# MILITARY LAW

AND

# PRECEDENTS

BY

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OF THE JUDGE ADVOCATES GENERAL

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[062.13; A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

PEYTON C. MARCH,
*General, Chief of Staff.*

OFFICIAL:

P. C. HARRIS,
*The Adjutant General.*

TO

HON. MARTIN F. MORRIS,

ASSOCIATE JUSTICE OF THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA,

AS A TRIBUTE TO HIS EMINENCE AS A LAWYER AND A JUDGE, AND AS AN EXPRESSION OF THE AUTHOR'S PERSONAL ATTACHMENT AND ADMIRATION,

THIS WORK IS RESPECTFULLY DEDICATED.

## PREFACE TO THE FIRST EDITION OF 1886.

In view of the absence and want of a comprehensive treatise on the science of Military Law, it has been for some years the purpose of the author—a member of the bar in the practice of his profession when, in April, 1861, he entered the military service—to attempt to supply such want with a work, which, by reason of its extended plan and full presentation of principles and precedents, should constitute, not merely a text book for the army, but a *law book* adapted to the use of lawyers and judges. The present treatise was substantially completed in 1880, when the author was called upon to publish his annotated "Digest of Opinions of the Judge Advocates General," and some of the references embraced in the original work were inserted in the notes of that publication. Since its date certain unusually important military trials and investigations have been had, sundry valuable opinions upon questions of military law have been pronounced by the courts and other legal authorities, and our written military law—especially the Army Regulations—has been materially modified. Meanwhile also, in England, the time-honored Mutiny Act and Articles of War have wholly passed away and been succeeded by the new "Army Act" and "Rules of Procedure,"—a reform of great interest to the military student,—and this legislation, &c., has been copiously illustrated by the excellent official "Manual of Military Law" and a series of minor commentaries.

In view of these changes, the present work has been revised, and in great part re-written, and the references have been brought down to the end of the year 1885. Apart from the views and conclusions of the author, the *precedents*, now first collected and considered, will, it is believed, be found to be valuable both as law and history. A complete history, for example, of the late war could scarcely be written without taking into consideration the more important trials and acts of military government of that period instanced in the course of these volumes.

The author, however, will be fully recompensed for his labors if the same shall result in inspiring an interest in the study of Military Law as a department of legal science not heretofore duly recognized. The lawyer who, if he has not been led into the old error of confounding the military law proper with martial law, has perhaps viewed it as consisting merely of an unimportant and uninteresting scheme of discipline, will, it is hoped, discover in these pages that there is a military code of greater age and dignity and of a more elevated tone than any existing American civil code, as also a military procedure, which, by its freedom from the technical forms and obstructive habits that embarrass and delay the operations of the civil courts, is enabled to result in a summary and efficient administration of justice well worthy of respect and imitation. The military student, on the other hand, in examining the cases cited, as adjudicated by the courts which expound the international law, the common law, the criminal law, and the maritime law, will, it is thought, more fully appreciate the connection between the military law and the general law of the land;—will perceive that the former, while distinct and individual,

is not an isolated exception, but a branch of the great body of the public law, variously and harmoniously affiliated with the other branches of the system.

That Military Law, from its early origin and historical associations, its experience of many wars, its moderation in time of peace, its scrupulous regard of honor, its inflexible discipline, its simplicity, and its strength, is fairly entitled to consideration and study, is a belief of the author which he trusts his readers will share.

## PREFACE TO THE PRESENT EDITION.

SINCE the publication of the original edition of this Treatise in 1886, the scope of our military law has been enlarged, and its procedure modified, by new legislation of Congress; notable adjudications illustrating military questions have been made by the civil courts, and opinions rendered by the law officers; important military trials have been held; the Army Regulations have been re-codified; and the discretion of courts-martial in the imposition of punishment in cases of enlisted men has been defined and restricted by statutory authority. A new edition of the work, revising the original text and bringing down the law and rulings to the present date, has thus seemed desirable. In preparing it, the subject of the Law of War, which was previously left somewhat incomplete, as a consequence of the author's absence at a station distant from Washington, has been materially supplemented.

Meanwhile there have been published two editions, of 1887 and 1893, (revised in 1895,) of a compendium of the text of this treatise, entitled an "Abridgment of Military Law," which has been adopted by the Secretary of War, and is now used, as the text book on Military Law for the instruction of the Cadets of the Military Academy.

*Pari passu* with this edition there has been prepared by the author, and recently published, a new annotated edition of the "Digest of the Opinions of the Judge Advocates General of the Army," covering the period from the date of the preceding edition in 1880 to 1895. This work will be frequently referred to in the notes herein.

Since the plates of the present edition have been cast, there has been completed in the War Department a new set of the Army Regulations, with which, when published, the Regulations mainly referred to in these volumes—those of 1889—may be compared and the new numbers noted. The most material portion of the new Regulations—those relating to COURTS-MARTIAL—have been extracted and are inserted in the Appendix at the end of Volume II.

WASHINGTON, *D. C., November 1, 1895.*

NOTE.—The smaller type used in this reprint has necessitated repaging. The paging of the 1896 edition is here preserved, however, indented in the text at the left of the page. For typographical reasons the notes are renumbered, but it is believed no considerable inconvenience will be caused thereby. The table of contents and index refer to the new paging.

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## EXPLANATION OF REFERENCES.

The known military writers, or authors of works on military or naval law or history, are generally cited simply by name—as Bruce, Adye, Sullivan, Grose, Williamson, Tytler, McArthur, Samuel, Delafons, McNaghten, Simmons, Harcourt, Griffiths, Kennedy, Napier, Hughes, Hickman, D'Aguilar, Prendergast, Thring, Tulloch, Franklyn, Gorham, Jones, O'Dowd, Brackenbury, Pratt, Story, Tovey, Worsley, Macomb, Maltby, O'Brien, DeHart, Coppée, Benét, Lee, Harwood, Ives, Birkhimer.

Hough's principal work on Courts-Martial, published in 1825, is referred to as—Hough.

His "Practice of Courts-Martial and other Military Courts," (1834,) as—Hough, (Practice.)

His "Military Law Authorities," (1839,) as—Hough, (A.)

His "Precedents in Military Law," (1855,) as—Hough, (P.)

Clode's "Military Forces of the Crown," (2 vols.,) is referred to as—Clode, 1 (or 2) M. F.

His "Administration of Justice under Military or Martial Law," as—Clode, M. L.

James' "Collection of the Charges, Opinions and Sentences of General Courts-Martial," is referred to as—James.

"A Letter to the Queen on a late Court-Martial," by Samuel Warren, is referred to as—Warren.

The "Rules for the guidance of Courts-Martial in the Bombay Army," is referred to as—Bombay R.

The "Manual of Military Law," by Col. J. K. Pipon and J. F. Collier, Esq., is referred to as—Pipon & Col.

The official "Manual of Military Law," the work of some seven different writers, revised by the Judge Advocate General, and published by the British War Office, Oct. 1st, 1882, is referred to as—Manual.

The French "Manuel Pratique des Tribunaux Militaires," by P. Alia, is referred to as—Alia.

The edition referred to of the Journals of (the Continental) Congress, is that published by Way & Gideon, Washington, 1823.

The Military Dictionaries referred to are specifically indicated as those of Voyle, Duckett, Campbell, Duane, Scott, &c.

The numerous military Trials or Inquiries referred to are chiefly the printed proceedings contained in volumes to be found in the law library at the Capitol, Washington, the libraries of the Executive Departments, and other law or general libraries. Others are to be found, and are cited as published, in the "American Archives" or "State Papers." Of others, which exist only in the original records on file in the Judge Advocate General's Department, the proceedings have generally been published in specified General Orders.

The Orders of the War Department or Headquarters of the Army, [including the earlier O., (A. & I. G. O.,) which were dated but not numbered,] are in

general referred to simply as G. O. or G. C. M. O., of such a year, &c., *without adding "War Dept.," or "Hdqrs. of Army."* They are *thus distinguished* from the G. O. and G. C. M. O. of the military Departments, &c., in citing which the name of the specific Dept., Division, Army, &c., is always given.

The other military work of the present author—the annotated "Digest of Opinions of the Judge Advocates General" is referred to simply as—DIGEST.

# MILITARY LAW.

## CHAPTER I.

### THE SUBJECT DEFINED AND DIVIDED—CONSTITUTIONAL PROVISIONS.

1 MILITARY LAW, in its ordinary and more restricted sense, is the specific law governing the Army[1] as a separate community.

In a wider sense, it includes also that law, which, operative only in time of war or like emergency, regulates the relations of enemies and authorizes *military government* and *martial law*.

The general subject of Military Law will therefore naturally be presented under two Parts, as follows:

Part I. The Military Law Proper.

Part II. The Law of War.

But a treatise on Military Law can scarcely be complete, or satisfactory to the military profession, without some reference to the *quasi* civil functions which may be devolved upon the army and to the legal relations in which its
2 members may be placed toward the civil community. A further Part has therefore been added to this work, entitled—

Part III. Civil functions and relations of the Military.

#### SOURCE OF AND AUTHORITY FOR MILITARY LAW IN GENERAL.

Historically, as will hereafter be indicated, our military law is very considerably older than our Constitution. With the Constitution, however, all our public law began either to exist or to operate anew, and this instrument therefore as in general referred to as the source of the military as well as the other law of the United States. Thus it is said by Chief Justice Chase, in *Ex parte* Milligan:[2]—"The Constitution itself provides for military government as well as for civil government. * * * There is no law for the government of the citizens, the armies, or the navy of the United States, within American jurisdiction, which is not contained in or derived from the Constitution."

[1] "The military establishment of this country is divided by the general laws of the United States into the Army and the Navy."—U. S. *v.* Dunn, 120 U. S., 252. Military Law, or the "Law Military," in its most comprehensive sense, may thus be deemed to embrace the law governing the *Navy*. This law, however, it is not proposed to advert to except in so far as its provisions or principles may illustrate those of the law pertaining to the Army, or affect the status of the Marine Corps when serving with the Army. For the distinctive features of our Naval Code, reference may be had to Title XV. of the Revised Statutes, the U. S. Navy Regulations, ed. of 1881, the Gen. Ct. Mar. Orders of the Navy Department, which have been issued regularly since February, 1879, and Commodore Harwood's treatise on Naval Courts Martial, published in 1867.

[2] 4 Wallace, 137.

**SPECIFIC CONSTITUTIONAL PROVISIONS.** The provisions of the Constitution which may be regarded as the source or sanction of, or authority for, our existing military law and jurisdiction—the discipline of armies as well as the war power—are the following, viz.:

*1st.* Those by which CONGRESS, as the *Legislative* branch of the government is empowered—"To define and punish * * * offences against the law of nations;" "To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;" "To raise and support armies;" "To provide and maintain a navy;" "To make rules for the government and regulation of the land and naval forces;" "To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;" "To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States;" and further, generally, "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers," (*i. e.* those here recited together with various others set forth in the same
3 section,) "and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof."[3]

*2d.* Those by which the PRESIDENT, as the *Executive* power, is constituted "Commander-in-Chief of the Army and Navy of the United States, and of the Militia of the several States when called into the actual service of the United States;" by which he is empowered to appoint, (generally in conjunction with the Senate,) and is required to commission, the officers of the Army, &c.; and by which it is made his duty to "take care that the laws be faithfully executed."[4]

*3d.* The provision of the Vth Amendment,[5] that—"No person shall be held to answer for a capital or otherwise infamous crime[6] unless on a presentment or indictment of a Grand jury, except in actual service in time of war or public danger."[7]

These provisions[8] will be variously applied and illustrated in the several Parts of the work.

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[3] Const., Art. I., Sec. 8.

[4] Const., Art. II., Secs. 1, 2 and 3.

[5] "This provision in effect says that offences in the land or naval force shall be dealt with according to military law."—Runkle *v.* U. S., 19 Ct. Cl., 397, 410. And see authorities cited in Chapter V, pp. 51, 52, *post*.

[6] That the term "infamous crime," as here used, is now mainly applicable to crime punishable by imprisonment in "a penitentiary or similar institution," see *Ex parte* Wilson, 114 U. S., 417; Mackin *v.* U. S., 117 U. S., 348; *In re* Claasen, 140 U. S., 200, 204.

[7] This Amendment has been very recently construed by the U. S. Supreme Court, in the case of Johnson *v.* Sayre, April 1895, (158 U. S., 109,) in which it was held that the description—"when in actual service in time of war or public danger"—applied not to "the land or naval forces," but to the "militia" only.

[8] With those cited may also be noticed Art. III. of the Amendments prescribing that: "No soldier shall in time of peace be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law." The billeting of soldiers, however, is practically unknown in our Army.

# CHAPTER II.

## Part I—MILITARY LAW PROPER.

### THE WRITTEN LAW—ARTICLES OF WAR AND OTHER DISCIPLINARY STATUTES.

4 **MILITARY LAW PROPER—OF WHAT IT CONSISTS.** Military law proper is that branch of the public law which is enacted or ordained for the government exclusively of the military state, and is operative equally in peace and in war. We will term it, in general, simply *military law*, in contradistinction to the law administered by the civil tribunals. Like that law, it consists of a Written and an Unwritten law.

**THE WRITTEN MILITARY LAW.** This, which comprises much the greater part of the Law to be considered, is made up of:—

I. The statutory Code of Articles of War; II. Other statutory enactments relating to the discipline of the Army; III. The Army Regulations; IV. General and Special Orders.

I. THE ARTICLES OF WAR.

The Articles, or Rules and Articles, of War, are statutory provisions for the enforcement of discipline and administration of criminal justice in the army, enacted by Congress in the exercise of the constitutional power "to make rules for the government and regulation of the land forces." In their origin, however, a majority of these Articles considerably *pre-date* the Constitution, being derived from those adopted by the Continental Congress between 1775 and 1786, which were themselves taken from pre-existing British articles having their inception in remote antiquity.

**EARLY CODES.** While no written military codes remain from the times of the Greeks or Romans, some of the principal military offences familiar
5 to our present law, as desertion, mutiny, cowardice, the doing of violence to a superior, and the sale or appropriation of arms, were recognized in their armies; and, of the punishments inflicted by them, while a portion, such as decimation, denial of sepulture (in connection with the death penalty), maiming, exposure to the elements, taking of meals standing, &c., have long ceased to be known, others, such as dishonorable discharge, expulsion from the camp, labor on the fortifications, carrying of burdens, and servile or police duty, have come down to our day without substantial modification. Among the early Germans, in the absence of a written law, justice was in general administered summarily by the chief commanders, through the instrumentality of the priests; the principal punishments, besides death, being whipping, forfeiture of horses or cattle, and a civil and military disqualification or dishonoring imposed for such offences as volunteering for a campaign but failing to take the field, losing the shield in battle, and returning alive from a battle where the chief had fallen.

Of the written military laws of Europe the first authentic instance appears to have been those embraced in the Salic code, originally made by the chiefs

of the Salians at the beginning of the fifth century, and revised and matured by the successive Frankish kings: other written laws—as those of the Western Goths, the Lombards, the Burgundians and the Bavarians, extending in date to the ninth century, belong to this period. These codes were all civil as well as military, the civil and military jurisdictions being scarcely distinguished and the civil judges being also military commanders in war.[1]

The date of the first French *ordonnance* of military law is given as 1378; the first German *Kriegsartikel* are attributed to 1487. The laws however of the Merovingian and Carlovingian Franks appear to have reached their full development in 1532 in the celebrated penal code of the Emperor Charles V., which has been viewed as the model of the existing military codes of continental Europe.

6 The Articles of War of the Free Netherlands of 1590, republished in 1705; the elaborate Articles of Gustavus Adolphus, framed in 1621; the Regulations of Louis XIV., of 1651 and 1665; the Articles and Regulations of Czar Peter the Great, of 1715; and the Theresian penal code of the Empress Maria Theresa, of 1768, with the later "Norma"—are among the most noted of the systems of European military law which have succeeded the "Carolina."[2] Some of the details of these laws will be hereafter referred to.

**THE BRITISH MILITARY CODE.** For nearly two centuries, and till a very recent date, this parent code was made up of—(1) the statute known as the Army Mutiny Act, and (2) the Articles of War.

**The Early Articles.** The Articles are much older in history than the statute. The earliest articles appear to have been specific military orders or directions issued to the army, for its government, when about to proceed upon an expedition, or from time to time during war.[5] They were commonly ordained directly by the King, by virtue of his royal prerogative, and with the aid and counsel of his peers, especially of the High Constable and Earl Marshall,[4] officials hereafter to be referred to as composing the court of chivalry, viewed by some writers as the proper original of the court-martial in England.[5] Early ordinances of this character are indicated by the authorities as promulgated by

7 Richard I.,[6] Richard II.,[7] Henry V.,[8] Henry VII., and Henry VIII.;[9] these were succeeded by more extended precepts which continued to be put forth by the Crown, or by its authority, till the period of the Rebellion; those of 1629 and 1639 being the most elaborate.[10] In some instances the generals commanding the armies were empowered by the King, by special commis-

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[1] Among the principal authorities consulted upon the subject of these early military laws are Potters' Archæologia Græca; Smith's Dictionary of Greek and Roman Antiquities; Adam's Roman Antiquities; Vegetius, De Re Militari; Ludovici, Kriegsprocess; Koppmann, Militärstrafgesetzbuch; Von Molitor, Kriegsgerichte und Militärstrafen; Le Faure, Lois Militaires de la France; Foucher, Commentaire sur le Code de la Justice Militaire.

[2] The more usual designation of the code of Charles V.; the full description being "Constitutio Carolina Criminalis."

[3] 2 Grose, History of the English Army, 58; Pipon & Col., 14; Clode, M. L., 29, 72. As to the early history of *naval* military law prior to the Act of 13 Chas. II., "which brought the naval usages and ordinances into the form of a statute," see Forsyth, Cases & Opins. of Const. Law, 193–4.

[4] 2 Grose, 58; Adye, 5; Tytler, 38; Samuel, 61; Griffiths, 18.

[5] See Chapter V.

[6] 2 Grose, 63; Samuel, 60, 89. And see Appendix.

[7] These "Statutes, Ordinances and Customs" of Richard II. (A. D. 1385), as given by Grose, vol. 2, pp. 64–69, will be found in the Appendix.

[8] These contain "regulations respecting duties, musters, watches and guards," etc. 2 Grose, 70. And see Samuel, 90; Pratt, 3. They will be found printed in the preface to Grose's Antiquities of England and Wales.

[9] 2 Grose, 70; Samuel, 59–63; Pipon & Col., 14.

[10] Clode, M. L., 9–11. The articles of 1639, as contained in Clode, 1 M. F., 429–440, are ninety in number and arranged under six separate titles.

sion, to make rules and articles of war.[11] Among the last of these was the ordinance issued in 1640 by the Earl of Northumberland as Lord General,[12] which was followed by a similar one (of ninety-six articles under twelve heads,) promulgated in 1642 by the Earl of Essex as commander of the opposing army of parliament and with the sanction of that body.[13]

Just before the dates last mentioned, viz. in 1639, there was published in London[14] the Code of Articles, already referred to, of Gustavus Adolphus, promulgated by him to his army in July, 1621. In reading these (one hundred and sixty-seven in number), it is readily concluded that not a few of the articles of the English codes of a later date were shaped after this model or suggested by its provisions.[15] In some instances, in our own present articles, there are retained quaint forms of expression identical with terms to be found in this early code as translated.

8 Subsequently to the Rebellion, articles were put forth, from time to time, by the Crown or under its authority, during the reigns of Charles II. and James II., viz.: the articles of 1662–3, 1666, 1672 ("Prince Rupert's code"), 1685 and 1688;[16] the last being those in force at the period of the English Revolution and at the date of the first Mutiny Act—1 William and Mary, c. 5, of April 3, 1689. With this Act British Military law began to assume a statutory form.

The most important of the early series of Articles are set forth in the Appendix.

**The first Mutiny Act, of 1689.** The event which induced the adoption of this enactment—the mutiny and substantial desertion of a detachment of troops, mainly Scotch, which adhered to the cause of the Stuarts and, refusing to obey the order of William III. to proceed to Holland, marched northward—is familiar to the student of military law.[17] The offences thus committed were, by the custom of war, punishable with death, but, by the laws of the realm, not always regarded in this particular by the sovereign, this punishment could not be imposed within the kingdom by the executive power in time of peace.[18] Parliament therefore availed itself of the occasion of asserting its

[11] 2 Grose, 58–59; Samuel, 64; Clode, M. L., 6, 10; also Id., 2 M. F., 425, where is given in full the commission of Chas. I to the Earl of Arundel as commander-in-chief, under which were issued the articles of 1639.

[12] 2 Grose, 70; Samuel, 65; Clode, M. L., 10.

[13] 2 Grose, 71; Samuel, 65; Clode, M. L., 84. And see Clode, 1 M. F., 442, where, as also in Pipon & Col., 867, extracts are given from this Code. Clode, (M. L., 10,) referring to these similsr sets of articles, adds—"so that both armies, though opposed to each other, were governed by the same military code. On p. 40, (referring to the articles adopted from the British by our Continental Congress,) he observes—"In 1775 the same thing happened in America."

As to the administration of military justice during the period of the Rebellion and the Protectorate, see, further, Pipon & Col., 15–18.

[14] In Ward's Animadversions of Warre, Book Second, pp. 41–54. See the reference to this code in Stevens' Life of Gustavus Adolphus, 129–130.

[15] A lsrge number of English hsd served, as officers and soldiers, in the armies of Gustavus Adolphus. Scott's Brit. Army, vol. 2, pp. 41–2, 566. As to the influence of his Articles, and of the military law of the Low Countries, in shaping the English code, see Simmons, § 1, and notes.

[16] See Appendix.

[17] See 1 McArthur, 22; Adye, 30; Tytler, 102; Samuel, 136; Clode, M. L., 19; Id., 1 M. F., 142, 497; Pratt, 5.

[18] "Attempts were made from time to time, especially during the despotic reigns of the Tudors, to enforce military law under the Prerogative of the Crown in time of peace; but no countenance was afforded to such attempts by the law of England, and commissions for the execution of military law in time of peace issued by Chas. I. in 1625 and the following years gave rise to the declaration in 1627, contained in the Petition of Right, (3 Chas. I., c. 1,) that such an exercise of the Prerogative was contrary to law." Manual of Military Law, 7–8.

exclusive authority to license such punishment by enacting on the date above mentioned a statute providing generally that any officer or soldier who should thereafter excite, cause, or join in a mutiny or sedition in the army, or should desert the service, should be punished with death or such other penalty as a court-martial might adjudge.[19] The existing articles of war were not superseded, nor was the prerogative of the Sovereign to make articles, or to authorize the death penalty for offences committed *abroad*, impaired by the Act: its effect was, as to this penalty, to preclude its infliction *at home* for any military offences except those which it designated.[20]

Later, in 1718, the making of Articles by the Crown, to be operative within the Kingdom as well as beyond seas, was expressly authorized by Parliament in the Mutiny Act; and in 1803 it was enacted that both the Act and the Articles should henceforth apply to the army equally at home and abroad. A general statutory sanction was thus given to the Articles, which no longer depended entirely for their authority upon royal prerogative.[21]

The Mutiny Act, initiated as above indicated, was limited in its operation to a term of about seven months, but, soon after its expiration, was renewed for a year. With frequent additions and modifications it has, since, except for a few brief intervals,[22] been, by annual enactment, continued in force until a very recent period. Meanwhile, though originally consisting of but ten sections, it had become so enlarged as to embrace, in 1878, upwards of one hundred. Meanwhile also the Articles of war, always published with the Act, and from time to time revised, had become, at the date mentioned, nearly two hundred in number. The Articles repeated, though in a different form, many of the provisions of the Act, while in others the two were quite distinct. The necessity of constantly comparing the two, and passing from the one to the other in order to ascertain and harmonize the law, was at least inconvenient, and that the body of law thus dissevered was not sooner consolidated and simplified must remain a matter of surprise to the American student.

**The Reform of 1879–1881. Army Act and Rules of Procedure.** At length, in 1879, after nearly two centuries of existence, the Mutiny Act, (and with it the code of Articles,) was allowed to expire without renewal, and there was substituted for it, on July 24th of that year, a quite new statute—also however intended to be annually renewed—entitled the "Army Discipline and Regulation Act."[23] In a section of this statute the Sovereign was expressly authorized to make not only articles of war but also "Rules of Procedure" for courts-martial, reviewing officers, &c. Rules, (but no Articles,) were made and published accordingly, but, in 1881, both Act, now designated as the "ARMY ACT," (or "Army Annual Act,") and Rules, underwent a full revision. The revised Act, passed August 27, 1881, has been since annually continued in force, (as of April 30th in Great Britain and later dates abroad,)

[19] The Act is given in full in the Appendix.

[20] Clode, M. L., 22; Pratt, 4. And see Barwis *v.* Keppel, 2 Wilson, 314.

[21] Pratt, 4; Clode, M. L., 22, 25; Id., 1 M. F., 146, 503. And see the full history of the Mutiny Act and Articles, between 1689 and 1879, as given in the Manual, pp. 14–18.

[22] The only considerable interval, according to the authorities, was one of about two years and ten months, *viz.*, from April 10, 1698, to Feb. 20, 1701. Adye, 21; Clode, 1 M. F., 389–391.

[23] 42 & 43 Victoria, c. 33. This Act superseded also the Marine Mutiny Act. A similar change—it may be noted—had previously taken place in the *naval* code; the naval Articles of War and general laws for the government of the Navy having been "reconstructed and placed on a new footing by the Legislature in the Naval Discipline Act of 1866." Thring, preface and p. 393.

and, with the Revised Rules, (first promulgated, August 29, 1881,) and a few army regulations,[24] constitutes the existing code for the royal military forces.

The Army Act is not only a substitute for the old Mutiny Act, but it substantially incorporates also the previous Articles of war,[25] and though the King is still empowered to make Articles, yet the fact of such incorporation, in connection with the creation of the Rules of Procedure, will, as observed by a recent writer,[26] "probably render the exercise of this power unnecessary or very rare." There are thus now *no* British Articles of war, nor are there likely to be any for an indefinite period.

The Act and Rules, instead of abridging and simplifying the law, constitute a code considerably more extended than that which they superseded.[27]

11 Whether the elaboration resorted to will prove to have been judicious is as yet a question. There are certainly, however, embraced in the new law many excellent provisions, some of which will be hereafter referred to. References will also be made to the admirable "Manual of Military Law," first published by the War Office, October 1, 1882, by which such provisions are illustrated.

**THE MILITARY CODE OF THE UNITED STATES.** The two main points of difference between the composition of the American military code and that of Great Britain are—1, that we have in our law no "Mutiny," or "Army Annual" Act, or other corresponding legislation; 2, that our Articles of war, though in large part derived from the British, are wholly statutory, having been, from the beginning, enacted by Congress as the legislative power. Of these Articles we now proceed to outline the history.

**Early History—Code of 1775.** The second Continental Congress having, early in its session, to wit, on June 14, 1775, "resolved"[28] that a military force should "be immediately raised," to "march and join the army near Boston," proceeded, on the same day, to appoint a committee, consisting of George Washington, Philip Schuyler, Silas Deane, Thomas Cushing, and Joseph Hewes, "to prepare rules and regulations for the government of the Army."[29] On June 28th following, there was reported by the committee, and on June 30th adopted by Congress, a set of Articles, prefaced by a preamble reciting the causes which had induced the Colonies to assume a defensive attitude and raise an armed force—"for the due regulating and well ordering of which," it is declared, "the following rules and orders are established."[30]

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[24] See "The Queen's Regulations and Orders for the Army, 1881," Sec. VI.

[25] The Act is "a consolidation of the Army Mutiny Act and Marine Mutiny Act, the Articles of War, and the Army Enlistment Act of 1870." Jones, 18. And see Graham, p. 5.

[26] Jones, p. 18.

[27] "The effect of the recent legislation has been rather to complicate than to simplify the military code. Some anomalies have been swept away, but with them has also disappeared much of the simplicity which characterized the administration of military law under the Mutiny Act and Articles of War. Not only has the actual punitive code been largely increased in size, but the manner of carrying it out, on the procedure of courts-martial, has become so involved that the regulations concerning it require close attention." Col. Brackenbury, in Preface to Pratt's Military Law.

As the Act and Rules, with their many Forms, take up so much space, they are not reproduced in this Edition. They will be found published, with copious explanatory notes, in the authorized MANUAL OF MILITARY LAW.

[28] 1 Journals of Congress, 82. The enactments of Congress prior to the adoption of the Constitution were in the form of Resolutions.

[29] 1 Jour. Cong., 83. Of this committee, Washington was, on June 15th, chosen general of the army, and Schuyler, on June 19th, a major-general. 1 Jour. Cong., 83, 86.

[30] 1 Jour. Cong., 90. These Articles, with the subsequent codes, are given in the Appendix.

12 Of this code, comprising sixty-nine articles, the original was the existing British code in force in the "ministerial army."[31] Many, however, of the articles were, with slight modifications, copied *directly* from the intermediate MASSACHUSETTS ARTICLES of the preceding April, which may be said to have constituted the first American written code of military laws.[32]

The Articles of War thus inaugurated were, by a Resolution of the same Congress, of November 7, 1775,[33] amended and added to by sixteen further provisions intended to complete the original draft in certain particulars in which it was imperfect.[34] In the meantime a provision, which was in fact a separate Article, and is still traceable in our code, relating to precedence in command between officers of the continental and provisional establishments and of the militia, had been adopted, on November 4th.

**Code of 1776.** The Articles of 1775 did not remain long in force. On June 14th of the following year it was *resolved* by Congress that "the committee on spies be directed to revise the rules and articles of war;[35] this being a committee of five, consisting of John Adams, Thomas Jefferson, John Rutledge, James Wilson and R. R. Livingston, which had been previously appointed "to consider what is proper to be done with persons giving intelligence to the enemy or supplying them with provisions."[36] New articles prepared by
13 this committee were reported on August 7th following, and the same were agreed to by Congress on September 20, 1776.[37]

Meanwhile, however, there had been adopted on June 17, 1776, a provision "that no officer suttle or sell to the soldiers," under pain of fine and dismissal by sentence of court-martial.[38] And, further, on August 21st, an article providing for the punishment of spies, whose crime was made capital.[39]

The code of 1776, which was an enlargement, with modifications, of that of 1775, was also a complete re-casting of the same; the articles being assembled, (according to the form of arrangement of the British articles,) under separate Sections, each comprising the provisions relating to some specific or general subject.[40]

**Amendments of 1786, &c.** The Articles of 1776 continued in force till after the date of the adoption of the Constitution; meanwhile, however, undergoing certain very considerable amendments. The most important of these was the last, that of May 31, 1786, by which Section XIV. of the existing code, with

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[31] These British Articles, as copied from the original publication in possession of the Massachusetts Historical Society, are set forth in the Appendix. The fact that the two opposing armies were, at this period, governed by similar codes, has already been noticed.

[32] These articles, (inserted in the Appendix,) were adopted on April 5th, 1775, by the Provisional Congress of Massachusetts Bay, for the observance of its own troops. (Am. Archives, Fourth Series, vol. I., p. 1350.) They were followed by similar articles adopted, in May and June of the same year, successively, by the Provincial Assemblies of Connecticut and Rhode Island, and the Congress of New Hampshire, (Id., vol. II., pp. 565, 1153, 1180;) in April, 1776, by the Pennsylvania Assembly, (Id., vol. V., p. 705,) and later, apparently, (see 1 Jour. Cong., 423,) by the Convention of South Carolina—for the government of their respective levies.

[33] 1 Jour. Cong., 97, 167.

[34] See Appendix.

[35] 1 Jour. Cong., 374.

[36] 1 Jour. Cong., 365. See Works of John Adams, vol. III., p. 83, as to his part in procuring the enactment of these Articles.

[37] 1 Jour. Cong., 435, 482. The Articles are set forth in the Appendix.

[38] 1 Jour. Cong., 377.

[39] 1 Jour. Cong., 450. The resolution enacting this article was *ordered* to be "printed at the end of the rules and articles of war"—where indeed a corresponding provision has ever since remained.

[40] This arrangement was abandoned in the Code of 1806, and has not since been reamed. The material differences between the articles of 1775 and 1776 will be indicated when we come to treat of the present Articles separately.

"such other articles as related to the holding of courts-martial and the confirmation of the sentences thereof," was repealed and a new Section, entitled "ADMINISTRATION OF JUSTICE," consisting of twenty-seven articles, was substituted.[41] The occasion of this Amendment, as expressed in the preamble of the Resolution of Congress, was the fact that the pre-existing Articles failed to make adequate provision for the trial of offenders "serving with small detachments," those articles requiring that a general court-martial should consist of thirteen members, and a regimental or garrison court of five members: in the new section the number of the inferior court was fixed at three, and the
14 minimum of the general court at five—limitations which have subsisted to the present time.[42]

Between the dates of the code of 1776 and the important Amendments of 1786 there were enacted various other articles of war or provisions in the nature of such articles, the greater part of which, however, were but temporary in their operation. Those which are material to be considered in connection with the study of the specific articles of the present code will be hereafter noted.

**Later history—Code of 1806.** After the adoption of the Constitution, the Articles in force at that date were, by the First Congress, in an enactment of September 29, 1789, (and see, to a similar effect, the Act of May 26, 1790, s. 13,) expressly recognized and made to apply to the existing army. They were subsequently, (with some additions,) continued in operation, by the successive statutes by which provision was made for increasing the army,[43] until the inauguration of a new code by the Act of April 10, 1806.

The Articles of 1806, which superseded all other enactments on the same subjects,[44] were adopted by Congress mainly for the reason that the changed form of government rendered desirable a complete revision of the code.[45] These Articles—one hundred and one in number, with an additional provision relating to the punishment of spies—remained in force, (except as amended,) for nearly seventy years, or till the enactment of the revised code of 1874. During this long interval the military statute law underwent but few changes prior to the commencement of the late war. After that date the alterations and additions were much more numerous. But a comparatively small proportion, however, of these modifications were permanent.

15 **Code and Revision of 1874.** The Code of 1874,—that at present in in force,—consisting of one hundred and twenty-eight articles, with a supplementary provision relating to the trial and punishment of spies, is embraced in Sections 1342 and 1343 of the Revised Statutes of the United States,[46] being Chapter Five of Title XIV, "THE ARMY."

All the codes which have been enumerated are set forth in the Appendix.

**Modifications of the last Code.** Since the taking effect of the Code of 1874, but few modifications of the Articles have been enacted. Those which have been amended, (with the nature of the amendment,) are as follows:—
Art. 17, (in doing away with the penalty of stoppage, and leaving the punish-

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[41] 4 Journals, 649. See Appendix.

[42] The Articles of '86, however, amended the existing code in various particulara other than those indicated in the *preamble*.

[43] See Acts of April 30, 1790, s. 3; March 3, 1791, s. 3, 10; March 5, 1792, s. 11; May 9, 1794, s. 4; March 3, 1795, s. 14; May 30, 1796, s. 20; April 27, 1798, s. 2; May 28, 1798, s. 2; July 16, 1798, s. 8; March 2, 1799, c. 27, s. 8; March 2, 1799, c. 31, s. 3; March 16, 1802, s. 10; Feb. 28, 1803, s. 3. In the Acts of 1790, 1795 and 1796, it is added—"so far as the same" (the existing articles) "are applicable to the Constitution of the United States."

[44] Milla *v.* Martin, 19 Johns., 23.

[45] See remarks of Mr. Varnum of the House of Representatives. Annals of Cong., 9th Cong., 1st Ses., p. 264; also O'Brien, 335.

[46] As to what are the Revised Statutes, see Chapter XVIII.—Legislative Acts and acts of State.

ment to the discretion of the court;) Arts. 38 and 98, (in prohibiting the punishments of flogging, branding, marking and tattooing;) Art. 72, (in extending the authority to convene general courts-martial to colonels commanding departments;) Art. 84, (in slightly modifying the terms of the oath to be taken by members of courts martial;) Art. 103, (in prescribing a separate rule of limitation of prosecutions for desertion in time of peace;) Arts. 104 and 110, (in causing them to specify more intelligibly the act of approval necessary to the execution of sentences;) and all the Articles which leave the punishment of the offence to the discretion of the court, by providing, (Act of September 27, 1890,) that such punishment "shall not, in time of peace, be in excess of a limit which the President may prescribe." Such *other* changes as, in the opinion of the author, may well be made in the present Articles are indicated at the end of Chapter XXV. Our military code, however, stands alone among our public statutes in its retaining many provisions and forms of expression dating back from two hundred to five hundred years, and while it is desirable that some of the Articles should be made more precise or extended in scope, and the code itself be simplified by dropping a few Articles and consolidating others, any radical remodeling which would divest this time-honored body of law of its historical associations and interest would be greatly to be deprecated.

16 Our existing code of Articles, consisting of the revision of 1874 and subsequent amendments, is contained in the Appendix. In subsequent parts of this work, these Articles will be separately reviewed, and their relations to the provisions of other existing statutes, as well as to those of the earlier sets of articles, be remarked upon.

II. OTHER STATUTORY ENACTMENTS RELATING TO THE DISCIPLINE OF THE ARMY.

The second of the components of the WRITTEN MILITARY LAW consists of those of the public statutes which concern the government or discipline of the military service but are not included in the existing code of Articles, although some of them indeed might well be classed as articles of war.

The statutes here intended are those relating to such subjects as—the authority of the Superintendent of the Military Academy to convene general courts-martial and execute their sentences; the jurisdiction of courts-martial over militia, marines, cadets, retired officers and convicts at the Military Prison; the trial and punishment of officers or soldiers aiding or allowing the escape of convicts; the authority of judge advocates to issue process of attachment of witnesses, to appoint reporters, to administer oaths, and to be present in court; the competency of accused persons as witnesses; the revision of the proceedings and disposition of the records of military courts; the restoration of dismissed officers; the dropping of officers for desertion; the trial by court-martial of officers dismissed by order; the composition of courts-martial for the trial of militia; the forfeiture of civil rights incurred by deserters; the military relations of post traders; the fixing of maximum punishments; the institution of summary courts; the jurisdiction of courts-martial in cases of fraudulent enlistment, etc.[17] These various statutes (which will be found in the Appendix) will hereafter be recurred to, and construed or otherwise considered under the appropriate heads.

A further class of enactments, authorizing or restricting the employment of the army for civil or *quasi* civil purposes, will be reserved for consideration in Part III of this treatise.

[17] See Rev. Sts., Secs. 1202, 1203, 1228, 1229, 1230, 1256, 1320, 1326, 1359, 1360, 1361, 1621, 1644, 1658, 1996–1998, 5306, 5313; and Acts of June 23, 1874, c. 458, s. 2; July 24, 1876, c. 226, s. 3; March 3, 1877, c. 102, s. 1; March 16, 1878, c. 37; April 11, 1890, c. 78; Sept. 27, 1890, c. 998; Oct. 1, 1890, c. 1259; July 27, 1892, c. 272.

# CHAPTER III.

## ARMY REGULATIONS AND ORDERS.

### ARMY REGULATIONS.

17 In passing from Articles of war to Army Regulations, we pass from the province of one department of the government to that of another—from legislative statutes to executive acts. The subject will be treated under the following heads: I. Regulations in general; II. Regulations for the Army; III. Principles governing regulations; IV. Special sets of Regulations.

#### I. Regulations in General.

**Their Classification—Express Authority for Regulations.** While all law is regulation in a greater or less degree, *regulations* proper, whether army regulations or other, are administrative rules or directions as contrasted with enactments. The word "regulation" or "regulations," (as also the allied term "rules,") is employed sometimes in the Constitution[1] as descriptive of *statute law*, and this use has proved confusing to the student. A similar designation occurs in certain, especially of the earlier public Acts, though it is not frequent. As a general practice, Congress, in framing a public law in which provision is made for an elaborated system, a measure of policy, or other extended subject or project, of which the execution involves minor details of performance, disposes of such details in one of *three* forms.[2] It either goes on itself to prescribe rules, general or specific, for such performance; or it authorizes some public officer to make proper rules for the purpose; or it is entirely silent on the subject, prescribing no regulations itself and devolving no authority, in terms, upon any official. The rules of the *first*
18 class are *statutes:* those of the *second* class *regulations* as distinguished from statutes, and bearing a relation to statutes similar to that which the latter bear to constitutional provisions. The *third* class, in which are included army regulations, will be considered presently. The *first* form—where *specific* regulations are set forth—is comparatively rare,[3] for the reason that the Legislature can seldom foresee all the details that may require to be regulated in the course of the execution of a statute.[4] Of the *second* form the instances are frequent, and this is the form ordinarily adopted in enactments relating to complex subjects. Thus, by Sec. 161 of the Revised Statutes, the heads of the executive departments are authorized by Congress "to prescribe regulations not inconsistent with law" for the internal government of their departments, the conduct of the business, and the custody and use of the records and public property in their charge. So, in a multitude of other important statutes, Congress, in imposing or conferring some special charge

[1] In Art. I., Sec. 4 § 1; Id., Sec. 8 § 11, 14; Art. 4, Sec. 3 § 2.

[2] See McCall's case, as cited in note, *post*.

[3] Conspicuous instances of specific regulations prescribed in statutes are found in the early Acts of March 23, 1792, c. 11, s. 2; March 3, 1803, c. 37, s. 1; April 10, 1806, c. 25, s. 2 and J. R. 14 of July 23, 1846; also in Act of April 29, 1864, c. 69, s. 1, (Sec. 4233, Rev. Sts.;) in Sec. 337, Rev. Sts., and in the recent Acts of March 3, 1879, c. 195; Aug. 2, 1882, c. 374; March 3, 1885, c. 354, and Aug. 19, 1890, c. 802.

[4] Boody *v.* U. S., 1 Wood & Minot, 164; U. S. *v.* Webster, Davels, 38.

or capacity, or in legislating generally upon some matter the particulars of which fall within the executive province, has specifically authorized or directed the proper executive officer—the President, or head of department, or, in some cases, inferior official—to make regulations for the proper discharging of the function, or the carrying out of the details of the subject.[5] These regu-
19 lations, indeed, numerous and multifarious as they are, represent the exercise of a very considerable power on the part of our public functionaries, and serve a purpose in the efficient administration of our Government not readily or commonly appreciated.[6]

**IMPLIED AUTHORITY—THE THIRD CLASS OF REGULATIONS.** But Congress is incapable of delegating any portion of the legislative power, and the giving, in a statute, of authority to an executive official, to make regulations for executing the same, is, in general, quite unnecessary, amounting to no more than an indication, on the part of Congress, of a purpose to leave the details of execution where in fact they properly belong, with a suggestion, sometimes, as to the particulars especially to be regulated. Thus, in the cases of a great majority of the statutes of the second class, an authority in the Executive to make regulations would legally have been *implied* without any express grant to that effect. So, there are many statutes of the *third* class—those in which Congress is silent as to the matter of the execution of the details—in which such an authority results by a legal implication from the terms or subject of the enactment, considered in connection with the inherent function of the Executive.[7] The Constitution devolves it upon the executive department to "take care that the laws be faithfully executed." In a case, therefore, of a law of which the execution requires to be specifically methodized, it is the duty
20 of that department, and it is authorized, in the absence of any *express* authority for the purpose, to prescribe the rules or directions necessary and proper to effectuate the object of the statute;[8] care of course being

[5] It would require too much space to enumerate all the statutory provisions of this class down to the present time, in which "regulations," as such, are authorized to be prescribed. For the principal of those enacted prior to 1886, reference may be had to the first edition of this work, page 18–19, note 3. Repeated instances also occur in the statutes where, though the word "regulations" is not employed, the same meaning is conveyed by some equivalent term or expression; as by the term "directions," "instructions," "forms," "requirements," "restrictions," "conditions," "limitations," "by-laws." Not unfrequently a thing is required by the statute to be done in such manner, etc., as a head of a Department, etc., "may prescribe." The "Regulations for the Government of the Revenue Cutter Service of the United States," issued by the Secretary of the Treasury, April 4, 1894, and resting on no authority more express than is found in the terms of Secs. 2758 and 2762 placing this corps (consisting of the officers and crews of thirty-six vessels) under the general direction of the Secretary, is a striking illustration of the discretion exercised by heads of Departments in making regulations as to matters of detail.

The point may be noted here that regulations duly framed under a statute may sometimes well be referred to as a practical interpretation of the statute itself. See U. S. *v.* Cottingham, 1 Rob., (Va.,) 635.

[6] "All the law of the United States is not specifically expressed in statutory enactments. Many powers are necessarily inherent in the various departments of the government without which the government could not perform functions necessary to its existence. The exercise of such powers is nevertheless in pursuance of the laws of the United States." *In re* Neagle, 39 Fed., 834.

