and this limit is intended for those cases in which the severest punishment should be awarded. In other cases the punishment should be graded down according to the extenuating circumstances. Offenses not herein provided for remain punishable as authorized by the Articles of War and the custom of the service.

ARTICLE VI.

Summary courts are subject to the restrictions named in the 83d Article of War. Soldiers against whom charges may be preferred for trial by sum-

mary court shall not be confined in the guard-house, but shall be placed in arrest in quarters, before and during trial and while awaiting sentence, except when in particular cases restraint may be necessary.

ARTICLE VII.

Substitutions for punishment named in Article II of this order are authorized at the discretion of the courts at the following rates:

Two days' confinement at hard labor for one dollar forfeiture, or the reverse; one day's solitary confinement on bread and water diet for two days' confinement at hard labor or for one dollar forfeiture: provided that a non-commissioned officer not sentenced to reduction shall not be subject to confinement; and provided that solitary confinement shall not exceed fourteen days at one time, nor be repeated until fourteen days have elapsed, and shall not exceed eighty-four days in one year.

ARTICLE VIII.

Non-commissioned officers above the rank of corporal shall not, if they object thereto, be brought to trial before regimental, garrison, or summary courts-martial without the authority of the officer competent to order their trial by general court-martial; nor shall sergeants of the post non-commissioned staff or hospital stewards be reduced, but they may be dishonorably discharged whenever reduction is included in the limit of punishment.

WILLIAM McKINLEY.

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