[7] "When statutes confer powers, impose duties, and provide for the accomplishment of various objects, they are necessarily couched in general terms, but they carry with them, by implication, all the powers, duties and exemptions necessary to accomplish the objects thereby sought to be attained." *In re* Neagle, *ante.*

[8] A recent instance of Army regulations instituted for the purpose of executing the intent of a statute in which no authority for regulations is conveyed in terms, is that of the regulations published in G. O. 55 of 1885, for effectuating the provisions of the Act of Feb. 14, 1885, entitling enlisted men to be placed upon the retired list.

taken that the regulations shall not partake of the nature of legislation. This inherent authority of the Executive—the President, or head of a Department acting for and representing him—has been repeatedly noticed and affirmed by the authorities.[9]

## II. Regulations for the Army.

**THEIR ORIGINAL SOURCE AND AUTHORITY.** The authority for army regulations proper is to be sought—primarily—in the distinctive functions of the President as Commander-in-chief and as Executive. His function as Commander-in-chief authorizes him to issue, personally or through his military subordinates,[10] such orders and directions as are necessary and proper to ensure order and discipline in the army. His function as Executive empowers him, personally or through the Secretary of War,[11] to prescribe rules, where requisite, for the due execution of the statutes relating to the military establishment. The *former* description of regulations scarcely differ from some of the Orders which remain to be separately noticed except in that they are of a more permanent character. Often indeed originally initiated as *orders* merely, they have become regulations by being incorporated as such in the authorized publications.[12] Those of the *latter* species are more strictly "regulations," being especially within the description of rules "in aid or complement of statutes."[13]

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From these two sources is derived an original and sufficient authority for Army Regulations in general, no authority or sanction on the part of Congress being required. Congress, however, has repeatedly conferred such authority in express terms where *general* regulations for the Army were to be issued, and has sometimes also reserved to itself a right of approval or supervision of the same when made. For *special* regulations also it has frequently given an express authority.

**REGULATIONS AS AUTHORIZED OR AFFECTED BY LEGISLATION—THE SUCCESSIVE PUBLICATIONS OF REGULATIONS.** The action of Congress on the subject of general army regulations, subse-

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[9] "Of course Congress cannot constitutionally delegate to the President legislative powers; but it may in conferring powers constitutionally exercisable by him, prescribe, or omit prescribing, special rules of their administration, or may specially authorize him to make the rules. When Congress neither prescribes them, nor expressly authorizes him to make them, he has the authority, inherent in the powers conferred, of making regulations necessarily incidental to their exercise, and of choosing between legitimate alternative modes of their exercise." McCall's Case, 2 Philad., 269. And see Wayman *v.* Southard, 10 Wheaton, 42, 43; U. S. *v.* Macdaniel, 7 Peters, 2; U. S. *v.* Bailey, 9 Id., 238; Lockington *v.* Smith, 1 Peters, C. C., 471; Boody *v.* U. S., 1 W. & M., 164; *In re* Spangler, 11 Mich., 298; *In re* Griner, 16 Wis., 423; Antrim's Case, 5 Philad., 287; Allen *v.* Colby, 47 N. H., 544; Cooley, Prins. Const. Law, 44; 1 Opins. At. Gen., 478; 2 Id., 225, 243–5, 421; 4 Id., 225, 227; 6 Id., 365.

[10] That military commanders, in giving legal orders, represent the Commander-in-chief, the President, see Clark *v.* Dick, 1 Dillon, 8; Lockington's Case, Brightly, 289; O'Brien, 30.

[11] That army regulations duly issued by the Secretary of War are in law the acts and regulations of the President as Executive or Commander-in-chief, see U. S. *v.* Eliason, 16 Peters, 301; Do. *v.* Webster, Davels, 59; Do. *v.* Freeman, 1 Wood & Minot, 50–1; Lockington's Case, Brightly, 288; McCall's Case, 5 Philad., 269; *In re* Spangler, 11 Mich., 322; Cooley's note to 2 Story, Const. Law, 314; Flanders, Expos. of Const., 169; 5 Opins. At. Gen., 39.

[12] See Maddux *v.* U. S., 20 Ct. Cl., 198.

[13] 8 Opins. At. Gen., 343; In the matter of Smith, 23 Ct. Cl., 460.

22 quently to the adoption of the Constitution,[14] may be said to have commenced with the Act of March 3, 1813, c. 52, s. 5,[15] in which the Secretary of War was authorized and required "*to prepare general regulations better defining and prescribing the respective duties and powers of the several officers in the adjutant general, inspector general, quartermaster general, and commissary of ordnance departments, of the topographical engineers, of the aids of generals, and generally of the general and regimental staff; which regulations,*"—it was added—"*when approved by the President of the United States, shall be respected and obeyed until altered or revoked by the same authority. And the said general regulations, thus prepared and approved, shall be laid before Congress at their next session.*"

Under this statute there was published a brief manual of regulations of some sixty duodecimo pages—the original of the compend now in use—bearing the endorsement: "Approved by the President, War Office, 1st May, 1813." These regulations were laid before Congress on June 7, 1813, but no legislative action was taken upon them.[16]

The next statute[17] of general importance was that of April 24, 1816, c. 69, ("for organizing the general staff," &c.,) by which, in section 9, it was enacted "*that the regulations in force before the reduction of the army,*" (referring to the Act of March 3, 1815, "fixing the military peace establishment," after the war with Great Britain,) "*be recognized, as far as the same shall be found applicable to the service, subject however to such alterations as the Secretary of War may adopt with the approbation of the President.*"[18]

In view of the authority thus given for additions and amendments, there was published a second and more extended set of regulations, (embrac-
23 ing amplified regulations for the ordnance corps,) dated "September, 1816." These were published with additions in 1817 and 1820; and on March 2, 1821, in section 14 or chapter 13 of the Acts of that year, a revision by Gen. Scott, of the existing regulations, received the formal sanction of Congress by enactment as follows:—"*that the system of 'general regulations for the army,' compiled by Major General Scott, shall be, and the same is, hereby approved, and adopted for the government of the army of the United States, and of the militia when in the service of the United States.*" In the next year,

[14] Prior to the adoption of the Constitution, Congress, (which then constituted the government), provided from time to time for regulations for the army, principally for the government of the staff corps. In some cases the Board of War, then consisting of civilians, was directed to make regulations. (2 Journals of Congress, 432, 520; 3 Id., 328.) In others, chiefs of the different corps were so authorized; as the Quartermaster General, for certain classes of his employees (Id., 126; 3 Id., 253, 496); the Inspector General, (3 Id., 203, 523, 525;) the Director of Military Hospitals, (Id., 527;) and the Medical Board, (Id., 705.) The Secretary of War, after one was appointed by Congress, was, in addition to his general duties, required to "regulate," or "direct," as to certain special subjects—as the making of payments and returns and keeping of accounts by regimental paymasters, (4 Journals, 7,) the making and transmitting of returns by officers generally, (Id., 9,) and the duties of the commissary general of prisoners. (Id.) On March 29, 1779, Major General (Baron) Steuben's "System of Regulations for the Infantry of the United States," a work consisting mainly of tactics and instructions for field service, was adopted and ordered to be observed in the Army. (3 Id., 237.) As to the publications of these and other early regulations and orders, see further in Gen. J. B. Fry's Pamphlet on "The Different Editions of Army Regulations," New York, April 10, 1876.

[15] For *prior* legislation of inferior and temporary importance the student is referred to the Acts of May 9, 1794, c. 24, s. 5; March 2, 1799, c. 27, s. 5; Jan. 2, 1812, c. 11, s. 1; July 6, 1812, c. 128; March 3, 1813, c. 48, s. 5. The provision of March 19, 1802, relating to Regulations for the Military Academy, will be hereafter separately noticed.

[16] Annals of Congress for 1813, pp. 23, 144.

[17] The intermediate Act of Feb. 8, 1815, c. 38, s. 4, 10, provided specially for regulations for the ordnance department.

[18] In s. 7 of this Act it was further provided "*that the manner of issuing and accounting for clothing shall be established in the general regulations of the War Department.*"

however, (1822,) by Act of May 7th, c. 88, the section of 1821 was expressly "repealed;"[19] the grounds for this action mainly being that the regulations as adopted operated with injustice in the provision authorizing the transfer of officers, and also in that relating to brevet rank. Neither of these provisions has, to the present time been repeated in the regulations of the army.

The regulations approved in 1821 were first published to the army in "July, 1821," when they were prefaced by an order of the Secretary of War, which recited that they had been approved by Congress, with the exception of fourteen, (indicated by their numbers,) which had "received the sanction of the President." These regulations, notwithstanding the legislation of 1822, continued to be observed till March 1, 1825,[20] when an enlarged edition was published to the army. This, with some modifications, remained in force till September 1, 1835, at which date a revision by Major General Macomb was printed by authority of the War Department, which was re-issued with amendments on December 31, 1836. Further on, January 25, 1841, May 1, 1847, January 1, 1857, and August 10, 1861, successive revisions, containing additions and variations were promulgated; each publication exhibiting an introductory announcement to the effect that the regulations thus revised had been approved
24 by the President and were by his command published "for the information and government of the military service," to be from their date "strictly observed as the sole and standing authority upon the matter therein contained." And it is added, in the more recent issues, "nothing contrary to the tenor of these regulations will be enjoined in any part of the forces of the United States by any commander whatever." The revision of 1861 was republished as of June 25, 1863, and this last edition remained in use during the latter portion of the late war and subsequently till the year 1881.

Until the year 1866, the enactments of 1813 and 1816 continued to constitute the main legislative authority and sanction for the making and amending[21] of

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[19] Annals of Congress for 1822, pp. 1730–1734, 1753–1758, 1868. And see Gen. Fry's Pamphlet, (above cited,) p. 4.

[20] They were so observed because of the previous sanction of the President, (under the Act of 1816,) which sanction was held by Atty. Gen. Wirt to have given them an efficacy not affected by the legislation of 1822. 1 Opins., 547. And see G. O., War Dept., May 22, 1822, in which, in stating the fact of the repeal of the provision of 1821 by that of 1822, it is announced that—"the General Regulations for the Army" thus "rest solely on the sanction of the President. The said Regulations are, therefore, continued in force by his authority in all cases where they do not conflict with positive legislation."

[21] The power to amend the existing regulations, as conveyed by the Act of 1816, was repeatedly recognized by the authorities during this interval. Thus Atty.-Gen. Wirt in an opinion addressed to the Secretary of War in 1821, observes:—"I have no doubt that the Secretary may, with the approbation of the President, alter at pleasure the existing regulations, * * * even although such alteration should go to an entire change of the present system; provided that such regulations, as proposed to be altered, be consistent with the Constitution and laws of the United States." 1 Opins., 470. And see, to a similar effect, 1 Id., 549; 3 Id., 85. Later, Atty.-Gen. Cushing, referring to the enactment of 1816 as a "permanent provision" for army regulations, remarks that—"under this authority it is that the subsisting" (1853) "regulations for the army have legal effect." 6 Opins., 15. That the Act of 1816 authorized the Executive to alter at discretion the regulations recognized by it as in force, is also held by a United States Court in U. S. *v.* Maurice, 2 Brock., 105. And compare, as to the authority to alter the regulations for the *Navy*, given by the Act of July 14, 1862 (Sec. 1547, R. S.), the opinion of Atty.-Gen. Bates in 10 Opins., 416.

It may be noted that the army regulations during this interval received indirect sanction from repeated statutes referring to them in general terms as the "existing regulations," or referring to the particular regulations relating to a certain subject, as transportation, forage, clothing, extra pay, etc., and also from a series of appropriation Acts in which appropriation was made for the "printing" of the same. In Maddux *v.* U. S., 20 Ct. Cl., 198, the Court say:—"When Congress permit regulations to be formulated and published and carried into effect year after year, the legislative ratification must be implied."

general army regulations; these enactments indeed being from time to time supplemented by special statutory provisions relating to particular branches of the service.[22]

25 **Later Legislation.** In 1886, by the Act of July 28th, c. 299, "fixing the military peace establishment" at the end of the war, the Secretary of War was "*directed to have prepared, and to report to Congress, at its next session, a code of regulations for the government of the army and of the militia in actual service, which shall embrace all necessary orders and forms of a general character for the performance of all duties incumbent on officers and men in the military service, including rules for the government of courts-martial. The existing regulations to remain in force until Congress shall have acted on said report.*" Here the general regulations in use in the army were, as a whole, for the first time since 1821, formally approved and recognized by Congress, and, for the first time since 1816, (when however *new* regulations were authorized only as "alterations" of those existing,) provision was made for a new issue. No regulations, however, were reported to Congress under this Act, or till after the passage of the Act next to be mentioned.

Later, in 1870,[23] by s. 20, c. 294, Act of July 15, the legislation of 1866 was, so far as regards the provision for new regulations, substantially superseded by an enactment—"*that the Secretary of War shall prepare a system of general regulations for the administration of the affairs of the army, which, when approved by Congress, shall be in force and obeyed until altered or revoked by the same authority; and said regulations shall be reported to Congress at its next session.*" In compliance with this statute, a complete set of army regulations was reported to Congress by the Secretary of War, on February 17, 1873.[24]

No determinate action, however, was taken upon these regulations
26 by Congress; but, in 1875, by Act of March 1, c. 115, (still in force,) the requirement of the section of 1870, that the regulations be reported to and approved by Congress, was "repealed," and the President was specifically "*authorized under said section to make and publish regulations for the government of the army in accordance with existing laws.*" Here Congress relinquished the right, which it had repeatedly reserved in previous statutes, of ratifying, or at least supervising, the regulations, and surrendered to the Executive the fullest control over the subject. For not only is the President hereby empowered to make regulations without restriction as to form, quantity or quality, but also without limitation as to time. He thus has the power to re-make and alter, in the future[25]—a power expressly given by the Act of 1816 and exercised thereunder till 1866, divested apparently by the legislation

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[22] Many of these provisions are given in the First Edition, p. 24, note. It is not thought worth while to reproduce them here.

Of the special regulations of this period the most extended and important were those which proceeded from the Provost Marshal General's Bureau, with the approval of the Secretary of War, under the Act of 1863 above cited. A set of these, first issued on April 21, 1863, was revised and republished with additions on May 1, 1864, and again on Sept. 1, 1864.

The Act of March 3, 1851, c. 25, s. 2, 9, providing for regulations for the Military Asylum, (now Soldiers' Home,) not noted above, will be referred to hereafter.

[23] Meanwhile special regulations relating to military subjects were authorized by several statutes of which the following are still in force:—Act of July 28, 1866, c. 299, s. 17, (Rev. Sts., Sec. 1180, as to hospital stewards;) J. R. of May 4, 1870, (Id., Sec. 1225, as to issue of arms, &c., for colleges;) Act of June 17, 1870, c. 132, s. 1, (Id., Sec 4787, as to artificial limbs, &c., for disabled soldiers.)

[24] These regulations are printed in Report, No. 85, Ho. of Reps., 42d Cong., 3d Sess.

[25] In U. S. *v.* Eliason, 16 Peters, 301–2, the Supreme Court, referring to the general power of the Executive to establish regulations for the government of the army, say:—"The power to establish implies, necessarily, the power to modify or repeal, or to create anew." And see 3 Opins., 63; 5 Id., 41.

of the latter year,[26] reserved to Congress by the Act of 1870, but now fully restored.

In the next year, (1876,) however, by a Joint Resolution of August 15, Congress "requested" the President "*to postpone all action in connection with the publication of said regulations until after the report*" of the Commission on the reform and reorganization of the army, created by Act of July 24, 1876, was "*received and acted upon by Congress at its next session.*"

Upon the "report" here indicated no final action was ever taken, and the said Commission was, after March 4, 1879, discontinued. Thereupon, by Act of June 23d of that year,[27] the Secretary of War was "*authorized and directed to cause all the regulations of the army and general orders now in force*
27 *to be codified and published to the army, and to defray the expenses thereof out of the contingent fund of the army.*"

**The present Army Regulations.** Upon this legislation, which was in effect an appropriation for the expense of carrying out the enactment of 1875, a compilation of regulations and general orders, in force February 17, 1881, was made and published to the army by the Secretary of War as of that date. The authority to *modify* began soon to be resorted to, and was presently most freely exercised. The result was a multitude of amendments, additions and revocations, announced in successive General Orders.[28]

These modifications became in a few years so numerous and confusing as to make necessary a further revision. This revision, published February 9, 1889, constitutes (with the amendments since made, for the modifying practice still goes on[29]) the existing Regulations for the Army upon the subjects embraced. They have been repeatedly impliedly sanctioned in Acts of Congress since that date.[30]

**Legal Effect and Force of Army Regulations.** We have seen that Congress, in the existing law, no longer reserves to itself the function of approving the army regulations, or makes its approval of the same a condition to their taking effect, but that, under the Act of 1875 above cited, the President is vested with a general and exclusive authority to make and publish regulations for the army. As has heretofore been remarked, he may, in the due execution of the laws for the government of the army, make needful and proper regulations without any legislative authority whatever, similarly as he may give orders as commander-in-chief. A statutory authority for general army regulations is indeed mainly useful and significant as a justification of such expenses
28 as it may be necessary from time to time to incur in the publication of the regulations, since it implies that the requisite appropriation for the same will be made by Congress.

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[26] See 14 Opins., 173. The view, however, expressed by the Atty. Gen., in his opinion, as to amendments, was not followed by the Secretary of War; repeated amendments being made and published in Orders between 1866 and 1875.

[27] Meanwhile—since 1870—had intervened the Act of Aug. 15, 1876, c. 300, authorizing regulations as to the furnishing of artificial limbs in certain cases, and the Acts of March 3, 1873, c. 249, s. 2, and April 10, 1878, c. 58, to be hereafter referred to, providing for regulations for the Military Prison and for the preparation, &c., of bids for contracts.

[28] These Orders were about three hundred and fifty in number. Many of them contained amendments of more than one, often of several, regulations. Certain regulations were amended not once but several times in successive Orders.

[29] Some two hundred Orders have since been issued, publishing modifications of these regulations.

[30] Mostly in the Army Appropriation Acts. See 25 Stats. at Large, 968; 26 Do., 154, 399, 777, 820, 874; 27 Do., 181, 484.

[October 1, 1895. It is understood that a *new* set of Army Regulations is in preparation and soon to be published.]

But, whether or not resting upon any express authority of statute, the *legal effect* of army regulations—as of other regulations proper—is, as already indicated, simply that of executive, administrative, instrumental rules and directions as distinguished from statutory enactment.[31] It is indeed somewhat loosely said of the army regulations by some of the authorities[32] that they have "the force of law," but this expression is well explained by the court in U. S. *v.* Webster,[33] as follows:—"When it is said that they have the force of law, nothing more is meant than that they have that virtue when they are consistent with the laws established by the Legislature." That is to say, while they have a legal force, it is a force quite distinct from, and inferior and subordinate to, that of the statute law. They have the force of law within their proper scope, not beyond it.[34] They are thus not law in the sense of being a part of the "law of the land," nor are they embraced in the designation, "laws of the United States," but are law, and operative, *as regulations* only. As such they are law to the army and those whom they may concern, and so far are binding and conclusive.[35] While regulations, "intended for the government and direction" of officers and agents under his authority, would not legally restrain, in the exercise of his executive powers, the *President*,
29 or the head of the Department by whom the same were made,[36] yet the President, as well as any other executive official, would be so far bound by general regulations framed by him that he could not justly except from their operation a particular case to which they applied.[37] Regulations are also recognized as conclusive upon the courts in cases to which they apply;[38] and when made in and for one department of the government, they are conclusive upon any other department in which, in the settlement of accounts or claims, or otherwise, they are found to be pertinent to the subject.[39]

The binding force and application to the army of the army regulations is illustrated by the fact that a failure to observe a regulation may constitute a military offence cognizable by court-martial under the 62d Art. of War.[40] On

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[31] 4 Opins. At. Gen., 62; 8 Id., 343.

[32] Gratiot *v.* U. S., 4 Howard, 117; *Ex parte* Reed, 100 U. S., 13; U. S. *v.* Eaton, 144 U. S., 688; Symonds *v.* U. S., 21 Ct. Cl., 151; In the matter of Smith, 23 Ct. Cl., 459; Smith *v.* U. S., 24 Ct. Cl., 215; 14 Opins. At. Gen., 173.

[33] Davies, (2 Ware,) 54. And see Wilson *v.* U. S., 26 Ct. Cl., 186. In McNamara *v.* U. S., 28 Ct. Cl., 420–1, the Court, referring generally to the Regulations between 1857 and 1890, say: "Those Army Regulations, having been approved by Congress, are recognized as having the force of law." [As to the approval or sanction of the Regulations of 1889, see *ante*, p. 31.]

[34] See U. S. *v.* Eaton, 144 U. S., 688.

[35] See 2 Opins. At Gen., 520, 580; O'Brien, 31; U. S. *v.* Freeman, 3 Howard, 567; U. S. *v.* Morrison, 96 U. S., 233; also Arthur *v.* U. S., 16 Ct. Cl., 422, where it was held that a contract made by the Surgeon General with an acting assistant surgeon for a compensation in excess of that fixed by the army regulations did not bind the United States. And compare Camp. *v.* U. S., 113, U. S., 648.

[36] Smith *v.* U. S., 24 Ct. Cl., 215. And see U. S. *v.* Burns, 12 Wallace, 246; Byrne *v.* U. S., 23 Ct. Cl., 255.

[37] Arthur *v.* U. S., 16 Ct. Cl., 422; 10 Opins. At. Gen., 17.

[38] Lockington's case, Brightly, 269; Maddux *v.* U. S., 20 Ct. Cl., 193; Hughes *v.* Oaks, 59 Pa. St., 52. In the latter case, (p. 42,) the court, in reference to the authority devolved upon the Secretary of the Treasury by the Acts of July 13, 1861, and May 20, 1862, to prescribe regulations in regard to commercial intercourse pending the late war, observe:—"A sound discretion is vested in him, and it being of a governmental character, it is not liable to our revision or reversal." But see *post* as to the action of the courts where regulations are not *equitable*.

[39] 5 Opins. At. Gen., 39–40; U. S. *v.* Freeman, 3 Howard, 567.

[40] DIGEST, 70, 168. And see *post*, ch. XXV.—SIXTY-SECOND ARTICLE.

the other hand, officers and soldiers, in complying with an authorized regulation, will be justified in law and protected by the courts.[41]

### III. Principles Governing Regulations.

But, to have legal force and effect, the regulations must conform to certain principles, as follows:[42]

1. **They must not contravene existing law.** Regulations proper being subordinate to statutory and constitutional law, it is clear that an executive regulation may not conflict with or contravene either the Constitution or the provisions of an Act of Congress, and that, where it does so, it is, so far, of no effect.[43] So, if Congress by express legislation should cover the ground previously occupied by such a regulation, the latter would be displaced and become inoperative, the higher law being paramount.[44]

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It is in recognition of this principle that, in statutes authorizing or directing the making of regulations, it is not unfrequently prescribed in express terms that the same shall not be inconsistent with, or contrary or repugnant to, the laws, or the Constitution and laws, of the United States, or in words of like import.[45] But such a provision is of course surplusage, a condition to this effect being always implied.

2. **They must not legislate.**[46] Regulations must confine themselves within their appropriate province—must not trench upon that of legislation. A regulation which assumes to prescribe in regard to a matter which is properly a subject for original legislation, departs from "the range of purely executive or administrative action,"[47] is in a just sense a regulation no longer, and can have no legal effect as such. The leading case illustrative of this

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[41] Gates *v.* Thatcher, 11 Min., 204. Note the Act of Dec. 17, 1813, c. 1, in regard to the laying of an embargo, in which (s. 11,) it is provided that a collector sued for exercising certain powers under the statute, "may give this Act and the *instructions and regulations of the President* in evidence for his justification and defence."

[42] Should army regulations in the future materially fail to conform to the principles stated, they may invite from Congress action similar to that taken in 1822. See *ante*.

[43] In U. S. *v.* Symonds, 120 U. S., 49, a naval case, it is said by the Supreme Court—"the authority of the Secretary" (of the Navy) "to issue orders, regulations and instructions, with the approval of the President, in reference to matters connected with the naval establishment, is subject to the condition, necessarily implied, that they must be consistent with the statutes which have been enacted by Congress in reference to the navy. He may, with the approval of the President, establish regulations in execution of, or supplementary to, but not in conflict with, the statutes defining his powers or conferring rights upon others. And see S. C. in 21 Ct. Cl., 148; U. S. *v.* Webster, Daveis, (2 Ware,) 54; Boody *v.* U. S., 1 Wood. & Minot, 164; McCall's Case, 5 Philad., 259; *In re* Spangler, 11 Mich., 298; Magruder *v.* U. S., Devereux, 148; Harvey *v.* U. S., 3 Ct. Cl., 41; Morrison *v.* U. S., 13 Ct. Cl., 2; Romero *v.* U. S., 24 Ct. Cl., 331; Crenshaw *v.* U. S., 134 U. S., 109; 1 Opins. At. Gen., 470; 2 Id., 57–8, 232; 5 Id., 62; 6 Id., 10, 215, 365; 11 Id., 254; 13 Id., 516; O'Brien, 31. In a recent Order, G. O. 111, Hdqrs. Army, 1882, a certain regulation is "annulled" as being "in conflict with" a provision of the Rev. Sts.

[44] 2 Opins. At. Gen., 232. And see McCall's Case, 269, 273.

[45] See, for example, Rev. Sts., Secs. 1752, 2058, 2651, 2949, 2989, 3001, 3003, 3057, 3215, 4825, Acts of June 20, 1874, c. 344, s. 8; March 3, 1875, c. 136, s. 3; June 16, 1880, c. 253, 4; June 19, 1882, c. 231, s. 1. The Act of March 1, 1875, authorizing the issue of the present army regulations, requires that they shall be "in accordance with existing laws." In Rev. Sts., Sec. 2086, it is specified that certain regulations authorized shall be "not inconsistent with treaty stipulations," (with Indians.)

[46] 4 *In re* Griner, 16 Wis., 447.

[47] 6 Opins. At. Gen., 15. In Magruder *v.* U. S., Devereux, 148, the Court of Claims, referring to regulations, observe—"It is the duty of the Departments to administer the law, and not to make it."

principle is that of the regulations for the navy, entitled a "System of Orders and Instructions," issued by the President in 1853, and which were condemned by Attorney General Cushing as being mainly of a "legislative quality," and in derogation of the constitutional powers of Congress, and therefore unauthorized and inoperative.[48] Similar views have been expressed by the authorities in other cases of a similar nature;[49] and it can scarcely be questioned that an army regulation which should assume to impose a condition upon the enjoyment of a statutory right or the exercise of a statutory authority, to vest or divest rights to pay[50] or rank, to restrict or extend the jurisdiction of a court-martial or otherwise administer justice,[51] to dispose of public property, to direct as to what persons should or should not be enlisted in the army,[52] to prescribe rules of evidence, or to regulate any other subject usually and properly regulated by the legislative department under the powers conferred upon Congress by the Constitution—would be *ultra vires* and unauthorized.

Whether indeed a regulation does or does not partake of the character of legislation may sometimes be an embarrassing question. It has been remarked by Attorney General Cushing that "cases may be supposed in which it is not easy to draw the line between what is legislative and what is executive and ministerial."[53] And Chief Justice Marshall, in expressing himself to a similar effect, has added that "the precise boundary of this power," (that of
32 making executive regulations,) "is a subject of delicate and difficult inquiry."[54]

**3. They must confine themselves to their subject.** This principle is especially apposite to regulations authorized or directed by special statute to be made with regard to some particular subject: when made, they must be within the specific authority conferred, or (unless authorized under the general executive function), they cease to be operative. The application of this principle has been variously illustrated by the authorities.[55] In some cases a statute, in authorizing regulations, has expressly provided that the same shall conform to, or not contravene or be incompatible with, the provisions of the Act itself which is the source of the authority.

As to the *extent* of the authority conveyed by the statute—this, where indefinite, is to be gathered not so much from the descriptive words employed as from the *nature of the subject* to which the regulations are to apply. To the use in a statute of the words "general," "special," "general and special," "necessary," "proper," "suitable," &c., in designating the regulations to be prepared, little or no significance is ordinarily to be attached, such terms being

[48] 6 Opins. At. Gen., 10–19.

[49] 10 Opins. At. Gen., 11–18, 413–4; 4 Id., 226; *In re* Griner, 16 Wis., 433-4; McCall's Case, 5 Philad., 269.

[50] See Symonds *v.* U. S., 21 Ct. Cl., 152, 154.

[51] That a regulation alone cannot make an act or omission a criminal offence, but that for this a statutory requirement is essential—see U. S. *v.* Eaton, 144 U. S., 688.

[52] See THIRD ARTICLE—"Enlistment in general," Chapter XXV.

[53] 6 Opins. At. Gen., 15. Similarly Atty. Gen. Legaré, (4 Opins., 59,) refers to the authority "often delegated to the Courts to adopt rules of practice" as "in some cases falling little short of legislative power."

[54] Wayman *v.* Southard, 10 Wheaton, 43, 46. And to a similar effect, see *In re* Oliver, 17 Wis., 681; Cooley, Prins. Const. Law, 44.

[55] See Aldridge *v.* Williams, 3 Howard, 29; Allen *v.* Colby, 47 N. H., 544; Antrim's Case, 5 Philad., 285; McCall's Case, Id., 259; Newman *v.* Wright, 28 Ind., 105; 5 Opins. At. Gen., 39–40, 62; 10 Id., 476–479. And compare In the matter of Ferrens, 3 Benedict, 442, where it was held that the "regulations for the government of the army" referred to in the Act of July 28, 1866, s. 37, applied only to persons actually in the army, and not to persons *to be* enlisted.

indeed surplusage.[56] So, no materially different import, in respect to the degree of the authority, is in general to be ascribed to the words "authorized" and "required," or their synonyms. Nor is the scope of the authority necessarily to be deemed to be essentially affected by the character or dignity of the official in whom it is vested. But where the regulations are to pertain to an
33 extended and unusually important subject, as where they are to carry into effect an entire statute of many or varied provisions; where they are to adjust the details of a ramified and comprehensive system; where high public considerations enter into the execution of the Act under which they are to be established;—in cases such as these the authority must needs be larger and more liberally construable than where the subject of a single provision, or a subject of a limited range or consequence, is to be regulated.[57] The widest discretion in the framing of regulations may, it is conceived, properly be taken by the Executive in a case where the enactment conveying the authority has been prompted by the necessities of a grave public emergency, and especially on existing or impending state of war.[58]

**4. They must be uniform.** The further minor principle has also been noticed by the authorities that regulations must be "*uniform*," that is to say in their application;—that they must apply equally and alike to all the persons or subjects of the class to which they relate. In this view, Attorney General Legaré, in advising the Secretary of the Treasury as to certain regulations to be issued by him under the revenue laws, observes—"I need scarcely add that your regulations must be uniform throughout the Union."[59] So the Supreme Court, in an adjudged case,[60] remark, of army regulations, that they "must be uniform and applicable to all officers under the same circumstances." In a few instances the public statutes, in providing for regulations, have specially required that they be "uniform."[61]

**5. They should be equitable.** It need scarcely be added that regulations should be just and equitable—that they should not be arbitrary or op-
34 pressive.[62] As already noticed, a regulation cannot deprive a person of a legal right,[63] and where a regulation is found to work an injustice in any material matter, as in the settlement of an officer's accounts, it will be disregarded by the courts.[64]

**OBJECTIONABLE FEATURES OF ARMY REGULATIONS.** To the student, as well as in practice, army regulations are the most unsatisfactory element of our written military law. Presented in connection with statutes from which they are sometimes imperfectly discriminated; not unfrequently themselves partaking of the character of legislation and thus of doubtful validity;[65]

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[56] In Gates *v.* Thatcher, 11 Minn., 204, the court in construing a provision of an Act of Feb. 24, 1864, providing for the furnishing by a drafted person of a substitute, "subject to such rules and regulations as may be prescribed by the Secretary of War," remark: "Clearly, we think, by this provision, the Secretary of War may prescribe any regulations *necessary or reasonable* to protect either the government, the substitute, or the principal."

[57] See The Thomas Gibbons, 8 Cranch, 428–9; Lockington *v.* Smith, 1 Peters, C. C., 470–473.

[58] Hughes *v.* Oaks, 59 Pa. St., 41, 42.

[59] 4 Opins., 63.

[60] U. S. *v.* Ripley, 7 Peters, 25. And see U. S. *v.* Webster, Daveis, (2 Ware,) 60.

[61] As in the Acts of Aug. 10, 1846, c. 175, s. 2; March 3, 1863, c. 71, s. 27.

[62] "It would be directly repugnant to the character of the power conferred, to suppose that a power to make *rules* was a power to dispense with them altogether, and to substitute in their place caprice or arbitrary discretion." Atty. Gen. Toucey, 5 Opins., 42.

[63] See 4 Opins. At. Gen., 223.

[64] U. S. *v.* Cadwalader, Gilpin, 563. And see U. S. *v.* Mann, 2 Brock. 9, 11.

[65] See instances referred to in DIGEST, "Army Regulations," § 6.

and fatally subject, as we have seen, to constant and repeated modification, their effect too often is to embarrass and mislead where they should assure and facilitate. To render them entirely useful, they should, in the opinion of the author, be reduced to the smallest available bulk; all that are really statutes and all that are of a legislative quality should be eliminated; only those should be included that are purely *general*, those relating to the business of the staff corps being left to be established by the heads of the same, subject to the approval of the President; and the authority to amend should be most rarely exercised.

### IV. Special Sets of Regulations.

Besides the special regulations for certain of the staff departments of the Army—as the Ordnance, Medical Subsistence, &c., departments—which are contained in the General Army Regulations, there are special sets of regulations, in no part embraced therein, which may properly be noticed in this Chapter—as follows:

**1. THE REGULATIONS FOR THE MILITARY ACADEMY.** While the cadets, professors, etc., of the West Point Military Academy, are, as a part of the Army, subject to the Army Regulations, so far as applicable to them,[66] they are also subject to special regulations framed expressly for their government as a separate branch of the military establishment. These regulations, initiated in the authority given by or implied from the Acts of March 16, 1802, c. 9, s. 26–28, and April 29, 1812, c. 72, s. 3, organizing and making provision for the corps of engineers,[67] now consist of a set, of 362 paragraphs, published in 1877, and republished June 1, 1883; this revision having been preceded by various issues, of which the principal were published in 1831, 1853, 1857, 1866 and 1873. Less extended regulations had previously existed in writing and are found in records of the Engineer bureau dated as early as in 1817 and 1818.

The regulations of 1883, with a few amendments since made, constitute the Regulations of the Military Academy.

The authority and binding force of the special regulations for the Academy, and the power of the President to modify and add to the same, have been recognized in the opinions of the Attorneys General.[68]

It need hardly be observed that the principles, heretofore indicated as properly governing the framing of general regulations for the army and their substance, are equally applicable to these special regulations.[69]

**2. REGULATIONS FOR THE MILITARY PRISONS.** The Act of March 3, 1873, c. 249, which provided for the establishment of the Military Prison maintained at Fort Leavenworth, Kansas, required the Secretary of War to organize a Board of direction which, it was added, should "frame regulations for the government of the prisoners in accordance with the provisions of the Act."[70]

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[66] 7 Opins. At. Gen., 328.

[67] The published volume includes also regulations specially authorized or directed, by Secs. 1319 and 1330, Rev. Sts., to be prescribed for the examination of appointees to cadetships, and in regard to the granting of leaves of absence to officers of the Academy.

[68] 1 Opins. At. Gen., 469; 7 Id., 328.

[69] The only portion of these regulations which would appear to be subject to legal criticism is that relating to "Discipline." Some of the paragraphs under this head are in the nature of *articles of war*, and might thus be deemed to trench upon the province of *legislation*.

[70] Rev. Sts., Sec. 1345.

By a recent Act of March 2, 1895, this Prison is "transferred from the Department of War to the Department of Justice, to be known as the United States Penitentiary."

A set of regulations for this purpose was published from the Head-
36 quarters of the Army in G. O. 12 of February 19, 1877, and subsequent amended sets in G. O. 100 of 1883, G. O. 5 of 1888, and G. O. 131 of 1890. These relate to the duties of the officers and employees at the institution and the books and accounts to be kept by them, and further to the admission, classification, diet, clothing, labor and discipline, of the prisoners, the school and library for the same, &c.

For the military prison at Alcatraz Island, California (not established by statute), rules and regulations were adopted and published by an order of the Department Commander, dated August 29, 1873, and revised and republished in August, 1880.

**3. REGULATIONS FOR THE SOLDIERS' HOME AND THE NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS.** As the former of these institutions is placed under military direction, and the inmates of the latter are discharged officers and soldiers, the regulations for the same may properly be noticed here.

**Soldiers' Home.** By the Act of March 3, 1851, c. 25, entitled "an Act to found a Military Asylum," it is provided that certain designated officers of the army "shall be *ex officio* Commissioners of the same," and these Commissioners are further empowered to establish from time to time regulations for the government and direction of the institution, subject to the approval of the Secretary of War.[71]

Under this authority regulations were adopted on March 27 and May 30, 1851, which were revised October 8, 1866. A new set was adopted January 31, 1883, which, however, was replaced by a revised set—that now in force—of April 9, 1883, approved by the Secretary of War, April 17, 1883. These regulations relate to the qualifications for admission to the Home, applications for admission, the rights and privileges of the inmates, and their government, the duties of the officers of the institution, function of the Board of Commissioners, &c.

**Volunteer Home.** By the Act of March 3, 1865, incorporating this institu-
tion, as amended by that of March 21, 1866, the designated Board of
37 managers, who are also the corporation, are authorized "to make by-laws, rules and regulations, for carrying on the business and government of the home, and to affix penalties thereto."[72]

Pursuant to such authority, there was adopted by the Board in 1866 a set of by-laws and regulations, consisting of 23 Articles, and relating mainly to the appointment and duties of the officers of the institution and the admission and disposition of its beneficiaries. In Art. 18, in which the duties of the "Governor" are set forth, it is provided that—"he shall from time to time make printed rules for the government of the employees and inmates of the Institution." Such rules have accordingly been made and published, in the form of General and Special Orders, &c., relating to military organization, discipline, labor, police, inspection, superintendence of shops, farm, &c., creation of a fire company, use and disposition of clothing, issue of quartermaster stores and tobacco, free postage, passes, and a variety of other subjects. The Regulations of the Home were republished, with additions, in 1892.

**4. OTHER SPECIAL REGULATIONS.** Other formulated regulations for purposes of instruction, administration, &c., in the army, have been promulgated from time to time, of which the following are the principal: The "Firing

[71] Rev. Sts., Sec. 4815. Amended, and the Board of Commissioners reconstituted, by Act of March 3, 1883, c. 130.

[72] Rev. Sts., Sec. 4825.

Regulations for Small Arms," adopted in G. O. 1 of 1889; The "Infantry Drill Regulations," adopted October 3, 1891; The "Cavalry Drill Regulations," adopted on the same date;[73] The Regulations for the examination of officers for promotion, published in G. O. 80 of 1891, amended in G. O. 6 of 1893; The Regulations for the examination of enlisted men for promotion to the grade of lieutenant, published in G. O. 79 of 1892; The Regulations in regard to the detail and duties of officers assigned to colleges, last issued in G. O. 93 of 1893; The Regulations accompanying the code of maximum punishments, contained in G. O. 21 of 1891, amended by G. O. 16 of 1895; The Regulations for the government of the Army and Navy General Hospital at Hot Springs, Arkansas, set forth in G. O. 60 of 1892; The "Post Exchange Regulations," published in G. O. 46 of 1895.

## II. Orders.

38 All orders, written or oral, made or given by any competent authority, from the commander-in-chief to an acting corporal, are indeed in a general sense a part of the law military; their observance by inferiors being strictly enjoined and their non-observance made strictly punishable. The orders, however, to which reference is now to be made, are the formal, generally printed, Orders, issued by the highest authority of the Army or of some high command, and preserved as a part of the permanent records of the military establishment.

**ORDERS OF THE PRESIDENT.** As constitutional Commander-in-chief of the Army, and independently of course of any authorization or action of Congress, the President is empowered to issue orders to his command; and the orders duly issued by him in this capacity, while ordinarily of but temporary importance as compared with his general army regulations, are obligatory and binding upon whom they concern, and so properly classed as a portion of the general law military. The validity and force of such orders have been repeatedly recognized by the authorities.[74]

**Their form and contents.** The orders of the President, as commonly issued, are in the form of, and designated as, General and Special Orders; the latter which relate chiefly to individual cases not being, in practice, published to the army at large. Since 1864, the orders announcing the action of the President upon the proceedings of general courts-martial, which before were incorporated with the other General Orders, have been separately issued and numbered under the name of General Court Martial Orders.[75] Both General

39 and Special Orders have formerly for considerable periods emanated, and may still emanate, directly from the Secretary of War, who, in making and publishing the same, as in most of his other official proceedings,[76]

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[73] With these Regulations may be classed the "Army Artillery Tactics," adopted July 17, 1873; the "Manual of Heavy Artillery," (Tidball's,) adopted Dec. 10, 1879; the "Manual of Guard Duty," (Kennon's,) adopted by G. O. 26 of 1890, and similar publications.

[74] See 2 Opins. At. Gen., 225, 228, 232; 5 Id., 15; 10 Id., 14; The Thomas Gibbons, 8 Cranch, 427; U. S. *v.* Freeman, 1 Wood & Minot, 50; Cowell *v.* Hopkinton, 45 N. H., 14; also the Act of Feb. 19, 1873, c. 169.

Congress has, in some instances, expressly directed that certain matters "be published in General Orders." See Acts of June 25, 1864, c. 149, s. 2; July 4, 1864, c. 253, s. 6, 10.

[75] Similar forms and designations are given to the Orders issued from the Headquarters of Military Divisions and Departments, and of Armies in time of war.

[But see, now, G. O. 29 of 1894, directing the resuming of the old form of publication in "*General Orders*," "in cases of officers and in important cases of enlisted men."]

[76] In *all*, except where Congress has, as it may do, invested him with independent powers or devolved upon him independent duties. Kendall *v.* U. S., 12 Peters, 610.

acts as the representative and presumably by the direction of the President;[77] the indication—"by the direction of the President," though not essential,[78] being not unfrequently expressed. Such Orders are now, however, usually promulgated through the Headquarters of the Army; although the provision of the Act of March 2, 1867, *requiring* that "all orders and instructions relating to military operations" should be "issued through the General of the Army," was *repealed* by the Act of July 15, 1870, c. 294, s. 15. The only Orders of this class which are now, in practice, signed by the President are those setting forth his action on sentences of court-martial, of which his confirmation is required by law—as sentences of dismissal of officers. This sign-manual is not, however, necessary even here.[79]

As has heretofore been noticed, the General Orders in force on February 17, 1881, were, by the authority and direction of the Act of June 23, 1879, compiled and published by the Secretary of War in connection with the existing Army Regulations, and printed therewith in the volume issued from the War Department on the date first named: they were thus practically converted into regulations. So the volume of the succeeding and now existing Regulations of 1889 purports to contain "a condensation and revision of all regulations and *standing orders* in force at its date."

The General Orders cover a great variety of particulars connected with
40 the discipline, employment, pay, clothing, subsistence, quartering and transportation of the army, the providing them with animals, arms, munitions, &c. As certain so-called "Regulations" are not properly classed as such, so a considerable proportion of the General Orders are not orders at all but *media* for the promulgation to the army of new legislation of Congress, regulations made or amended, appointments, promotions, etc., of officers, opinions of courts or law-officers, or other matters of information of value to the service. In time of peace indeed the Special Orders, by which direction is more commonly given as to the duties of inferior officers, changes in station, details of general courts, discharges of soldiers, &c., &c., are in a larger proportion orders proper than those designated as General. In connection with the General Orders are from time to time published "Circulars" to the army, the usual purpose of which is not to convey commands but to communicate rulings and decisions of the Secretary of War, and to advise officers, etc., of matters of which they will properly take notice in the course of the performance of their functions and duties.

**ORDERS OF MILITARY COMMANDERS.** Of a similar force and effect to the Orders of the President, though within a narrower range, are the General and General Court Martial Orders, and Special Orders, made and published by the superior military commanders, such as commanders of Divisions and Departments. As to the Orders thus promulgated in their general military capacity, these commanders directly represent, and exercise in a greater or less degree the authority of the Commander-in-Chief.[80] In the Orders in which they act

[77] Parker *v.* U. S., 1 Peters, 297; U. S. *v.* Eliason, 13 Id., 302; U. S. *v.* Freeman, 1 Wood & Minot, 50; Lockington's Case, Brightly, 282; *In re* Spangler, 11 Mich., 313, 322; *In re* Neagle, 39 Fed., 834; Opins. At. Gen., 380; 7 Id., 453; 10 Id., 14; 14 Id., 458.

In some instances during the late war, orders termed "Executive Orders," or "War Orders," were issued directly by the President in his own name, similarly to proclamations. See such orders in Vol. XIII. Stats. at Large, pp. 775–778; G. O., War Dept., of March 11, 1862; Do. 252, 300, 331, of 1863; Do. 35, 100, 308, of 1864.

[78] See 17 Opins. At. Gen., 19, 44; 15 Do., 290.

[79] U. S. *v.* Page, 137 U. S., 673.

[80] See Lockington's Case, Brightly, 289; Clark *v.* Dick, 1 Dillon, 8; Napier, 57, 115.

upon the proceedings and sentences of courts-martial, they exercise an authority expressly conferred upon them by statute, though here too they act practically as substitutes for the Commander-in-chief. The very numerous Orders, especially of the latter character, issued *during the late war*, are a monument to the fidelity to duty and scrupulous regard for justice which have in general characterized our high commanders in war as well as in peace. In the thousands of these Orders published during that period from the headquarters of the various departments, divisions, districts, brigades, armies and army corps, the errors of law discovered have been strikingly few, and the cases
41 in which justice has not clearly been duly administered most rare. To these Orders, as a most valuable part of our military law and history, references will be abundantly made in the course of the following Chapters.

**PRINCIPLES GOVERNING ORDERS.** As in the making of Regulations, so in the framing of Orders, the principles heretofore laid down to the effect that executive acts may not trench upon the province of legislation, or conflict with the existing constitutional or statutory law, are to be strictly observed.[81] Further, Orders should not conflict with established Regulations.[82] And Orders issued by commanders of departments or armies, or other military authorities inferior to the President, may not contravene the orders of the latter as Commander-in-chief.

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[81] 2 Opins. At. Gen., 230–234; 6 Id., 15. In an Act of March 3, 1863, two designated General Orders of the War Department, relating to enlistments, were in express terms "*rescinded*" by Congress.

[82] 2 Opins. At. Gen., 230–234; 10 Id., 17.

# CHAPTER IV.

## THE UNWRITTEN MILITARY LAW.

42 WHILE the Military Law has derived from the Common Law certain of the principles and doctrines illustrated in its code,[1] it has also a *lex non scripta* or unwritten common law of its own. This consists of certain established principles and usages peculiar or pertaining to the military status and service, and which, though unenacted, are recognized in the 84th article of war, under the designation of "the custom of war," as a means for the guiding of courts-martial in the administration of justice in doubtful cases. The same are also recognized by the courts and legal authorities as operative and conclusive as to questions in regard to which the written military law is silent.[2]

This unwritten law may be said to include:—1. The "customs of the service," so called; 2. The unwritten laws and customs of war.

1. **USAGES OR CUSTOMS OF THE SERVICE.** These, whether originating in tradition or in specific orders or rulings, are now, *as such*, not numerous, a large proportion, in obedience to a natural law, having changed their form by becoming merged in written regulations embraced in the General 43 Regulations of the Army.[3] The regulations, for example, on such subjects as discipline, precedence, command, arrests, and the procedure of courts-martial, are in great part but the specific expression of usages of more or less early date, most of which have come to us from the British service.

**As to the procedure of military courts.** Here, however, *usage* still governs as to various important particulars. Thus a reference to usage as furnishing a guide for the judgment of the court upon the FINDING is not unfrequently required to be made on military trials, and especially as apposite to the question whether the facts alleged or proved constitute the military offence charged. For example,—whether an order which the accused is charged to have disobeyed was a "lawful" order; whether the accused is to be considered as having been "on duty" at the time of his alleged offence; whether an officer charged to have been assaulted by a soldier was at the time "in the execution of his office;" whether certain acts amount to "conduct unbecoming an officer or a gentleman," or to "conduct to the prejudice of good

[1] See 1 Opins. At. Gen., 233; 6 Id., 204; Prendergast, 200.

[2] "The general usage of the military service, or what may not unfitly be called the customary military law." Story, J., in Martin *v.* Mott, 12 Wheaton, 35. And see Barwis *v.* Keppel, 2 Wilson, 314; U. S. *v.* Macdaniel, 7 Peters, 14; U. S. *v.* Webster, Davels, (2 Ware,) 42, 43, 56; 1 Opins. At. Gen., 699; 2 Id., 461; 1 Bishop, C. L., § 50; Cooley, Prins. Const. Law, 137; Prendergast, 53; Simmons, § 80; Clode, M. L., 128; O'Brien, 223; De Hart, 20; Kautz, Customs of the Service. For an *express statutory* recognition of "the usages and customs of armies," and "the custom and usage of the sea service," see c. 27, s. 8, and c. 24, s. 11, Acts of March 2, 1799.

[3] Compare U. S. *v.* Webster, Davels, (2 Ware,) 56; O'Brien, 223.

order and military discipline;" in what acts consist the offences of false muster, mutiny, misbehavior before the enemy, breach of arrest, or desertion;—as to such questions, the court in deliberating upon its judgment (as also the commander in passing upon the same), will constantly recur to the general usage of the service as understood and acted upon by military men.

Usage may also be authoritative in connection with the question of the punishment to be imposed by the SENTENCE. The Articles of war and the Regulations indeed specify nearly all the *species* of punishment to which an officer or soldier may be subjected; but to determine in some cases as to the *kind*, and in others as to the *degree*, in amount or duration, of the proposed punishment; to decide whether the same is sanctioned by custom or is "unusual;" as also in some instances to indicate or direct as to the form of the execution of the penalty—the court, (or the reviewing authority,) will not unfrequently have occasion to take into consideration the unwriten law or practice of the service.[4]

44 **2. LAWS OR CUSTOMS OF WAR.** These are the rules and principles, almost wholly unwritten, which regulate the intercourse and acts of individuals during the carrying on of war between hostile nations or peoples. While properly observed by military commanders in the field, they may often also enter into the question of the due administration of justice by military courts in cases of persons charged with offences growing out of the state of war. Such laws and customs would especially be taken into consideration by *military commissions* in passing upon offences in violation of the laws of war. But courts-martial also, in time of war, may have occasion to recur to the same, upon trials of military offences peculiar to a state of war and expressly made cognizable by such courts by the Articles of war—as, for instance, the offences of relieving an enemy (Art. 45), corresponding with or giving intelligence to an enemy (Art. 46), forcing a safeguard (Art. 57), and the offence of the spy.[5] (Sec. 1343, Rev. Sts.) And so, upon trials involving the rights or obligations of prisoners of war. In such cases the unwritten laws and customs of war, as generally understood in our armies or as defined by writers of authority, will often properly be consulted as indicating whether certain acts are to be regarded as constituting the offences charged, or what measure of punishment will be just and adequate in the event of conviction. Certain of these laws and customs will hereafter be referred to in considering particular Articles of war. In the main, however, they pertain to the separate Title of the LAWS OF WAR, the subject of PART II. of this work.

**ESSENTIALS OF A USAGE OR CUSTOM.** As to what constitutes a usage or custom in law,—it is laid down by the authorities that it must consist of a uniform, known practice of long standing, which is also certain and
45 reasonable,[6] and is not in conflict with existing statute or constitutional

[4] Less frequently now indeed, in view of the enactment of the statute of Sept. 27, 1890, c. 998, authorizing the President to prescribe *maximum* punishments—since prescribed by him in G. O. 21 of 1891, (amended by G. O. 16 of 1895.)

[5] The original Article of War of 1806, in regard to spies, provided that, on conviction, they should "suffer death according to the law and usages of nations."

[6] U. S. *v.* Duval, Gilpin, 356; Collings *v.* Hope, 3 Washington, 149; U. S. *v.* Buchanan, 8 Howard, 102; Knights of Pythias' Case, 3 Brewst., 452; Minis. *v.* Nelson, 43 Fed., 777; 2 Greenl. Ev., § 251; 2 Parsons, Con., 48; Lawson on Usages and Customs, 2–15. It must be so long-continued and notorious that all persons concerned may be presumed to have knowledge of it. Wadley *v.* Davis., 59 Barb., 503; Saint *v.* Smith, 1 Cold., 51.

provisions.[7] A civil custom cannot set aside or modify the statute law,[8] or subsist in regard to any matter regulated by such law.[9] Moreover a prevailing usage is superseded when an enactment is made covering the subject: a usage can grow up or continue only in reference to a subject upon which the written law is silent or quite obscure. So, a usage or custom of war or of the military service, to be recognized and acted upon as such by a military court or commander, must have prevailed without variation for a long period, must be well defined, equitable, and uniform in its application, must not be prejudicial to military discipline, and must not only not be at variance with the statute or written law relating to the army but must pertain to a subject not
46 provided for by such law.[10] A ministerial officer (as it has been observed by a U. S. Court)[11] cannot institute a usage, but the same must be built up out of a series of precedents;[12] so, a custom of the service cannot be created by isolated or occasional instances,[13] or by the practice of a particular command or commander,[14] but must be a usage of the army at large or of some separate or distinct branch of the military establishment, as, for example, the Military Academy and Post of West Point. An illegal or unauthorized practice, however frequent or long continued, cannot constitute a legal usage.

**CUSTOM OF THE SERVICE AS A DEFENCE.** It will be apparent from the foregoing that an alleged military usage cannot avail an officer or soldier charged with a military offence, to vindicate his act, except where its existence and its lawfulness are susceptible of exact proof. "Custom of the service"—

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[7] Thompson *v.* Riggs, 5 Wallace, 680; The Floyd Acceptances, 7 Id., 677. "No erroneous practice of however long standing can justify the allowance of a claim" against "the true intent and meaning" of a statute. U. S. *v.* Freeman, 3 Howard, 564. Usage "arises from long recognized rights countervened by no legislative action." Miller *v.* McQuerry, 5 McLean, 472. And see authorities cited in preceding note; also G. C. M. O. 86, Dept. of Dakota, 1892.

[8] 6 Opins. At. Gen., 73. But though usage cannot alter the statute law, it may be evidence of the construction given to it. U. S. *v.* Gilmore, 8 Wallace, 330; 2 Opins. At. Gen., 460; 3 Id., 363. It may also be evidence of the intent or purport of a regulation. 2 Id., 560, 705; 8 Id., 5. This is especially true of the usages of the executive departments of the government. U. S. *v.* Gilmore; U. S. *v.* Lytle, 5 McLean, 17; U. S. *v.* Maurice, 2 Brock, 100.

[9] "Generally, a statutory enactment controls all prior usages and laws, and establishes the rule which governs the subject-matter." U. S. *v.* Collier, 3 Blatchford, 332.

[10] "In order to apply it" (the custom of war) "to any particular case, it must be certain and well defined, and clearly not opposed to any law or regulation." De Hart, 20. There can be "no excuse for a practice which, with whatever good intentions, is forbid by law." G. O. 1, War Dept., 1861. "Customs of service can only be taken as precedents to follow, when intrinsically proper of themselves, and supplementary of the written law and regulations, on points on which the latter are silent, and when not in direct opposition to these." G. O. 2, Dept. of Texas, 1874. (Gen. Augur.) "The evidence of a custom to disobey a General Order was rightly rejected by the court. A custom, to be a good one, must not be contrary to law, or the law governing troops, but must be a general custom, a well-known custom to all the command." G. C. M. O. 2, Dept. of Va. & No. Ca., 1865. (Gen. Butler.) And see Hough, C. M., 372, 620; G. O. 4, Dept. of La., 1866; Do. 15, First Mil. Dist., 1870. That a custom of the service must be *uniform* is held by the court in U. S. *v.* Buchanan, Crabbe, 578, where, referring to an alleged usage in regard to the emoluments of pursers in the navy, it is said: "A usage to be binding must be uniform and applicable to all officers of the same grade under similar circumstances." In 4 Opins., 18, Atty. Gen. Legaré, in allusion to a supposed usage of courts-martial in regard to adjournments, says: "This I understand to be the uniform practice; and uniform practice is good law in such cases when it is not unreasonable and works no wrong."

[11] U. S. *v.* Babcock, 4 McLean, 113.

[12] See 5 Opins. At. Gen., 351.

[13] U. S. *v.* Buchanan, 8 Howard, 102.

[14] Compare Greenwich Ins. Co. *v.* Waterman, 54 Fed., 839.

it is remarked in a General Order[15]—"is a treacherous tribunal, and it is a hazardous thing for an officer to appeal to it to justify failure to obey orders or a departure from strict compliance with the articles of war." The existence in a command of an unauthorized practice, sanctioned by a commanding or superior officer, may sometimes extenuate the act of a subordinate who adopts it, but, unlike a legal custom, it cannot serve as a *defence*.[16]

[15] G. O. 42, Dept. of Washington, 1866. (Gen. Augur.) And see G. C. M. O. 86, Dept. of Dakota, 1892.

[16] In G. C. M. O. 1, Dept. of the Mo., 1885, the court, in connection with its sentence, observes: "The court is of opinion that the following of an unauthorized and pernicious custom constitutes no good defence for any neglect on the part of the accused." [For "custom" the term should, strictly, have been *practice:* custom proper cannot, of course, fitly be described as "unauthorized."] And see Do. 22, Id., 1887.

# CHAPTER V.

## THE COURT-MARTIAL—ITS HISTORY AND NATURE.

47 HAVING seen in what consists Military Law, we proceed to consider the tribunal by which it is mostly administered—the Court-Martial. The subject will be presented, in this and succeeding Chapters, under the following heads:

I. The Origin and History of the Court-Martial.
II. Its Nature as a legal tribunal.
III. The Constitution of General Courts-Martial.
IV. The Composition of General Courts-Martial.
V. The Jurisdiction of General Courts-Martial.
VI. The Procedure of General Courts-Martial.
VII. The Inferior Courts-Martial.

### THE ORIGIN AND HISTORY OF COURTS-MARTIAL.

**EARLY FORMS—THE FRANCO-GERMAN SYSTEM.** Some form of tribunal for the trial of military offenders would appear to have coëxisted with the early history of armies. In those of Rome justice was commonly administered by the *magistri militum*, and especially by the legionary tribunes, either as sole judges or with the assistance of councils.[1] Among the early Germans, judicial proceedings in time of peace were conducted by the Counts assisted by assemblages of freemen; in time of war by the Duke or military chief, who, as heretofore remarked, usually delegated his jurisdiction to the priests who accompanied the army and carried its banners. At a later period arose courts of regiments, held either by the colonel or by an officer invested by him with the staff or mace called the *regiment*, as the emblem of judicial authority,
48 and of which courts soldiers as well as officers were eligible as members: for the trial of high commanders the King convened courts of bishops and nobles. During the Middle Ages, however, the civil and military jurisdictions were, as indicated in Chapter II., but imperfectly distinguished, and it was not till a comparatively modern date that special courts administering military codes may be said to have been instituted.[2] In France, courts-martial (*conseils de guerre,*) appear to have been first established by an ordinance of 1655, military persons having previously been subjected to the jurisdiction, successively, of the Mayor of the Palace, the Grand Seneschal, the Constable, and the Provost Marshals.[3] In Germany, courts-martial proper, (*militärgerichts,*) may probably be traced back to the articles, already referred to as earliest in date, of the Emperor Frederick III. of 1487: they were specifically provided for—the re-

[1] Bruce, Insts., 295–300; Adams, Roman Ant., 330; De Chenier, Guide des Tribunaux Militaires, Introd.; Von Molitor, Kriegsgerichte und Militärstrafen, 11.

[2] See Von Molitor, *ante;* Ayala, de Judiciis Militaribus; Le Faure, Lois Militaires de la France; De Chenier, *ante;* Bruce, 300.

[3] Le Faure, p. 141. And see Foucher, Code de la Justice Militaire, p. 3.

markable "*spear*" court, (in which the assembled regiment passed judgment upon its offenders,) being especially characterized—in the penal code of Charles V., though more accurately defined in the articles of Maximilian II., of 1570.[4] Meanwhile, however, the Anglo-Norman system of administration of justice, in which the courts were open, the prosecution was public and verbal, the accused was tried by a *jury* of his peers or military associates upon specific charges and was permitted to be heard in his defence, and the proof was made by the examination of witnesses—in contradistinction to the *inquisitorial* method which was subsequently adopted—had extended to England, Sweden and Russia, and prevailed generally throughout Europe.[5] The courts established by the codes and articles, (heretofore specified,[6]) of the sixteenth and seventeenth centuries[7] were courts of this system, and to such courts the present British and American court-martial is more nearly assimilated in its procedure than to the now-existing military court of Germany or France.

49 **BRITISH COURTS-MARTIAL.—The Court of Chivalry.** In the English law, the original of the modern court-martial is discovered in the "King's Court of Chivalry," or "Court of the High Constable and Marshal of England"—sometimes also designated as the "Court of Arms" or "Court of Honour"—of which the judges were the Lord High Constable and Earl Marshal. These officials, who date from the times of the Frankish—Carlovingian—Kings, are said to have formed a part of the *Aula Regis* of William the Conqueror, but it was, apparently, not till the subdivision of that tribunal into separate courts by Edward I, in the latter part of the 13th century, that the Court of Chivalry began to have a distinct existence. Thus instituted, it came to exercise an extended jurisdiction, both civil and criminal; taking cognizance not only of "all matters touching honor and arms," "pleas of life and member arising in matters of arms and deeds of war," "the rights of prisoners taken in war," and, generally, of "the offences and miscarriages of soldiers contrary to the laws and rules of the army," but also of civil crimes and matters of contract.[8] Having thus indeed gradually encroached upon the other courts of common law, the Court of Chivalry was subsequently, by acts of parliament, restrained and curtailed of much of its power; and, the office of High Constable having, as a permanent judicial function, been discontinued, upon the attainder of the then Constable, in the 13th year of Henry VIII, this tribunal, though at first held at intervals by the Marshal alone, fell into disuse. From a case adjudged in the Court of Queen's Bench so recently as in the 1st year of Anne,[9] it is seen that the Court of Chivalry, as held by the Marshal, still survived with a doubtful and trifling jurisdiction apparently rarely exercised. But though never abolished by specific statute, it had, some time before the English Revolution, practically ceased to exist as a military tribunal.[10]

50 **Later history.** Upon its decadence, and during the interval preceding the first Mutiny Act, justice was administered, in the military forces

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[4] Koppmann, Militärstrafgesetzbuch; Von Molitor, *ante*.

[5] Von Molitor, Sec. 1 § 8.

[6] See Chapter II.

[7] See especially the Articles of Gustavus Adolphus, in Appendix.

[8] A corresponding jurisdiction was exercised in *naval* cases by the Lord High Admiral. Tbring, 5; Clode, M. L., 41.

[9] Chambers *v.* Sir John Jennings, 7 Mod., 127, and 2 Salk., 553.

[10] Upon the history of the Court of Chivalry, see Coke, 4 Inst., 123; Hale, Hist. Com. Law, 42; Hawk, P. C., b. 2, c. 4; 3 Black. Com., 68; 4 Stephen, Com., 329; Boyer, Com. Const. Law, 281; 2 Grose, Hist. Eng. Army, 58–60; Tytler, 38–42, 46, 377–392; Adye, 1–12; 2 McArthur, 15–20; Pipon & Col., 7–9; Clode, M. L., 83, 158; Id., 1 M. F., 76, 473; Pratt, 6; Lieber, Observations on origin of military trials, &c., N. York, 1876; Chambers *v.* Jennings, *ante; Ex-parte* Reed, 100 U. S., 20.

from time to time raised, mostly by martial courts or councils held under the ordinances or articles heretofore noticed,[11] or assembled by special commission issued under the royal prerogative, or what was arbitrarily assumed to be such.[12] During the reigns especially of the Tudors and Stuarts, and prior to the Petition of Right, military law, as administered, more nearly resembled the martial law than the military law of modern times; trials of civilians by courts-martial, and the imposition by the same of the death penalty, being sanctioned in cases in which the law of the land did not authorize such jurisdiction or punishment.[13] It was such arbitrary exercise of military authority which was doubtless had in view by Hale[14] and Blackstone[15] in their apparent confounding of military with martial law, to the disparagement of the former.

At length, by the original Mutiny Act of 1689, already described, the infliction of the death penalty within the Kingdom was prohibited except upon conviction of mutiny, sedition, or desertion, and the Sovereign, (for the first time by legislative authority,) was expressly empowered to grant commissions to convene courts-martial, whose jurisdiction and powers, extended and developed in subsequent Mutiny Acts and Articles of War, have finally—as has been seen in Chapter II—been established and defined in the Army Act of 1881. These powers, as compared with those of our own military courts, will be frequently referred to in the course of this treatise.

51 **THE AMERICAN COURT-MARTIAL.** The English military tribunal, transplanted to this country prior to our Revolution, was recognized and adopted by the Continental Congress, in the first American Articles of war of 1775, where the different courts-martial—*General, Regimental*, and detachment or *Garrison* courts—were distinguished, and their composition and jurisdiction defined. These provisions were modified and enlarged in the succeeding Articles of 1776 and 1786, and in the latter the authority to order general courts was more precisely indicated. Coming to the period of the Constitution—that instrument, while expressly empowering Congress to provide for the government of the army, and thus to institute courts-martial,[16] also recognized—in the Vth Amendment—the distinction between civil offences and those cognizable by a military forum.[17] But, in legislating in view of these provisions, Congress did not originally create the court-martial, but, by the operation of the Act of September 29, 1789,[18] continued it in existence as previously established. Thus, as already indicated, this court is perceived to be

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[11] See Chapter II.

[12] Grant *v.* Gould, 2 H. Black., 69, 84; Tytler, 48–58; Adye, 13–15; 2 McArthur, 20; Kennedy, 1; Pipon & Col., 9–12, 17–18; Pratt, 7.

[13] 1 Black. Com., 414; Hallam, Const. Hist., vol. 1, pp. 325–330, 531; Manual, 7–8, cited in Ch. II, p. 8, note. Col. Woodward's Essay on Mil. & Mar. Law, United Service Mag., Oct., 1879.

[14] Hist., Com. Law, c. 2.

[15] "Martial law, which is built upon no settled principles, but is entirely arbitrary in its decisions, is, as Sir Matthew Hale observes, in truth and reality no law, but something indulged rather than allowed as a law. The necessity of order and discipline in an army is the only thing which can give it countenance." 1 Black. Com., 413. And see 8 Opins. At. Gen., 365–6; also Part II.—MARTIAL LAW.

[16] See Dynes *v.* Hoover, 20 Howard, 79; *Ex parte* Reed, 100 U. S., 21; *Ex parte* Biggers, 1 McM., 69; 5 Opins. At. Gen., 508.

[17] *Ex parte* Mason, 105 U. S., 700; *Ex parte* Milligan, 4 Wallace, 123, 137, 138; *In re* Bogart, 2 Sawyer, 396; Trask *v.* Payne, 43 Barb., 569; In matter of Martin, 45 Id., 142; People *v.* Daniell, 6 Lansing, 49; Rawson *v.* Brown, 18 Maine, 216; Rawle, Const., 220; Whiting, War Powers, 553; 6 Opins. At. Gen., 425; 17 Id., 297.

[18] Providing that the Army should continue to be governed by the existing articles of war.

in fact older than the Constitution,[19] and therefore older than any court of the United States instituted or authorized by that instrument.

The revised code of Articles of war soon after enacted, *viz.*, by the Act of April 10, 1806, repeated the provisions of 1786 in regard to courts-martial, with some slight modifications consisting mainly in extending the authority to convene general courts and in substituting the President for Congress in the cases in which the latter had previously been vested with final revisory authority.

These earlier codes, as also the later Articles, have been considered in Chapter II., and are set forth in the Appendix.

Between 1806 and 1874, a fourth court-martial—the *Field-Officer's Court*, authorized however only in time of war—was added to those previously established; the authority to order general courts was still further extended,
52 and their jurisdiction and powers were enlarged. The legislation by which these changes were introduced has been heretofore indicated as embraced in the code of Articles contained in the Revised Statutes of June 22, 1874. The subsequent amendments to these Articles and other enactments affecting the same—including that of October 1, 1890, adding the *Summary Court* to the list of military tribunals—have already been specified. The Articles of 1874, with these later provisions, comprise the *existing* statute law in regard to the constitution, composition, jurisdiction, powers and procedure of American courts-martial. The *regulations* and *usages* relating to their forms and practice have been referred to in previous Chapters.

## THE NATURE OF THE COURT-MARTIAL AS A LEGAL TRIBUNAL.

**ITS AUTHORIZATION IN THE CONSTITUTION.** By Art. 1, sec. 8, of the Constitution, Congress, as we have seen, is invested with the power to *govern* the army, as well as the militia when employed in the public service, and is further authorized to make all laws which may be necessary and proper to carry such powers into execution. Under these powers Congress has from time to time enacted articles of war and other laws specifically providing for the institution of courts-martial.

The 5th Amendment of the Constitution, heretofore cited, which in effect provides that persons charged with crimes shall be proceeded against by indictment, &c., except in military or naval cases, has also sometimes been viewed as a source of authority for courts-martial. Thus Attorney General Cushing[20] observes of it that it "expressly excepts the trial of cases arising in the land or naval service from the ordinary provisions of law." And in the case, adjudged in New York, of Trask *v.* Payne,[21] the court say: "This provision practically withdraws the entire category of military offences from the cognizance of the civil magistrate and turns over the whole subject to be dealt with by the military tribunals." In the view of the author, the Amendment, in the particular indicated, is rather a *declaratory recognition and sanction*
53 of an existing military jurisdiction than an original provision initiating such a jurisdiction.[22]

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[19] See Rawson *v.* Brown and People *v.* Daniell, above cited.

[20] 6 Opins., 425.

[21] 43 Barb., 569. And see *Ex parte* Mason, 105 U. S., 700; Runkle *v.* U. S., 19 Ct. Cl., 397, 410; *In re* Esmond, 5 Mackay, 73–4.

[22] In Runkle *v.* U. S., 19 Ct. Cl., 410, the court say of this Amendment that it is—"an express constitutional affirmation and preservation of the unlimited right of administration of military justice through military channels without the agency of grand jurors." And compare, as to a similar provision of the State Constitution, People *v.* Daniell, 50 N. Y., 275.

A further authority for the ordering of courts-martial has been held to be attached to the constitutional function of the President as Commander-in-chief, independently of legislation—as will be pointed out in the next Chapter.

**NOT A PART OF THE JUDICIARY BUT AN AGENCY OF THE EXECUTIVE DEPARTMENT.** Courts-martial of the United States, although their legal sanction is no less than that of the federal courts, being equally with these authorized by the Constitution, are, unlike these, not a portion of the Judiciary of the United States, and are thus not included among the "inferior" courts which Congress "may from time to time ordain and establish." In the leading case on this subject, the Supreme Court, referring to the provisions of the Constitution authorizing Congress to provide for the government of the army, excepting military offences from the civil jurisdiction, and making the President commander-in-chief, observes as follows:—"These provisions show that Congress has the power to provide for the trial and punishment of military and naval offences in the manner then and now practised by civilized nations, and that the power to do so is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States; indeed that the two powers are entirely independent of each other." [23]

Not belonging to the judicial branch of the Government, it follows that courts-martial must pertain to the executive department; and they are
54 in fact simply *instrumentalities of the executive power*, provided by Congress for the President as Commander-in-chief, to aid him in properly commanding the army and navy and enforcing discipline therein,[24] and utilized under his orders or those of his authorized military representatives.

Thus indeed, strictly, a court-martial is not a *court* in the full sense of the term, or as the same is understood in the civil phraseology. It has no common-law powers whatever, but only such powers as are vested in it by express statute, or may be derived from military usage. None of the statutes governing the jurisdiction or procedure of the "courts of the United States" have any application to it;[25] nor is it embraced in the provisions of the VIth Amendment to the Constitution.[26] It is indeed a creature of *orders*, and except in so far as an independent discretion may be given it by statute, it is as much subject to the orders of a competent superior as is any military body or person.

**A TEMPORARY SUMMARY TRIBUNAL—NOT A COURT OF RECORD.** As a purely executive agency designed for military uses, called into existence by a military order and by a similar order dissolved when its purpose is accom-

[23] Dynes *v.* Hoover, 20 Howard, 79. And see *Ex parte* Bright, 1 Utah, 154; Fugitive Slave Law Cases, 1 Blatchford, 635; People *v.* Daniell, 6 Lans., 44, 50 N. Y., 274; 1 Kent, Com., 341, note; also *Ex parte* Vallandigham, 1 Wallace, 253, where it is remarked by the court that the authority exercisable by a *military commission*, though "it involves discretion to examine, to decide and sentence," is not "judicial in the sense in which judicial power is granted to the courts of the United States." Compare Contested Election of Brig. Genl., 1 Strob., 198, cited *post*.

[24] Clode, 2 M. F., 361, says of these courts in the British law:—"It must never be lost sight of that the only legitimate object of military tribunals is to aid the Crown to maintain the discipline and government of the Army." And see Id., M. L., 91; Prendergast, 148.

[25] Thus it has been *held* that Sec. 848, R. S., (relating to witness fees,) and Secs. 866–870, R. S., (relating to depositions, &c.,) in the federal courts had no application to courts-martial. DIGEST, 107, 760.

[26] That is to say, the term—"criminal prosecutions" does not include proceedings before courts-martial.

plished,[27] the court-martial, as compared with the civil tribunals, is transient in its duration and summary in its action.[28] It is not, in a legal sense,
55 a "court of record,"[29] and, unlike the superior courts of record, has no fixed place of session, no permanent office or clerk, no seal, no inherent authority to punish for contempt, no power to issue a writ or judicial mandate, and its judgment is simply a recommendation, not operative till approved by a revisory commander. It thus belongs to the class of minor courts of special and limited jurisdiction and scope, whose competency cannot be stretched by implication, in favor of whose acts no intendment can be made where their legality does not clearly appear, and which cannot transcend their authority without rendering their members trespassers and amenable to civil action.[30] But their proceedings, where no illegality is exhibited upon their face, will in general be presumed to be regular and valid.

**NOT SUBJECT TO JUDICIAL REVISION.** Further, the court-martial being no part of the Judiciary of the nation, and no statute having placed it in legal relations therewith, its proceedings are not subject to be directly reviewed by any federal court, either by *certiorari*, writ of error, or otherwise, nor are its judgments or sentences subject to be appealed from to such tribunal. It is not only the highest but the only court by which a case of a military offence can be heard and determined; and a civil or criminal court of the United States has no more appellate jurisdiction over offences tried by a court-martial—no more authority to entertain a rehearing of a case tried by it, or to affirm or set aside its finding or sentence as such—than has a court of a foreign nation. In Dynes *v.* Hoover,[31] above cited, this principle is well illustrated by the Court in the declaration that a duly-confirmed sentence of a court-martial "is altogether beyond the jurisdiction or inquiry of any
56 civil tribunal whatever;" and further that with the legal sentences of competent courts-martial "civil courts have nothing to do, nor are they in any way alterable by them. If it were otherwise"—it is added—"the civil courts would virtually administer the rules and articles of war irrespective of those to whom that duty and obligation has been confided by the laws of the United States, from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts." This ruling has been abundantly affirmed and illustrated in later cases.[32]

In the recent case of Wales *v.* Whitney,[33] a proceeding instituted against the Secretary of the Navy for the discharge on *habeas corpus* of an officer of the

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[27] Mills *v.* Martin, 19 Johns., 33; Brooks *v.* Adams, 11 Pick., 442; Brooks *v.* Daniels, 22 Pick., 501; In the Matter of Wright, 34 How. Pr., 211; 3 Greenl. Ev., § 470. "These courts are not permanent, but created *pro hac vice*, i. e. for the trial of the particular offender." Clode, M. L., 58.

[28] "The discipline necessary to the efficiency of the army and navy required other and swifter modes of trial than are furnished by the common-law courts." *Ex parte* Milligan, 4 Wallace, 123. In Coleman *v.* Tennessee, 97 U. S., 513, the Court refer to the "swift and summary justice of a military court."

Compare the more permanent "Military Courts" established by Act of the Confederate States Congress, of Oct. 9, 1862, as given with amendments, in Appendix, XV.

[29] Chambers *v.* Jennings, 7 Mod., 125; *Ex parte* Watkins, 3 Peters, 209; Wilson *v.* John, 2 Binn., 215. The view expressed by Thring, (Criminal Law of the Navy, 103,) that a court-martial is a court of record and invested with the same power to punish for contempt as any common-law court, if applicable—which is questioned—to English naval courts martial, is certainly not law as applied to our courts-martial as governed by Art. 86.

[30] Runkle *v.* U. S., 122 U. S., 556; 19 Opins. At. Gen., 503. Upon the subject of the amenability of members of courts-martial to civil suit or prosecution, see Part III.

[31] 20 Howard, 81, 82.

[32] 114 U. S., 564.

[33] "The Judiciary Act of 1789 gave the federal judiciary no such control, and none has been given since." Woolley's Case, Am. S. R., M. A., *v.* IV, p. 853. And see

navy, the Supreme Court of the United States, in holding that no federal tribunal "has any appellate jurisdiction over the naval court-martial nor over offences which such a court has power to try," adds that no such
57 tribunal "is authorized to interfere with" a court martial "in the performance of its duty by way of a writ of prohibition[34] or any order of that nature."

This ruling was presently affirmed in the case of Smith *v.* Whitney,[34] where a petition for a writ of *prohibition*[35] to the Secretary of the Navy and to a naval general court martial, to prohibit such court from trying a naval officer, was specifically refused by the same court. More recently the same writ has been refused in an army case by a U. S. Circuit court.[36] In a still more recent instance, (Johnson *v.* Sayre, April, 1895,)[37] the Supreme Court, in denying relief to a naval paymaster's clerk, convicted of embezzlement by a naval court-martial, declares, generally—"The court-martial having jurisdiction of the person and offence," and "having acted within scope of its legal powers, its decision and sentence cannot be reviewed or set aside by the civil courts by writ of habeas corpus or otherwise."

**Prohibition and Certiorari in England.** In England, indeed, where all courts derive their original authority from the Sovereign as the "fountain of justice,"[38] and a relation, unknown to our law, exists between civil and military tribunals, a power to review the proceedings and sentences of courts-martial appears to have been at one time specifically recognized by the Mutiny Act as possessed by the superior courts of common law.[39] No such provision, however, was contained in the later Acts, and none such is to be found in the present statute law. But, independently of statute, it has been held that writs of *prohibition* and of *certiorari* may legally issue out of the High Court of Justice to courts-martial; *prohibition*, to forbid the court to proceed on the ground that it is without authority or jurisdiction; and *certiorari*, to require it to certify

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Porret's Case, Perry's Oriental Cases, 419; *Ex parte* Vallandigham, 1 Wallace, 243; *Ex parte* Milligan, 4 Do., 123; *In re* Grimley, 137 U. S., 147; *Ex parte* Reed, 100 U. S., 13, 23; *In re* White, 17 Fed., 724–5; *In re* Davison, 21 Fed., 618; *In re* Zimmerman, 30 Fed., 176; *In re* Spencer, 40 Fed., 149; Swaim *v.* U S., 28 Ct. Cl., 173; *In re* Esmond, 5 Mackey, 64; Moore *v.* Houston, 3 S. & R., 197; State *v.* Davis, 1 South., 311; *Ex parte* Dunbar, 14 Mass., 393; Tyler *v.* Pomeroy, 8 Allen, 484; State *v.* Stevens, 2 McCord, 38; *Ex parte* Bright, 1 Utah, 148, 153; Whiting, War Powers, 278; Cooley, Prins. Const. Law, 113; 12 Opins. At. Gen., 332; Maltby, 151; also Wales *v.* Whitney and Smith *v.* Whitney, cited *post*.

In a few of the States the proceedings of *militia* courts-martial have been held to be subject, under the local law, to review by the civil courts of appeal. State *v.* Davis; Washburn *v.* Phillips, 2 Met., 296. But in the case of the Contested Election of Brig. Gen., 1 Strob., 198, the incongruity of a review of the proceedings of a court-martial by means of a writ of *certiorari* issued by a civil court is well illustrated as follows. After remarking that *certiorari* only lies to remove judicial acts, the court holds:—"The proceedings and sentences of courts military can hardly be considered judicial acts. * * * The very fact that the sentence of the court is not known until approved, then that the court is dissolved, and that the whole proceedings are in the possession of the officer ordering the court, show that the writ of *certiorari* cannot be awarded. For there is no one to whom it can go, and who can, as of and for the court, certify the proceedings. But that the Court of Sessions," (the civil court applied to for the writ,) "has no right to pronounce a *military judgment* upon the proceedings being up, is conclusive against the writ." But see the late case of *Ex parte* Thompson, 2 Quebec L. R., 115.

[34] 116 U. S., 168. The writ had been first refused in this case by the Supreme Court of the District of Columbia. See 4 Mackey, 535.

[35] A writ of prohibition is a means resorted to to prevent the doing of an act not yet performed or completed. U. S. *v.* Hoffman, 4 Wallace, 158.

[36] U. S. *v.* Maney, U. S. C. C., 61 Fed., 140. (May, 1894.)

[37] 158 U. S., 109.

[38] 1 Black. Com., 266; 2 Stephen, Com., 538; Broom, Const. Law, 145.

[39] Tytler, 167; 1 Opins. At. Gen., 236.

up the record with a view to the quashing of conviction or sentence if
58 found illegal.[40] It was also held, however, that the former writ would not be granted on account merely of irregularities or informalities in the proceedings of the court-martial, or of an erroneous decision on the merits,[41] or after the sentence had been executed, or because the sentence was excessive;[42] and that *certiorari* was a proper remedy only where the rights of the party affected by the judgment of the court-martial were *civil* rights, and the court had acted without jurisdiction,—that the writ would not issue where the rights affected were of a military character, *i. e.*, such as are attached to military rank or status.[43] And it is a noticeable fact that the British courts have never granted *either* of these writs in a case tried or on trial by court-martial.

**No appeal, as such, to Congress.** It may be remarked here that while Congress is of course empowered to legislate at discretion for the relief of any person deemed to have suffered unjustly or too much from the sentence of a court-martial, it can have no authority whatever to entertain an appeal as such from the judgment of such a court, or to set aside or revise its proceedings. The point would scarcely be noticed except for the reason that it has been, in early cases, the subject of rulings in Congress itself. Thus in the Report of the Committee on Military Affairs of the House of Representatives, in 1826, in the case of Col. T. Chambers, 1st artillery,[44] it was said that the Committee "disclaimed any idea of countenancing or entertaining an appeal from the decision of military courts to this House—a practice which would be subversive of discipline and highly injurious to the service." In the later case of Lt. Col. Woolley, in 1832,[45] the same Committee observes in its report—"Congress are not authorized to revise or to reverse the judgment of any tribunal, civil or military."

**Cognizance collaterally, on Habeas Corpus.** While courts-martial,
59 not being "inferior courts" to the Supreme Court under the Constitution, cannot be appealed from to any civil court, or controlled or directed by the decree or mandate of such a court, yet in our U. S. Courts, similarly as in the English tribunals, the writ of *habeas corpus* may be availed of by a prisoner claiming to be illegally detained under trial or sentence of court-martial, and in this proceeding the legality of the action of the court—as whether it was legally constituted, or had jurisdiction, or its sentence was authorized by the code—may be inquired into.[46] But the action must have been absolutely illegal and void in law to induce the federal court[47] to grant relief,[48] for a civil tribunal will not go into the merits of, or try, a military cause.[49]

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[40] Manual, 151, 153; Grant *v.* Gould, 2 H. Black., 69; *In re* Mansergh, 1 Best & Smith, 400 Clode, M. L., 158.

[41] Grant *v.* Gould, *ante*.

[42] *In re* Poe, 5 Barn. & Adol., 681; Prendergast, 202. In the more recent (Irish) case of Sergt. McCarthy, 14 W. R., 918, it was held that "a prohibition will not issue merely because the evidence given in support of a military charge discloses a higher civil offence."

[43] *In re* Mansergh, *ante;* Capt. Roberts' Case, Manual, 154.

[44] Am. S. R., M. A., vol. III, p. 327.

[45] Am. S. R., M. A., vol. IV, p. 853.

[46] *In re* Grimley, 137 U S., 150.

[47] It need hardly be observed that a *State* court could have no jurisdiction in such a class of cases. See PART III.

[48] In *Ex parte* Mason, 105 U. S., 697, the Supreme Court, in holding that it "has no power to review the judgments of courts-martial," adds that it cannot, upon *habeas corpus*, discharge a person under sentence of court-martial, "if the court had jurisdiction to try the offender for the offence with which he was charged, and the sentence was one which the court could, under the law, pronounce." In *Ex parte* Reed, 100 U. S., 23, the same court well say:—"A writ of *habeas corpus* cannot be made to perform the functions of a writ of error. To warrant the discharge of the petitioner, the sentence under which he is held must be not merely erroneous and voidable but absolutely void." And see *Ex parte* Parks, 93 U. S., 18; Barrett *v.* Hopkins, 2 McCrary, 129; King *v.*

So, in a case before the Court of Claims,[50] or an ordinary civil court, where the right to recover pay, &c., depends upon the legality of the proceedings of a court-martial, the question whether the court has transcended its authority may be passed upon. So, such question may be tried in an action for damages for false imprisonment under sentence.[51] But these *collateral* methods of
60 reviewing the action of military courts have not been frequent in practice, since it is well established that the civil judicature will not interfere in any case in which the court, however irregular may have been its proceedings, has acted or is acting within its legal jurisdiction and powers.[52]

It may be noted that the law is similarly held by the authorities in the kindred class of cases in which the petitioner for the writ of *habeas corpus* has not yet been tried or arraigned but is detained in military custody with a view to trial. If the person and the offence are within the jurisdiction of the proposed court-martial, the civil federal court will not enter into the merits of the charge, but will leave the same to be tried by the military tribunal and remand the prisoner.[53]

**Mere errors of procedure not revisable on habeas corpus.** That mere errors of procedure, not affecting the jurisdiction, or authority to sentence, of the court, are not to be regarded by a United States civil court, in its collateral inquiry, has been frequently noticed by the authorities. Thus, in *In re* Grimley, the Supreme Court say—"It is clear that by *habeas corpus* the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial, and that no mere errors in their proceedings are open to consideration."[54]

**The only real appeal.** In the British practice substantially the only court of appeal from the judgments of courts-martial may be said to be the Judge Advocate General, a civil official and member of the Government representing the Sovereign in the administration of military justice.[55] So, with us,
61 an Accused has always an appeal, from a conviction and sentence by court-martial, to the President, (or Secretary of War,) who, in entertaining and determining such appeal, is assisted and advised by the Judge Advocate General of the Army.[56] Thus, as the tribunal is an *executive* agency, the appeal therefrom is to a superior *executive* authority.

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Suddis, 1 East, 306. In Wales *v.* Whitney, 114 U. S., 575, it is remarked that, even where the court-martial had in fact no jurisdiction, the power of the civil tribunal, on *habeas corpus,* "extends no further than to release the prisoner. It cannot remit a fine, or restore to an office, or reverse the judgment of the military court." But it is further held in this case that an officer merely in arrest at large, *i. e.,* under an arrest confining him to the limits of the City of Washington, was not under such physical restraint as to be a subject of discharge on *habeas corpus.*

[49] In the matter of Corbett, 9 Benedict, 277.

[50] See Keyes *v.* U. S., 15 Ct. Cl., 553, and 109 U. S., 336; Wales *v.* Whitney, 114 U. S., 575; Swaim *v.* U. S., 28 Ct. Cl., 217.

[51] See PART III; also Wales *v.* Whitney, *ante.*

[52] Barrett *v.* Crane, 16 Vt., 246; Brown *v.* Wadsworth, 15 Id., 170; Keyes *v.* U. S., 109 U. S., 336; Barrett *v.* Hopkins, 7 Fed., 312; *In re* Davison, 21 Fed., 618. "The single inquiry, the test, is jurisdiction." *In re* Grimley, 137 U. S., 150.

[53] *In re* Bogart, 2 Sawyer, 396; *In re* White, 9 Id., 49; *In re* McVey, 23 Fed., 878.

[54] 137 U. S., 150. And see Smith *v.* Whitney, 116 U. S., 168; U. S. *v.* Fletcher, 148 U. S., 92; *In re* White, 17 Fed., 725; *In re* Davison, 21 Fed., 621; *In re* McVey, 23 Fed., 879; Swaim *v.* U. S., 28 Ct., Cl., 217. And see Grant *v.* Gould, 2 H. Bl., 107.

[55] "The Judge Advocate General's Department forms a Court of Appeal, and therefore takes no part in the actual preparation, conduct, or management of prosecutions." Jones, (1881,) p. 63. "The Judge Advocate General and his Deputy form a sort of *final court,* which has the power of upsetting, or 'quashing,' all court-martial proceedings." Gorham, (1880,) p. 37.

[56] Congress, "in addition to courts for trial, has provided a separate and complete line of reviewing authorities, terminating in the Executive." *In re* Esmond, 5 Mackey, 74 [That the Judge Advocate General, under the authority vested in him by Sec. 1199,

**CONCLUSIVENESS OF JUDGMENTS OF COURT-MARTIAL.** Not being subject to be reversed or appealed from, the judgment of a court-martial of the United States is, within its scope, absolutely final and conclusive.[57] Its sentence, if *per se* legal, cannot, after it has received the necessary official approval, be revoked or set aside; and it is only by the exercise of the pardoning power that it can—provided it he not as yet *executed*—be rendered in whole or in part inoperative.[58]

**A COURT OF LAW AND JUSTICE.** Notwithstanding that the court-martial is only an instrumentality of the executive power having no relation or connection, in law, with the judicial establishments of the country, it is yet, so far as it is a court at all, and within its field of action, as fully a court of law and justice as is any civil tribunal. As a court of law, it is bound, like
62 any court, by the fundamental principles of law, and, in the absence of special provision on the subject in the military code, it observes in general the rules of evidence as adopted in the common-law courts.[59] As a court of justice, it is required, by the terms of its statutory oath, (Art. 84,) to adjudicate between the United States and the accused "without partiality, favor, or affection," and according, not only to the laws and customs of the service, but to its "conscience," *i. e.*, its sense of substantial right and justice unaffected by technicalities. In the words of the Attorney General, courts-martial are thus, "in the strictest sense courts of justice."[60]

**A COURT OF HONOR.** A court-martial has been called a "court of honor," and this designation, though less employed than formerly, is still applicable to it, for the reason that it punishes dishonorable conduct where the same affects the reputation or discipline of the army.[61] It may try an officer for not being also a gentleman—a dereliction not cognizable by any other species of tribunal. But though in this a court of *honor*, it is at the same time a court of *law*, since it proceeds against such conduct as an offence to be charged and proved according to the rules of criminal pleading and evidence.

**AS ASSIMILATED TO A CIVIL JUDGE AND JURY.** As illustrating the function of a court-martial to administer law and justice, it may be noted that this court, though an "exceptional forum,"[62] is not without close analogies in its *personnel* to the ordinary civil tribunals. Thus it has frequently been compared, as to some of its powers and proceedings, to a *judge*, and as to others

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R. S., to receive, *revise*," &c., the proceedings of courts-martial has of course no power to *reverse* a finding and sentence, was ruled in Mason's Case, U. S. Circ. Ct., No. Dist. N. Y., October, 1882.]

[57] "Within the sphere of their jurisdiction the judgments and sentences of courts-martial are as final and conclusive as those of civil tribunals of last resort." Hoffman, J., in *In re* McVey, 23 Fed., 878. And see 11 Opins. At. Gen., 139; 17 Id., 297; 18 Id., 21; *Ex parte* Reed, 100 U. S., 13; *In re* Esmond, 5 Mackey, 64; *In re* Davison, 21 Fed., 620; Warden *v.* Bailey, 4 Taunt., 76; Frear *v.* Marshall, 4 F. & F., 485; Dynes *v.* Hoover, 20 Howard, 83; *Ex parte* Reed, 10 Otto, 13; *In re* Bogart, 2 Sawyer, 396; Moore *v.* Houston, 3 S. & R., 197; Brown *v.* Wadsworth, 15 Vt., 170; People *v.* Van Allen, 55 N. Y., 36; State *v.* Stevens, 2 McCord, 38; *Ex parte* Bright, 1 Utah, 145; Porret's Case, Perry, 419.

[58] DIGEST, 551, 552, 557, 701. And see under NINETY NINTH ARTICLE, in Chapter XXV.

[59] See Chapter XVIII—EVIDENCE.

[60] 11 Opins., 138.

[61] "In military life there is a higher code termed *honor* which holds its society to stricter accountability; and it is not desirable that the standard of the Army shall come down to the requirements of a criminal code." Nott, J., in Fletcher *v.* U. S., 26 Ct. Cl., 563.

[62] 6 Opins. At. Gen., 204.

to a *jury*.[63] Indeed, in its taking of a statutory oath, its being subject
63 to challenge, its hearings and weighing of evidence, its finding of guilt or innocence, and its liability to be reassembled to reconsider its verdict, it nearly resembles a traverse jury in a criminal court. On the other hand, in its arraignment of the accused, its entertaining of special pleas to its jurisdiction or competency as a court and objections to the sufficiency of the pleadings and the admission of testimony, its authority to grant continuances and to adjourn, and its power to impose sentence, it is more closely assimilated to the judge. The further comparison by Atty. Gen. Cushing[64] of a court-martial to a "*grand jury*," in that its members are "changeable in numbers and personality within certain limits," is a much less obvious analogy.

**A CRIMINAL COURT.** In regard to the class of courts to which it belongs, it is lastly to be noted that the court-martial is strictly a criminal court.[65] It has in fact no civil jurisdiction whatever; cannot enforce a contract, collect a debt, or award damages in favor of an individual. All fines and forfeitures which it decrees accrue to the United States. Even where it tries and convicts an accused for an offence involved in an obligation incurred or injury done to another person, whether a military person or a civilian—as in the case of an officer guilty of dishonorable conduct in the non-payment of private debts, or in that of a soldier who has stolen from a comrade or trespassed upon a citizen—it cannot adjudge that the debt be paid, that the property be returned, or that its pecuniary value or the amount of the damage, be made good to the party aggrieved. Its judgment is a criminal sentence, not a civil verdict: its proper function is to award *punishment* upon the ascertainment of guilt.[66]

The nature and characteristics of the Court-Martial will be abundantly illustrated as we proceed with the details of its powers and practice.

**THE DIFFERENT KINDS OF COURTS-MARTIAL.** As has already been perceived, there are now, in our military law, five species of courts-
64 martial, to wit—1. A superior or highest court known as the General Court-Martial; 2. The Regimental Court-Martial; 3. The Garrison Court-Martial; 4. The Field Officer's Court; 5. The Summary Court. The first three have been specifically authorized in our Articles of War from the beginning. The fourth, a court for time of war only, was established by an enactment of July 17, 1862, incorporated in the Code of Articles of 1874. The last is a court authorized for time of peace by an Act of October 1, 1890. The four courts last-named, which may be designated as the *Inferior* courts-martial, will be treated of in a separate Chapter.[67].

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[63] Sullivan, 17; Adye, 167; Tytler, 221; 1 McArthur, 274; Delafons, 121; Hough, 944; Simmons, § 637; Griffiths, 168; Harcourt, 128: McNaghten, 117, 122, 124, 127; Bombay R., 30; Macomb, 31; 3 Opins. At. Gen., 398; 5 Id., 707; 6 Id., 206; 7 Id., 340; 10 Id., 65. "The verdict of a jury bears a close analogy to the judgment of a court-martial." 19 Id., 107.

[64] 7 Opins., 340.

[65] DIGEST, 321–2; U. S. *v.* Clarke, 96 U. S., 40; "The crimes or misdemeanors forbidden by the Articles of War are offenses against the United States." 19 Opins. At. Gen., 106.

[66] DIGEST, 322; 3 Greenl. Ev § 469, 471, 476; Warden *v.* Bailey, 4 Taunt., 78.

[67] There is no such court recognized in our law or practice as the "Drum Head Court-Martial." With us, summary justice is done, in peace, through the Summary Court; in war, mostly through the Field Officer's Court and the Military Commission.

In our Navy the only trial courts are two in number—the General Court-Martial and the Summary Court.

The courts-martial of the Militia of the District of Columbia, (whose proceedings are required to conform to those of the courts-martial of the Army,) consist of—(1) General Courts-Martial, ordered by the Brig.-General commanding, and (2) Battalion

The *General Court-Martial*, much the most important of our military tribunals, will now be considered with respect to its Constitution, its Composition, its Jurisdiction, and its Procedure.

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Courts-Martial, and (3) Company Courts-Martial, ordered, respectively, by commanders of battalions and companies. [Act of March 1, 1889, c. 328, s. 51–54.] It may be remarked here that the authority for and legal status of the District militia are not clear. It is no part of the militia referred to in the Constitution, (Art. I., sec. 8 §15, 16,) which evidently contemplates a militia of the *States*. It would appear to have been created as a species of military police, in the exercise of the power of "exclusive legislation" conferred upon Congress by § 17 of the same section, similarly as such a police might perhaps be provided for a Territory under Art. IV., section 3.

# CHAPTER VI.

## THE CONSTITUTION OF GENERAL COURTS-MARTIAL.

65 THE law authorizing and relating to the constituting of General Courts-Martial is contained in the provision of the Constitution making the President the Commander-in-chief of the Army, in the Seventy-Second and Seventy-Third Articles of war, and in Secs. 1230 and 1326 of the Revised Statutes. By this law the authority to constitute these courts is vested in—I, The President; II, Certain military commanders.

### I. AUTHORITY OF THE PRESIDENT TO CONSTITUTE GENERAL COURTS-MARTIAL.

The President is empowered to institute courts-martial—1st, as Commander-in-chief under the Constitution; 2d, in the special contingency indicated in the 72d Article; 3d, in the particular cases provided for by Sec. 1230, Rev. Sts.

**1. AS COMMANDER-IN-CHIEF.** The 72d Article of War, (as amended by the Act of July 5, 1884,) which provides for the convening of general courts-martial in the army, is as follows—"Art. 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."

This Article, (unlike the corresponding article of the naval code,[1]) does not expressly designate the President as one of the officials invested with
66 a general authority to order general courts-martial, but declares that the same may be convened by certain military commanders, *except* in a certain specified contingency, (hereafter to be defined,) when—it is provided—the court shall be ordered by the President. And it has been argued, on the principle—assumed to be applicable—of *expressio unius exclusio alterius*, that the President was thus legally empowered to exercise the authority in question only in the cases embraced in the exception.

But as the law is now generally held, and in the opinion of the author, the President is invested with a general and discretionary power to order statutory courts-martial for the army, *by virtue of his constitutional capacity as Commander-in-chief, independently of any article of war or other legislation of Congress.* In this view the 72d Article is construed simply as an enabling statute, indicating what military commanders "may," for the purpose of discipline, (and to relieve, while representing, the Commander-in-chief,) "appoint"[2] such courts; the exception expressed in the second clause being regarded as a recog-

[1] See Rev. Sts., Sec. 1624, Art. 38.

[2] The amended Article has recurred to the form of expression employed in the code of 1806. The form in the Article of 1874, before the amendment, was—"shall be competent to appoint." It may be observed that the antiquated term *appoint*, still retained in the Article, is not often used in practice; such equivalent forms as order, convene, assemble, detail and constitute being employed, indifferently, instead.

nition of and reference to the President, as the source of military command, for the purposes of the exercise by him in person of the authority in a particular class of cases where his subordinate cannot justly or properly act. As if the Article had said that while the commanders designated might convene these courts for their commands in cases in general, yet in the instances specially excepted recurrence must be had to the original power residing in the Commander-in-chief.

**Original authority of British Sovereign to convene courts-martial.** By the common and statute law of Great Britain down to the period of the first Mutiny Act, the King was vested with the supreme command and government of the army, a function which necessarily included the power to constitute courts-martial.[3] Nor, in the author's opinion, was this power, exercised
67 from an early period, divested by the Mutiny Act of 1869.[4] This Act did not assume in terms to authorize the Crown to convene military courts in general, but, in view of the emergency which had induced its enactment, while condemning the exercise of martial law and the arbitrary infliction of the penalty of death, it made special provision for the assembling of such courts by "their Majestyes," &c., for the trial, within the Kingdom, and punishment capitally if found necessary, of three offences of particular gravity, which, in time of peace at least, in the absence of such provision, would legally have been punishable, or punishable with death, within the realm, only by the civil courts.[5] That the Act was not intended to impair, and in fact left intact, the original function of the Sovereign to order courts-martial for the trial of military offences, seems to be the soundest conclusion, and such is apparently the conclusion of Samuel,[6] the principal of the earlier, and Clode,[7] one of the most recent, of the commentators on the Mutiny Act. That this is the proper view is confirmed by the consideration that in the larger measure of its exercise, *viz.* in respect to the constituting of courts-martial outside the Kingdom, and for the trial of offences other than mutiny, sedition, and desertion within the
68 Kingdom, this branch of the prerogative remained for a long period acquiesced in and acknowledged by the Legislature.[8] Later Acts which recited that it "shall be lawful" for the Sovereign to institute courts-martial generally, should, it is believed, properly be regarded as mainly of a *declaratory* effect.[9]

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[3] See Samuel, 34, 53, 55, 64, 65, 134. The extent of this power, as understood at the time, appears from the well-known statue of 13 & 14 Car., 2, "passed," in the words of an English writer, (Law Mag., vol. XIV., (1835,) p. 4,) "for settling all disputes on this important subject," of which the preamble runs as follows: "Forasmuch as within all his majesty's realms and dominions, the sole and supreme power, government, command, and disposition of the militia, and of all the forces both by sea and land, and of all forts and places of strength, is and by the laws of England ever was, the undoubted right of his majesty and his predecessors, kings and queens of England; and that both, or either, of the houses of parliament cannot and ought not to pretend to the same," &c. This prerogative, observes Samuel, (writing in 1816) is "as complete at this day as in precedent times;" and, as illustrating the same, he declares that—"as connected with the fulness of the kingly authority over the military state, to the Crown it has always belonged to make laws or ordinances for the economy, discipline and government of the army, *and to appoint and erect tribunals for the administration and enforcement of them throughout the same.*" (pp. 53, 162.)

[4] See Samuel, 162, 163.

[5] See Clode, M. L., 19, 91.

[6] Page 163.

[7] M. L., 91, 92. On my reading this passage to Mr. Clode in person, he assured me that I had not misapprehended his view.

[8] See Simmons § 2; Clode, M. L., 21; Samuel, 203.

[9] The provision of the existing British "Army Act," in regard to the authority to convene general courts-martial, *viz.*, "A general court-martial shall be convened by Her Majesty, or some officer deriving authority immediately or mediately from Her Majesty,"—certainly seems to be declaratory of a prerogative of the Crown in this particular.

**Law and practice as to the exercise of the authority by the President.** In this country prior to the adoption of the Constitution, Congress, which exercised the entire power of the government, executive as well as legislative, while itself expressly directing the institution of military courts in some cases,[10] in general devolved the authority for this purpose upon the commander-in-chief of the army and the generals commanding in the separate States.[11] To the *latter* this authority was expressly delegated by Congress, by resolution of April 14, 1777,[12] but it is noticeable that the authority, as ascribed to and exercised by the *commander-in-chief*, rested upon no express grant, but was apparently derived mainly by implication from the terms of Washington's commission by which he was vested with "full power and authority to act as he should think fit for the good and welfare of the service," and enjoined to cause "strict discipline and order to be observed in the army."[13] Con-
69 siderably later, in the Articles of 1786, the authority was in terms vested in "the general or officer commanding the troops."

Upon the adoption of the Constitution and the division of the powers of the government, the executive power, previously exercised by Congress, was transferred to the President, and with it the function of commander-in-chief. This function was not defined by the Constitution. To it therefore were properly to be regarded as attached, (with such modifications as the new form of the government required,) the powers originally vested in Congress and delegated by it as above indicated to the commander-in-chief of its army, and which had been exercised by the latter up to this period. Among these powers was the authority, properly incident to chief command, of issuing to subordinates and the army at large such *orders* as a due consideration for military discipline might require, and, among these, orders directing officers to assemble and investigate cases of misconduct and recommend punishments therefor—in other words orders constituting courts-martial. The Constitution had indeed vested in the new Congress the power to legislate for the regulation and government of the army, but this provision could not rightly be regarded as *per se* militating against the exercise of an authority properly inhering in a function devolved by the same instrument upon the Executive, and which had been attached to that function by the previously-existing law and usage.[14]

That the right of the Commander-in-chief to exercise this power was not seriously questioned would appear from the practice of the early Presidents by

[10] See 1 Jour. Cong., 329, 427. In some instances the direction was given to the Board of War or Navy Boards, or the "Secretary at War." 2 Jour., 517; 3 Do., 26, 686; 4 Do., 44.

[11] 2 Jour., 242, 243, 281, 431; 3 Do., 244.

[12] The codes of articles of 1775 and 1776, though conferring, respectively, upon "the general or commander-in-chief" the power to pardon or mitigate punishments, and the power to act upon sentences, omitted to make provision for the *convening* of general courts.

[13] The commission in full, as "agreed to" by Congress, is given in 1 Journals, 85. That the powers here conferred were regarded as including authority to order military courts is evident from a letter from Washington to Maj. Gen. Gates, of Feb. 14, 1778, (Sparks' Writings of Washington, vol. 5, p. 236,) in which, in expressing the opinion that the power of appointing such courts was "too limited," he observes—"I do not find it can legally be exercised by any officer except the commander-in-chief or the commanding general in any particular State." The subsequent resolution of Congress, of April 10, 1782, 4 Journals, 8,)—"That the Secretary of War shall, in the absence of the commander-in-chief, be empowered to order the holding of general courts-martial in the places where Congress may be assembled"—is a legislative recognition of the existence of the power in the commander.

[14] Among the principal cases in which the courts were ordered by Washington as Commander-in-chief, were those of Gens. Arnold, Lee, Schuyler and St. Clair, Cols. Graham and Zedwitz and Lt. Col. Enos.

whom it was exercised in most important cases.[15] Subsequent Presidents employed the same authority from time to time, both in peace and in war,[16]
70 and during the late civil war it was repeatedly resorted to and in conspicuous instances.[17]

Meanwhile, indeed, the provision of 1830, now incorporated in the second clause of the 72d Article, had specially devolved it upon the President to appoint the court whenever the military commander, otherwise competent for the purpose, should happen to be the "accuser or prosecutor" of the officer to be tried; but the effect of this, according to recent ruling,[18] was "to limit the authority of commanding officers, not to confer power upon the President." And the authority of the President to order such courts, generally and at discretion, *as commander-in-chief*, continued to be exercised irrespective of such provision. Otherwise indeed it would have resulted that many officers and soldiers, not under the command of a "department" or "army" commander, including general officers, certain officers of the general staff, cadets of the Military Academy, and sundry enlisted men of the Engineer Battalion, or Ordnance or Signal corps, or acting as clerks in the War Department, would, prior to 1874, (or, in the case of the cadets, 1873,) have remained exempt from amenability to military justice, to the serious prejudice of discipline.

The enactments of 1873 and 1874, enabling the Superintendent of the Military Academy and the General of the Army to convene general courts, have reduced in number the occasions for the exercise of this power by the Commander-in-chief, but the same is still asserted in proper cases and has been resorted to in recent important instances.[19]

The authority in question, however, does not rest wholly upon executive practice and precedent. The legality of its exercise was affirmed by the
71 Military Committee of the House of Representatives in Lt. Col. Woolley's Case in 1832,[20] and had also been asserted by Maltby,[21] Macomb[22] and De Hart,[23] in their treatises. Later writers on military law have adopted the same view,[24] and the same was also declared by distinguished department and army commanders in Orders, during the late war.[25] Further, in the leading case of Major Runkle, where the point was specifically raised, it was held by Judge Advocate General Holt in 1872 that the convening of the court by the President in his capacity of commander-in-chief was a legal act;[26] and this

[15] As in those of Brig. Gen. Hull and Maj. Gens. Wilkinson and Gaines, tried in 1813–1816.

[16] As in the cases of Gens. Talcott and Twiggs, Col. Sumner, Lt. Col. Montgomery, and Majors Crittenden and Cross.

[17] As in the cases of Brig. Gens. Hammond, Gordon and Paine.

[18] Swaim *v.* U. S., 28 Ct. Cl., 223.

[19] As in those of Cadet J. C. Whitaker (Dec., 1880;) Major J. H. Taylor, (Aug., 1882;) Brig. Gen. Swaim and Lieut. Col. Morrow, (June, 1884;) Brig. Gen. Hazen, (March, 1885;) Major G. J. Lydecker, (March, 1889;) Capt. G. A. Armes, (April, 1889;) Lieut. J. A. Swift, (May, 1890;) Capt. A. E. Miltimore and three other officers, (May, 1890;) Colonel C. E. Compton, (June, 1891;) Major C. B. Throckmorton, (Nov., 1891;) Major L. C. Overman, (Dec., 1891;) Capt. W. S. Johnson, (March, 1893;) Lieut. W. M. Williams, (May, 1893;) Capt. D. F. Stiles, (Oct., 1893;) Lieut. Jas. A. Maney, (May, 1894;) Capt. W. S. Johnson, (Aug., 1894;) Lieut. J. V. S. Paddock, (Jan., 1895.)

[20] Am. State Papers, Mil. Affairs, vol. 4, p. 854.

[21] Pages, 18, 142, 146, 147.

[22] Edit. of 1809, p. 8; edit. of 1841, p. 13.

[23] Pages 5, 6.

[24] Coppée 11; Lee 86–7; Ives, 30.

[25] G. C. M. O. 12, Army of the Potomac, 1864, (Gen. Meade;) G. O. 48, Dept. of the Cumberland, 1864, (Gen. Thomas;) Do. 27, Dept. of the N. West, 1864, (Gen. Pope;) Do. 160, Dept. of the Ohio, 1863, (Gen. Burnside;) Circ., Dept. & Army of the Tenn., Jan. 16, 1865, (Gen. Howard.)

[26] DIGEST, 81, 605–6.

opinion, adopted by the Secretary of War at the time, was subsequently sustained by the Attorney General[27] and also by the Judiciary Committee of the Senate in reports of March 3, 1879 and February 18, 1885, and by the Court of Claims in April, 1884.[28]

More recently, (February, 1893) the power in question has been again maintained by the Court of Claims in Gen. Swaim's case,[29] where it is ascribed not only to the fact that the President is Commander-in-chief and so invested therewith *ex officio*, but also to the fact that a general power given by a statute to a subordinate is given necessarily to the superior, since the greater, in the system of military discipline and authority, must contain the less. Upon the latter point the Court say—"It seems evident then to the court that as courts-martial are expressly authorized by law, and the authority to convene
72 them is expressly granted to military officers, this power is necessarily vested in the President by statute, though it may not be inherent in his office. A military officer can not 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. * * * It is said that courts-martial are the creatures of statute law. But so also are regiments. There can be no standing army without statutory authority. Congress may place the command of a regiment in a colonel, a lieutenant-colonel, a major, or any other officer, but when Congress so enact they, without words to that effect, likewise place the command in the Commander-in-chief. His name is to be understood as written in every statute which confers upon a military officer military authority."

Thus resting upon law, authority and precedent, the power of the President to order general courts-martial may well be regarded as no longer open to serious question.[30]

**2. UNDER THE 72d ARTICLE OF WAR.** In the second clause of this Article it is provided that when a military commander authorized by the first clause to "appoint" a general court-martial, is the "*accuser or prosecutor*" of an officer of his command proposed to be brought to trial, the court shall be appointed by the President.[31]

This provision was introduced into our military law by an Act of May 29, 1830, as an amendment to the 65th article of the then existing code. The amendment has been held, as we have seen, to be "plainly restrictive of the preceding legislation," *i. e.* the article prior to 1830; its effect being not to add to the authority of the President but to detract from that of the commanders
73 designated.[32] Its purpose clearly was to debar a superior from selecting

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[27] 15 Opins., 302–3, *note*. The author's previously prepared MS. on the subject under consideration was furnished to the officer of the Dept. of Justice by whom this *note* was drawn.

[28] Runkle *v.* U. S., 19 Ct. Cl., 396. It is significant that the Supreme Court, in their consideration of this case on appeal, (122 U. S., 543,) make no reference to the initial question of the authority of the President to order the court, thus impliedly concurring in the view of the Court of Claims on this point.

[29] 28 Ct. Cl., 173, 221, 224.

[30] The form of its exercise is generally an order issued by the Commanding General of the Army, "*by direction of the President.*" See the S. O., Headquarters of the Army. Or the order may be issued through the Secretary of War. G. O. 35, War Dept., 1850.

[31] It may be noted that this provision does not apply to trials of *enlisted men*, also that, equally with a similar provision of the succeeding (73d) article, it does not apply to trials by inferior courts. *On principle*, however, it should be applied to such courts where it can be done "without serious embarrassment to the service." DIGEST, 84. In a case in G. O. 11, Dept. of Texas, 1866, it was applied to a trial by *military commission*.

[32] Swaim *v.* U. S., 28 Ct. Cl., 223.

the court for the prosecution and trial of a junior under his command, and, as reviewing authority, passing upon the proceedings of such trial, or executing the punishment, if any, awarded him, in a case where, by reason of having preferred the charge or undertaken personally to pursue it, he might be biased against the accused, if indeed he had not already prejudged his case.[33] The article wholly divests such superior of power to order the court, "nor could such power be imparted to him otherwise than by a special legislative act.[34]

Construction of terms "accuser" and "prosecutor." As indicated by the use of the disjunctive "or" these terms are evidently intended to bear a somewhat different signification. To distinguish therefore the two designations—"*accuser*" is construed to mean one who either originates the charge or adopts and becomes responsible for it; "*prosecutor*" one who proposes or undertakes to have it tried and proved. It is not essential that the accuser or the prosecutor should be the principal, or what is sometimes termed the "prosecuting" witness, or indeed that he should be a witness at all. The characters of accuser and prosecutor, though distinct, may be united in the same person: indeed, where a commander is in fact the "accuser," he will, in the majority of cases, be found to be also the true prosecutor.

74 Whether a commander who has taken action in the case of an officer of his command proposed to be tried,—as by ordering his arrest, preferring or directing the preferring of charges, or approving charges as preferred, &c.,—is to be considered as an accuser or prosecutor in the sense of this Article, so as to disqualify him from ordering the court and to make it necessary for the President to do so, is a question depending mainly upon the relation and *animus* of such commander toward the accused or the case. Where his action has been merely *official*, the capacity indicated cannot in general properly be ascribed to him. Thus, where, upon the facts of the supposed offence being reported to him, and appearing to call for investigation by court-martial, he has, *as commander*, directed some proper officer, as the commander of the regiment or company of the accused, or his own staff judge advocate, to prepare the charges, (indicating or not their form,) or has approved or revised charges already prepared, he is not to be regarded as an "accuser" in the sense of the Article, his action having been official and in the strict line of his duty. Nor is he to be deemed a "prosecutor" merely for the reason that, having personal cognizance of the facts of the case, he contemplates being a material and important witness on the trial.[35]

On the other hand, where, having personally originated or adopted the charges, he has himself preferred them as his own, or caused them to be preferred nom-

[33] "The object of this provision is just and beneficial. It is intended to prevent the packing of a court, and still more perhaps to prevent the suspicion of such packing." O'Brien, 227. And see G. O. 11, Dept. of the Ohio, 1866; also the opinion of the At. Gen. in case of Capt. Coleman (17 Opins., 436,) where it is held that if the convening commander was accuser or prosecutor, the court was "illegally constituted, and the findings and sentence consequently void."

The occasion of this legislation was the trial of Col. R. Jones, Adjutant General, by a court convened by Maj. Gen. Macomb, then commanding the Army, who preferred the charges, was the prosecuting witness, and was also the reviewing authority who approved the sentence. See the proceedings published in G. O. 9 of March 13, 1830.

In the present practice, where a court-martial is ordered by the President, not as Commander-in-chief, but in compliance with this statute, the Order specifies in terms that it is made "under the 72d Article of War," or to that effect. See instances in S. O. 98, 114, 118, 244, of 1876; 79 Id., of 1877; 3 Id., 1878; 250, 257 Id., 1879; 88 Id., 1880, but such cases are infrequent.

[34] Capt. Coleman's case, *ante*.

[35] Compare DIGEST, 83; G. O., 25, Dept. of Fla., 1866, (remarks of Gen. Foster;) 16 Opins. At. Gen., 106.

inally by another for him,[36] with the purpose of having them brought to trial, he is in general properly the "accuser," even if he may occupy no hostile or adverse position toward the accused. So, if, influenced by hostile feeling, or by a conviction that the accused is guilty and that his offence demands to be promptly and efficiently dealt with, he proposes, upon assembling the court, actively to promote the prosecution, as by instructing the judge advocate, facilitating the attendance of witnesses for the prosecution, appearing himself as prosecuting witness, &c., he is properly to be deemed a "prosecutor" within the meaning of the Article, and it will not be legal for him to order the court, but the President must be resorted to for the purpose.

75 It may be remarked that the action of the commander, to have disqualified him from convening the court, must have been taken by him *of his own will*, and not merely ministerially and in compliance with orders. Thus where a commander, by the direction or at the instance of the President or other official superior, has caused a subordinate to be arrested and charges to be preferred against him, and thereupon assembled a court for his trial, the proceedings or sentence of such court can not be called in question under the Article.[37]

**Procedure under this part of the Article.** The same facts and considerations which are pertinent to the inquiry as to the attitude of the commander toward the case *before* a court has been ordered, are equally so when, the court having been assembled, the accused is arraigned, or at any subsequent stage of the proceedings.[38] In the majority of cases, the issue upon the point, whether the commander who convened the court was or not the accuser or prosecutor of the accused, has been raised by the accused either at the trial, or subsequently before the reviewing authority and especially before the President. Regularly, indeed, where the accused is informed as to the action, and *animus* of the commander in the case, he should properly take the objection at the arraignment; but as the constituting of a court-martial in contravention of the prohibition of the Article necessarily nullifies its proceeding *ab initio*, the question of the legality of a court claimed to have been thus constituted may be raised at any time during the trial or within a reasonable interval thereafter.[39]

The exception being taken at the trial, the original charge, as preferred and signed, will be significant evidence. If this, however, is not forthcoming, or does not, (as it more frequently will not,) exhibit the precise relation of the commander to the case, other evidence relevant to this relation may be introduced, as upon the trial of any other issue. The accused, if necessary, may even call upon the commander himself to be sworn and examined.

76 **The authority exclusive in the President.** In view of the positive provision that, in the event of the contingency specified in the Article, the court is to be ordered by the President, it would scarcely be worth while to notice that no *intermediate* commander could exercise this authority, were it not for the fact that this point has actually been passed upon by the Secretary of War. This was in the case of Capt. Mackenzie, who was brought to trial, in July, 1845, before a general court-martial, which, the charges having been preferred by the department commander, was ordered by Brig. Gen. Wool, com-

[36] See case in G. O. 11, Dept. of the Ohio, 1866.

[37] DIGEST, 83.

[38] DIGEST, 84. And see 16 Opins. At. Gen., 106.

[39] Compare the case in 16 Opins., 106. The right of the accused to know whether the convening commander may not be the accuser or prosecutor in the case was recognized on Gen. Porter's trial. Printed Record, p. 10–11.

manding the "Eastern Division." The question of the authority of the latter, under the circumstances, having been submitted to Mr. Marcy, then Secretary of War, he of course decided that the order of the Division commander was illegal, and dissolved the court.[40]

**3. UNDER SEC. 1230, REV. STS.** This Section is as follows:—*"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."*

This provision was originally enacted in s. 12 of the Act of March 3, 1865, c. 79—a date when the war was still pending and the President was empowered to summarily dismiss officers of the army. In this form the statute applied, in terms, to officers "who may be hereafter dismissed," *i. e.* after its date; and it has been held, successively, by the Judge Advocate General and the Solicitor General,[41] that the fact that the word "hereafter," or some equivalent term, was not employed in the provision, as incorporated in the Rev. Sts., did not extend the application of such provision, or give it a retroactive effect so that an officer who had been dismissed in 1863 could be allowed a trial under it.

77 It is further evident that, under the existing law—Sec. 1229, Rev. Sts., and the 99th Art. of war—which prohibits summary dismissals of officers by the President in time of peace, the Section under consideration is operative and available only in time of war, or in cases of officers dismissed in war.[42]

It has been held by the Judge Advocate General,[43] in whose opinion the Attorney General has since concurred,[44] that officers *dropped for desertion* under Sec. 1229, Rev. Sts., were not of the class of dismissed officers contemplated by Sec. 1230, and so not entitled to apply for a trial under the latter statute.

The Section is incomplete in that it fails to prescribe a limit of time within which the application for a trial shall be made. It can thus only be said that it should be made within a reasonable time,[45] and what is a reasonable time will of course depend upon the circumstances of the particular case. If not made within a reasonable time, the officer will be deemed to have acquiesced in his dismissal and waived his right to the trial.[46]

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[40] This case is referred to by De Hart, p. 7, and note.

[41] DIGEST, 373; 16 Opins. At. Gen., 599.

[42] For the few cases in which officers availed themselves of this statute at the end of the late war, see G. C. M. O. 539, 568, 636, 637, of 1865; Do. 118 of 1866. In one of these cases the officer was redismissed; in one he was awarded a punishment less than dismissal, *viz.*, forfeiture of pay, and the original dismissal was accordingly declared void; in the other three he was acquitted, with a like result.

[43] DIGEST, 374.

[44] 17 Opins., 13.

[45] So held by the Judge Advocate General, (DIGEST, 373;) the Attorney General, (17 Opins., 13;) and the Court of Claims, (18 R., 435,)—in Lieut. Newton's Case, in which also the opinions above cited were mostly given. The Atty. Genl. observes, (17 Opins., 20,)—"It is not reasonable to wait until the statute of limitations has run against the offence, witnesses have disappeared, and memory failed, or until we may naturally expect these things to have occurred." In the same case the Court of Claims, p. 444, say—"The claimant waited nine years before making his application. During all this time he did not report himself to the Department, neither rendered nor offered to render any service, made no claim to the office or its pay, and now gives no good reason for his long silence. Under these circumstances, in our opinion, the law should presume acquiescence."

[46] Newton *v.* U. S., 18 Ct. Cl., 444, *ante*.

The Section, moreover, does not prescribe as to the *contents* of the application, except that the applicant shall set forth therein "that he has been wrongfully and unjustly dismissed." In practice, applications which merely followed
78 this form of words, without specifying in what the alleged wrong or injustice was claimed to consist, have been accepted as sufficient. A more specific statement, however, would be preferable.[47]

It is to be observed, as a further peculiarity, that a court-martial ordered under this Section differs from all other courts-martial in that, if it fails to impose one of the sentences indicated in the Section, its judgment takes effect without the approval of the convening authority. If it acquits the party, or does not sentence him to death or to be dismissed, his original dismissal is by such action vacated instanter and is restored to the army, and the approval or disapproval of the President can affect in no manner this result.

**Constitutionality of the statute.** This statute has thus far been viewed as constitutional, but its constitutionality may well be questioned. The Attorney General indeed has passed upon this question,[48] holding the Section to be within the power of Congress to legislate for the government and discipline of the army, and not to be "obnoxious to the objection that it invades or frustrates the power of the President to dismiss an officer. On the contrary," he adds, "it proceeds upon an admission that the power of dismissal belongs to the President. It is simply a regulation which is to follow a dismissal, providing in certain contingencies for the restoration of the officer to the service, and leaving the dismissal in full force if those contingencies do not happen." But the power of dismissal can hardly be deemed substantial if thus liable to be nullified at any time within an indefinite period, and moreover a statute which authorizes a court-martial not only to try a civilian, but practically to appoint him to the army, is certainly subject to serious question.[49]

## 79 II. AUTHORITY OF MILITARY COMMANDERS TO CONSTITUTE GENERAL COURTS-MARTIAL.

This authority is conferred by the 72d and 73d Articles of war, and Sec. 1326, Rev. Sts.

1. **UNDER THE 72d ARTICLE.** This Article, as has been seen, provides that—"*Any general officer commanding an army, a territorial division or a department, or colonel commanding a separate department, may appoint*[50] *general courts-martial whenever necessary.*"

"General officer commanding an army." The corresponding term of description employed in the Article of 1874, of which the above is a recent amendment, was—"Any general officer commanding the Army of the United States, a separate army, or," &c. Upon comparing the two forms, it is quite evident that the designation "an army" was employed as a single and comprehensive term intended to include both the Army as a whole and any lesser or separate "army"—in other words the two sorts of armies indicated in the original 72d Article. Under the present provision, therefore, a general court-martial may be ordered—1st, by the general officer assigned by the President to command

[47] See DIGEST, 373. In the regulations referred to in a previous note it is directed that the application shall set forth, under oath, "facts showing the error or injustce complained of."

[48] 12 Opins., 4.

[49] See DIGEST, 373, note.

[50] The proper significance of the term "appoint," as meaning the same as *order* or *convene*, has been referred to in a previous note.

the Army of the United States,[51] (and, in practice, such courts are now frequently ordered by such commanding general); 2d, by any general commanding a body of forces organized and designated by the President for special military purposes as an "army." Such would properly be a body distinct and complete within itself, and not existing as an integral portion of some larger component part of the Army, but acting independently under its own commander, subject only to the direction of the Commander-in-chief, or the General-in-chief of the Army. Such an "army" would scarcely be constituted except in time of war; and of the species of army contemplated the Army of the Poto-
80 mac, Army of the Tennessee, Army of Virginia, &c., as organized in the late war, were instances.

"A territorial division or a department"—"A separate department." The terms "division" and "department," as here employed, refer to the geographical or territorial commands, fixed and designated in General Orders, into which the public domain is commonly divided for military purposes by the orders of the President.[52] Such were heretofore the Divisions of the Missouri, of the Atlantic and of the Pacific;[53] and are now (1895) the Departments of the East, the Missouri, Texas, Dakota, the Platte, California, the Columbia and the Colorado. The term "Division" is thus distinguished from the same word as employed in a purely military sense in the next (73d) Article, and the term Department from the same name as attached to the corps of the General Staff.[54] A general commanding both a Division and a Department, (as do the Commanders of the Divisions of the Atlantic and the Pacific,) is empowered to order a general court-martial in either of his capacities. A colonel commanding a department would not be empowered to order such a court as Division Commander even if temporarily assigned to the command of
81 the Division.[55] To make the court legal, the convening officer must of course be a department, &c., commander *at the date of the convening order.*[56]

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[51] Under a similar term in the corresponding article, (the 65th,) of 1806, the different generals commanding the Army, as Gens. Dearborn, Brown, Macomb and Scott, convened, from time to time, general courts-martial.

[52] As to the meaning of the term "department," see Parker *v.* U. S., 1 Peters, 293; also 2 Opins. At. Gen., 355, where it is held that the words as used alone, (*i. e.*, without the word "territorial" or like description,) in the 65th Article of 1806, meant geographical department. Compare Art. XXIX., A. R.—"Military Geographical Divisions and Departments."

[53] The Division commands were, for the time, discontinued, by G. O. 57 of July 3, 1891.

[54] That "department," as employed in the corresponding article of 1806, included a staff department, or at least the "Engineer Department," was claimed at an early period by the Chief of Engineers. See Order, Hdqrs. Engr. Dept., Washington, July 23, 1818, promulgating proceedings in cases of Pvt. B. Moss and others, Company of Bombardiers, Sappers and Miners, tried by a general court-martial convened by the Chief of Engineers at West Point, with remarks of Brig. Gen. J. G. Swift, C. E. This view was not tenable after the ruling of the Supreme Court in Parker *v.* U. S., *ante*, and was abandoned. It has recently, (July, 1894,) been *held* by the Actg. Judge Advocate General that the Chief of Engineers was not authorized to grant a leave of absence, as a *department commander.*

[55] A *brevet* general, assigned, (under Sec. 1211, Rev. Sts., as amended by the Act of March 3, 1883,) to command a Division or Department according to his brevet rank, would be invested with the command and powers of a full general under this Article, and otherwise. See 17 Opins. At. Gen., 39.

[56] In an early case, (1813,) where the court had been convened by an officer who was not a department commander, and its proceedings were therefore illegal, it was *held* that the President could not make them legal by declaring the command to be a department command *after* the trial and sentence of dismissal. Case of Lieut. J. D. Cobb, Am. S. P., M. A., vol. IV, p. 82. This officer, having thus been dismissed by an illegal court, was subsequently rehabilitated, with full pay for the interval, by the authority of a special Act of Congress. Do., p. 854.

**Delegation of the authority.** As the Article expressly designates certain particular commanders as competent to order general courts for armies, divisions and departments, it follows, upon the principle of *expressio unius exclusio alterius*, that no other commanders or officers shall be so authorized. A commander of a division, department or army cannot therefore delegate to an inferior commander or to a staff officer the authority vested in himself by this Article, or authorize such officer to exercise the same, *for him*, in his temporary absence or otherwise.[57]

**Scope of the authority.** It is of course to be understood that the authority, conferred by the article upon division, department and army commanders
82 as such, extends only to the convening of courts for the trial of officers and men *of their own command.*

**Suspension of the authority by absence, &c.** It further follows from the terms of the Article that the general officer or colonel must be in the exercise of his command when the court is ordered, to make the order a legal one. While the mere fact alone[58] that, when issuing the order, he was absent from his command—as where, in pursuing hostile Indians, he had temporarily passed the boundaries of his department,[59] or where he had temporarily left it on official business—would not properly be deemed to affect the legality of the order,[60] the result would be otherwise where the absence was such as, by military law or usage, to *detach* him from his command. Thus, where a division or department commander is absent for any considerable period from his command by reason of having received and taken advantage of a leave of absence,[60] or of having been placed by superior authority upon some distinct and separate military duty,—as the duty of sitting as a member of a court or board at a distance from his department,—his authority under the 72d Article will, during the period of such absence, strictly and properly be regarded as *suspended*, even if no other officer be assigned to command in his place.[61]

In such cases indeed the same power that has originally assigned the officer to his command, the President, may *specially order* that, during his ab-

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[57] DIGEST, 82; Circ., No. 2; (H. A.,) 1892. As to the effect of the absence of the commander from his command, see *post.*

The practice was at one time very general in our Army for department or army commanders, in detailing general courts, to authorize or instruct the commander of the post at which the court was to be held, to fill up such vacancies as might occur in the detail, through absence, &c., with officers of his command selected by himself. See, for example, G. O. as late as of Aug. 24 and Sept. 23, 1841. In some cases the president only, or two or three members, were named by the superior, and the inferior was directed to add the rest. See G. O. 14 of 1832; Do. 33 of 1838; also Do. (without number,) of April 11, 1838. In a few cases the order for the court designated a certain post commander as president, and directed him to detail the other members from his command. See, for example, G. O. 60, of 1835. It need hardly be said that all such orders were in contravention of law, and upon the revision by the Secretary of War of Capt. Trenor's case, (G. O. 71 of Nov. 18, 1841,) in which the practice was condemned, the same was finally discontinued.

[58] Compare 16 Opins. At. Gen., 678.

[59] See Circ. No. 8, (H. A.,) 1886.

[60] The principle that the effect of the status of being on leave of absence is to detach the officer from the command or duty held or exercised at the time of entering upon the leave, is illustrated in 1 Opins. At. Gen., 181; 7 Id., 161; 13 Id., 526, 527; U. S. *v.* Williamson, 23 Wallace, 415. And see the definition of soldiers "in the line of duty," as excluding those "at the time on furlough or leave of absence," in J. R. of April 12, 1866. In 13 Opins., 527, the Atty. Gen. says:—to have "no post or duty * * * is the case, for the time being, of an officer on leave."

[61] See G. C. M. O. 26 of 1878; Do. 9, Dept. of Columbia, 1880. The "decision of the Executive" referred to in the former of these Orders was a ruling, (in concurrence with an opinion of the Judge Advocate General,) that a department commander, who had duly convened a certain general court-martial, was not authorized to take action upon and approve its proceedings and sentence, when absent from his command and the department, on a leave of absence.

83 sence or detaching duty, he shall continue to exercise his division or department command as if he were present; and under such an order he would continue to be authorized to convene general courts therefor. But, in practice, wherever such a commander has been for any time detached from his command, the President has almost invariably at once assigned some other officer to exercise the command in his absence.

**Discretion, in general, of commander under the Article.** Under the conditions indicated, and subject to the general law of the service, the power vested in the commander by the Article is *complete* and *exclusive*. The President indeed, as Commander-in-chief, may direct him to order a court in a particular case; and the exercise of his authority must of course be governed by the statute of limitations, (Art. 103.) But, in general, it is entirely within his discretion to determine, in each instance, whether a court shall be ordered at all, or, if ordered, when and where, (within the command,) it shall be convened. As to *place*, the commander, being informed of the stations and status of the officers of his command available for court-martial duty, (and having in view the general provision on the subject, of the 76th Article,) will readily select the locality at which any particular court may be assembled with the most convenience to the service and the least expense to the United States.[62]

**2. UNDER THE 73d ARTICLE.** This article is as follows:—"*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.*"

**Operation of the Article.** This statute, of which the original form was contained in the Act, passed early in the late war, of December 24, 1861, made its first appearance as an Article of war in the revised code of 1874.[63] As a provision for time of war only, it certainly ceased to be operative after August 20, 1866, the date of the conclusion of the *status belli* throughout the United
84 States;[64] and in several cases the proceedings of courts convened under it in 1866, subsequently to that date, were declared void in Orders.[65]

**Division and brigade commands.** In our law a brigade properly consists of at least two regiments of infantry or cavalry, and a division of at least two brigades; and the "commander" indicated in the Article will regularly be, of the former a brigadier general, and of the latter a major general.[66] It is not, however, essential that he should be such, or even a general officer. A colonel or officer of less rank may, in war, become, for the time, by virtue of seniority, the commander of a brigade or a division, and as such empowered to exercise the authority devolved by this Article. Except indeed in war, divisions and brigades are not formed in our army.[67]

**Meaning of "separate brigade."** By this term is evidently meant a brigade which is not a component part of any division, but is operating by itself, and of which the commander reports directly to the commander of the corps, army, or department, or to the General commanding the Army or the Commander-in-chief.[68] After the passage of the Act of 1861, the original of Art. 73, it was found that officers sometimes assumed to convene general courts as commanders of "separate" brigades, when their commands were not *separate*

[62] G. O. 9 of 1892.

[63] Other provisions of this Act are incorporated in Arts. 105, 107 and 112.

[64] The Protector, 12 Wallace 702.

[65] G. O. 68, Dept. of Washington, 1866; Do. 7, Dept. of the Potomac, 1866; Do. 24, Dept. of the Mo., 1866.

[66] Sec. 1114, Rev. Sts. See *ante* as to the difference between the term "division" as here used and as used in the preceding Article.

[67] Par. 188, Army Regs.

[68] DIGEST, 85.

in the evident sense of the Article, but were embraced in division commands,[69] or were small or mixed commands not properly amounting to or constituting brigades.[70] The latter was peculiarly the case with the commands known
85 as "districts." With a view of defining the subject, there was issued from the War Department, in August, 1864, a General Order, which, under the heading of "Courts-Martial for Separate Brigades," prescribed 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 orders 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.*"

The rulings of the Judge Advocate General in construing this Order are set forth in the Digest of Opinions.[71]

The Article under consideration concludes with the provision that, when a commander, authorized by the article to order a general court, "is the accuser or prosecutor of any person under his command, the court shall be appointed by the next higher commander." What has been said under the previous Article as to the purport of the terms "accuser" and "prosecutor" will in substance be applicable here. The "next higher commander," in our military organization in time of war, will ordinarily be the commander of the "army in the field to which the division or brigade belongs." It is this commander whose confirmation is made by Art. 107 necessary to the execution of sentences of dismissal adjudged by division and separate brigade courts-martial.

**3. UNDER SEC. 1326, REV. STS.** This statute declares that: "*The Superintendent of the Military Academy shall have power to convene general courts-martial for the trial of cadets, and 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.*"

This is an enactment of March 3, 1873, and is properly an article of war. The "Superintendent" indicated is the officer invested, by Sec. 1311, Rev. Sts., with the "immediate government and military command" of the Academy
86 and of the military post of West Point. The above provision is sufficiently clearly expressed,[72] and no serious question as to its construction is known to have been raised. The "limitations and conditions" which it refers to are the following, viz: (1) that sentences of dismissal or suspension, imposed upon cadets by courts-martial convened by the Superintendent, can become operative only through the order of the President given for their execution, upon the formal confirmation by him of the same, after the approval thereof by the Superintendent; (2) that where the Superintendent is the "accuser" or "prosecutor" of a cadet whose trial is contemplated, recourse must be had to the President for the ordering of the court, as in the analogous case of the "officer" referred to in the 2d clause of Art. 72.

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[69] In G. O. 299 of 1863, the proceedings were set aside and the sentence held inoperative in a case tried by a general court convened by the commanding officer of the "2d Brigade, 3d Division, 14th Army Corps," *i. e.*, of a brigade which was a component of a division and so not "*separate.*" And see G. O. 246 of the same year; also DIGEST, 85.

[70] See case in G. O. 14, Dept. of the Platte, 1866.

[71] Pages 86–87. See also G. C. M. O. 43, of 1865, where it was held that the officer commanding the "Kanawha Valley Forces" was not authorized to order a general court; also G. O. 48, Northern Dept., 1865, where it was similarly held of the commander of a Draft Rendezvous.

[72] It would have been more complete had the words *approve the proceedings and* been inserted before the word "execute." That the Superintendent shall approve before executing is however of course to be understood.

# CHAPTER VII.

## THE COMPOSITION OF GENERAL COURTS-MARTIAL.

87 THIS subject is regulated by the 75th, 77th, 78th and 79th Articles of War, and Sec. 1658, Rev. Sts. It will be considered under the heads of—I. Class and Rank of Members; II. Number of Members.

### I. CLASS AND RANK OF MEMBERS.

**THEY MUST BE COMMISSIONED OFFICERS.**—Art. 75. This Article provides that—"*General courts-martial may consist of * * * officers;*" i. e. that officers alone shall be competent to sit on such courts. Sec. 1342, Rev. Sts., by which the code of Articles is prefaced, declares that "the word officer as used therein shall be understood to designate *commissioned* officers." Commissioned officers only therefore may compose general courts.[1] The detailing of non-commissioned officers or soldiers, where the accused is of one of these grades, with commissioned officers, on courts-martial, which is required by some of the European codes,[2] has never been authorized by our law.

**GENERAL RULE OF ELIGIBILITY.** The term "officers" not being limited or qualified by the Article, (Art. 75,) it follows that *all* commissioned officers of the army, of whatever rank, and whether or not having *command*, are, (except where specifically excluded by express enactment,) eligible to be detailed as members of general courts. Officers on the retired list are so
88 excluded by Sec. 1259, Rev. Sts.;[3] but they are the only class thus excepted. All other commissioned officers, *i. e.* all officers on the active list having military rank,[4] whether officers of the line or staff, may legally sit as members;[5] and although staff officers are detailed as such less frequently than line officers, there is, in our present limited army, no department or branch of the staff, (other than the Judge-Advocate General's department,)[6] which is not more or less frequently represented on courts-martial, except only chaplains.[7] The officers detailed must all of course be within the command of the convening commander.[8]

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[1] The law is the same as to inferior courts. See Arts. 80–82.

[2] See the author's Translation of the German Military Code, p. 16—note, and authorities cited. The French Code de Justice Militaire, § 10, directs that one *sous-officier*, (non-commissioned officer,) shall sit on courts for the trial of non-commissioned officers and soldiers.

[3] See, in this connection, 19 Opins. At. Gen., 500.

[4] See *post*—"Professors."

[5] Subject of course to objection under Art. 88. It may be remarked that officers known or believed to be liable to challenge will not properly be detailed upon courts-martial.

[6] This for the reason that the duties of the officers of this department include the reviewing of and reporting upon the proceedings of trials, and because they are not unfrequently required to be utilized as judge-advocates in important cases.

[7] Chaplains, being commissioned officers with the rank of captain, are as *legally eligible* for court-martial duty as any other officers of the army. Their detail however has been expressly discountenanced by the Secretary of War. Circ., Dept. of Cal., June 8, 1875.

[8] See par. 189, Army Regulations. The classes of officers specified in par. 190, A. R., though within the territorial department, are not within the command of the department commander. See Circ., No. 13, (H. A.,) 1891.

**WHO ARE COMMISSIONED OFFICERS.** These are officers who have duly received and accepted commissions appointing them, (or rather evidencing their appointment,) to *offices* in the army. A commission may be permanent or temporary; that is to say it may evidence an appointment made by the President and confirmed by the Senate, or merely an appointment of the class authorized, by Art. II., Sec. 2 § 3, of the Constitution, to be conferred by the President during a recess of the Senate, to "expire at the end of their next session," and also called "commissions" in the Constitution.[9] Thus an officer holding a commission of the latter description, is, while it remains in force, as eligible to
89 be assigned to duty on a court-martial as is any officer who has received the more formal and permanent commission issued upon the confirmation of his appointment by the Senate. So, the tenure, as to duration, of the office conferred by the commission cannot affect the eligibility of the officer for court-martial service. Thus a commissioned officer of volunteers, though the tenure of his office may be limited to a comparatively brief period, is no less eligible for such service.[10]

The appointment of a Cadet is not a commission in the military sense.[11] He is therefore not a commissioned officer, and not eligible to act as a member of any court-martial.[12]

**"ACTING" OFFICERS.** It need hardly be added that persons "*acting;*" (by the authority of military orders,) as officers, or for and in the stead of officers, but who are not legally appointed or commissioned as such, are, though effectively performing all the duties which would devolve upon officers of the army under similar circumstances, clearly not officers within the meaning of the present Article, or qualified to sit upon courts-martial. Thus an "acting assistant," or "contract" surgeon, not being an officer of the army, but a civil official, is not so qualified,[13] and would not be so even though serving with an army in the field and thus subject to military discipline. Nor, for a similar reason, would a civilian, acting as a volunteer aid on the staff of a general in the field, or a non-commissioned officer acting as a commissioned officer, be thus eligible.

**"OFFICERS" IMPLIES RANK.**—Professors. It is clearly contemplated by the laws and regulations governing the service that members of courts-martial shall have relative military rank. Thus Art. 79 provides that an officer shall not in general be tried by officers inferior to him in rank; so the Army Regulations, pars. 878, 879, 881, direct as to the order of the naming of the members in the detail and their precedence on the court and as to the
90 selection by seniority of the president. The term "officers," as employed in Art. 75, must therefore be deemed to imply *rank;* and as all commissioned officers, with a single exception, of the present military establishment have military rank, it follows that the excepted officers referred to cannot legally be ordered to sit on courts-martial. These are the Professors of the Military Academy, who, though made by Sec. 1094, Rev. Sts., a part of the army, and appointed by the President and confirmed by the Senate as public officers,

[9] See 18 Opins. At. Gen., 28, 29; 19 Do., 261; O'Shea *v.* U. S., 28 Ct. Cl., 392. Reference may well be made in this connection to the definition of the term "officer of the United States" as set forth by the Supreme Court in U. S. *v.* Germaine, 99 U. S., 508, and U. S. *v.* Monatt, 124 U. S., 307.

[10] See 10 Opins. At. Gen., 522–3.

[11] He is held by the Court of Claims, (Babbitt *v.* U. S., 16 Ct. Cl., 203,) to be of the class of "inferior officers," indicated in the Constitution, (Art. II., Sec. 2,) as appointed but not commissioned. See Collins *v.* U. S., 14 Ct. Cl., 569.

[12] 1 Opins. At. Gen., 469; 2 Id., 251; 7 Id., 323.

[13] DIGEST, 144; Byrnes *v.* U. S., 26 Ct. Cl., 302.

yet have no military rank. That they were not eligible to detail upon courts-martial, because having no rank "lineal or assimilated," was held by Attorney General Wirt in 1821.[14] More recently they have been described by Attorney General Brewster as "commissioned officers of the army," who "in pay and allowances are *assimilated* to the rank of colonel and lieutenant-colonel."[15] In this category, however, is not included the Professor of Law, who is an officer of the army temporarily detailed in this capacity,[16] and is therefore legally eligible as member or judge-advocate of a general court-martial.

**RELATIVE RANK OF MEMBERS.—Art. 79.** This Article, with a view to the excluding, as far as reasonably practicable, from courts-martial, officers who as junior to the accused may have an interest in procuring him to be dismissed, suspended, &c., provides that—"*No officer shall, when it can be avoided, be tried by officers inferior to him in rank.*" This provision, (like that of the 75th article in reference to the *number* of the court, presently to be considered,) is regarded as not prohibitory but directory only upon the convening commander. Its effect is understood to be to leave to the discretion of that officer, as the conclusive authority and judge, the determining of the question of the rank of the members, with only the general instruction that superiors or equals in rank to the accused shall be selected, so far as the exigencies and interests of the service may permit. Such was, early in the recent war, the construction given to the provision by Judge Advocate General Holt,[17] and this construction,
91 adopted by other authorities,[18] has been recently finally established in the case of Mullan *v.* U. S.,[19] where it was held by the Supreme Court, affirming the judgment of the Court of Claims,[20] that, in the instance of a court-martial of the navy, (whose code in this respect is similar to that of the army,) composed of seven members, five of whom were junior in rank to the accused, it was to be presumed that the detailing of such a proportion of junior officers could not "be avoided without injury to the service," and that the legality of the proceedings of the court was not affected thereby. Thus, that an officer is inferior in rank or grade to the accused does not render him incompetent to sit as a member of a military court-martial,[21] or subject him as such member to challenge.[22] Nor would it affect the validity of the proceedings that *all* the members were junior to the accused.

In practice, in our service, courts for the trial of general officers have almost invariably, if not necessarily, comprised members junior to the accused; in time of *peace* indeed, it would rarely be practicable to assemble even a *minimum*

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[14] 1 Opins., 469.

[15] 17 Opins., 359.

[16] Under the Acts of June 6, 1874, and June 1, 1880.

[17] DIGEST, 89.

[18] See trial of Capt. D. Porter of the Navy, (1825,) p. 20; G. C. M. O. 7, Dept. of the Platte, 1880; Wooley *v.* U. S., 20 Law Rep., 631; also case cited in note 21, *post.*

That the phrase, "*when it can be avoided,*" in Art. 79, has practically the same meaning as the clause of Art. 75, that general courts "*shall not consist of less than 13 when that number can be convened without manifest injury to the service,*" is illustrated by the provision in the *naval article,* (No. 39,) corresponding to that of Art. 79, viz:—"*where it can be avoided without injury to the service;*" this expression combining in effect the two forms employed in the articles of war.

[19] 140 U. S., 240.

[20] 23 Ct. Cl., 34.

[21] In Lieut. Armstrong's case it was held by the Attorney General, (17 Opins., 397,) that the fact that a member, *not objected to on the trial,* would (and did) become advanced in his grade by the dismissal of accused, did not render him incompetent, or affect the validity of the proceedings.

[22] See Trial of Capt. Porter above cited; also, generally, under EIGHTY-EIGHTH ARTICLE in Chapter XIV.

court of equals or superiors in rank for the trial of a general officer of one of the higher grades.[23] Upon courts for the trial of officers of the lower
92 degrees the direction of the Article has been more nearly observed. There have indeed been frequent departures from the rule, prompted doubtless in general by a due consideration for the convenience and economy of the service. Such exceptions, however, *if reasonably avoidable*, are in contravention of the letter of the law, and should not be too freely sanctioned.

**COMPETENCY OF CERTAIN CLASSES OF OFFICERS IN CERTAIN CASES—Regulars, as distinguished from volunteers, militia, &c.—Art. 77.** This article declares that—"*Officers of the regular army shall not be competent to sit on courts-martial to try the officers and soldiers of other forces, except as provided in Art. 78*,"—next to be considered. By "regular army" is to be understood the permanent military establishment, as especially distinguished from *volunteers*, or *militia* in the federal service. These two contingents—volunteers and militia—are indeed quite distinct from each other; the former, as will be further illustrated in the next Chapter, being, for the time, equally with the regulars, a part of the Army of the United States, while the latter, though in the employment of the nation, are State troops.[24] But in view of the comprehensive and general term, "officers and soldiers of *other forces*," the Article has been construed as disqualifying regular officers
93 from acting as members of courts-martial for the trial of any officers or soldiers not of the regular army, whether volunteers, militia, drafted men, or any other persons except the class of *marines* designated in the next article.

Thus a court composed entirely of regular officers cannot legally be ordered for the trial of an officer or soldier of another military force; nor, where such a court has been once duly created for the trial of a regular or regulars is it qualified to proceed to the trial of a volunteer, &c., if brought before it for trial. And where the court is not entirely but only partially so composed, even if it comprises five officers of another force eligible for the particular trial, it cannot legally proceed to such trial.

**Volunteers, &c., as eligible for trial of regulars.** It may be noted that while regular officers are thus precluded by Art. 77 from trying offenders belonging to the other branches of the public military force, our code contains no converse provision that regulars shall not be tried by courts composed

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[23] On some of the principal trials of general officers in our army, the rank of the members of the court was as follows: Maj. Gen. Chas. Lee, (1778,)—1 maj. gen., 4 brig. gens., 8 cols.; Maj. Gen. Arnold, (1779,)—1 maj. gen., 3 brig. gens., 9 cols.; Brig. Gen. Hull, (1813,)—1 maj. gen., 1 brig. gen., 4 cols., 7 lieut. cols.; Maj. Gen. Wilkinson, (1814,)—2 maj. gens., 3 brig. gens., 7 cols., 1 lieut. col.; Maj. Gen. Gaines, (1816,)—1 maj. gen., 3 brig. gen., 3 cols., 6 lieut. cols.; Bvt. Maj. Gen. Twiggs, (1858,)—3 bvt. maj. gens., 2 bvt. brig. gens., 5 cols., 2 bvt. cols., 5 lieut. cols.; Maj. Gen. Porter, (1862,)—2 maj. gens., 7 brig. gens.; Brig. Gen. Hammond, (1864,)—1 maj. gen., 8 brig. gens.; Brig. Gen. Swaim, (1884,)—1 maj. gen., 5 brig gens., 7 cols.; Brig. Gen. Hazen, (1885,)—2 maj. gens., 8 brig. gens., 3 cols.

The court for the trial of Marshal Bazaine, (1873,) consisted of ten generals, no marsbals being at the time available. That by which the "Emperor" Maximilian and his generals Miramon and Mejia were tried and sentenced to death, at Queretaro, Mexico, June 13–14, 1867, was composed of one lieut. col. (president,) and six captains.

[24] Art. 1, Sec. 8 § 16 of the Constitution. In some cases during the late war volunteers were confounded with militia, and it was held that, under the then existing Art. 97, a regular officer could not legally be detailed on a court for the trial of volunteers. G. O. 53, Dept. of the East, 1864; Do. 16, Dept. of the Mo., 1864; G. C. M. O. 11, 13, 16, Dept. of Ky., 1865. While this construction is believed to have been incorrect, it can scarcely be questioned that the present Art. 77—a much clearer and more precise provision—is to be interpreted as indicated in the text.

of officers of the other contingents—militia or volunteers—of a mixed national army. In the absence of any such provision during the late war, officers of volunteers were not unfrequently detailed as members of courts-martial for the trial of regular officers and soldiers; their competency to take part in such trials having been at an early date affirmed by the Judge Advocate General. Officers of militia called forth and engaged in the public service would have been equally competent. And—the law remaining unchanged—militia and volunteer officers will of course be similarly competent, when serving with regulars in the future; as will also militia officers be competent to sit upon trials of volunteers.[25]

94 **REGULARS AND MARINES ASSOCIATED.—Art. 78.** This article provides that: "*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.*" The nature and capacity of that amphibious branch of the public service known as the Marines, as a kind of connecting link between the army and the navy, is illustrated in this Article. This corps, under the earlier legislation in regard to it,[26] had occoupied an undefined position.[27] The Act of June 30, 1834, however, while assimiliating it to the army in respect to organization, discipline and pay, permanently attached it to the naval establishment for administrative and jurisdictional purposes,[28] and is now classed as a part of the navy in the Revised Statutes. The Act of 1834 contained a provision, now re-enacted in Sec. 1621, Rev. Sts.,—"*That the said corps shall at all times be subject to and under the laws and regulations which are or may hereafter be established for the better government of the navy, except when detached for service with the army by order of the President.*"

The latter part of this provision, incorporated with the substance of Article 68 of the code of 1806, forms the present 78th Article.

The principal situations in which marines would be likely to co-operate or be associated with the army on duty, are indicated in the provision of the Act of 1798, embodied in Sec. 1619, Rev. Sts., as follows—"*The marine*

[25] In this connection may be noticed a ruling properly made during the late war—that an aid-de-camp to a Governor of a State was not *as such* eligible to be detailed on a court-martial for the trial of U. S. volunteers. G. O. 30, Dept. of the Mo., 1864.

It is of course not competent for a military commander to *order* that courts for the trial of a certain class of volunteer, &c., troops shall be composed in whole or in part of particular volunteer, &c., officers. Thus the order—G. O. 46, Dept. of Va. & No. Ca., 1863—that a majority of the members of courts for the trial of *colored troops* should, (when the same could be detailed without manifest injury to the service,) be officers in command of such troops, was properly revoked by the subsequent G. O. 29, Dept. of Va., 1865.

[26] Res. of Nov. 10, 1775; Acts of March 27, 1794, July 1, 1797, April 27, 1798, July 11, 1798, and Dec. 15, 1814.

[27] Atty. Gen. Berrien describes the corps, (in 1830,) as—"in many respects anomalous, attached both to the army proper and to the naval armament of the United States, and yet incorporated with neither, but rather *sui generis*" 2 Opins., 357. And see Id., 239–241, 353; 3 Id., 117, where it was regarded as rather belonging to the army; and, *contra*, 1 Id., 381; 2 Id., 78; 5 Id., 705; Com. *v.* Gamble, 11 S. & R., 93; Wilkes *v.* Dinsman, 7 Howard, 125, where it was viewed as an adjunct of the navy—under the legislation prior to 1834.

[28] See 10 Opins. At. Gen., 118, 129, 487; 19 Id., 618, Wilkes *v.* Dinsman, 7 Howard, 125, 126; *In re* Bally, 2 Sawyer, 200; *In re* Doyle, 18 Fed., 369. The corps of the *marines* is not "a distinct military organization," but "a military body, primarily belonging to the navy, and under the control of the head of the naval department, with liability to be ordered to service in connection with the army, and in that case under the command of army officers." U. S. *v.* Dunn, 120 U. S., 253, 255.

95 *corps shall be liable to duty in the forts and garrisons of the United States, on the sea-coast, or any other duty on shore, as the President at his discretion may direct.*" Marines were detached for service with the army for considerable periods in the war with Mexico;[29] and similarly on several occasions during the recent war, of which the taking of Fort Fisher was the most marked.[30]

In the early case of Lieut. Col. Wharton of the marine corps,[31] it was held by Atty. Gen. Rush that, under the terms of Art. 68 of 1806, it was *discretionary* with the government whether to detail *any* marine officers on a court-martial for the trial of a marine serving in connection with the army;—that the court might legally be composed of army officers only; and this conclusion was approved by the President. It was deemed expedient, however, to detail two marine officers on the court in that case; and such course, since adopted in practice, is especially fitting in view of the changed relations of the army and marine corps under the subsequent legislation.

In what proportions the two different classes of officers will properly be associated on courts-martial is not indicated by the Article; this matter being evidently left to be regulated by the convening authority in view of the comparative numbers of the officers of the two corps available for the duty, the particular corps—whether army or marines—of the offender or majority of offenders to be tried, &c.[32]

96 **MILITIA.—Authority for their government, &c.** The Constitution, Art. I, Sec. 8 § 15, 16, empowers Congress—"To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;" and further—"To provide for organizing, arming and disciplining the militia, and for 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." It also, (Art. II, Sec. 2 § 1,) makes the President the Commander-in-chief of the militia when in the service of the United States.[33]

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[29] See the references to the services of this corps in the Mexican war, in 5 Opins. At. Gen., 59, 155; also the recognition of their service by Congress in the J. R. of Aug. 10, 1848, and in the vote of thanks, tendered in the J. R. of Aug. 7, 1848, "to the officers, sailors, and marines of the navy," especially for "their efficient co-operation with the army in the capture of Vera Cruz and the castle of San Juan de Ulloa." See, further, as illustrating the subject, the printed Trial of 1st Lieut. J. S. Devlin, Marine Corps, Washington, 1852.

[30] See official reports of Gen. Terry and Rear Admiral Porter, and votes of thanks to them and their commands in the J. R. of Jan. 24, 1865.

[31] G. O. of Sept. 19, 1817.

[32] Marine, and other, officers were detailed together as follows, in the following Orders:—In G. O., Third Mil. Dept., of Oct. 20, 1813, 1 marine officer with 4 regular and 2 volunteer officers; In G. O., Hdqrs., N. Orleans, of Dec. 25, 1813, 2 marine with 7 other officers; In Dept. O., Second Mil. Dept., Nov. 15, 1817, 1 marine officer with 5 other officers; In Lt. Col. Wharton's case (*ante,*) 2 marine with 3 regular officers; In Orders, Second Mil. Dept., Nov. 24, 1818, 3 marine with 2 regular officers; In G. O. 6, A. G. O., 1830, 2 marine with 5 regular officers, for the trial of a captain of marines; In O., No. 47, Army of the South, 1836, 2 marine with 5 regular officers; In G. O. 10, Hdqrs. Army, Mexico, 1848, 1 marine officer with 8 regular officers, in a court by which were tried 24 soldiers of the army and 1 enlisted marine.

Hough, (P. 683,) cites a case of an officer of marines, in which, "*at the prisoner's request,* his court-martial," (ordered under an article similar to that of our code,) "was composed of one-half officers of his own corps and the other half of officers of the line."

[33] That the *Militia of the District of Columbia* are no part of the Militia of the Constitution, see *ante,* p. 56, note.

By virtue of these grants, Congress, in a series of statutes, particularly in those of May 2, 1792, February 28, 1795, April 18, 1814, May 13, 1846, July 29, 1861, and July 17, 1862, s. 1, has authorized the President, in certain contingencies,[34] to call forth the militia, and has provided for their government; and in a further series, (particularly in those of May 8, 1792, January 2, 1795, May 2, 1803, April 23, 1808, May 12, 1820, March 19, 1836, and July 17, 1862, s. 2,) has provided more especially for their organization, arming, pay, and internal discipline.

Of the former series the Act of 1792 was repealed and superseded by that of 1795, which was indeed with some slight modifications a repetition of the first. The Acts of 1814 and 1846 were resorted to for the special oc-
97 casions of the late war with Great Britain and the war with Mexico respectively, and presently expired by their own limitation.[35] To the date of the Revised Statutes the Act of 1795 remained the principal law on the subject of the mobilization and government of the militia, though in some of its details superseded or materially amended by the Acts above specified of 1861 and 1862.[36] These Acts were indeed adaptations of the legislation of 1795 to the circumstances of the recent war. Such of their provisions as were of a general character, together with those remaining from the Act of 1795 and other early legislation, comprise, (in combination with the operative enactments of the second series above indicated,) the existing law relating to the militia, and are all incorporated in a separate Title—No. XVI—of the Revised Statutes.

The first section of this Title defines the militia as including, generally,[37] "every able-bodied male citizen of the respective States, resident therein, who is of the age of eighteen years, and under the age of forty-five years;" and Atty. Gen. Legaré has well described this class as "the body of the people, armed and disciplined in self defense."[38] When and how the militia are brought within the *jurisdiction* of courts-martial, and what is the extent of that jurisdiction, will be considered in the next Chapter.

**Composition of militia courts.**[39] As to the composition of such courts,—Sec. 1658, Rev. Sts., (a re-enactment, in the same words, of s. 6 of the Act of 1795,[40]) provides: "Courts-martial for the trial of militia shall be composed of militia officers only."

The "courts-martial" here indicated are courts-martial not of States
98 but of the United States, convened not under State law but under the Articles of war, and the militia referred to are the militia when called into the active service of the United States under the Constitution and the laws above mentioned. The "militia officers" are the officers elected or appointed for such militia under the laws of the States from which they are called, in conformity with the Constitution, Art. I, Sec. 8, § 16.

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[34] That the President is the sole judge to determine whether one of the exigencies contemplated by the Constitution has arisen, and that his decision on the point is conclusive upon all other persons, was held in Martin *v.* Mott, 12 Wheaton, 19. And see Luther *v.* Borden, 7 Howard, 11; Vanderheyden *v.* Young, 11 Johns., 150; People *v.* Campbell, 40 N. Y., 135; Kneedler *v.* Lane, 45 Pa. St., 238.

[35] See Mills *v.* Martin, 19 Johns, 21, 23.

[36] By the Act of 1862, the President was, for the first time, authorized to resort to conscription for compelling the service of the militia. See McCall's Case, 5 Philad., 259.

[37] With certain exemptions specified in Sec. 1629.

[38] 2 Opins. At. Gen., 691. The so-called "*National Guard*" is simply a part of the militia. Neither the Constitution nor Laws of the United States distinguish it in any manner from the mass of the militia.

[39] As to the courts-martial of the militia of the District of Columbia, see *ante*, p. 55, note.

[40] This provision was also contained in the code of articles of 1806, (in Art. 97,) but was omitted from that of 1874.

In composing, however, courts-martial for the trial of militia, the members are to be selected from the entire body of militia officers in the service of the United States, without any reference to the different States from which they may have been called. Militia once called into the service, from whatever State, may be placed by the President under the command of *any* officer,[41] and may be required to serve in any part of the United States;[42] and it was specifically held in Mills *v.* Martin[43] that a court for the trial of a militiaman need not be composed of officers of the militia of the State of the accused, but might legally be made up of officers of the militia of *any* State or States. In the article of war of 1776, in which the statute under consideration first appeared in our law, it was provided that militia courts should "be composed entirely of militia officers of the same provincial corps with the offender." This restriction was omitted in the corresponding article of 1806, the original provision having been meanwhile superseded by the present form as initiated in the Act of 1795.[44]

## II. NUMBER OF MEMBERS.

**THE LAW ON THE SUBJECT.** This is contained in Art. 75, as follows:—"*General courts-martial may consist of any number of members from five to thirteen; but they shall not consist of less than thirteen when that number can be convened without manifest injury to the service.*"

**FIVE MEMBERS A QUORUM.** It is clear from the first part of this provision that, while a court of less than five or more than thirteen[45]
99 members will not be a legal body,[46] a court of five will always be a full and complete tribunal for the purpose of trial and judgment, and that the addition of further members will not augment or in any manner affect its jurisdiction or authority. A less number indeed than five may meet and adjourn, and where there are but five members present at the outset and one is objected to, (under Art. 88,) the other four may deliberate and determine upon the challenge.[47] But five members at least must be sworn and constitute the court for the trial, and five must continue present and acting throughout the entire proceedings till the final record is completed and authenticated.

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[41] Cooley, note to 2 Story, Com., 121.

[42] Highsmith *v.* Ussery, 25 Texas, 108.

[43] 19 Johns., 7.

[44] The present enactment is, as has already been noticed, properly an article of war, and might well have been embraced in the present, as it was in the preceding, code.

[45] The first Mutiny Act prescribed that no court authorized thereby should "consist of fewer than thirteene." Clode, (M. L., 120,) observes:—"It may reasonably be presumed that the controlling analogy which suggested this tribunal, (composed of a president and twelve officers,) was the civil administration of justice by a presiding judge and twelve jurymen." In the present British law, "a general court-martial shall consist, in the United Kingdom, India, Malta, and Gibraltar, of not less than nine, and elsewhere of not less than five, officers." Army Act, § 48, (3.)

[46] Thirteen members were usually detailed on our earlier important general courts-martial—those, for instance, for the trials of Gens. Hull, Wilkinson and Gaines, and Col. Cushing, in 1811–1818. So, for the trials of Capt. Drane in 1846, Lt. Col. Fremont in 1847, and Gen. Twiggs in 1858. Of later years the maximum has more commonly been nine—the number in the cases of Gens. Porter and Hammond, in the recent war. In the cases of Gens. Swaim and Hazen, however, the number detailed was thirteen, and that number is now, (1894–5,) more resorted to than heretofore. In the British service, before courts of less than thirteen were authorized for the trial of officers, the number of members often exceeded that number. For example, the number detailed for the trial of Lord George Sackville, in 1760, was sixteen; for the trials of Lt. Gen. Murray and Col. Debbieg, in 1783 and 1784, eighteen; for the trial of Lt. Gen. Mordaunt, in 1757, twenty-one; and for the trials of Capt. Burrish, Lieut. Page, and others, tried by a naval court in 1745, twenty-five.

[47] DIGEST, 88.

If the court begins with more than five members, the loss or absence of one or more does not affect its capacity provided at least five remain, and this rule applies through the entire life of the body.[48] Thus five are sufficient to be re-
assembled and to revise the sentence, though when it was originally ad-
100 judged, the court may have consisted of ten or thirteen members; and
the sentence, as revised and finally adopted by the five, will be the sentence of the court.[49]

On the other hand, if a court, beginning with five or more, loses, by the operation of challenge, or by death, sickness, or other casualty, a member or members, so that it is reduced to four or less, its action must be at once suspended, since it has ceased, for the time at least, to be a court, and the objection to its proceeding is one which cannot be waived.[50]

The number—within the limitations of the Article—to be detailed upon a general court for the trial of any case or cases, will be determined by the convening commander in his discretion, and with a view especially to such circumstances as the rank of the accused, the importance of the case, the character of the offence, the supply of available officers, and the exigencies of the service.[51]

**AUTHORITY TO ADD MEMBERS.** A General court, though reduced below five, is not necessarily to be dissolved, nor can it assume to dissolve itself or declare itself dissolved. Such dissolving is a function of the convening commander, who is also empowered, in his discretion, to continue the court by adding a member, or the requisite number of members to bring it up to five, and when thus renewed, its power as a court is restored, and it may legally proceed with the trial.[52] The adding, however, of new members to courts-martial, *after a trial has been entered upon*, has been of rare occurrence in
our practice. Such action is not indeed illegal;[53] the added member,
101 provided the evidence taken, or material proceedings had, prior to his
appearance, be first read to him from the record, and he be duly sworn, (after the accused has been afforded an opportunity to challenge him,) may legally act upon the court during the remainder of the trial and take part in the judgment; and the sentence, if any, imposed by the court will be entirely legal and operative. But this action must be in general of doubtful policy, and is not to be resorted to unless the demands of justice and interests of the service clearly require it. Where, for example, by the death, disability, enforced absence, &c., of a member or members, a court is reduced below five, in the midst of an important trial, so that, if not renewed, its previous proceedings, however extended, will go for nothing, and the trial will have to be recommenced by a new court, to the delay of justice, inconvenience of the service, detriment of discipline, and perhaps greatly increased public expense,—

[48] A form, now unknown, prevailed to some extent in our army, apparently till about 1841, of detailing 13 or 11 members, with directions to proceed if not reduced below 9 or 7. See G. O. 44 of 1832; 3 of 1837; 25 of 1839; 65 of 1841.

[49] DIGEST, 678. And see 7 Opins. At. Gen., 338. The direction often given in convening orders to the effect that "should any of the members be prevented from attending, the court will proceed provided the number present be not less than the legal maximum"—is wholly unnecessary and surplusage.

[50] DIGEST, 88.

[51] Coppée, 55.

[52] DIGEST, 88.

[53] Though not favored, it has been regarded as legal in our service ever since it was sanctioned by the Secretary of War on Gen. Hull's trial in 1814. The Secretary there held that new members might be added pending a trial, "the proceedings as recorded being read to them." See published Trial, appendix, p. 29. From this ruling dates also the authority for the returning to the court of absent members, a subject to be considered in Chapter XII.

in such a case the authorized commander will be fully justified in continuing the courts by the detail of the requisite number of members.

**EFFECT OF SECOND CLAUSE OF ARTICLE.**—"Manifest injury."—The Article, as has been seen, declares that a general court "*shall not consist of less than thirteen when that number can be convened without manifest injury to the service.*" In a case of a deserter sentenced to be shot by a court of five members, it was held, at an early period, (1810,) by Atty. Gen. Wirt,[54] that the court "was not a legal" one "if thirteen could have been convened without manifest injury to the service." He adds:—"It is difficult to conceive an emergency so pressing as to disable the general officer who orders the court from convening thirteen commissioned officers on a trial of life and death, without manifest injury to the service. And if a smaller number act without such manifest emergency, I repeat that they are not a lawful court, and an execution under their sentence would be murder." He concludes by suggesting to the Secretary of War "as a matter of legal propriety, that in every case of life and death at least, the President ought to be satisfied of the manifest injury which the service would have sustained in convening a court of thirteen before he gives his sanction to a sentence of death by a smaller number."

102 This case was one which occurred in time of peace, when death sentences are required to be confirmed by the President, and, being of an extreme class, it was proper that the fullest weight should be given to any legal doubt as to the validity of the proceedings. But the theory that the question of "manifest injury" is reviewable by the President, or any authority superior to the officer who ordered the court, has ceased to be admissible since the specific adjudication on the subject, in 1827, by the Supreme Court in the case of Martin *v.* Mott.[55] In this case, Story, J., in construing the provision of the Article under consideration, held that the same was "merely directory to the officer appointing the court, and that his decision as to the number which can be convened without manifest injury to the service, being in a matter submitted to his sound discretion, must be conclusive." This ruling settled the law on this point,[56] and the question as to the legality of a court of less than thirteen members is not now raised in practice.

In the form of Order for convening a general court, now commonly employed, a clause is generally added, after the recital of the officers detailed, when less than thirteen, to the effect that 'a greater number of officers than those named cannot be assembled without manifest injury to the service.' Such addition, however, though usual, is not necessary, and its omission will affect in no manner the validity of the order. The mere fact that less than thirteen *are* detailed will constitute a sufficient indication of the determination by the convening officer, in his discretion, that a greater number can not in fact be assembled without the prejudice to the service contemplated by the Article.[57]

**SUPERNUMERARY MEMBERS.** It remains to notice a practice, which at one time prevailed in our service, of detailing, with a court of thirteen,

103 (and sometimes with a court of lesser number,) one or more additional officers as "supernumeraries," whose purpose was to supply the places

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[54] 1 Opins., 299, 300.

[55] 12 Wheaton, 34.

[56] See 2 Opins. Atty. Gen., 535; 6 Id., 511; Wooley *v.* U. S., 20 Law Rep., 631, and Am. S. P., M. A., vol. IV, 850; G. O. 4, Mil. Div. Atlantic, 1874; also Clode, (M. L.,) 123. And see the recent case of Mullan *v.* U. S., 140 U. S., 245.

[57] See O'Brien, 228. The early case of Mills *v.* Martin, 19 Johns., 26, (1821,) is, in effect, *contra*. But the provision under consideration had not then received the interpretation subsequently given it in Martin *v.* Mott. Par. 1002, A. R., now declares—"A decision of the appointing authority as to the number that can be assembled without manifest injury to the service is conclusive."

of such original members as might be excluded on challenge, or whose seats might be vacated by absence,—thus keeping the court always up to the maximum. These officers took their seats with the court and were sworn with it, were subject to challenge, were present during the trial and permitted to take part in discussions on interlocutory questions but not to vote thereon, and retired—if not previously becoming full members—when the court was finally cleared to deliberate upon its findings and sentence.[58] This practice, however, had no statutory sanction, and, in substantially adding members with limited indeed but material powers to the maximum of thirteen, was in fact in contravention of the Article of war. It has been disused in our service for some fifty years,[59] though in the British it still subsists in a different form.[60]

[58] See De Hart, 88; Macomb, 15; O'Brien, 226; Benét, 28, 87; Coppée, 46, 54. Supernumeraries are constantly detailed with general courts in the early Orders of the War Department, &c., especially from 1809 to 1836. In each of the cases of Gens. Hull, Wilkinson and Gains, three supernumerary members were named in the original detail. Supernumeraries were also detailed in the navy, and for courts of less than thirteen members. See 1 Opins. At. Gen., 698.

[59] The paragraph, (§ 237,) of the Army Regulations of 1841, directing the detailing of "one or more supernumeraries" with courts of thirteen members, does not appear to have been repeated in any subsequent issue. A comparatively recent, though isolated case, is published in G. O. 9, Dept. of the Mo., 1862, of a general court attended by a supernumerary, who, upon a vacancy occurring on the trial of an officer, took a seat as a member.

[60] The British law authorizes the convening authority to detail, with the regular members, "such *waiting officers* as he thinks expedient," with a view "to provide for casualties or for the case of challenges being allowed," Rules of Procedure, § 17 (D,) 25 (G,) Simmons, §§ 427, 526.

# CHAPTER VIII.

## THE JURISDICTION OF GENERAL COURTS-MARTIAL.

104 THE subject of the jurisdiction of general courts-martial will be considered under the following heads:—

I. The Place or field over which such jurisdiction extends or within which it may be exercised;

II. The period of Time to which its exercise is limited;

III. The Persons who are subject to it;

IV. The Offences which it embraces.

### I. THE PLACE OR FIELD OF JURISDICTION.

**IT INCLUDES THE ENTIRE UNITED STATES.** The jurisdiction of general courts-martial is coëxtensive with the territory of the United States. That is to say, a general court assembled at any locality within that territory may legally take cognizance of an offence committed at any *other* such locality whatever; such a court, unlike a civil tribunal, not being restricted in the exercise of its authority to the limits of a particular State or other district or region. While it will in general be more for the interest and convenience of the service to bring an accused officer or soldier to trial at or near the place of his offence, he may, with equal *legality*, be tried by a court convened, (by competent authority,) in any other part of the United States.[1] This is a general principle, nor is its application limited to cases in which the court is convened by a commander whose command is conterminous with the federal domain—as the President as Commander-in-chief, or the general commanding the army. A court ordered by a department commander within his department, for the trial of
105 an officer or soldier of his command, may take cognizance of the case though the offence or offences may have been committed in any other department or departments. It may be added that the question, whether an offence was or not committed at a place over which exclusive jurisdiction has been reserved or ceded to the United States, can affect in no respect the jurisdiction of the *military* court before which such offence is brought for trial.

**EXTENDS TO REGION OF MILITARY OCCUPATION IN WAR.** Further, such jurisdiction extends to the places or territory held or occupied by our armies when invading the domain of a foreign nation with which we are at war. A court-martial, whether assembled in the foreign territory or in the United States, will have jurisdiction of military offences committed within such places equally as if committed on our own soil.[2]

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[1] See DIGEST, 322.

[2] "Wherever our army or navy may go beyond our territorial limits, neither can go beyond the authority of the President or the legislation of Congress." Chase, C. J., in Ex parte Milligan, 4 Wallace, 141. And see 5 Opins. At. Gen., 58; Coleman *v.* Tennessee, 97 U. S., 515, 516. In the latter case the law was applied to offences committed by soldiers of our army when in occupation of insurrectionary districts during the late war, and it was held that, (as in the case of an army lawfully marching through the territory of a foreign country—see *post*,) our army was then exempt from amenability to the local courts and subject only to the jurisdiction of its own military tribunals.

**EFFECT OF PRINCIPLE OF EXTERRITORIALITY.** Such jurisdiction extends also to offences committed by our officers or soldiers within the lines or in the neighborhood of our armies, when in the transit, by the permission of its government, through the domain of a foreign nation with which we are at peace. This on the principle of international law known as "exterritoriality," under which when the armies of one nation are privileged to enter or pass through the territory of another friendly nation, the laws of the former are deemed to continue to apply to its forces equally as if the same were within their own country.[5] Such, for example, would be the legal status of our troops
106 when permitted by the government of Mexico to cross the frontier in carrying on hostilities against Indians.[4]

**CASES OF OFFENCES COMMITTED IN FRIENDLY FOREIGN TERRITORY, ENTERED WITHOUT AUTHORITY.** A status less clearly defined in law is that of our military forces when induced, in pursuit of Indians or marauders, or for other purposes, to enter the territory of a foreign power with which we are at peace, *without its authority*. While such an entry of an armed body would be *per se* unlawful,[5] it is nevertheless the opinion of the author that military offences committed by any of such forces on the foreign soil would properly be cognizable by courts-martial convened within the United
107 States, provided the offender at the time of the offence was a member of an organized detachment or other force under military command and discipline. For while a refusal to cross the boundary under the circumstances might not constitute a disobedience of a "lawful command" in violation of the 21st Article of war, it does not follow that an act of insubordination, neglect, or disorder, or an act of desertion, committed after the passing of the frontier in obedience to orders, would not be cognizable and punishable as a military

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[3] "This privilege is extended to armies in their permitted transit through foreign territory," and includes the right "of exercising military discipline on the officers and soldiers. * * * When the transit of troops is allowed, it is apt to be specially guarded by treaties." Woolsey, Int. Law, 64; Vattel, 3., 7 § 130. And see The Exchange, 7 Cranch, 139; Coleman *v.* Tennessee, 97 U. S., 515.

[4] There has in fact existed for some years a formal "provisional" agreement between the governments of the United States and Mexico, stipulating for the "reciprocal crossing in the unpopulated or desert parts of the international boundary line, by the regular federal troops of the respective governments, in pursuit of savage hostile Indians." This agreement, originally made in July, 1882, (see G. O. 91, 118, of 1882,) to continue in effect for one year, has been since repeatedly renewed. The last form of the agreement is dated Nov. 25, 1892, and is to continue in force not beyond one year. See it published in G. O. 85 of Dec. 22, 1892. Of this agreement the only portion that need be cited in this connection is the following: "ART. VII. The abuses which may be committed by the forces which cross into the territory of the other nation shall be punished by the government to which the forces belong, according to the gravity of the offence and in conformity with its laws, as if the abuses had been committed in its own territory, the said government being further under obligation to withdraw the guilty parties from the frontier."

[5] It would, in the first instance, be unlawful for any subordinate commander to direct such an invasion or command the invading party, except under orders emanating from the highest authority. In Com. *v.* Blodgett, 12 Met., 84, 90, the court say:—"Nothing but the sovereign power of the State, by a previous order directing such invasion, or by a subsequent ratification when done in its name, will warrant such invasion, and excuse the subordinates engaged in it. * * * Such act is a high prerogative of sovereignty and the necessity of it must be judged of, and the warrant for it must be given, by the express command or direction of the sovereign authority." Note, in this connection, G. O. 97 and 100, Dept. of the East, 1864. In the former Order, military commanders near the Canadian boundary were instructed by General Dix to cross the same where necessary in pursuit of marauders, and pursue, capture and bring them within the United States for trial and punishment. In the latter Order, it was announced that this instruction had been *disapproved* by the President and was accordingly revoked.

offence equally as if committed within our own territory. Indeed, that it *would* be so cognizable can scarcely reasonably be questioned.[6]

**OFFENCES COMMITTED IN A FOREIGN COUNTRY WHEN THE OFFENDER IS NOT PRESENT IN A MILITARY CAPACITY.** Thus an officer or soldier of our army committing, in a foreign country, an act which, if committed at home, would constitute an offence against our military code, would in general be amenable to trial therefor, by court-martial, on his return, provided that when he committed it he was within the foreign territory *in a military capacity.* But if *not* present there in a military capacity—as where he had passed the frontier for private business or amusement, or on a social visit, or for other personal reason, or was there as a deserter from our army—his amenability to trial by a court-martial in his own army for an offence committed would depend upon the nature of the offence itself. A crime or disorder committed against an inhabitant of the country could ordinarily scarcely be cognizable under the 62d Article as prejudicial to military discipline,
108 or otherwise than according to the local law. But for an act which at home would constitute conduct unbecoming an officer and a gentleman, an officer offending would in general remain as liable to trial under Art. 61 as if the offence were committed within the United States. Thus it has been held that an officer of our army was liable under this Article to trial by court-martial in Texas for the offence of exhibiting himself in a drunken condition at a public entertainment in Mexico.[7] The status of amenability of the officer or soldier under the circumstances would thus be analogous to that of an officer or soldier absent on leave or furlough within his own country,[8] or while held as a prisoner of war by the enemy.[9]

**The question of jurisdiction as affected by the 64th Article.** This Article provides as follows: "*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.*"

This enactment has recently been construed as conferring upon courts-martial by the term—"*in all places,*" a jurisdiction over offences committed by officers or soldiers of the army in foreign countries, and thus to constitute authority for the trial, by a court-martial convened in our own territory, of a military

[6] In the case of Pvt. Joseph Lee, convicted by a general court-martial in Texas of manslaughter, consisting in the homicide of a sergeant of the detachment while on a scout within Mexico,—in which the proceedings and sentence were approved by Gen. Ord in G. C. M. O. 17, Dept. of Texas, 1877,—it was held by the Secretary of War, June 23, 1877, that the court had jurisdiction of the case.

The ruling *contra,* by a department commander in a case published in G. C. M. O. 35, Dept. of the Missouri, 1872, is not regarded as sound.

The point may here be noticed, though not as a matter necessarily affecting *jurisdiction,* that our military authorities can have no authority to enter a foreign country for the *arrest* there of a military offender who has escaped from the United States. Thus, in G. O. 119, War Dept., 1863, an officer of volunteers is dismissed by the President "for violation of the sovereignty of a friendly foreign State, in arresting a deserter from the U. S. forces and bringing him away from within the boundaries of Canada."

[7] See DIGEST, 331.

[8] See G. C. M. O. 14, Dept. of Texas, 1888; also remarks upon this Article in Chapter XXV, *post.*

It may be observed, however, that, whether or not the offending officer or soldier were within the foreign territory with or without authority from his proper military superiors, would be immaterial: his status of amenability to our jurisdiction for offences committed in that territory would not be affected by the circumstances of his having been there with or without a leave of absence or pass, or other permission.

[9] See *post*—"Jurisdiction during Absence on leave or as a Prisoner of war."

offence committed abroad.[10] With due deference to its source, this construction can but be regarded by the author as a forced one and not war-
109 ranted either by the context or history of the Article. It is considered that this Article is a declaratory provision intending no more than simply to affirm the general rule of amenability to military law of any forces or detachments, such as militia or marines, who may be serving with the army in time of war, rebellion, &c., assimilating them to the latter in respect to discipline and jurisdiction. To the army itself, as such, the Article, it is believed, is not intended to apply, but only to the contingents which, under the Constitution and laws, may be employed with it in the U. S. service on particular occasions. This is deemed to be quite clear from the language of the *original* provision, which occurs first in Art. 1, Sec. xvii, of the Articles of 1776 and is repeated in Art. 97 of the code of 1806. Here, after the words—"in all places," is added—"*when joined or acting in conjunction with the regular forces of the United States.*" Nor, in the view of the author, does the fact that this part of the Article is now omitted modify or affect its import, since these additional words were surplusage merely and doubtless omitted for that reason. It would only be when militia, marines, &c., were serving in connection with the army that they would properly be amenable to the jurisdiction of army courts, and, by the omission, the Article has been merely simplified without any change of meaning.

The sound conclusion is thus considered to be that the Sixty-fourth Article has, in fact, no larger or other significance or scope than as an enunciation of a general principle as aforesaid, and accordingly affects in no manner whatever the question of the amenability of officers or soldiers of the army for offences committed in foreign countries. This Article indeed, as being declaratory of the law as enacted in other statutes,[11] might well be dropped as superfluous upon a revision of the existing code.

## II. THE TIME WITHIN WHICH JURISDICTION IS TO BE EXERCISED.

**AS AFFECTED BY THE LIMITATION OF ART. 103.** If the jurisdiction of a general court-martial can properly be regarded as controlled in its exercise by any general rule of limitation as to *time*, such general rule
110 is that prescribed in the 103d Article of war. This Article, (as amended by the Act of April 11, 1890,) prescribes that for all offences, except "*desertion in time of peace and not in the face of the enemy*," an officer or soldier shall not (unless meanwhile withdrawn by absence, &c., from the jurisdiction) be liable to trial by general court-martial, where the offence "*appears to have been committed more than two years before the issuing of the order for such trial.*" In the excepted case of desertion, it is provided that the party (unless meanwhile absent from the United States) shall not be so triable where, at the time of his arraignment, *more than two years* have elapsed since the *end of the term* for which he enlisted.

But the question here arises whether this Article is to be viewed as a prohibitory restriction upon *jurisdiction*, or merely as providing a *defence* to be taken advantage of by special plea.

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[10] This ruling was one made by the Acting Judge Advocate General, in January, 1891, in a case of an officer who, having committed in Mexico what would be a military offence under our Art. 61, was held triable therefore by a court martial subsequently convened in the Department of Texas, not only on general grounds but also *by the authority of this Article.* See DIGEST, 331.

[11] As the Act of Feb. 28, 1795, c. 36, s. 4; the Act of July 29, 1861, c. 25, s. 3; Secs. 1621, 1644, Rev. Sts.

**VIEW OF ATTORNEY GENERAL WIRT.** It was held at an early date, (1820,) by Mr. Wirt,[12] in construing this Article, that the limitation thereby prescribed was *absolute* in all cases and could not be *waived*. The reason assigned for this opinion was in effect that the Article was an enactment based upon considerations of *public policy*, being intended not solely for the benefit of the accused, but to secure that prompt and certain prosecution of military offences which is essential to maintain the discipline of the service; and that therefore it was to be regarded as prohibitory not only upon the United States but upon the accused also. The view of Mr. Wirt, that the limitation was not waivable, was affirmed by later Attorneys General,[13] and for a considerable period was recognized in the War Department as established law.[14] And it was held by the Judge Advocate General,[15] and subsequently by the Attorney
111 General,[16] that an accused could not, by a *plea of guilty* at the trial, any more than by previously requesting,[17] or by consenting without objection, to be tried, waive the limitation and withdraw the case from the application of the Article, where it appeared from the charge that the offence had been committed more than two years before the ordering of the court.

**RULING OF THE U. S. CIRCUIT COURT.** If this view as to the effect of the Article is the correct one, the subject of the limitation is properly to be considered in the present Chapter. But though this view was apparently that taken by the U. S. District Court for the Southern Dist. of New York, in 1880, in Davison's case,[19] the judgment in that case was, in 1884, reversed on appeal in the U. S. Circuit Court, Second Circuit,[19] where it was in substance held that the limitation of Art. 103 was not a jurisdictional objection but a "matter of defence;" the court here adopting the ruling which had been made at San Francisco in the previous year, in Bogart's[20] and White's Cases,[21] by the Circuit Court for the Ninth Circuit. In these cases, (and subsequently in Zimmerman's Case,[22] in the same Circuit,) the courts, in effect through not in terms, overrule Mr. Wirt's opinion, and treat the military statute of limitations as the United States' and State statutes of limitations relating to crimes are ordinarily treated, *viz.* not as a restriction upon the powers of the court, but as a provision solely or mainly for the benefit of the accused, to be taken advantage of by him at his option, by way of defence in the form of special plea, or on the general issue.

These rulings are followed in the War Department, and have now apparently settled the law upon the question involved. In view of this conclusion, the subject of the application and operation of the provisions of Art. 103 has been incorporated in Chapter XVI, in treating of PLEAS.

**TERM OF JURISDICTION IN GENERAL.** The term of time dur-
112 ing which an officer or soldier continues within the jurisdiction of a

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[12] 1 Opins., 383. Compare this view with the converse view expressed by him, in 1 Opins., 233, as to the waiver of the benefit of the provision of Art. 102, a point remarked upon in Chapter XVI.—"Waiver of the right to plead former trial."

[13] 6 Opins. At. Gen., 239; 13 Id., 463; 14 Id., 267–8; 16 Id., 173.

[14] See the opinion, as adopted by the Secretary of War, of Judge Advocate General Holt, in the case of Brig. Gen. Dyer, Chief of Ordnance. Proceedings of Court of Inquiry, Part II., pp. 612–614.

[15] See DIGEST, 12.

[16] 16 Opins., 17.

[17] See Gen. Dyer's Case, *ante*.

[18] *In re* Davison, 4 Fed., 507.

[19] 21 Fed., 618.

[20] *In re* Bogart, 2 Sawyer, 397.

[21] *In re* White, 9 Sawyer, 49, 17 Fed., 723.

[22] *In re* Zimmerman, 30 Fed., 176.

court-martial is the term between the time of his entering the military service by acceptance of appointment or commission, or by enlistment or muster in, and the time of his leaving it by resignation, dismissal, discharge, or death. This subject will be more fully treated in this chapter, under the later head of—"Beginning and End of the Personal Amenability."

**AS AFFECTED BY THE CONTINUANCE OF WAR.** While the termination of a state of war does not, as such, affect the jurisdiction of a court-martial, as it does that of a military commission—a tribunal whose action is determined by the existence and continuance of war—there are yet cases in which, by the express terms of a statute, or by implication from its terms, the jurisdiction of a court-martial over certain specific offences is restricted to the period of war. Thus the 58th Article of the code expressly makes the offences therein enumerated punishable by sentence of general court-martial only in time of war, rebellion, &c., and if in any case the war which prevailed at the commission of the offence has ended[23] before the same is actually brought to trial, the court will not be legally competent to take cognizance thereof under this Article. Similarly, it has been held that Sec. 1343, Rev. Sts., relating to the offence of the spy, inferentially limits the trial by court-martial of a spy to the period of the duration of the war, &c., so that if not brought to trial before the war is terminated, he cannot be tried at all.[24]

The term "*war*," as employed here and elsewhere in this treatise, is to be understood as including not only foreign or international war, but also civil war, as well as a state of active hostilities with an Indian tribe.

## III. THE PERSONS SUBJECT TO THE JURISDICTION.

**CLASSIFICATION.** General courts-martial, created and empowered as they are by express statute, can exercise jurisdiction over such persons and offences only as are constitutionally brought by statute within their cognizance.

113 By the articles of war and other statutes certain classes of persons are rendered, or declared to be, amenable to the jurisdiction of courts-martial, as follows:—I. The Army of the United States; II. The militia when called into the service of the United States; III. Officers and soldiers of Marines when detached for service with the Army; IV. Certain civilians subjected to military discipline in time of war; V. Certain other civilians.

### I. The Army of the United States.[25]

In this designation are embraced the following:—1. The Standing or "Regular" army; 2. Volunteers; 3. Drafted men.

1. **THE REGULAR ARMY.** The constituents of this army are the officers, soldiers and others specified in Sec. 1094, Rev. Sts., and its amendments, *viz.*: certain general officers and their aids; certain officers and enlisted men of the staff departments; certain officers and enlisted men of the enumerated regiments of artillery, cavalry and infantry; certain enlisted men of the hospital corps and "general service," or unattached to regiments, &c.; the "army service men of the quartermaster department;" a force of enlisted Indian scouts, the

[23] As to what constitutes a legal termination of a state of war, see Chapter XXV.—Fifty-Eighth Article.

[24] *In re* Martin, 45 Barb., 142; Wells on Jurisdiction, 577.

[25] The President, though commander-in-chief, is not a part of the army or a military person. In Parker *v.* Kaughman, 34 Ga., 136, it was held that the President of the "Confederate States," being commander-in-chief, was "in the army;" but this was probably a misconception.

corps of professors and cadets[26] of the Military Academy, and the officers and enlisted men of the retired list.[27] The total enlisted force, exclusive of the "general service" and the hospital corps, is fixed by statute at 25,000 men. The aggregate of the entire army, officers and enlisted men, (including the officers and men of the retired list, amounting to 1,562,) is given in the Army Register for 1895 as 29,838. These members of the regular army of whatever grade are all military persons: there exists no longer in our service what
114 was once styled the "civil branch" of the army. Our surgeons, paymasters, chaplains, storekeepers, &c., are all now commissioned officers in the same manner as are the officers of the line, and, whether or not having commands, are, equally with the latter, military officers. The professors of the Academy, though without rank, are, as indicated in the foregoing Chapter, commissioned officers; and even the cadets, whose status was for a long period not clearly defined,[28] are now held to be "inferior officers, appointed though not commissioned."[29]

In time of *peace*, the "regular" army ordinarily constitutes the entire Army of the United States.

**2. VOLUNTEERS.** In time of war the regular contingent has commonly been supplemented by a force of volunteer troops: in the late war indeed the volunteers composed by far the greatest portion of our army. Though in some particulars of its organization assimilated to the militia, this force is in fact as well as in law quite distinct therefrom. Originated under the constitutional power "to raise armies," not under the power "to provide for calling forth the militia," it is also distinguished from the militia in the persons composing it, in the period of their service, and in the duties upon which they may be employed. The *militia* is composed of citizens between 18 and 45 years of age, (Rev. Sts., Sec. 1625,) their term of service cannot exceed nine months, (Id., Sec. 1648,) and they cannot be used for the invasion of a foreign country or for military service abroad.[30] The employment of *volunteers* is not limited by any of these restrictions. That this force, though differing from the regulars in that it is resorted to for a temporary purpose,[31] is, equally with the latter, a part of the Army of the United States, has, (as indicated in the last Chapter,) been expressly held and adjudged.[32]

115 **3. DRAFTED MEN.** Through the necessities of the government there came to be added, during the recent war, to the Army of the United States a further body of *drafted men*, who entered the military service not as volunteers but compulsorily, under the provisions of the Act of March 3, 1863, c. 75, and the succeeding statutes in amendment, &c., of the same. This is the first and only instance in our history in which the regular army has been

[26] That Cadets have always been a part of the Army, see Morton *v.* U. S., 112 U. S., 4.

[27] That retired officers are a part of the army and so triable by court-martial—a fact indeed never admitting of question—is adjudged in Tyler *v.* U. S., 16 Ct. Cl., 223; Id., 105 U. S., 244; Runkle *v.* U. S., 19 Ct. Cl., 396. And see Hill *v.* Territory, 2 Wash. Ter., 147. By the Act of Feb. 14, 1885, enlisted men of the army and marine corps were made eligible to retirement after thirty years' service.

[28] As to the status of the Cadets as viewed by the Attys. General, see 1 Opins., 276, 469; 2 Id., 251; 7 Id., 323; 16 Id., 611. That they are liable to trial by garrison, (as well as by general,) courts-martial was held by Wirt, (1 Opins., 469,) and affirmed by Cushing, (7 Id., 323).

[29] Babbitt *v.* U. S., 16 Ct. Cl., 202.

[30] McCall's Case, 5 Philad., 259.

[31] 7 Opins. At. Gen., 621.

[32] Burroughs *v.* Peyton, 16 Grat., 483; Kerr *v.* Jones, 19 Ind., 351; Wantlan *v.* *White*, Id., 470; DIGEST, 60, 424, 478. And see 3 Opins. At. Gen., 696; 6 Id., 484; 7 Id., 621.

recruited by conscription.[33] Owing to the defects in the operation of the existing militia systems of the States,[34] and to the fact that the *materiel* of the militia was limited to citizens,[35] the measure of adding to the military strength of the country by calling out the militia had, notwithstanding the authority to enrol this force conferred upon the President by the Act of July 17, 1862, proved quite inadequate to the emergencies of the period. The Act of 1863 was therefore passed, by which all able-bodied citizens of the United States and all aliens who had declared their intention to become citizens, between the ages of twenty and forty-five years, were constituted "national forces," and required to be enrolled subject to draft by the United States authorities. This Act did not repeal that of 1862, but being "more matured in its details than any system that could have been organized for the militia,"[36] as well as more efficient and comprehensive in its operation, was resorted to almost exclusively in lieu of the former statute.[37] The Act of 1863 and the system thereby inaugurated have received an especially careful examination in McCall's Case[38] and the leading case of Kneedler *v.* Lane,[39] in which the Act was held
116 to be a constitutional exercise of the power of Congress "to raise armies," and the troops raised by draft under the machinery which it provided were held to constitute a part of the Army of the United States.[40] As such they were of course subject to trial by court-martial.[41]

**GENERAL PROVISION OF SEC. 1342, REV. STS.** Thus defined, the Army of the United States, whether composed solely—as in time of peace—of the regular army, or—as in time of war—of this and one or both of the other contingents named, is, as a whole, made subject to the jurisdiction of courts-martial by this Section, which, in prefacing the military code, declares: "The armies of the United States shall be governed by the following rules and articles." Certain particular classes—as the retired officers, by Sec. 1256, Rev. Sts.—are made specifically so subject, but such provisions are unnecessary in view of this general enactment.

The opinion once expressed by Atty. Gen. Wirt,[42] to the effect that no military persons or forces could properly be treated as subject to the articles of war, unless so subjected in specific terms by the separate statute making them a part of the army, if ever sound, certainly cannot now be maintained in view of the comprehensive terms of Sec. 1342. Now, whenever any addition is made to the army, the person or force added will, without any such express provision

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[33] Drafts of *State* troops were resorted to during the Revolutionary war. See 2 Jour. Cong., 458–9; 3 Do., 38. An Act of June 30, 1834, refers to "draughted militia" as in service against Indians on the frontier.

[34] McCall's Case, 5 Philad., 267. It was anticipated by Hamilton in the Federalist (p. 117) that the militia could not be depended upon as an adequate force for war. And see Com. *v.* Barker, 5 Bin., 429; U. S. *v.* Blakeney, 3 Grat., 417.

[35] 6 Opins. At. Gen., 484.

[36] McCall's Case, 5 Philad., 268.

[37] Subsequently to its passage there was but one call for militia, (limited to four States,)—that by proclamation of June 15, 1863.

[38] 5 Philad., 259.

[39] 45 Pa. St., 238. So Jenkins, J., of the Supreme Court of Georgia, (November, 1862,) decided the Confederate conscript Act to be constitutional, as being within the power to raise armies as distinguished from the power to call out the militia. VI. Rebellion Record, 15.

[40] That conscripts are not militia but a part of the Army, see also Burrougha *v.* Peyton, 16 Grat., 483; Cooley, Prins. Const. Law, 89.

[41] Instances of "drafted men," tried as such by general court-martial for desertion in failing to report under the draft, &c., are especially frequent in the G. O. of the Depts. of the East, of Pennsylvania, of the Susquehanna and the Monongahela, and of the Middle Dept., from 1863 to 1865.

[42] 1 Opins., 277–9.

in the statute, at once come within the general application of this Section, and be thenceforth subject to the military jurisdiction.

**BEGINNING AND END OF THE PERSONAL AMENABILITY—GENERAL RULE.** Here, as especially applicable to officers and soldiers of the army proper, may suitably be considered the subject of the duration or continuance of the amenability of the *person* to the military jurisdiction.

It is the *general rule* that the person is amenable to the mili-
117 tary jurisdiction only during the period of his service as an officer or soldier. Thus, in the case of an *officer*, the jurisdiction commences with the acceptance of his appointment or commission,[43] or, where originally appointed by State authority, with his muster, (or re-appointment,) into the service of the United States, and ends with his death, the acceptance of his resignation, his dismissal,[44] &c., or—if a volunteer officer—his discharge or mustering out, &c. In the case of a *soldier*, it begins with his enlistment[45] or muster into
118 the service, and ends with his discharge or muster-out.[46] In other words, the general rule is that *military persons*—officers and enlisted men—are subject to the military jurisdiction, so long only as they remain such; that when, in any of the recognized legal modes of separation from the service, they cease to be military and become *civil persons*, such jurisdiction can, constitutionally, no more be exercised over them than it could before they originally entered the army,[47] or than it can over any other members of the civil community.

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[43] The acceptance, almost uniformly indicated by an express official communication to that effect, may, it has been ruled by the Attorney General, be evidenced by the officer's taking the oath of office required by Secs. 1756 and 1757, R. S., which act—it is held—will constitute a sufficiently formal and legal acceptance. 19 Opins., 283.

In the case of an officer appointed during a recess of the Senate, but whose appointment is not subsequently acted upon and confirmed thereby, the amenability continues from his acceptance of his appointment to the last day of the session of the Senate next succeeding. (Const., Art. II., secs. 2 & 3; 4 Opins. At. Gen., 30.) The appointment, however, of an officer appointed during a recess may be recalled by the President without being submitted to the Senate, (8 Opins., 380,) and the appointment of any officer may be withdrawn after it has been submitted to the Senate, but before it is finally acted upon. In such cases the jurisdiction would cease with the recall or withdrawal.

[44] The early English ruling in Sackville's Case, (1760,) to the effect that an officer, after having been dismissed the service and become a civilian, could, at his own request or with his consent, legally be brought to trial by a general court-martial, has not been followed in the later English law, and has never been adopted in our own. (See DIGEST, 323.) In our practice no trial of a dismissed officer has ever been had, except by the authority of some express statutory provision, such as the last clause of the 60th Article of War. In the author's opinion, any such statute must necessarily be unconstitutional, and such trial inoperative. See *post*.

An officer who has been dropped from the rolls for desertion under Sec. 1229, Rev. Sts., is assimilated to a dismissed officer in that he cannot thereafter be made amenable to trial by court-martial. See G. C. M. O. 16, War Dept., 1871. An officer of the army whose office has been vacated by operation of law, as under Sec. 1222 or 1223, R. S., ceases of course to be so amenable.

[45] It should be noted that it is not necessary that the enlistment be a formal one, but that receipt of pay, performance of service as a soldier, &c., may be equivalent to, or constitute evidence of enlistment. See DIGEST, 384–5; Grant *v.* Gould, 2 H. Black, 69; Tytler, 111; Prendergast, 39; Clode, M. L., 93; also, *post*, chapter XXV—FORTY-SEVENTH ARTICLE.

[46] The discharge must of course be due and legal, not fraudulent. See 16 Opins. At. Gen., 349; Circ. No. 4, (H. A.,) 1888.

[47] DIGEST, 323–324. And see the principle, that the jurisdiction ends with the discharge—whether honorable or under a sentence—recognized in the following General Orders: G. C. M. O. 4, 16, War Dept., 1871; G. O. 42, Dept. of the East, 1865; Do. 43, Middle Dept., 1865; Do. 90, Dept. of Pa., 1865; Do. 101, Dept. of Va., 1865; Do. 22, Dept. of the Mo., 1866; Do. 23, Dept. of Dakota, 1871; Do. 55, Dept. of Cal., 1873; and in 5 Opins. At. Gen., 58–9.

**JURISDICTION AFTER END OF TERM OF SERVICE BUT BEFORE DISCHARGE.** While the soldier, since he cannot discharge himself, is in general entitled at the expiration of his term of enlistment to be forthwith discharged in the form and by the authority prescribed by the 4th article of war,[48] there are yet cases where, for offences previously committed, he may be held for trial by court-martial for a period after his term is completed, but before actual discharge, his right of discharge being meanwhile suspended. These cases are as follows:

**1. Cases of deserters under Art. 48.** This Article, in providing that—"*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,*" goes on to declare—"*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.*" The effect of this Article, (which is fully considered in Chapter XXV,) is to continue the jurisdiction of a general court-martial over a *deserter*, without regard to the duration of his term of enlistment, provided of course the statutory limitation of Art. 103 has not taken effect.

119 It need hardly be added that here, as in other cases of soldiers liable to trial, the Government may by its own act, *i. e.*, by a formal discharge of the soldier, (under Art. 4,) terminate his amenability under the Article.[49]

**2. Deserters whose enlistment was illegal.** It has been ruled in a series of adjudged cases[50] that, even if an enlistment be voidable for illegality, (as in the instance of a minor enlisted under the legal age,) yet if, after the enlistment, the soldier becomes a deserter, he may, upon arrest, be held, tried and punished for his offence, and an application by a parent for his discharge made to the Secretary of War, or on *habeas corpus* to a U. S. court, will not properly be granted. In such cases the military jurisdiction is sustained for the reason that the interest of the public in the administration of justice and maintenance of military discipline is paramount to the right of the individual.

**3. Offenders in general—Attaching of jurisdiction.** It has further been held, and is now settled law, in regard to military offenders in general, that if the military jurisdiction has once duly *attached* to them previous to the date of the termination of their legal period of service, they may be brought to trial by court-martial after that date, their discharge being meanwhile withheld. This principle has mostly been applied to cases where the offence was committed just prior to the end of the term. In such cases the interests of discipline clearly forbid that the offender should go unpunished. It is held therefore that if before the day on which his service legally terminates and his right to a discharge is complete, proceedings with a view to trial are commenced against him,—as by an arrest or the service of charges,—the military jurisdiction will fully attach, and once attached may be continued by a trial by court-martial ordered and held after the end of the term of the enlistment of the accused. The leading adjudication on this point is that of the Supreme Court of Massachusetts in *In re* Walker,[51] (1830,)—a case of a seaman in the navy, but the ruling in which is equally applicable to soldiers of the army.

120 Here the court, in adverting to the injurious results that might ensue

[48] DIGEST, 20. And see U. S. *v.* Travers, 2 Wheeler, C. C., 509, (Story J.;) Prendergast, 42; also, *post*, Chapter XXV.—FOURTH ARTICLE.

[49] DIGEST, 43, 324.

[50] See cases cited in Chapter XXV., under THIRD ARTICLE, where this subject is fully treated.

[51] 3 Am. Jur., 281. And see DIGEST, 324–5.

were such a person permitted to be guilty with impunity of grave offences on the last days of his engagement, adds:—"It is true that seaman is not bound to do service after the expiration of his term of enlistment. But within that term he is bound to observe the rules and regulations provided by law for the government of the navy, and is punishable for all crimes and offences committed in violation of them during his term of service. * * * 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." This case, since affirmed in principle by other rulings,[52] has always been regarded as controlling authority in the military practice.

**JURISDICTION DURING ABSENCE ON LEAVE OR AS A PRISONER OF WAR.** Here should be noticed a class of cases in which an officer or soldier, though fully in the service, is, in a measure, not subject to the military jurisdiction.

Thus, when an officer or soldier is duly absent from his post or station upon a leave of absence or furlough, he ceases for the time to be subject to the orders of his commander,[53] or indeed to any orders except—in the event of some public exigency or grave occasion requiring his services—an order discontinuing his leave and directing him to return to his regiment, &c., or otherwise disposing of him as the public interest may require. During the pendency of his
121 leave, therefore, he cannot well be guilty of a breach of the discipline of the command from which he is absent, or of a neglect of duty, or disobedience of orders, (except as above indicated,) or mutiny, or subject to a military trial therefor.[54] So, if he commit a crime or offence against the laws of the land, he will not in general properly be triable for the same by a military tribunal, but will be amenable therefor to the civil authorities in the first instance and without any previous application by them to a military commander for the surrender of his person under the 59th article of war.[55] But for an act not involving insubordination or failure to comply with a lawful order, but which—in case of an officer—is "unbecoming an officer and a gentleman," or—in a case of officer or soldier—constitutes an offence of the class specified in the 60th article of war, the offender, though on leave at the time, may in general legally be held subject to military jurisdiction and trial.

So a prisoner of war, though not subject, while held by the enemy, to the discipline of his own army, would, when exchanged or paroled, be not exempt

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[52] See U. S. *v.* Travers, 2 Wheeler, C. C., 509; In the matter of Dew, 25 Law Rep., 540; *In re* Bird, 2 Sawyer, 33; Barrett *v.* Hopkins, 2 McCrary, 129, and 7 Fed., 312. In the last case, where the term of enlistment of the soldier expired after his arrest, but before he was brought to trial, it is well remarked that—"the jurisdiction of the court having once attached by the arrest, it retained jurisdiction for all the purposes of the trial, judgment and execution."

[53] "Out of command and out of service are different things in a military sense. An officer on furlough is out of command, absent from the army," though "not out of the service." Cushing, 6 Oplns., 252. "An officer on leave has, for the time being, no post or duty." 13 Id., 527. And see the recognition of the difference between the status of being on duty and that of being on furlough or leave of absence—in J. R. of April 12, 1866.

[54] DIGEST, 29, 329. He may of course commit and become amenable for a *desertion*, an offence not unfrequently by soldiers when on furlough.

[55] *Ex parte* McRoberts, 16 Iowa, 603; G. O. 29, Dept. of the Northwest, 1864; DIGEST, 52, note.

from liability for such offences as criminal acts or injurious conduct committed during his captivity against other officers or soldiers in the same status.[56]

**EXCEPTIONS TO THE GENERAL RULE—AMENABILITY AFTER DISCHARGE.** To the general rule above indicated, that the military jurisdiction ends with the discharge, &c., of the officer or soldier, there are several *exceptions*, created by or held to result from certain express statutory
122 provisions. These statutes are the Sixtieth Article of war, and Secs. 1230, 1361, 4824, and 4835, Rev. Sts.

**The Sixtieth Article.** This Article, which is a statute for the punishment of certain frauds, embezzlement and conversion of public property, &c., when committed by military persons, after defining the offences to which it relates, concludes as follows:—"*And if any person, being guilty of any of the offences 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.*"

A similar Article is contained in the naval code, the original of the statute being a general enactment of March 2, 1863, in terms applicable to army, navy and civilians alike.[57]

The amenability to prosecution and trial created by this provision is not unlimited as to time, but is subject to the restriction imposed by Art. 103.[58] Instances of trials ordered under it have been unfrequent in practice.[59] None have occurred in the army for more than twenty years.

**Sec. 1230, Rev. Sts.** This section, under which an officer once dismissed by order of the President may be allowed a trial by court-martial for the offence for which he was dismissed, has already been considered, in Chapter VI, in treating of the authority of the President to convene courts-martial. As has been seen, it is a provision originally enacted in time of war, and which, under the existing law, applies only to cases arising in war.

**Sec. 1361, Rev. Sts.** By this statute a further exception to the above general rule has been in effect created in cases of soldiers confined in the Military Prison at Leavenworth, Kansas, under sentences which imposed dis-
123 honorable discharge in connection with confinement, and who, accordingly have been formally discharged in fact, prior to being imprisoned. The section provided that all persons confined under sentence in said prison "*shall be liable to trial and punishment by courts-martial under the rules and articles of war for offences committed during the said confinement.*" It applies only to the particular place of confinement mentioned—has no application, for example, to the prison at Alcatraz Island, California.[60] Trials of discharged soldiers under confinement have been had from time to time under this provision; the

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[56] See an instance in G. C. M. O. 425, War Dept., 1865, of an officer convicted of an offence of this character committed while held as a prisoner of war at Danville, Va.

It need hardly be added that a prisoner of war *on parole* is subject to the military jurisdiction for such military offences as, under the terms or circumstances of his parole, he may be called to account for. In Gen. Burgoyne's case, it was held that, while he was in the status of a prisoner of war on parole in England, he was not subject to trial for acts committed in America before the capitulation at Saratoga. Simmons § 64. The opposite would probably now be held in a similar case in our army.

[57] See Secs. 5438, 5439, Rev. Sts. The 60th Art. is treated of in Chapter XXV.

[58] See Chapter XVI.

[59] Cases of such trials are to be found in G. C. M. O. 16, War Dept., 1871; G. O. 35, Div. West Miss., 1865, Do. 22, Dept. of the Mo., 1866; Do. 13, Dept. of the South, 1867; also in G. O. 143, Navy Dept., 1869.

[60] DIGEST, 327; G. C. M. O. 55, Dept. of Cal., 1873.

accused, who are really *civilians*, being designated in the proceedings as "military convict," or "military prisoner."[61]

Secs. 4824 and 4835, Rev. Sts. By the former of these statutes the inmates of the "Soldiers' Home," who are mostly discharged soldiers of the army, are made "subject to the rules and articles of war in the same manner as soldiers in the army." By the latter, the inmates of the "National Home for Disabled Volunteer Soldiers," who are all discharged officers or soldiers of volunteers employed during the late war, are made similarly subject "in the same manner as if they were in the army." In practice, however, courts-martial are not resorted to for the discipline of these classes of persons.[62]

The provisions of the five statutes here specified, so far as they subject civilians to trial by court-martial, are in the opinion of the author, clearly *unconstitutional*. They will be recurred to later in this chapter, and the question of their constitutionality specifically considered.

124 **JURISDICTION AFTER A SECOND APPOINTMENT OR ENLISTMENT.** It remains to refer to the effect, *per se*, of a subsequent appointment or enlistment of an officer or soldier, (once duly dismissed, resigned, &c., or discharged,) upon his amenability to trial for an offence committed prior to such discharge, &c., (and within two years,) but not yet made the subject of a charge or trial. Upon this point there is not known to have been any adjudication. Putting out of the question the class of offences, the amenability for which is expressly defined by the 60th article, it is the opinion of the author that, in separating in any legal form from the service an officer or soldier or consenting to his separation therefrom, and remanding him to the civil status at which the military jurisdiction properly terminates, the United States, (while it may of course continue to hold him liable for a pecuniary deficit,) must be deemed in law to waive the right to prosecute him before a court-martial for an offence previously committed but not brought to trial. In this view, a subsequent re-appointment or re-enlistment into the army would not revive the jurisdiction for past offences, but the same would properly be considered as finally lapsed.[63]

**JURISDICTION AS AFFECTED BY AMENABILITY TO CIVIL PROCEEDINGS—DOUBLE AMENABILITY.** That the offender may be amenable to a criminal court of the United States or of a State, by reason of such court having concurrent jurisdiction of his offence, or jurisdiction of a civil offence involved in the act committed, or that he may actually have been tried by such court for such offence, cannot affect the exercise of jurisdiction by the court-martial. This principle and its converse—that liability to trial or actual trial by court-martial does not affect the liability of the party to civil trial or suit, for a civil offence or cause of action included in the act—were first fully impressed upon the army by the cases (of homicide) of Capt. Howe and Asst. Surgeon Steiner,[64] and have been abundantly illustrated in subsequent rulings and Orders. That a *double amenability* exists in all cases in which

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[61] Repeated instances of such trials, principally for escape, attempted escape, and insubordinate conduct, are to be found in the G. C. M. O., Dept. of the Missouri, since 1875. In Circ. No. 4, (H. A.,) 1888, is published a ruling to the effect that Sec. 1361 does not include offences committed after discharge, but before the commencement of the confinement in the Military Prison.

[62] But one trial is known to have ever been had. This proceeding—as absurd in fact as it was unwarranted in law—is described in DIGEST, p. 329–30. That the inmates of the Volunteer Homes are not in the military service was specifically ruled in U. S. *v.* Murphy, 9 Fed., 26. And see DIGEST, 744–5.

[63] DIGEST, 324, 331, 654.

[64] G. O. 25 of 1840; 6 Opins. At. Gen., 413, 506; 8 Id., 328.

the officer or soldier, (who, in becoming subject to military discipline, has not discharged himself from the liabilities of the citizen,) has, by his criminal act, offended against both the civil and the military code, is now established law.[65] The offender in such a case is two distinct persons, each of whom has committed a distinct offence. Thus where officer or soldier has been guilty of an act of offence having both a civil and a military aspect and quality, as where he has committed a homicide, robbery, battery, forgery, or theft against the person or property of another officer or soldier, or an embezzlement or larceny of public money or larceny at a military post, or a breach of the peace which has also prejudiced military discipline, his trial for and conviction or acquittal of the civil offence by a civil court of the State or of the United States, will not impair or affect the authority of a court-martial to take cognizance of the military crime or disorder, or offence against discipline, involved in his unlawful act. Where indeed the civil jurisdiction is the first to be initiated, the *court-martial* cannot properly take cognizance of the military offence till the party is wholly discharged from the civil proceeding;[66] but its jurisdiction remains unimpaired, and may be freely exercised at the proper time, whether the accused may have been acquitted or convicted by the civil court. On the other hand, if military proceedings have been first commenced, and the case has been once duly taken cognizance of by a court-martial, the civil jurisdiction is suspended and the trial by the military court is not subject to be interrupted, and should not be deferred by any process or action of the civil court or authorities.[67]

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The subject of *double amenability* will be recurred to and further illustrated later in the work.[68].

## II. The Militia when Called into the Service of the United States.

**OCCASIONS OF AMENABILITY.** Under the subject of the Composition of General Courts-Martial, we have seen what the militia is, and have referred to the series of statutes regulating its organization, service, &c. It remains to consider when and how officers and soldiers of the militia become amenable to the jurisdiction of courts-martial of the United States.

The statute law and the judicial decisions recognize two occasions upon which this amenability attaches, viz. (1) when the militia, being actually employed in

[65] *Ex parte* McRoberts, 16 Iowa, 606; U. S. *v.* Carr, 1 Woods, 386; *Ex parte* Mason, 105 U. S., 699; U. S. *v.* Cashiel, 1 Hughes, 552; *In re* Esmond, 5 Mackey, 64; U. S. *v.* Barnhart, 22 Fed., 285; U. S. *v.* Clark, 31 Fed., 712, 715; People *v.* Porter, 50 Hun., 161; State *v.* Rankin, 4 Cold., 145; State *v.* Rogers, 37 Mo., 367; *In re* O'Connor, 37 Wisc., 379; Oregon *v.* Colman, 1 Or., 191; State *v.* Brown, 2 Or., 224; People *v.* Sheffield, Dist. Ct. Utah, Nov., 1893; G. C. M. O. 20 of 1869; G. O. 28 of 1894, (case of Lieut. Maney;) G. C. M. O. 50, Dept. of the Mo., 1871; Do. 287, Dept. of the East, 1885; Do. 12 Id., 1894: G. O. 78, Id., 1869; Do. 69, Id., 1870; Do. 52, Dept. of the Pacific, 1865. And compare cases, of double amenability to Federal and State jurisdiction for the same act, of Moore *v.* Illinois, 14 Howard, 13; *Ex parte* Robinson, 6 McLean, 355; also cases of similar amenability for contempts—as Gen Houston's case, 2 Opins. At. Gen., 655; State *v.* Yancey, 1 No. Ca. Law Rep., 519.

[66] 3 Opins., At. Gen., 460. In the case of *In re* Wall, 8 Fed. Rep., 85, a soldier was tried and sentenced by a court-martial while in the constructive custody of the U. S. District Court, under a writ of *habeas corpus;* the officer who had him in charge not thinking it worth while to inform the court-martial that the civil proceedings were pending. "This conduct," observes the District Judge, "was highly reprehensible." In Capt. Howe's case, (*ante,*) the action of the court-martial was suspended for more than two years, while the civil proceedings (first initiated) against the accused were pending.

[67] See Circ. No. 1, (H. A.,) 1886.

[68] See Chapter XVI.—"Plea of Former Trial;" also Part III.

the federal service, "in time of war or public danger,"[69] commit military offences; and (2) when they commit the offence of refusing to be so employed. There is a marked distinction between the two instances, from the fact that in the one the militia are a part of the military forces of the United States and subject to the articles of war, while in the other they are no part of such forces and not so subject.[70]

1. **AMENABILITY WHEN IN THE U. S. SERVICE.** The Constitution, as we have seen, empowers Congress to "provide for governing such part" of the militia "as may be employed in the service of the United States."
127 The Act of Feb. 28, 1795, in execution of this power, provided, (sec. 4,) "*that the militia employed in the service of the United States shall be subject to the same rules and articles of war as the troops of the United States,*" and this provision, repeated in substance in the Act of July 29, 1861, is now embraced in Sec. 1644 of the Revised Statutes and in the 64th article of war. The question as to when the militia should be regarded as legally in the employment of the United States was, at an early period, (1820,) settled by the Supreme Court in the leading case of Houston *v.* Moore,[71] in which, (with reference to the war of 1812,) it was held that the mere calling forth did not constitute an employment of the militia in the public service, and that they did not become "so employed" until their arrival at the place of rendezvous and muster. From this point it was—as determined by the court—that their character was changed from that of State to that of National militia, that they were brought under the command of the President as constitutional "commander-in-chief of the army and navy of the United States and of the militia of the several States when called into the *actual* service of the United States," and that they became subject to the federal military code.[72]

The ruling in Houston *v.* Moore has been affirmed by subsequent rulings and opinions,[73] in which it is the more distinctly laid down that it is *the formal muster into the U. S. service at the place of rendezvous* which properly constitutes the legal evidence of the commencement of the employment of this force. That the proceeding of muster-in is, regularly, the proper starting point of the service is indeed made quite apparent by the express language of the provision of the Act of July 17, 1862, now incorporated in Sec. 1648 of the
128 Revised Statutes, that "the militia so called shall be mustered in," &c.

It is therefore from the muster-in that the *amenability* under consideration properly begins.

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[69] Constitution—Vth Amendment.

[70] In Senate Bill, No. 2537, of March 9, 1892—"To promote the efficiency of the Militia," was an excellent provision to the effect that the militia, when called into the service of the United States, "shall be held to be in such service, and every officer or enlisted man of such militia who shall refuse or fail to obey such call shall be subject to trial by court martial;" thus doing away with the undesirable distinction made by the existing law. Compare p. 96, *post*. It is to be regretted that such provision was not enacted.

[71] 5 Wheaton, 20.

[72] It may here be noted that a considerable number of cases of trials of *militia* officers and soldiers by courts-martial during the late war are published in the General Orders of that period. A large proportion will be found in the Orders of the Department of the Missouri; the Governor of Missouri having been specially authorized by the President, in November, 1861, (by G. O. 96, War Dept.,) to raise a force of State militia to serve during the war within the State. See, for example, cases in the following Orders of Dept. of the Mo.: G. O. 31 of 1862; do. 10, 15, 84, 94, 98, 104, 112, 141, of 1863; also G. O. 38, Dept. of the Tenn., 1863.

[73] Kneedler *v.* Lane, 45 Pa. St., 238; McCall's Case, 5 Philad., 261; Antrim's Case, Id., 278; People *v.* Campbell, 40 N. Y., 135; Tyler *v.* Pomeroy, 8 Allen, 493; Story, Const., § 1213; 3 Opins. At. Gen., 691; 10 Id., 14, 282.

**The term of liability—Form of discharge.** The status thus initiated continues till the period of discharge. In the Act of 1861, above referred to, it was directed that the militia should serve "until discharged by proclamation of the President;" in the provision of 1862, repeated in Sec. 1648, Rev. Sts., it was declared that they should serve for the period, (not exceeding nine months,) specified in the call, "unless sooner discharged by command of the President." The form of the order of discharge is not material provided it issue by the authority of the President, though communicated by a subordinate commander. Thus an order proceeding from such authority, which directed certain militia, upon being mustered and without being required to serve, to disband and return to their homes, was held by Atty. Gen. Legare[74] "a virtual discharge from actual service." The usual mode, however, of discharging militia during the late war was similar to that pursued in the case of volunteers—a formal muster-out, accompanied by written discharges.[75]

**2. AMENABILITY FOR REFUSING TO COMPLY WITH THE CALL.** The Act of 1795 provided that an officer or soldier of militia who should fail to obey the orders of the President calling the militia into the public service should incur a certain forfeiture and become liable to certain other punishment, "to be determined and adjudged by a court-martial." This provision, substantially repeated in the enactment of 1861, has been reproduced in Sec. 1649, Rev. Sts. The question which it suggests is—what kind of court-martial is intended, and this question has been passed upon and settled by the highest authority. In the case of Houston *v.* Moore[76] heretofore cited, it was held by the Supreme Court that, though the mere calling forth of the militia did not bring them into the public service, or render them subject to the articles of war, a militiaman who refused to obey the call was yet guilty of a military offence against the
129 United States, for which, under the provision of the Act of 1795, he was triable and punishable by a court-martial of the United States, composed of course of militia officers. This ruling, affirmed in Martin *v.* Mott,[77] recognizes a peculiar jurisdiction having a source quite different from that exercisable over the militia after it has become a part of the national forces. This source is found in the power of Congress to provide, not for governing the militia but for calling them forth, and in the further general power "to make all laws which shall be necessary and proper for carrying into execution" its specific powers In asserting the authority of Congress to establish this jurisdiction by its enactment of 1795, Chief Justice Marshall, in an early case,[78] observed:—"In the execution of this power," (the power 'to provide for calling forth the militia,') "it is not doubted that Congress may provide the means of punishing those who shall fail to obey the requisitions made in pursuance of the laws, and may prescribe the mode of proceeding against such delinquents and the tribunal before which such proceedings should be had." That the exceptional jurisdiction[79] thus created is quite other than that first above specified, and which is

[74] 3 Opins., 687.

[75] See Mustering Regulations in G. O. 108 of 1863.

[76] 5 Wheaton, 1, 25, 64–66.

[77] 12 Wheaton, 19, 34. And see Meade *v.* Depty. Marshal of Va., 1 Brock, 324; Moore *v.* Houston, 3 S. & R., 169; Com. *v.* Irish, Id., 176; Duffield *v.* Smith, Id., 590. It is to be noted that the doctrine of the U. S. Supreme Court, as stated in the text, overrules that of the Supreme Court of New York in Mills *v.* Martin, 19 Johns., 7, and Ratbbun *v.* Martin, 20 Johns., 343, in which it was held that a *State* militia court was intended by Sec. 5 of the Act of 1795, (R. S., Sec. 1649,) and could alone take cognizance of the offence therein contemplated, the delinquent not being subject to the articles of war.

[78] Meade *v.* Depty. Marshal, 1 Brock, 326.

[79] Remark the provision, referred to in note on p. 95, of a Bill introduced in Congress, March 9, 1892, by which this exceptional jurisdiction is avoided by making the militia a part of the U. S. forces, *upon being called out.*

exercised over the militia similarly as over the Army of the United States, is illustrated by the fact, heretofore noticed, that the courts-martial, (authorized by Sec. 1649, Rev. Sts.,) for the trial of militiamen for disobeying the call, are not necessarily governed by the code of articles of war. This is indicated in Martin *v.* Mott,[80] where it was held that the matter of the composition of
130 such courts, so far as respects the *number* of the members, was not required to be regulated by the article, (now the 75th,) on that subject. And the court say, referring to the articles in general,—"If any resort is to be had to them, it can only be to guide the discretion of the officer ordering the court, as matter of usage and not as matter of positive institution."

That the offence which shall subject an officer or soldier of militia to the jurisdiction under consideration must consist in a refusal or neglect to obey the order of the President, and that a refusal to obey an order emanating merely from a Governor of a State will not render the delinquent so amenable, is shown by Atty. Gen. Wirt in an early opinion.[81]

**Term of the jurisdiction.** It was held in Martin *v.* Mott,[82] that "a court-martial regularly ordered for the trial of a delinquent militiaman under the Act of 1795 did not expire with the end of a war existing when it was convened, its jurisdiction to try such offence not being dependent upon the fact of war or peace." It was added:—"It would be a straitened construction of the Act to limit the authority of the court to the mere time of the existence of the particular emergency, when it might be thereby unable to take cognizance of and decide upon a single offence. It is sufficient to any that there is no such limitation in the Act itself."

### III. Marines Detached for Service with the Army.

**NATURE OF THE JURISDICTION.** It is provided by Sec. 1621, Rev. Sts., that the "*marine corps, when detached for service with the army, by order of the President, * * * shall be subject to the rules and articles of war prescribed for the government of the army.*" The relation of the corps to the army, and the amenability of its officers and men to trial by courts jointly made up of regular and marine officers, are recognized in the 78th article of war, and have already been considered in the Chapter on the Composition of Courts-Martial. It need only be added that such amenability during the continuance of the detached service will be substantially of the same quality as if
131 the offenders were members of the army proper: further, that while the jurisdiction for the trial and punishment of offences committed pending such service will most readily and appropriately be exercised before the same be terminated, it may legally be exercised within a reasonable period thereafter, provided it has regularly attached by the due commencement of proceedings before.

### IV. Civilians Subjected to Military Discipline in Time of War.

**STATUTES AUTHORIZING JURISDICTION.** The class now to be considered are persons whose liability to military government and trial by court-martial arises only in time of war, and is the result solely of the exceptional relations and obligations prevailing during a state of war. The statutes by which courts-martial, which, as has been seen, receive all their jurisdiction from

[80] 12 Wheaton, 35. [81] 1 Opins., 473. [82] 12 Wheaton, 37.

statute, are empowered to take cognizance of offences of civilians in time of war, are the 63d, 45th and 46th articles of war, and Sec. 1343, Rev. Sts., which is also an article of war.[83]

1. UNDER ART. 63. This Article, which is the most important and comprehensive of the statutes indicated, provides as follows:—"*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* 132 *rules and discipline of war.*" This provision, which, with some slight modifications,[84] has come down from our original code of 1775, which derived it from a corresponding British article, has always been interpreted as subjecting the descriptions of persons specified, not only to the orders made for the government and discipline of the command to which they may be attached, but also to trial by court-martial for violations of the military code.[85] Protected as they are by the military arm, they owe to it the correlative obligation of obedience; and a due consideration for the *morale* and discipline of the troops, and for the security of the government against the consequences of unauthorized dealing and communication with the enemy, requires that these persons shall be governed much as are those with whom they are commorant.[86] Owing indeed to the policy of our laws relating to the army, which has aimed to impress, in general, a distinctive military character—as officers and enlisted men—upon the persons employed in the military service proper, the classes of *attachés* mentioned in the Article have been less varied and numerous in our armies than in those of foreign nations. In our late war, however, they were necessarily more considerable than at any previous period.

"Retainers to the camp." This term may be deemed to include: —1. Officers' servants; 2. Camp-followers attending the army but not in the public service. Of the former, there have been but few trials by court-martial,[87]

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[83] Here may be noticed certain statutes, no longer in force—*viz:* the Acts of July 17, 1862, c. 200, s. 16; of July 4, 1864, c. 253, s. 6, 8; and of July 16, 1866, c. 200, s. 3—by which certain civilians, to wit, contractors for arms, munitions and supplies for the army, (and navy,) inspectors in the quartermaster department, and civil officials and agents of the Bureau for the relief of Freedmen and Refugees, were made amenable to the military jurisdiction during the period of the late war. Cases of trials, convictions, &c., by courts-martial, of *army contractors* for frauds, neglects, &c., are published in the following Orders: G. O. 375 of 1863; G. O. and G. C. M. O. 3, 147, 166, 181, 212, 223, 322, 345, 375, of 1864; G. C. M. O. 382 of 1865; G. O. 167, 186, Dept. of the Ohio, 1863; Do. 62, Northern Dept., 1864; Do. 46, Dept. of the Susquehanna, 1864; Do. 3, Mil. Dist. of Ky., 1865; Do. 54, Dept. of La., 1865; Do. 47, Middle Dept., 1865; Do. 19, Dept. of Tenn., 1866. And see G. C. M. O. 614 of 1865; G. O. 114, Dept. of Washington, 1865, for proceedings of trials of *inspectors;* and G. O. 75, Third Mil. Dist., for a case of a trial of an *agent* of the above-mentioned Bureau.

As to the constitutionality of this class of statutes, especially of the enactment relating to *contractors*, see *post*.

[84] The principal was the omission in the code of 1874 of the mention of *sutlers*.

[85] See Samuel, 691–697; Hough, 596–598; Simmons, § 71; Maltby, 31; O'Brien, 151; De Hart, 22; G. O. 175 of 1864; DIGEST, 148.

[86] See the authorities cited in the last note; also Com. *v.* Gamble, 11 S. & R., 93; Foucher, Commentaire sur le Code de Justice Militaire, 177. And note in this connection the case of *Ex parte* Van Vranken, 47 Fed., 890, where "clerks of naval officers on duty on shipboard on a voyage" are assimilated as to naval discipline and jurisdiction to officers and men of the navy, "because of the necessity of absolute discipline on a ship at sea, where there cannot, in the nature of the case, be one law for one class of those on board and another law for another class." And see Johnson *v.* Sayre, 158 U. S., 109.

[87] See case in G. C. M. O. 139 of 1864, of an officer's servant tried for stealing from the mail; also in Do. 29, Army of the Potomac, 1864, of one tried for selling liquor to soldiers. Samuel, p. 695, cites a case of an officer's servant sentenced to death, for robbery, by a court-martial.

133 their breaches of discipline having been in general summarily punished by expulsion from the station or beyond the lines.[88] Of followers of the camp—sutlers,[89] sutlers' employees,[90] newspaper correspondents,[91] telegraph operators,[92] and some others,[93] were from time to time during the late war brought to trial by court-martial, or otherwise summarily disciplined.[94] The post-traders who succeeded sutlers[95] would, in time of war, have been of the class of camp-followers if their posts had been within the theatre of the war.

134 Camp-followers are generally restricted to the least number, on the eve of an important movement by the army to which they are attached.[96]

"Persons serving with the armies in the field." While this might perhaps be viewed as a general designation including all persons serving in the field with the army in any capacity whether public or private, yet inasmuch as the terms "service" and "serving," as used in the Articles of war, have reference to public service—the service of soldiers and the like—it is preferred to treat these words as intended to describe civilians in the employment and service of the *government*.[97] This class, during the late war, was considerably more numerous than that of the camp-followers or private retainers. It consisted mostly of civilian clerks, teamsters, laborers and other employees of the different staff departments, hospital officials and attendants, veterinaries, interpreters, guides, scouts and spies, and men employed on transports and military railroads and as telegraph operators, &c.[98] Of these persons those who appear from the General Orders to have been most frequently subjected to trial by

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[88] This punishment has also been imposed, summarily as well as by sentence, upon the other classes of persons who are the subjects of the Article. See *post*.

[89] See G. C. M. O. 164 of 1864; Do. 9, Army of the Potomac, 1865; G. O. 13, 132, Dept. of Washington, 1865. Sutlers were also sometimes expelled in orders without trial. See G. O. 87, Army of the Potomac, 1863; Do. 11, 21, Mountain Dept., 1862. Compare Hough, (P.) 823, as to the expulsion of sutlers from the French army in the Crimea by an order of Gen. Canrobert for selling to the soldiers "adulterated and unwholesome beverages."

[90] G. O. 76, Dept. of Washington, 1865. And see G. C. M. O. 12, Army of the Potomac, 1865.

[91] See cases of newspaper correspondents tried for making unauthorized publications—in G. O. 10, Dept. of Washington, 1863; Do. 29, Army of the Potomac, 1863; Do. 13, Dept. of the Tenn., 1863. In G. O. 39, Div. West Miss., 1864, two correspondents of the New York Herald and Tribune, respectively, were ordered to be sent beyond the lines for a similar offense. In G. O. 48, Army of the Potomac, 1863, all correspondents not complying with a certain order in regard to publications are directed to be excluded from the lines.

[92] In G. C. M. O. 29, Army of the Potomac, 1864, two telegraph operators are ordered to be sent beyond the lines.

[93] See a case of an employee of the U. S. Sanitary Commission sentenced to imprisonment, on conviction of selling liquor to soldiers—in G. O. 45, of 1864.

[94] Members of the families of soldiers or officers, commorant with the army, would be amenable as camp-followers. Simmons § 71, note, cites the case of Hannah Fitchet, a soldier's wife, convicted of manslaughter by a general court-martial in India in 1825. That the *wife of an officer* may be triable by court-martial as a camp-follower, see Hough, (P.) 629.

[95] Post-traders are here referred to as persons in the *past* because of the recent Act of January 18, 1893, providing for the gradual doing away with them by the not filling of vacancies. The post-trader's store has meanwhile been in a measure superseded by the "CANTEEN," established by G. O. 10 of 1889, which has since, (G. O. 11 of 1892,) given place to the "POST EXCHANGE."

[96] Thus, by an order of the Comdg. General of the Army of the Potomac, of April 8, 1864, only members of the Sanitary and Christian Commissions, and "registered correspondents," were allowed to remain with the army. All other civilians, including sutlers, were sent to the rear.

[97] Persons not in public employment are classed under the previous description of "retainers." See *ante*.

[98] See DIGEST, 75–6.

court-martial were—Inspectors, Teamsters, and other employees of the Quartermaster's Department;[99] Officials and employees of the Provost Marshal General's Department,[100] Contract surgeons and nurses,[1] Paymasters' clerks,[2]
135 Officials of boards of enrollment,[3] Officers and men employed on steam transports,[4] Military telegraph operators,[5] &c.[6]

**The Article to be strictly construed.** This Article, in creating an exceptional jurisdiction over civilians, is to be strictly construed and confined to the classes specified.[7] A civil offender who is not certainly within its terms cannot be subjected under it to a military trial in time of war with any more legality than he could be subjected to such a trial in time of peace. As held by the Judge Advocate General,[8] the mere fact of employment by the Government within the theatre of war does not bring the person within the application of the Article. In several cases of public employees brought to trial by court-martial during the late war the convictions were disapproved on the ground that it
136 did not appear that at the time of their offences they were '*serving with the army*' in the sense of this Article.[9]

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[99] See G. C. M. O. 392 of 1864; Do. 25, 614, 625, of 1865; G. O. 9, 64, 86, 114, Dept. of Washington, 1865; G. C. M. O. 22, 45, Army of the Potomac, 1864; Do. 4 Id., 1865; G. O. 20, Dept. of the Susquehanna, 1863; Do. 15, Dept. of Ark., 1864; Do. 17, Dist. of Oregon, 1864; Do. 53, Div. West Miss., 1864; Do. 63, Middle Dept., 1865; Do. 27, Dept. of the South, 1866; Do. 29, Dept. of La., 1866; Do. 15, Second Mil. Dist., 1868; Do. 2, 5, 65, Dept. of the Platte, 1869; G. C. M. O. 45, Dept. of the Mo., 1868. And see, generally, G. O. 175, War Dept., 1864.

[100] G. O. 353 of 1863; Do. 33, 43, and G. C. M. O. 271 of 1864; G. O. 60, Northern Dept., 1864; Do. 105, 199, Dept. of the Mo., 1864; Do. 27, Dept. of the East, 1865; Do. 62, Dept. of Pa., 1865.

[1] G. C. M. O. 373 of 1864; G. O. 58, Northern Dept., 1864; Do. 81, Dept. of Pa., 1864; Do. 163, Dept. of Washington, 1865.

[2] G. O. 294 of 1863; Do. 72, Dept. of the Ohio, 1864; Do. 5, Dept. of West Va., 1864.

[3] G. C. M. O. 388 of 1864; Do. 1, 59, 386, of 1865.

[4] G. O. 7, 9, Dept. of Ohio, 1863; Do. 126, Dept. of the South, 1864; Do. 88, Div. West Miss., 1864; G. C. M. O. 26, Army of the Potomac, 1864; G. O. 40, Dept. of La., 1865.

[5] G. C. M. O. 29, Army of the Potomac, 1864; G. O. 109, Dept. of the Ohio, 1864; Do. 19, Div. West Miss., 1865.

[6] See cases of trials of employees of the subsistence, engineer, and ordnance departments in G. C. M. O. 39 of 1865; G. O. 9, 24, 153, Dept. of Washington, 1865; Do. 25, Dept. of the Tenn., 1866; of an ambulance driver in G. C. M. O. 161, War Dept., 1864; an agent of the Freedmen's Bureau in G. O. 75, Third Mil. Dist., 1867; a veterinary surgeon in G. O. 36, Dept. of La., 1866; a scout in G. O. 19, Div. West. Miss., 1865; and of persons styled, generally, "Government employees" in G. C. M. O. 25 of 1865; Do. 22, Dept. of Ky., 1865; G. O. 118, Dept. of Washington, 1865; Do. 16, Dept. of Ark., 1865; Do. 23, Dept. of Tenn., 1866; Do. 68, Dept. of the Mo., 1866.

[7] As to the limits of the military jurisdiction exercisable under the *British* law over a similar class of persons, Clode, M. L., 95, well says:—"From what has been already written the reader perhaps need not be cautioned against supposing that all those who are resident or commorant within the Camp or Barrack are thereby rendered liable to trial by court-martial. Such a liability must be found upon the statute book in plain and explicit words leaving nothing to inference." And he adds, from the ruling of Chief Justice Best, in Looker *v.* Halcomb, 4 Bing, 189, that—"Any statute which takes away the right of trial by jury and abridges the liberty of the subject must receive the strictest construction," so that "nothing should be holden to come under its operation that is not expressly within the letter and spirit of the Act."

[8] DIGEST, 76.

[9] See instances in G. O. 9, Army of the Potomac, 1863; Do. 132, 153, Dept. of Washington, 1865; Do. 40, Dept. of La., 1865; G. C. M. O. 22, Dept. of Ky., 1865. Similarly, in a case adjudicated during the same period, it was held that an agent of the Confederate Treasury Dept., though acting upon the scene of hostilities, was not a 'person serving with the army' or subject to military trial; and he was accordingly released, upon *habeas corpus*, from military custody, after having been tried, convicted, and sentenced to death, by a court-martial. Confederate States *ex rel.* McKee *v.* Scully *et al.*, Sup. Ct., Confed. States, Sept., 1864. And see, as to the general principle involved, Sup. Ct., Confed. States, Sept., 1864. And see, as to the general principle involved, Antrim's Case, 5 Philad., 288.

**Limits of its operation—Application to Indian Wars.** Further, the use of the terms—"to the camp," "in the field," "according to the rules and discipline of war," is deemed clearly to indicate that the application of the Article is confined both to the period and pendency of war and to acts committed on the theatre of the war.[10] A period of hostilities with Indians is, equally with a period of warfare against a foreign power, a "time of war;"[11] and it has been specifically held by the Attorney General that civil employees of the War Department—"serving with the army in the Indian country during offensive or defensive operations against the Indians" are amenable to military trial for offences committed pending such service.[12] In cases indeed of offences alleged to have been committed during hostilities against Indians, it may not always readily be determined whether a *war* was in a proper sense pending at the date of the offence, or whether the *locus* of the offence was, properly speaking, the theatre of such a war.[13] In a case of a quartermaster's clerk arrested, upon a charge of fraud against the Government, while serving at a post in the proximity of an Indian Agency, and of a band of Indians a portion of whom had previously been hostile but with whom no hostilities whatever were at the time pending, it was held by the Judge Advocate General,[14] that the cir-
137 cumstances were not within the description or application of the Article, and this opinion was concurred in by the Attorney General.[15] In general indeed, the jurisdiction created by the Article should be extended with special caution over civilians serving with troops during an *Indian* war, for the reason that the theatre of such a war is commonly restricted in extent and that its duration is ordinarily but brief as compared with other wars.[16]

**Application to clerks of War Department, and the like, in time of peace.** In view of the fact that this article is operative only in and for a time of war, it need hardly be remarked that the mere fact that a civilian is serving, in time of *peace*, in connection with the military administration of the government,—as where he is a clerk of the War Department, or at a Military Division or Department headquarters,—will not be sufficient to subject him to military trial for offences committed during such service. This point was so held in 1877 by the Judge Advocate General in the case of Barth, a clerk in the office of the Chief Quartermaster Military Division of the Pacific, and, further, with regard to the Superintendents of National Cemeteries who are discharged soldiers and civilians.[17] In both cases the ruling was concurred in by the Attorney General.[18]

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[10] In 14 Opins., 22, it is remarked by the Atty. Gen. that "the words '*in the field*' imply military operations with a view to an enemy."

[11] 13 Opins. At. Gen., 31, 470.

[12] 14 Opins., 22.

[13] Note the situation as described in 14 Opins. At. Gen., 23, and also in 13 Id., 472.

[14] DIGEST, 76, 77.

[15] 16 Opins., 48.

[16] DIGEST, 76.

[17] DIGEST, 77.

[18] 16 Opins., 13. And see his later opinion in Crafts' case, Id., 48; also *Ex parte* Van Vranken, 47 Fed., 888.

The only case *contra* is that of John Thomas, (1 Chicago Legal News, 245,) a civilian clerk of an army paymaster in Mississippi in 1867, who was held by the U. S. Dist. Judge to be amenable to military trial for a fraud upon the United States. But this conclusion was determined by the fact that the State was then under military government, it not having yet been authoratively decided by the Supreme Court that the war was legally ended. It may be noted in this connection that the rulings to the effect that *naval* paymasters' clerks were persons in the naval service and amenable to trial by court-martial, (U. S. *v.* Bogart, 3 Benedict, 257; *In re* Bogart, 2 Sawyer, 396; *Ex parte* Reed, 100 U. S., 13,) have recently been affirmed by the Supreme Court,

**Term of the jurisdiction.** It need only be added that the juris-
138 diction authorized by Art. 63 should properly be exercised, or at least initiated, during the *status belli*. Upon a declaration of peace, or other legal termination of hostilities, the Article is no longer operative, and the "discipline of war" cannot lawfully be applied thereunder.[19]

**ARTS. 45 AND 46.** These provisions of the Code declare that—"Whoso*ever relieves the enemy with money, victuals, or ammunition, or knowingly harbors or protects an enemy;*" and "*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 shall direct.*"

**Construction as to application to civilians.** Whether the word "*whosoever*" is here employed in a general sense, and includes civil equally with military persons, is a question frequently discussed in cases arising during the late war, but which must be regarded as determined by the weight of reason and authority in the affirmative. The principal grounds for such determination may be stated as follows:—

**1st.** While all the other articles of the Code by which specific offences are denounced are so expressed as to apply *in terms* to military persons—as by the words "any officer who," "any soldier who," "any officer or soldier who," and the like, the persons to be affected by Arts. 45 and 46 are designated by a general and comprehensive term of description which may include persons without as well as within the army.

**2d.** In the only other case in which the word "whosoever" is employed, that of Art. 57, the same is qualified by the addition—"belonging to the armies of the United States." A similar qualification is perceived in Art. 44 which begins—"Any person belonging to the armies of the United States who," &c. It is a fair inference that where the qualification is absent the general term is intended to be unqualified.

**3d.** In their original form in the code of 1775, these Articles were phrased—"Whosoever belonging to the continental army," &c., a limitation taken from the corresponding British articles, then existing, which commenced—"Any officer
or soldier who," &c. In the "additions" to this code, of November, 1775,
139 was contained an article substantially identical with the second of the original articles, but substituting for the description there employed the general term—"All persons." In the code of 1776 the description in *each* of the original articles was changed to "Whosoever," a form retained without variation to the present time; the articles in other respects also remaining without substantial modification. It is a reasonable argument that, in abandoning the words of limitation first employed, it was intended by Congress that these statutes should not be restricted in their application to members of the army.

**4th.** The contemporaneous construction of the articles as expressed in the code of 1776 appears to have been that they applied to cases of civilians. Thus, in May, 1777, a case of one John Brown, a civilian, convicted by a general court-martial of corresponding with the enemy in violation of art. 19, sec. 13, of 1776, (the present 46th Art.,) was reported to Congress and recorded in its journals.[20] Subsequently, by Resolution of Oct. 8, 1777,[21] it was declared

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in the case of Johnson *v.* Sayre, 158 U. S., 109, and anything *contra* in *Ex parte* Van Vranken, *ante*, must of course be regarded as overruled. But the clerks of *army* paymasters, like all other clerks connected with the *military* department of the government, are *civil* officials merely.

[19] See DIGEST, 76. And compare 5 Opins. At. Gen., 58; 14 Id., 253.

[20] 2 Journals, 135.

[21] 2 Journals, 281. See, with this, the Resolution, *in pari materia*, of Feb., 1778—2 Journals, 459—under which Joshua Hett Smith, the alleged confederate of Arnold and André, was brought to trial by court-martial in 1780. 2 Chandler, Crim. Trials, 185.

by Congress that "any person" who should be guilty of giving intelligence or aid to the enemy should himself be "considered and treated as an enemy and traitor to these United States," and be triable by court-martial and subject to the death penalty or such other punishment as the court might think proper. This enactment was practically but a reiteration of the existing articles of war, while at the same time extending their application to certain forms of relieving and assisting the enemy not therein enumerated.

**5th.** That these Articles, upon their re-enactment, after the adoption of the Constitution, in the code of 1806, were similarly construed, appears from the military Orders for the "Army of West Lake Champiain," dated in 1813, in which the two articles are published for the information and warning of the civil community, as being "equally binding on the citizen as the soldier." In 1818, R. C. Ambrister, a civilian, was convicted by a court-martial convened by General, afterwards President, Jackson, (by whom also the finding and
140 sentence were approved,) of aiding the enemy by "supplying them with the means of war," [22] &c. Of the earlier writers on military law, while Malthy [23] was of opinion that the articles under consideration applied only to military persons, O'Brien [24] held that they were equally applicable to persons "in civil life."

**6th.** Coming to the period of the late war—the view was expressed at an early date by Judge Advocate General Holt that civil persons were included within the general description of the two articles and amenable to trial thereunder.[25] This view was adopted by the Secretary of War, and announced in Orders of the War Department [26] and of the military commands;[27] and, between 1863 and 1865, civilians charged with a violation of one or both of the articles were frequently brought to trial by courts-martial; their sentences, when convicted, being generally approved and executed.[28]

**7th.** The practice during the war seems to have settled the question in the executive department. In July, 1871, the prevailing construction was recognized and adopted by the Attorney General, who held that certain civilians, apprehended in New Mexico for supplying ammunition to Indians at war with
141 the United States, were amenable to trial under the 56th (now 45th) article, which, he observed, applied to "persons who are not as well as persons who are in the military service." [29] This is the most recent authoritative ruling upon the question of jurisdiction under consideration.

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[22] Trial of Arbuthnot and Ambrister, London, 1819; Am. State Papers, Mil. Affairs, vol. 1, pp. 721–734.

[23] Pages 37–40.

[24] Page 147.

[25] DIGEST, 40. And see Ives, 63.

[26] See G. O. 67, War Dept., 1861, in which it is declared that all persons guilty of any unauthorized correspondence or communication by which intelligence may be conveyed to the enemy "will be proceeded against under the 57th (now 46th) Article of war."

[27] In G. O. 24, Dept. of the Ohio, 1863, Gen. Wright, in calling attention specifically to the two articles, enjoins it upon all military officers in the Department "to arrest all persons guilty of their violation, without regard to age, sex or condition, and submit proper charges against such offenders that they may be brought before a court-martial for trial." And see G. O. 80, Div. West Miss., 1864; also Orders cited in next note.

[28] See G. O. 76, 175, 250, 371, War Dept., 1863; Do. 51, Id., 1864; G. C. M. O. 106, 157, Id., 1864; Do. 260, 671, Id., 1865; G. O. 10, Dept. of Washington, 1863; Do. 52, Dept. of the Ohio, 1863; Do. 31, Middle Dept., 1863; Do. 13, Dept. of the Tenn., 1863; Do. 39, 58, Dept. of the Mo., 1863; Do. 190, 203, Id., 1864; Do. 31 Id., 1865; Do. 176, 181, Dept. of the Gulf, 1864; Do. 11, 19, 67, Id., 1865; Do. 78, 88, Div. West. Miss., 1864; Do. 14, 27, Id., 1865; Do. 54, Dept. of the East, 1865.

[29] 13 Opins., 472. What is said under Art. 63, (see *ante*,) as to its applicability to an Indian as well as to a foreign war, is equally apposite here.

8th. It is, lastly, a just argument in favor of the view that by the term "whosoever" it was intended to embrace non-military persons, that it is not in fact members of the army but civilians—disaffected or mercenary—who would be the most likely to indulge in the practices denounced by these Articles.

**Limits of the jurisdiction.** Accepting as correct in general the construction which has been put upon the two Articles by the mass of authority cited, it remains to repeat that these are statutes operative only in war, and to remark that the military jurisdiction extended over *civilians* by the same, (as by the other statutes of the general class under consideration,) must be understood to be limited to acts committed on the theatre of war or within the scope of martial law. This point, in substance so ruled by Chief Justice Kent in the early case of Smith *v.* Shaw,[30] has been more recently most clearly held in Jones *v.* Seward,[31] a leading case of a suit instituted against the Secretary of State during the late war. The same principle is in effect asserted by the U. S. Supreme Court in *Ex parte* Milligan.[32]

**Term of the jurisdiction.** It may further be remarked that this special jurisdiction, like that authorized by Art. 63 or any other growing out of a condition of war, should properly be exercised during the continuance of the war status.[33]

**The jurisdiction not exclusive.** It may be added with reference to this jurisdiction that it is not exclusive. The acts denounced in the Articles
142 are mostly acts of treason, and as such cognizable by the U. S. Courts.[34]

**SEC. 1343, REV. STS.—JURISDICTION OVER SPIES.** This jurisdiction will be more appropriately considered in Chapter XXV, on the "Articles of War separately considered;" this statute, providing for the trial and punishment of spies, being properly an Article of War.

### V. Certain other Civilians made Amenable by Law to the Military Jurisdiction.

**THE CLASSES OF PERSONS AND THE STATUTES MAKING THEM AMENABLE.** Besides the classes of civilians last considered, as subjected by statute to the jurisdiction of courts-martial *in time of war*, the existing law makes similarly amenable certain other civilians, generally—*i. e.* without regard to the prevalence of a state of war, or equally in peace and war. These latter, who have already been referred to, in this Chapter, under the head of "Exceptions to the General Rule of Non-amenability after discharge, &c.," are the following:—

(1.) Officers and soldiers retained under military jurisdiction, after discharge, &c., by the last clause of the 60th article of war, providing for the punishment of frauds against the United States, &c.: (2.) Officers accorded a trial by general court-martial, after being summarily dismissed, by Sec. 1230, Rev. Sts.: (3.) Soldiers sentenced to dishonorable discharge and confinement, and, after discharge, held in confinement at the Military Prison at Leavenworth, who are made liable to military trial for offences committed during confinement as being within the terms of Sec. 1361, Rev. Sts.: (4.) Discharged soldiers of the regular

[30] 12 Johns., 257, 265. And see *In re* Stacy, 10 Id., 332; Mills *v.* Martin, 19 Id., 22; *In re* Kemp, 16 Wis., 359.

[31] 40 Barb., 563.

[32] 4 Wallace, 121–3.

[33] See Digest, 76, 507, and other authorities cited under Art. 63, *ante*.

[34] That giving intelligence to the enemy, and supplying the enemy with arms, munitions, provisions or money, are overt acts of *treason* indictable in the U. S. Courts, see Chapter XXV.—Forty-Fifth and Forty-Sixth Articles, and authorities cited in notes.

army who are inmates of the Soldiers' Home, and as such made subject to the rules and articles of war by Sec. 4824, Rev. Sts.: (5.) Discharged officers and soldiers of volunteers, who, as inmates of the National Home for Disabled Volunteer Soldiers, are made similarly subject by Sec. 4835, Rev. Sts.

143 **GENERAL PRINCIPLE OF NON-AMENABILITY OF CIVILIANS TO THE MILITARY JURISDICTION IN TIME OF PEACE.** All persons of these several classes are *civilians*, by reason of their legal discharge or dismissal from the military service. That a civilian, entitled as he is, by Art. VI of the Amendments to the Constitution, to trial by jury, cannot legally be made liable to the military law and jurisdiction, in time of peace, is a fundamental principle of our public law,[35] and it is quite probable that Congress did not contemplate in these enactments any material departure from this principle. The provision of Art. 60 and that of March 3, 1865, incorporated in Sec. 1230, Rev. Sts., were war measures, intended apparently to be but temporary in their operation, and which have indeed been but rarely availed of in practice.[36] As to Sec. 1361, it may well have been framed without a consideration of the fact that it was expressed in such general terms as to include prisoners who had been discharged as well as those still in the service. Sec. 4824 was probably added simply or mainly *in terrorem:* no court-martial is known to have ever been convened under it.[37] Sec. 4835 is a copy of the last, and as authority for trials by court-martial has proved wholly unavailable.[38]

144 **CONSTITUTIONALITY OF THE STATUTES.** These laws, however, remain on the statute book, and under Sec. 1361 discharged soldiers have not unfrequently been brought to trial,[39] while under Art. 60 discharged officers and soldiers are always liable to be tried. It is proper therefore to consider the question of the constitutionality of such laws, and that they are constitutional cannot, in the opinion of the author, be maintained upon sound legal principles. They are certainly not so as being forms of exercise of the power to "govern and regulate the land forces," because the term "land forces" does not embrace discharged officers and soldiers or any other civilians. They must be so therefore under and by virtue of a combination of the *two* powers, to "raise armies" and "govern the land forces." That is to say, they must be regarded as placing or retaining these persons, notwithstanding that they have become civilians, in the army for a temporary or special purpose, and, by the same act, providing for their government while so placed or retained, so that

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[35] See *Ex parte* Milligan, 4 Wallace, 121, 123; Jones *v.* Seward, 40 Barb., 563; *In re* Martin, 45 Id., 145; Smith *v.* Shaw, 12 Johns., 257, 265; *In re* Stacy, 10 Id., 332; Mills *v.* Martin, 19 Id., 22; Johnson *v.* Jones, 44 Ills., 142, 155; Griffin *v.* Wilcox, 21 Ind., 386; *In re* Kemp, 16 Wis., 359; *Ex parte* McRoberts, 16 Iowa, 605; Antrim's Case, 5 Phila., 278; *Ex parte* Merryman, Taney, 246; *Ex parte* Henderson, U. S. Circ. Ct., Dist. of Ky., 1866; Parker *v.* Ld. Clive, 4 Bur., 2419; Looker *v.* Halcomb, 4 Bing., 189; Rawle on Const., 220; 3 Opins. At. Gen., 690; 5 Id., 736; 13 Id., 63; 16 Id., 13, 48; Malthy, 37; G. C. M. O. 16 of 1871.

[36] See cases under Art. 60 in note, *ante.* As to cases under Sec. 1230, see Chapter VI., where this statute is considered with reference to the authority of the President to convene courts-martial under it.

[37] See, in this connection, the recently published opinion of the Attorney General, in 20 Opins., 514, to the effect that the military authority of arrest, &c., cannot be extended over "non-military persons" at the Soldiers' Home. As a matter of fact *all* the inmates of the Institution are non-military persons, being all honorably discharged soldiers, who had been duly discharged, and had thus become civilians before being admitted to the Home.

[38] A remarkable instance of a futile court ordered under this section, in 1870, and which well illustrates the incongruity of such proceedings, is set forth in DIGEST, 329–30, and referred to *ante,* p. 93, note.

[39] See p. 93 and note, *ante.*

their offences shall be punishable as "*cases arising in the land forces.*"[40] But does the power to "raise armies" extend to the inclusion of such civilians in the land forces? What are "armies" in the sense in which this term is used in the Constitution? Its interpretation is to be found in the series of statutes dating from the period of the adoption of that instrument, and of which the constitutionality has not been questioned, by which the constituents of our armies or Army have been repeatedly defined. These constituents are a certain number of officers commissioned or appointed, and of soldiers enlisted, into the military service as such, bound to obey military orders and to perform military duty in peace or war, entitled to military pay, and remaining under military discipline and government till discharged in due form, or otherwise legally separated from the military state. Such are the "armies" or "land forces" which the Constitution authorizes Congress to raise, support and govern. Can this authority be held to include the raising or constituting, and the governing *nolens volens*, in time of *peace*, as a part of the army, of a class of persons who are under no contract for military service, but on the contrary have been formally discharged from all such contract, who render no military
145 service, perform no military duty, receive no military pay, but are and remain civilians in every sense and for every capacity except the special one for which the statutes under consideration propose to reserve them? Can the authority to govern be extended to the disciplining of soldiers after they have been legally separated from the army? In the opinion of the author, such a range of control is certainly beyond the power of Congress under the provisions of the Constitution referred to. That instrument, in a further provision also,—the Vth Amendment,—clearly distinguishes the military from the civil class as separate communities. It recognizes no third class which is part civil and part military—military for a particular purpose or in a particular situation, and civil for all other purposes and in all other situations—and it cannot be perceived how Congress can create such a class, without a disregard of the letter and spirit of the organic law.

In 1866, the Circuit Court of the United States for the district of Kentucky[41] passed upon the constitutionality of the section of the Act of Congress (no longer in force,) of July, 1862, which, in subjecting contractors for supplies for the army and navy to trial by court-martial for certain misconduct,[42] provided in express terms that they should be "deemed and taken to be a part of the land forces or naval forces for which they contracted to furnish the supplies." This statute the court, in an elaborate opinion, pronounced unconstitutional, holding that Congress could not "by its mere declaration" place or include civilians in the army, and that the provision cited was "idle and nugatory;" and it was well observed that if Congress could so dispose of one class of civilians, it could of another, or of all classes, and thus establish a "military despotism."

As to the particular existing statutes under consideration, however, the present weight of authority is in favor of their constitutionality. In the U. S. Circuit Court for the Dist. of California,[43] the concluding clause of Art.
146 63 has been viewed as constitutional, and a similar view has been taken of Sec. 1361, Rev. Sts., as including prisoners who have been discharged

[40] Compare the ruling in Wildman's Case, DIGEST, 327, note; 16 Opins. At. Gen., 294–5.

[41] In the case of *Ex parte* Isham Henderson, on *habeas corpus*. The judgment of the Court of Claims in U. S. *v.* Hill, 9 Ct. Cl., 178, proceeds upon the theory that the enactment of July, 1862, relating to contractors, is a valid provision; but the question of its constitutionality is not at all considered.

[42] Cases of such trials are referred to in note, p. 98, *ante*.

[43] *In re* Bogart, 2 Sawyer, 406.

as soldiers, by the U. S. Dist. Court for the Dist. of Kansas[44] and by the Attorney General.[45] Such opinions, whether or not satisfactory to the military student,[46] are to be deferred to till overruled by subsequent or higher authority.[47] The opinion of the author—that this class of statutes, which in terms or inferentially subject persons formerly in the army, but become finally and legally separated from it, to trial by court-martial, are all necessarily and alike unconstitutional—remains unmodified. In his judgment, *a statute cannot be framed by which a civilian can lawfully be made amenable to the military jurisdiction in time of peace.*

## IV. THE OFFENCES WHICH THE JURISDICTION EMBRACES.

The offences cognizable by general courts-martial are those made so cognizable either by the Articles of war or by other *statutes.*

### I. The Offences Cognizable under the Articles of War.

**SPECIFIC AND GENERAL OFFENCES.** The offences of which mention is made in the code of Articles may be divided—First, into (1) those which are distinguished by specific names and (2) those which are designated under a general description. The former are those made punishable in all the articles which provide for the punishment of offences except the 61st and the 62d: the latter are those included within the general terms of these two articles. But these general terms include more particular forms and phases of misconduct than are contained in all the other articles combined, comprehending
147 as they do all the dishonorable or disgraceful acts compromising their military relations of which officers may be guilty, and all the crimes other than capital, neglects, violations of army regulations and disorders, of whatever nature, not enumerated in the specific articles, which may be committed either by officers or soldiers, and which are directly prejudicial to the order and discipline of the service.

**TWO KINDS OF SPECIFIC OFFENCES.** Further, the specific military offences may be divided into (1) those which are purely military and (2) those which are also crimes at the civil law. The former are those designated in all the specific articles except the 58th and 60th; the latter are those enumerated in these two articles.[48] The former are desertion, absence without leave, mutiny, disobedience of orders, disrespectful conduct to a superior, false muster, sleeping on post, drunkenness on duty, cowardice, pillaging, &c.; the latter are the larceny and crimes accompanied with violence recited in Art. 58, and the frauds, embezzlements, &c., described in Art. 60. But in regard to these two forms of offences it is to be observed that all are criminal and all military;—criminal because the jurisdiction of courts-martial is criminal only; military because all

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[44] Wildman's Case, Digest, 327, note.

[45] 16 Opins., 292.

[46] Neither the opinion in Bogart's nor that in Wildman's case is of a positive character. Nor does it seem to be appreciated by the court in either case, or by the Attorney General, that a discharged solder is fully a civilian, or that a soldier imprisoned under sentence after discharge is simply a civilian convict.

[47] See, now, a recent ruling in the War Department, according with the view expressed by the author, noted in Digest, 327, note.

[48] With these two articles, there might, though less obviously, be classed Arts. 26 and 27 which relate to the sending and accepting of challenges, acting as second, &c.,—offences generally punishable by the criminal codes of the States; and Arts. 45 and 46 which relate to the relieving and aiding of the enemy in various forms, some of which certainly, as heretofore remarked, would be indictable as treasons.

offences of officers and soldiers cognizable by courts-martial are necessarily military offences. But though all are both military and criminal, there is the distinction between them that, of the purely military offences the jurisdiction of the court-martial is *exclusive*, while of the others this jurisdiction, except sometimes in war, in a region under martial law or military government,[49] is *concurrent* with that of the civil tribunals.

**FURTHER DIVISION OF THE SPECIFIC OFFENCES.** Specific offences may also be divided into (1) those which are peculiar to, or made punishable in, a time of war, and (2) those which may be committed and are punishable at any time whether of war or peace. Of the former are those indicated in Arts. 9, 43, 45, 46, 57 and 58, and most of those specified in Art. 42: that described
148 in Art. 44 is also properly a war offence. Of the latter are all the other offences set forth in the code.

**NO COMMON-LAW GRADES OF OFFENCES OR OFFENDERS.** It is further to be said of the offences which are the subjects of the articles of war that there is no distinction between them of "felony" and "misdemeanor."[50] None of them are felonies and none of them are misdemeanors at military law, but all are simply military crimes.[51] So, among offenders, the Articles recognize no principals, and no accessories either before or after the fact, *as such*.[52] The grades of crimes and of participators in crime, familiar to the common law, are unknown to the law military, and the embarrassing technicalities which have grown out of the division of crimes into principal and accessorial are wholly foreign to the procedure of courts-martial. In the military practice all accused persons are treated as independent offenders. Even though they may be *jointly* charged and tried, as for participation in a mutiny for example, and each may be guilty of a distinct measure of criminality calling for a distinct punishment, yet all are principals in law.

149 **NO STATUTORY GRADES OR DEGREES OF OFFENCES.** Nor are there any *statutory* grades of military offences. There are no grades, for example, of mutiny, desertion, cowardice, or other purely military offence, though the instances of such offences may differ greatly in criminality and may call for very different measures of punishment. So, as to the offences made punishable in time of war by Art. 58—the statutory military law recognizes no

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[49] See Coleman *v.* Tennessee, 97 U. S., 515, 516.

[50] U. S. *v.* Clark, 31 Fed., 713. The term *felony*, which originally at common law signified a crime entailing a forfeiture of land or goods, is now generally employed in this country to indicate an offence punishable either by death or by imprisonment in a penitentiary. A misdemeanor is "any crime less than a felony." 1 Rus. Cr., 45. The old common law division was into treasons, felonies and misdemeanors. 3 Greenl. Ev. § 1; 1 Bish., C. L. § 608. No sentence of court-martial, though it may include a *quasi* "infamous" punishment, can involve the disability or other penal consequence ordinarily attaching to conviction of felony or other infamous crime.

[51] The offences designated in Art. 58 are indeed, *as civil crimes*, some of them felonies and some of them misdemeanors at common law. But as here made cognizable and punishable by court-martial, *viz.*, "when committed by persons in the military service," they are simply military crimes, and no disability or other penal consequence of a conviction of a *felony* can, in the absence of any statute imposing the same, result from a conviction of any one of them. See DIGEST, 509.

[52] See Kennedy, 188, 190. In the only instance in our code where any apparent allusion is made to the distinction between principal and accessory, occasion is taken to discard it. This is in the 27th article, where it is expressly provided that "all seconds or promoters of duels, and carriers of challenges to fight duels, shall be deemed principals and punished accordingly." In several of the articles, as the 37th, 42d, 43d, 51st and 60th, offences in the nature of those of accessories are made punishable, but always as distinct and independent acts.

such distinction in larceny as *grand* or *petit*, nor any *degrees* in murder, manslaughter, &c., such as are known to the laws of most of the States.[53]

**MINOR INCLUDED OFFENCES.** By this term is intended the lesser acts of offence which may be included in the specific offences with which military persons may be charged. The principal of these are absence without leave, manslaughter and larceny, as offences included in desertion, murder and robbery. A further offence of this nature is the "conduct to the prejudice of good order and military discipline" which may be deemed to be involved in every specific military crime. The subject of such inclusion will be further considered in the Chapter on the Finding; it is here adverted to for the reason that the legality of the finding of a lesser offence results from the fact that the court in trying the crime charged, has *jurisdiction* of any minor criminal act recognized as an offence by law, which it contains or involves.[54]

**SEPARATE CONSIDERATION OF MILITARY OFFENCES.** The various offences made cognizable by court-martial by the Articles of war will be specifically defined and considered in Chapter XXV, in examining those Articles *seriatim*.

II. OFFENCES COGNIZABLE UNDER OTHER STATUTES.

There remain a few minor statutes not included with the Articles of war, and mostly of a more recent date, by which military persons are made amenable to trial by court-martial for offences additional to those designated in
150 the code. The statutes are:—Secs. 1359 and 1360, Rev. Sts., by which officers and soldiers are made so amenable for the offences of allowing or aiding convicts to escape or attempt to escape from the Fort Leavenworth Military Prison; Secs. 5306 and 5313, Rev. Sts., in which trading with an enemy without a license, dealing in captured property, &c., with certain other acts of falsity and fraud, are, in cases of military offenders, made cognizable by court-martial—legislation evidently intended to be operative only or mainly in time of war; sec. 4 of the Act of May 11, 1880, by whch it is declared that any officer of the army, Indian agent, &c., who, without authority from the President, shall permit any Indian on a reservation to go into the State of Texas, "shall be dismissed from the public service"—in the case of an army officer, it is presumed, upon conviction by court-martial; and sec. 3 of the Act of July 27, 1892, c. 272, by which "fraudulent enlistment" is declared a military offence and made punishable by court-martial. It is only under the first two and the last of these provisions that cases are, in practice, presented for trial.

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[53] In a few cases the *military commissions* established by the Reconstruction Acts, in deference to the procedure under the State law, found persons charged with Murder guilty of the same in the *second degree*. G. O. 107, 153, Fifth Mil. Dist., 1869; Do. 53, 62, Id., 1870. But they were here acting as *substitutes for the State Courts*, (See PART II.)

# CHAPTER IX.

## THE PROCEDURE OF GENERAL COURTS-MARTIAL.

### I. THE ARREST OF THE ACCUSED.

151 We come now to the extended subject of the Procedure of General Courts; and this subject will be presented in separate Chapters under the following heads:—I. The Arrest of the Accused; II. The Charge; III. The formal Ordering, Meeting, &c., of the Court; IV. The province and duties of the President and Members; V. The Judge Advocate; VI. Challenges; VII. Organization, Arraignment, &c.; VIII. Pleas and Motions; IX. The Trial; X. The Evidence; XI. The Finding; XII. Sentence and Punishment; XIII. The Record.

THE ARREST.

Before a court-martial is assembled for the trial of an officer or soldier charged with a military offence, the accused is ordinarily and regularly placed in arrest. This personal attachment, or taking of the body into the possession of the law, is, in the military, as in the general criminal procedure, the usual, (though not invariable,) preliminary to a bringing to justice of the offender.[1]

The subject of Arrest is regulated in part by the Articles of war. (Arts. 65 to 71 and Art. 24,) the Army Regulations, (Art. LXXIV,) and the Regulations of the Military Academy; and in part by military usage. It will be considered under the three heads of—I. Arrest of Officers; II. Arrest of Cadets; III. Arrest of Enlisted Men.[2]

I. ARREST OF OFFICERS.

152 **OCCASION AND GROUND FOR THE ARREST.** It is declared by par. 993, Army Regulations, that—"Officers are not to be put in arrest for light offences. For these the censure of the commanding officer will, generally, answer the purposes of discipline." Where, however, the offence is such as to call for trial and punishment, the strict course to be pursued is prescribed in the 65th Article of war, as follows:—"*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 term "*crime*," as here used, is to be construed not as referring to civil crimes only, but as employed in a general sense and including *all military offences*, whether those purely military, or those which, while cognizable in their civil aspect by the ordinary criminal courts, are also in their military aspect cognizable by court-martial under Arts. 58, 60 and 62.[3] The context of

[1] Samuel, 639; Clode, 1 M. F., 169; Id., M. L., 10; Manual, 28.

[2] In a strict sense the term *arrest* applies only to officers, the taking into military custody of soldiers being more accurately expressed as *confinement*. Manual, 28. Our Art. 70, however, employs the term "arrest" in reference to soldiers as well as officers, and it has been found more convenient to use it in the text as a general rather than a specific description.

[3] See DIGEST, 78. And compare construction of Art. 66, *post*.

the code from Art. 65 to Art. 71 favors this construction, which is also that sustained by the practice of the service. The corresponding article of the late British code was similarly interpreted by the authorities.[4]

The occasion and authority for the arrest of an officer thus is that he shall be *charged with a material military offence.*[5] By this, however, it is not intended that formal charges shall as yet have been served, or even preferred. It is sufficient that knowledge of the offence be had by the officer making the arrest because of its having been committed in his presence, or, where this is not the case, that an accusation be seriously made, orally or in writing, by a responsible person and communicated to such officer. In most cases indeed—and this is the proper course where practicable—a copy of the charges as preferred is served upon the officer at the time of the arrest. An officer,

153 however, is *not entitled to know forthwith* why he is placed in arrest, and, provided the charges are served upon him within eight days, according to the provisions of Art. 71, he can claim no relief on account of the delay.

**FORM OF THE ARREST**—The order. In lieu of the warrant or other process of the general criminal law, a military arrest is, by the usage of the service, regularly imposed by an *order*, and this order may be either verbal or written.[6] An order in writing, as being more formal and better evidencing the action taken, is the preferable mode, and that commonly adopted, except where, the offence being committed in the presence of the commander, the arrest is made by him on the spot. The order of arrest, especially where in writing, is usually given through the adjutant or other staff officer.[7] This official does not ordinarily serve the order by copy, making return upon the original in the manner of a writ,[8] but simply delivers to the accused an original, of which a duplicate is retained or a record made at the headquarters.

There is no prescribed form of expressing the order of arrest. A simple and usual form is a direction to the officer that he "will consider himself in arrest," or, "consider himself in arrest and confine himself to his quarters,"[9] till further orders.[10] A requirement that he surrender his sword is sometimes added, but is not essential, the Article itself specifically providing for such surrender.

154 **The confinement.** Art. 65 requires that the arrested officer shall be "confined to his quarters," &c., and an officer, upon arrest, will properly betake and confine himself to his quarters without being specifically directed to do so.[11] The quarters of an officer are his military residence, whether consisting of a tent or tents, a barrack, a separate tenement assigned to him at a post, or a house or rooms occupied by him at a station where public quarters are not furnished by the government. The limits of such quarters he

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[4] Wolton *v.* Gavin, 16 Ad. & El., 66; Simmons § 360.

[5] An officer cannot properly resort to an arrest of another officer in order to anticipate and prevent his own arrest by the latter. See case of Col. J. L. Smith, 3d Infy., in G. O. of Dec. 19, 1820.

[6] That a verbal is equally efficacious with a written order. see Hough, 493; Id., (P.) 22; Griffiths, 24; DeHart, 75; Benét, 47.

[7] "An officer is put in arrest, either directly by the officer who orders it, or, more generally, by the ministration of a staff officer." Simmons § 353; Manual, 28. Simmons adds:—"Arrests have occasionally been imposed by the intervention of the provost marshal, and, more rarely, notified even in public orders."

[8] As is sometimes done in the *militia* service, where the procedure is in all respects more nearly assimilated to that of the State courts. See Maltby, 128.

[9] But that the direction as to *confinement* is not necessary, being included in the simple order of *arrest*, see *post.*

[10] An officer when duly placed in arrest cannot *refuse* to so "consider himself." As remarked by Gorham, (p. 27,) "he is under arrest whether he acknowledges it or not."

[11] Unless indeed larger limits are specifically assigned him in the order of arrest. See *post.*

cannot, of his own authority, exceed without being guilty of breach of arrest—the offence made punishable by the last clause of the Article.[12] On the other hand, an officer is entitled to be held in arrest at his own military habitation or lodgings, and cannot legally be removed to and confined in a building, tent, &c., remote from his proper quarters.

The term "confined" does not necessarily import that the officer is to be *detained by force*, or to be harassed or humiliated by any unnecessary restraint. Such a restraint would exceed the requirements of safe custody, and be in the nature of a punishment. Except, therefore, where an attempt to escape or some act of violence is to be apprehended from him, or where he is charged with an exceptionally heinous crime, or an aggravated breach of a previous arrest, he is not in general to be held under guard, and the commander will not properly place a sentinel over his quarters.[13] For an undue or unreasonable exer-
155 cise of the power of arrest and confinement conferred by the Article, a commander will himself become amenable to charges.[14]

**The taking of the sword.** The theory—it may be noted—of this further feature of a strict arrest under the Article is, that it formally suspends the officer from the functions of his office, and especially from the exercise of command.[15] The sword must of course be surrendered on demand.[16] It is not, however, *essential* to an arrest that it be taken, and this requirement of the Article may be waived; the sword in such case, by a fiction of law, being nevertheless regarded as having actually been surrendered.[17] But that the sword is not in fact taken does not authorize the officer to appear with it during the continuance of the status of arrest.

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[12] "The article defines precisely what are the limits of an officer in arrest, unless when modified by his commanding officer, and an officer would no more be justified in exceeding them because they are not defined in the order arresting him than he would be in appearing with his sword because it failed to state that he had been deprived of it by his commanding officer." G. O. 42, Dept. of Washington, 1866. (Gen. Augur.)

[13] See Samuel, 642; Simmons § 355; Hough, (P.) 19; 2 McArthur, 3; Delafons, 199, 204; Griffiths, 25; Maithy, 129; Macomb, 20; O'Brien, 154; De Hart, 75. "In the dubious interval between commitment and trial, a prisoner ought in general to be used with the utmost humanity." Adye, 144. The arrest, where the officer properly conducts himself, should not be so severe as to prevent the due preparation of his defence. James, 411. "Where the party may be outrageous, given to drinking, or subject to a temporary derangement of mind, sentries have been placed to prevent the possibility of his going from his confinement." Hough, 492. In the cases of breach of arrest published in the following Orders of the War Dept., the officer was confined under guard to his quarters: G. C. M. O. 441 of 1865; Do. 164 of 1866. The close arrest of an officer should not be characterized by an undue *publicity*, as tending unnecessarily to impair the respect in which he should be held by his inferiors. Hough, 461, note.

[14] Samuel, 642; G. O. 59, Dept. of the South, 1862; Do. 251, War Dept., 1863. As to his liability also to a civil suit for damages, see PART III.

[15] O'Brien, 154; Harwood, 35. In the early cases of Gen. Hull, (1813,) and Gen. Gaines, (1816,) these officers are described in the records of trial as depositing their swords with the President of the Court before being arraigned. The Order, (of Nov. 11, 1816,) which promulgates the proceedings in the case of the latter, (who was acquitted,) directs:—"The President of the Court will restore the sword of Maj. Gen. Gaines, with a copy of these Orders." In a case of an officer sentenced to be suspended, it was ordered by the reviewing authority, in approving the sentence, that—"his sword will not be returned to him until after the expiration of the term of suspension." G. O. 61, Dept. of the East, 1865.

[16] In a case in G. O. 310 of 1863, an officer is convicted of "conduct unbecoming an officer and a gentleman" in first refusing, when placed in arrest, to surrender his sword, and then endeavoring to break it before delivering it up. At the "Simla court-martial," Capt. Jervis was convicted upon a charge of refusing to give up his sword on arrest. Simmons § 353, note.

[17] See Tytler, 203; Hough, 460, 493; Griffiths, 24; Macomb, 19; Maithy, 129; O'Brien, 154; De Hart, 75.

**EXTENSION OF LIMITS OF ARREST**—"Close" and "open" arrest. An arrest imposed according to the terms of Art. 65 is that which is termed "close arrest," or rather the arrest to which an officer is by strict law subjected is necessarily *close* arrest, unless expressly modified by the com-
156 mander. The Article, indeed, in declaring that the arrested officer "*shall* be confined," &c., might perhaps be regarded as a mandatory statute, absolutely requiring a close arrest by confinement in all cases. No penalty, however, is prescribed for not complying with its injunction, and that the provision is to be viewed as directory only upon the commander, who may thus, in proper cases, at his discretion, make exceptions to the general rule, is indicated by the fact that, *pari passu* with the Article, has long existed and been in force the army regulations—now par. 992, A. R.[18]—to the following effect: "An officer in arrest may, at the discretion of his commanding officer, and upon written application, have larger limits assigned him than his tent or quarters. Close confinement will not be enforced except in cases of a serious nature."

The result, in practice, is that in the great majority of cases, (especially where the detention is likely to be of considerable duration,) larger limits than the quarters of the officer are granted when asked; the arrest being in this manner reduced from a "close" to an "open" one, or an arrest "at large."[19] In many cases, indeed, more extended limits than those specified in the Article are allowed in the first instance and without being applied for, such limits being designated in the original order of arrest. Which of the two kinds of arrest shall be imposed or continued rests wholly in the discretion of the commander. This discretion will be guided by a consideration not only of the nature of the offence and the conduct of the accused prior to and at or after the arrest, but of his state of health, the facilities required to enable him to confer with his counsel and prepare for his defence, the commodiousness or the reverse of his quarters, the season, climate, &c.;—the certificate of the medical officer, when the accused is ill, as to his physical or mental condition, the space properly required by him for air, exercise, &c., being of course always deferred to.[20]
157 The limits usually prescribed or acceded, where a close arrest is not imposed or continued, are commonly the boundaries of the camp, post, or station, or of a certain circuit of the neighborhood of the officer's quarters. At a post upon a military reservation, the range of the reservation, if not too extended, would in a proper case be accorded.[21] The limits once fixed may even

[18] The substance of this paragraph first appears in the Regulations of 1821. That the arrest, in the British military law, may be close or open at the discretion of the commander, is noticed in Hannaford *v.* Hunn, 2 C. & P., 158.

[19] As to the distinction between close and open arrest, see Tytler, 202; Hough, 494; Id., (P.) 21; Simmons § 354; Clode, M. L., 113; De Hart 75; DIGEST, 119–120. That an open arrest, where the limits prescribed were "the City of Washington," did not impose a *physical restraint* entitling the officer to resort to a writ of *habeas corpus* for his release, see Wales *v.* Whitney, 114 U. S., 564.

[20] See Tytler, 203; Hough, 460, 492, 493; Id., (P.) 19, 22; Clode, M. L., 113; Id., 1 M. F., 169, 171.

[21] Griffitha, 24; Benét, 46–7; DIGEST, 170. And see G. C. M. O. 51 of 1867; G. O. 42, Dept. of Washington, 1866. In a case of breach of arrest in G. C. M. O. 37, Dept. of Texas, 1874, the order enlarging the limits of the original arrest, as set forth in the specifications, is as follows: "The limits of the arrest are so far extended as to allow him to leave his quarters at any time between revellie and retreat for the purpose of exercise, with permission to go beyond the limits of the garrison. He is not authorized by this order to enter any house." [The offence consisted in entering houses in an adjoining village without authority.]

In the British navy, the officer "is generally allowed to walk about the ship at large, (the quarter deck excepted,) without a sword." Delafona, 199. And see Hickman, 162. As to the practice in our navy, see Harwood, 36.

be enlarged upon a second application. As to the number of applications there is no restriction: larger limits may first be refused on account of misconduct of the officer, and granted after his behavior has improved. In some cases the scope allowed, in view of the rank of the party, the nature of the offence, &c., is so wide and general that the arrest becomes little more than a mere form."

**Analogy of enlargement on bail.** A theory which has been advanced to explain the practice of thus permitting an arrested officer to be at large is that the possession by him of a *commission*, which would be in danger of being forfeited if he violated his parole and escaped, is a sufficient *security*, answering to *bail* at the criminal law, for his not withdrawing himself from military custody, and for his appearance before the court for trial at the appointed time. In the words employed by Clode, "the officer gives bail in the value of his commission."[22]

158 **DEFERRING OF ARREST TILL TRIAL.** The arrest of officers is so much a matter of discretion that cases are recognized in which arrest is not required to be imposed until just before trial. Par. 994 of the Army Regulations prescribes that—"A *medical officer* charged with the commission of an offence 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." Other instances also may arise where, because the officer is engaged upon some highly important service, or for other controlling reason, it may not be desirable to order him in arrest till the eve of trial.

**OMISSION TO ARREST.** In some cases it has been omitted altogether to place the officer in arrest either prior to or pending the trial. These were mostly cases of officers of the higher grades, in which a trial was desired by the accused, and it was known that he would voluntarily appear before the court. The mere fact that the accused has not been subjected to arrest can in no case affect the jurisdiction of the court or the validity of its proceedings or sentence. If the accused of his own accord appears and submits himself to trial, the court is authorized to proceed in the case equally as if he had been brought before it compulsorily and in arrest. On the other hand an officer cannot refuse to appear for trial on the ground that he has not been put in arrest, or plead the omission in bar of trial.[24] An officer is not entitled to demand to be arrested prior to trial, and he must obey an order to present himself for trial with the same promptitude whether or not he may have been formally arrested.[25] It is proper to add that an omission to arrest is an *irregu-*
159 *larity* which must in general be prejudicial to discipline and the due administration of justice.

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[22] As in the case of Medical Director Wales of the Navy, (Wales *v.* Whitney, 114 U. S., 564), noticed in note on p. 113, *ante*.

[23] M. L., 113. And see Id., 1 M. F., 171. "It is an old and very good military maxim that an officer's commission is a good security against his breaking his arrest." Hough, (P.) 19. And see Adye, 144; Delafona, 199; Kennedy, 15; O'Brien, 153. "This affords one great reason for the distinction taken between a commissioned officer and soldier, in the circumstances of the arrest. * * * in all cases where the alleged crime, if proven, could not endanger more than an officer's commission, it may be said that this is a sufficient guarantee for the appearance of the accused, and that no other precautionary measure for that purpose would appear demandable." But in more aggravated cases, "additional securities should and ought to be taken." Samuel, 614.

[24] See the case of a conviction of a superior officer, for a violation of this regulation, in G. O. 59, Dept. of the South, 1862, and Do., 251, War Dept., 1863. In an old Order, (A. & I. G. O.,) of Sept. 22, 1819, the conduct of a post commander, in placing the post surgeon in arrest under a sentinel, is disapproved as "contrary to the usages of the service and unjustifiable."

[25] DIGEST, 170.

**BY WHOM ARREST IS TO BE IMPOSED.** Art. 65 indicates the "commanding officer" as the agent of arrest,[26] and par. 990 of the Army Regulations declares:—"Commanding officers alone have power to place officers under arrest, except as provided in the 24th Article of war."

By the term "commanding officer," as applied to the *line* of the army, is meant the chief of the complete integral command or separate organization to which the officer is attached or with which he is serving—as the regiment, detached company, detachment made up from various companies, or corps, garrison, post, &c. Thus a captain commanding a company would not properly place in arrest a lieutenant of his company, if the company was serving with and as a part of a regimental or post command, of which a superior to the captain was the commanding officer present: otherwise, if the company was quite severed and acting alone. As applied to the *staff*, the "commanding officer," in the sense of the Article, of an officer of the general staff would ordinarily be either the chief of the staff corps of which he was a member, or department commander at whose headquarters or under whose immediate command he was serving;[27] or, if his station of duty were a separate post, the officer superior in rank to himself, in command of the post, provided he were at the time under the orders of such post commander.[28]

Of course, here as in the other military relations, the "commanding officer" is not merely the immediate commander but also any superior of the latter who also commands him. Thus a department commander may place in arrest an inferior officer attached to a post command within his department.
160 So the President may order the arrest of any officer of the army, and the general-in-chief the arrest of any officer under himself. In practice, the arrest of an officer proposed to be tried is not unfrequently originally ordered by the authority by whom the court has been or is to be convened. In some cases the arrest *must* be ordered by a superior to the officer who, as commanding officer, would otherwise be the proper person to order it. Thus a post commander could scarcely properly place in arrest an officer of his command who had been detailed and was acting upon a court-martial assembled at the post by the department commander, but the latter would be the proper authority for the purpose.[29]

**Excepted cases—Arrest by others than the commanding or superior officer.** The exceptions referred to in par. 990, Army Regulations, (above cited,) as authorized by Art. 24, are those of "quarrels, frays, and disorders," on the occasion of which any inferior officer or non-commissioned officer of the army is empowered to place in arrest the participants though they be of superior rank. Thus a sergeant or corporal, in exerting himself to quell an affray or riot, would be authorized to arrest a commissioned officer engaged in it, and a lieutenant would be authorized to arrest a captain, or field officer, &c.[30] There is nothing in this power to excite apprehension; the inferior, in em-

[26] "The custody of the prisoner's person belongs to the commanding officer as a part of his command." De Hart, 81. "The commanding officer is the person vested with authority of placing an officer in arrest, or soldier in confinement, and this for wise purposes; for, if any officer under his command could at pleasure, upon any fancied insult or supposed grievance, deprive another of his liberty, a regiment would exhibit a scene of disorder, anarchy, and a total absence of all discipline." Hough, 459.

[27] In the case of an aid-de-camp, the commanding officer would be the general to whose personal staff he belonged or was attached.

[28] See G. O. 395 of 1863, in regard to the arrest of paymasters.

[29] Hough, (P.) 711.

[30] See O'Brien, 106; De Hart, 76. That such was the construction of the similar British article, see Samuel, 400; Hough, 203.

ploying it, simply exercises an authority, analogous to that with which every citizen is invested, to put a stop to a breach of the peace and arrest an affrayer;[31] and a military superior, arrested by an inferior under the circumstances, instead of protesting, would in general rather have occasion to congratulate himself that he had been taken in hand by one of his own class rather than by a strange policemen or other civilian. Cases of such arrests, however, must be of the rarest occurrence.

A further rare *exception* to the general rule is recognized in a case where a junior may be authorized to arrest a senior on account of some gross misconduct or criminal incapacity by which military authority and discipline
161 are paralyzed, and where the *necessity* of the moment justifies the junior in assuming to supersede his superior in the command. The leading case of this class is that of Lieut. Col. Hog of the British army, who was convicted of drunkenness on duty on an inspection parade and cashiered. The court, in imposing sentence, remarked as follows:—"The court conceives that it would be dereliction of duty were it to pass unnoticed so extraordinary and, as far as the experience of the court extends, unprecedented an occurrence as that of a commanding officer being put in arrest, while in the actual command of a regimental parade, by a junior officer of the corps." Upon this observation the comment of the reviewing authority, the Commander-in-chief, was as follows:—"The court are in error when they suppose that circumstances may not occur, even upon a parade, to justify a junior officer in taking upon himself the strong responsibility of placing his commander in arrest; such a measure must alone rest upon the responsibility of the officer who adopts it, and there are cases wherein the discipline and welfare of the service require that it should be assumed."[32] This ruling has been recognized as law by the later authorities.[33]

**STATUS OF ARREST.** An arrest once duly imposed detaches the officer from the functions of his office: he may not assume to command or to perform any military duty. At the same time a certain line of conduct becomes obligatory upon him. If closely confined, he cannot leave his quarters: if he does so, he will render himself amenable to trial and to a sentence of dismissal for the offence of breach of arrest, hereafter to be considered. If his arrest is an "open" one—the privilege of extended limits having been accorded him—he is considered as at large upon his parole of honor, and, if he exceeds the limits assigned, is liable to trial for a violation of the 62d article of war. He should also be especially circumspect in conforming to regulations and orders so far as they apply to him; the fact that he is no longer a free agent not entitling him to consider himself irresponsible.[34]

There are also certain acts which, though not necessarily subjecting an
162 arrested officer to charges, are considered inappropriate and indecorous, and, if aggravated or persisted in, may furnish ground for further proceedings. Thus par. 995 of our Army Regulations declares:—"An officer under arrest will not * * * 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."[35] The Queen's Regulations prescribe:—"An officer in open arrest is on no account to appear in his own or any other mess premises, or in

[31] See Burdett *v.* Abbot, 4 Taunt., 449, and the other authorities cited on this subject in the author's note to DIGEST, 32; also *post*, Chapter XXV—"TWENTY-FOURTH ARTICLE."

[32] James, 840, 841.

[33] Hough, 296; Simmons § 357; Gorham, 27; Manual, 29.

[34] See Hough, 491.

[35] Par. 1000 assigns a place for arrested officers when the regiment or company is "on the march."

any place of amusement or public resort, and he is not on any pretext whatever to appear within the precincts of the station or garrison dressed otherwise than in uniform. An officer, when in arrest, will not wear sash, sword, or belts with his uniform."[36] These rules are in general equally appropriate to our service.

On the other hand, it devolves upon the commander to treat in a similarly formal and ceremonious manner an officer whom he has placed in arrest; all orders or communications made to him being properly transmitted in writing and through a staff officer.

The status of arrest affects in no manner the right of the officer to the pay and allowances of his rank.[37] Unless in arrears to the United States, or held as a deserter,[38] he is entitled to be paid precisely as if he had not been arrested. So, as it has been held by the Judge Advocate General, an officer in arrest is not disqualified to prefer charges.[39] But an arrested officer could not properly be allowed a leave of absence, except in some extreme case, as where considerations of humanity or justice require the granting of the indulgence, and in such a case the arrest would properly be temporarily suspended.

**163 TERM AND DISCONTINUANCE OF ARREST—Discretion of commander.** Subject to the provisions of Arts. 70 and 71 yet to be considered, the matter of the release of an officer from arrest is, in general, quite within the discretion of the commander by whom the arrest was ordered.[40] An arrest being imposed with a view to trial is in general not discontinued till the trial has been completed and the judgment of the court finally acted upon. The original commander, however, if the case has not passed beyond his control, may, under exceptional circumstances, if he deems it just and proper to do so, release the officer from arrest without regard to the pending proceedings. But where the case has been formally submitted to the action of higher authority, as where a court-martial for the trial of the arrested officer has been convened by a superior of the original commander, the latter would not be empowered, except by the direction of the superior, to terminate the arrest.[41]

**Absence of authority in the court.** A court-martial can no more release from arrest than it can arrest an officer.[42] Even its acquittal does not enlarge the accused: it still remains for the proper commander to discharge him from the arrest as such, in and by the written order promulgating the proceedings or otherwise.

**Absence of authority in the officer—His duty.** Nor can the officer under any circumstances release himself from arrest. Moreover, when the authorized

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[36] Sec. 6, § 20. And see, as especially full on this subject, Hough, 491. The same author, (p. 494,) cites a case where certain subalterns were censured for persisting in associating in a marked manner with an officer while in arrest.

[37] See Circ. No. 14, (H. A.,) 1890.

[38] Par. 1413, A. R.

[39] DIGEST, 171. It has been held that an officer, though under arrest, was empowered to exercise the authority to quell frays and disorders devolved by Art. 24. G. O. 92, Dept. of the South, 1872. But he could hardly "order officers into arrest," &c.

[40] Samuel, 640; Kennedy, 15; Simmons § 368.

[41] "The authority competent to direct the release of an officer must be the officer who imposed the arrest, or the superior to whom it may have been reported." Simmons § 368. And see Manual, 20. Our corresponding article of 1786 and 1806, contained, after the words "by his commanding officer," in the last line, the words, (now omitted,) "or by a superior officer."

[42] So, having legally nothing whatever to do with the matter of arrest, a court-martial cannot, with a view to facilitate the defense of an officer, properly interfere with the continuance of a close arrest, nor, in its judgment, unfavorably criticise the action of the commander in imposing or continuing such an arrest. Hough, 461. Id. (P.) 20; Griffiths, 25.

commander has released him, he cannot refuse to be released. The discharge from arrest is an *order* which, like any other military order emanating
164 from a competent source, must be obeyed by its subject. The commander alone having authority in the matter, the officer is bound to accept his release as determining his status in regard to the case, and to resume the functions of his office. Even after charges have been duly preferred and served, he cannot, on being discharged from arrest and ordered to return to duty, persist in considering himself in arrest or entitled to a trial. The fact of arrest with charges gives him no right to demand a court; the granting of a trial in his case being a matter within the sole discretion of the department commander or other superior authorized to order one.[43]

**CONSTRUCTIVE RELEASE FROM ARREST.** There are certain proceedings which, either in law or by the custom of the service, have been regarded as practically releasing an officer from arrest, because operating to discontinue the status of arrest. Thus it was held by Atty. Gen. Cushing[44] that the *promotion* of an officer, while he is in arrest, will have such effect: this because the promotion is a constructive pardon, and, the charge being removed, the arrest falls with it. So, putting an arrested officer on duty, or allowing him to do duty at his own request—as to go into an engagement with his regiment—will discontinue the arrest.[45] But here there is no pardon of the offender, nor can the action taken be pleaded in bar, or serve as a defence, upon a trial subsequently ordered: in such case the right to arrest is not divested by the action taken, but suspended only, and the officer, after the duty has been performed, may be re-arrested and arraigned.[46]

**LIMITATION OF PERIOD OF ARREST OF OFFICERS, BY ARTS. 70 AND 71.** Art. 70, which will be more fully considered in treating of ar-
165 rests of *soldiers*, directs 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.*"

From the use of the word "confinement" it is to be inferred that, as to *officers*, this Article applies only to those who are in close arrest, *i. e.* those arrested and held strictly as contemplated by Art. 65.

In the original article, as it appeared in the codes of 1775 and 1776, the word "conveniently" preceded and qualified the word "assembled." In view of its omission in the subsequent forms, the term "can be assembled" must, it is believed, be held to mean can *practicably* or reasonably be assembled, *i. e.* as soon as the exigencies of the service may permit.[47]

The effect of the Article, as to officers, thus is, that officers in close arrest may not be retained in such arrest for a longer period than eight days, unless a court-martial cannot with reasonable diligence be assembled within that time. How much longer they may be held if a court cannot thus be convened is left indefinite.

But here intervenes Art. 71, which provides, (among other things,) that, "*except at remote military posts or stations*," (*i. e.* those on the frontier, or which are distant because of the absence of facilities of communication there-

[43] Upon the subject of this paragraph, see Samuel, 639; Hough, 465, 494; Id. (P.) 21; Simmons § 368; Kennedy, 15; O'Brien, 155; De Hart, 76; Manual, 29, (citing Queen's Regs., Sec. VI, § 23.) As to the distinction in this respect between the military and the civil procedure, see In matter of Martin, 45 Barb., 144.

[44] 8 Opins., 237.

[45] DIGEST, p. 170. But ordering or permitting the officer to appear as a witness before a court-martial will not properly have such effect. Harcourt, 119.

[46] The removal of an arrested officer to a new station does not *per se* suspend the arrest. See Cox *v.* Gee, Winst. L. & E., 134.

[47] Compare the construction of a similar provision by Atty. Gen. Wirt in 1 Opins., 300.

with,[48]) officers of the army shall not be held in arrest for a longer period than forty days. Construing this article with the former, the result is that, as to the excepted cases, Art. 70 is left to apply without qualification, while, as to other cases, it cannot be held to authorize, under any circumstances, a confinement before trial longer than forty days.

**SPECIAL PROVISIONS OF ART. 71.** This Article is in full as follows: "*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,*[49] *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*
166 *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 provision, which was originally enacted as s. 11, c. 200, Act of July 17, 1862, and first appears as an article of war in the revised code of 1874, is comprehensive in its terms and applies to all arrested officers, whatever the form of the arrest, whether "close" or "open." Its evident policy was to preclude protracted arrests and secure prompt trials. It may be said of it, as was remarked by Atty. Gen. Cushing[50] of an article of the naval code, (the present 45th,) that it is enacted in the spirit of the provision of the VIth amendment to the Constitution, that "in all criminal trials the accused shall enjoy the right to a speedy trial."[51].

Except as to the occasions expressly excepted of cases occurring "at remote military posts or stations," which are left to be governed by the provision of Art. 70 just considered, the present Article is absolute and mandatory. The term of the officer's arrest,—instead of remaining dependent upon the uncertainties attending the assembling of the officers necessary and proper to compose the court, the collecting of the witnesses at the place of trial, the movements of the army in war, or other incidents of the service,—is limited by the Article absolutely and under all circumstances to certain periods. If charges are not served upon him within eight days after the arrest, "*the arrest shall cease.*" If, having been duly served with charges, he is not brought to trial within ten days after the arrest, or—where the exigencies of the service prevent a trial by that time—within forty days at the longest, "*the arrest shall cease.*"
167 An enactment thus mandatory and explicit in the conferring of individual rights cannot be disregarded or evaded by a commanding officer.[52]

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[48] See Waters *v.* Campbell, 5 Sawyer, 20.

[49] See the ruling of the Supreme Court in construing Art. 43 of the naval code, in the recent case of Johnson *v.* Sayre, 158 U S., 109.

[50] 6 Opins., 207.

[51] The occasion of the enactment of this Article is understood to have been the protracted arrest and confinement at Fort Lafayette of Brig. Gen. Chas P. Stone, U. S. Vols., who had been so held without trial for about one hundred and fifty days, when Congress, having become advised of the facts, inserted this provision for his benefit in an Act relating to the army. After its passage he was held thirty days longer, (the limit allowed by the atatute,) and then released after a confinement of one hundred and eighty-eight days in all. Blaine's Twenty Years of Congress, vol. 1, p. 390.

[52] "It would manifestly be an evasion of the Act if a (commanding) officer were to be permitted to keep an officer in arrest by *renewing* his arrest as often as it expired by legal limitation. The evil and injustice which this Act was designed to prevent would be equally as well accomplished by repeated arrests of eight days each as by one continued arrest." G. O. 86, Dept. of Va., 1865. (Gen. Terry.)

But while, in view of the positive language employed, the officer becomes entitled to an immediate release from arrest, upon failure to serve charges or bring to trial as provided, and *is* released *in law*,[53] yet, if not released *in fact*, he cannot, from military considerations, be permitted to release himself. In deference to the principle of subordination which is the foundation of the military system, he must, if not discharged at the proper time, (as he should be,) duly make application to be released to the commander by whom the arrest was ordered. If the application is disregarded, he may seek redress under the 29th Article, if his case falls within its provisions;—or, if not, may appeal for relief to superior authority.[54] He has the right of course to prefer charges against the commander for a failure to observe the injunctions of the statute.

While the fact of a prolonged arrest in contravention of the terms of the Article could not be pleaded in bar of trial when the officer came to be arraigned, this fact, in the event of a conviction, would properly go to induce a mitigation of the punishment, or would furnish good ground for a remission, in whole or in part, of the sentence by the reviewing authority.[55]

The effect of the concluding provision of this Article, considered in connection with Art. 103, will be remarked upon in Chapter XVI.

**BREACH OF ARREST.** Art. 65, which provides, as we have seen, for the close arrest of officers by confinement in quarters, declares further:—"*And any officer who leaves his confinement before he is set at liberty by his commanding officer, shall be dismissed from the service.*"

168 The offence thus visited with an extreme punishment[56] is that which is known in military parlance as *breach of arrest*. It is here restricted to the single act of the quitting of close confinement by the officer before he is duly liberated therefrom. The term "breach of arrest," however, is not exact or technical, and is sometimes carelessly employed in describing offences not within the purview of this, but cognizable only under the general 62d article.[57]

**The leaving of the confinement.** The "confinement" intended is clearly that designated in the first clause, viz. a confinement in "barracks, quarters, or tent." To constitute therefore a violation of the Article, the officer must (as shown by the written order of arrest, or testimony of adjutant, &c.[58]) have been duly confined in and to his proper quarters, (as heretofore defined,) and must have quitted the same before being permitted to do so by the proper commander.[59] The distance which he may thus go is not material, nor is the period of time during which he may be absent.[60] If he leaves, (except from

[53] See G. O. 86, Dept. of Va., 1865.

[54] DIGEST, 80.

[55] See G. O. 44, Fifth Mil. Dist., 1868.

[56] It was once punished with death in the British law. Samuel, 644. As to its gravity, see remarks of Gen. Augur in G. C. M. O. 37, Dept. of Texas, 1874.

[57] As to disorders, or acts of disobedience or neglect, by officers, improperly charged under this designation, see *post*. The most frequent misuse of the term, however, is in describing violations of arrest by non-commissioned officers and soldiers. See G. O. 19, Dept. of the Cumberland, 1867.

[58] Hough, 494.

[59] The quitting must be of *quarters*. The conviction in the case in G. C. M. O. 93 of 1865, where the officer was charged with "breach of arrest" in escaping from a *military prison*, (to which he had been committed for the killing of a sutler,) was properly sustainable only on the ground that the pleading amounted to an allegation of an offence under Art. 62.

[60] "Officers under close arrest ought to be extremely cautious not to quit their quarters; * * * for to whatever trifling distance they may have gone, or for whatever short time they may have been absent, a general court-martial would be obliged to find them guilty of breaking their arrest." Kennedy, 15. "It is sufficient to prove in the case of a close arrest, that A. B. left his confinement; it matters not where he went to." Hough, 494. In G. C. M. O. 1, Dept. of Ky., 1865, is a case of an officer charged with breach of arrest in "leaving his stateroom on a transport and going to the fore part of the cabin."

169 necessity,[61]) the place to which he is restricted, merely to proceed to some other part of the same garrison, he is equally chargeable with a breach of the Article as if he had separated himself by a long distance or time from the post or station. In the cases, published in the General Orders, of officers properly charged with, and convicted of, this offence, the same is alleged to have variously consisted—in visiting without permission the quarters of the commanding officer,[62] or those of another officer,[63] at the same post; in going to the guard-house or visiting the guard;[64] going to the sutler's or post trader's store;[65] attending as a spectator a trial by court-martial;[66] similarly attending a parade of the battalion;[67] riding or walking outside the camp;[68] visiting a place of entertainment near the camp;[69] going outside the post into the neighboring town[70] and appearing in public places;[71] crossing the Navy Yard Bridge from the District of Columbia and entering Maryland;[72] going to a public race-course and remaining two days absent;[73] going from Portland, Me., to Boston, and not returning till the fourth day,[74] &c.

170 The animus of the offender. It is to be remarked that the mere act of quitting the quarters, &c., without the proper authority, consummates the offence, whatever the intention or motive. Breach of arrest indeed ordinarily involves, with a disobedience of orders, a deliberate defiance or contempt of authority,[76] and hence the heinousness usually ascribed to it;[76] but an evil *animus* is not essential to constitute it, and an officer leaving his close arrest under the *bona fide* impression that he was authorized to do so, when in fact no such authority existed, would, strictly, be guilty of a violation of the Article.[77]

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[61] The order of arrest sometimes expressly provides for cases of necessity. Note instances in G. C. M. O. 16, Dept. of the Miss., 1865; Do. 18, War Dept., 1867.

[62] G. O. 380 of 1863; G. C. M. O. 441, Id. of 1865; G. O. 111, Dept. of Washington, 1864.

[63] G. C. M. O. 18 of 1867; Do. 29 of 1881.

[64] G. C. M. O. 164 of 1866; Do. 57 of 1867.

[65] G. C. M. O. 220 of 1866; Do. 29 of 1881; Do. 16 of 1888.

[66] See in Hough, (P.) 77, a case of an officer who, having been placed in arrest while a member of a general court-martial, "went in person to make the circumstance known to the court," thus breaking his arrest.

[67] G. O. 26, 1851; Do. 11, Army of the Potomac, 1861. In Do. 29, Dept. of New Mexico, 1864, is a case of an alleged breach of arrest in leaving quarters and "loitering about the post."

[68] G. C. M. O. 44, Army of the Potomac, 1864.

[69] G. C. M. O. 93 of 1875. And see Do. 115 of 1866.

[70] G. C. M. O. 53 of 1890, where the breach of arrest of the officer consisted in his going to a neighboring town and thence to a ranch, seventeen miles from the post, and remaining there till apprehended.

[71] G. C. M. O. 16, Dept. of Miss., 1865; Do. 42, Dept. of Washington, 1866.

[72] G. O. 111, Dept. of Washington, 1864. And see a similar case in G. O. 84 of 1863.

[73] G. O. 62, Dept. of the Gulf, 1864.

[74] G. O. 43, Dept. of the East, 1864. In a case in G. C. M. O. 38 of 1867, the officer, in breaking his arrest, left the post and was absent 22 days,—for which he was, also, charged with desertion and convicted of absence without leave.

[76] As indicated sometimes, not only by protracted absence on the part of the officer, but by such acts as resuming his sword or the exercise of his official functions, (See case in G. C. M. O. 57 of 1867;) disorderly conduct or insolence toward the commanding officer, (G. C. M. O. 441 of 1865;) refusing to return to his quarters, and only doing so when compelled by force, (G. C. M. O. 3, Div. of the S. West, 1865;) forcing a sentinel placed over his quarters, (G. C. M. O. 164 of 1866.)

[76] See O'Brien, 154; DeHart, 80.

[77] In cases where it appears that the accused has acted in good faith, in ignorance, or under a misapprehension of his strict military obligation, the court has not unfrequently recommended and the reviewing authority granted a remission or commutation of the sentence. As in an early case in G. O. 27 of 1835, where the breach consisted in going to the mess-house. And see a similar case in G. C. M. O. 18 of 1867, where it consisted in going to the sutler's store.

**Defences.** The nature of the offence is further indicated by the defences which have been set up to the charge. Thus it is no defence that the officer was *innocent* of the offence for which he was arrested and confined and that the arrest was therefore unwarranted.[78] The question of the guilt of the accused upon the original charge cannot be tried in this proceeding, and evidence offered to show that he was not guilty will be irrelevant and inadmissible. Even if innocent in fact, his arrest would not necessarily be illegal; the commander being, in his discretion, authorized to arrest upon reasonable grounds of suspicion. Nor is it any justification for a breach of arrest that the quarters of the officer were in bad repair or otherwise unsuitable as a domicile;[79] or that the arrest, by reason of the unnecessary placing of a guard over the
171 quarters, or otherwise, was unjustifiably severe;[80] in such cases the officer's proper course is to apply for relief to the commander, or, if he refuses it, to the proper superior. But that the arrest was ordered by an officer without authority to impose it, would be a complete defence: what officers have authority to institute arrests has been heretofore considered. It is also a complete defence that, subsequently to his original confinement, the accused has been put on duty or allowed to do duty,[81] provided that, before the breach assigned, he had not been duly re-arrested and re-confined.

**Acts not constituting the specific offence.** The character of the offence is also illustrated by distinguishing it from certain acts sometimes charged under Art. 65, but which are properly acts in disobedience of orders or merely acts prejudicial to good order and military discipline. Thus a non-compliance with an order of arrest, in refusing to be arrested or confined, or of an order requiring the officer to report in arrest to a certain commander, however grave a dereliction, does not constitute the offence under consideration. Nor does a transcending of limits, after larger limits than those of the original close arrest contemplated by the Article have been allowed the officer, constitute the offence, though it may indeed involve a still higher criminality.[82] So, for an arrested officer to quit his company or regiment, when personally with it in the field or on the march, is an offence quite other than a violation of this Article.

Further, the specific offence being restricted to the single act indicated, no infraction or non-observance of any condition or obligation incident to the status of arrest *other* than that to remain confined till liberated, will of itself amount to such offence. Thus the wearing of his sword by an officer while confined in arrest, is not, *per se*, a technical breach of arrest, nor is the issuing of an
172 order or other assumption of official authority.[83] Nor, again, will drunkenness, disorderly conduct, or other improper or criminal act of which an officer, while remaining strictly within his confinement, may be guilty, however grossly the same may offend against good order and military discipline, amount to the particular delinquency under consideration.

**The setting at liberty.** This proceeding of the commanding officer, which alone will discontinue the close arrest, may be resorted to presently upon the arrest, and either by the commander of his own motion or in compliance with

[78] "It does not signify whether he was placed in arrest with or without cause." Hough, 494.

[79] G. O. of Oct. 31, 1809.

[80] G. O. of Sept. 22, 1819.

[81] See Hough, (P.) 19.

[82] In G. C. M. O. 37, Dept. of Texas, 1874, Gen. Augur, in referring to cases of transgressing *extended* limits of arrest, as not "technically fulfilling the requirements of" the Article, adds that the same "nevertheless involve as much if not more moral turpitude in their commission, inasmuch as the greater the liberty accorded to an officer, and the confidence reposed in him, the greater are his obligations not to abuse that confidence."

[83] See De Hart, 80; Benet, 47–8.

an application by the accused, or may be delayed till the trial has been completed and the judgment finally acted upon.[84] But where indeed the *limits* of the strict arrest have been *extended* by the commander, as where the officer, confined upon arrest to his quarters, has been allowed the range of the post or station, he is, so far as concerns the application of the Article, as effectually "set at liberty" as if the status of arrest had been discontinued altogether.

### II. Arrest of Cadets.

In the main the principles applicable to the arrest of officers will apply to the arrest of cadets, these also being officers.[85] Specific provisions, however, on the subject of the arrest of cadets are contained in pars. 264 to 269 of the Regulations of the Military Academy. It is here specified that a cadet when arrested shall, (except as further indicated,) "confine himself to his quarters until released" by the Superintendent; and rules are prescribed in regard to his action and *status* while in arrest.

### III. Arrest of Enlisted Men.

This subject is regulated mainly by the 66th and 70th Articles of war, but in part also by Arts. 67, 68 and 69.

173 **PROVISION OF ART. 66.** This Article declares that:—"*Soldiers charged with crimes shall be confined until tried by court-martial, or released by proper authority.*"

**General effect.** The terms "crimes," like the word "crime" employed in Art. 65 and heretofore interpreted, is evidently a general designation intended to include all substantial military offences, both those purely military and those having a civil aspect. This Article prescribes a general rule of administration and discipline. Except so far as may be authorized in the case of Cadets, we have in our law no such system of disciplinary punishments, imposable by commanding officers independently of courts-martial, as is found in the European codes. Our soldiers, therefore, when, as it is expressed in the Article, "charged with crimes," must—to be legally punished—be "tried by court-martial." The great majority indeed of their offences are disposed of, comparatively summarily, by the inferior courts. But in all cases, the trial, by the direction of this Article, is to be preceded by arrest in the form of *confinement*. Enlisted men, however—and this indeed is also indicated by the use of the term "crimes"—should not be confined in arrest for trifling irregularities or petty derelictions.

**By whom the arrest is to be made.** While in a case requiring immediate action the arrest of a soldier may legally be made by any commissioned officer, or, if none be at hand, non-commissioned officer, the proper person in general to make or order the arrest is the officer commanding the company or other immediate commander of the offender. Such also is the proper authority to make the arrest of a non-commissioned officer. In practice, however, a discretion for making arrests of enlisted men on account of ordinary offences is commonly delegated by commanders to 1st sergeants or other non-commissioned officers.

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[84] Precedents of cases of officers convicted of breach of arrest in leaving their quarters and going at large, after their trials had been completed, but before they had been duly released from arrest, are found in G. O. 80, Army of the Potomac, 1862; Do. 43, Dept. of the East, 1864; G. C. M. O. 15, War Dept., 1866.

[85] *Ante*, p. 65, note.

Form of the arrest. "The arrest of a soldier is, properly, confinement."[86] It is indicated by the authorities[87] as a reason why confinement is the form of arrest specifically prescribed for enlisted men, that military superiors, if liberty were allowed the prisoner, would not have that security against escape
174 which, as heretofore remarked, they have in the case of an officer allowed to be in arrest at large, and that, therefore, to make sure of holding the party, a closer arrest must in general be imposed.

As to the *mode* in which the confinement is to be executed—the *private soldier*, when placed in arrest, is generally confined in the guard-house or other appropriate place of restraint, a sentinel being usually posted either without or within.[88] By a recent order,[89] however, it is prescribed that soldiers charged for trial by *summary court* shall not be so confined, but shall be "placed in arrest in quarters before and during trial and while awaiting sentence, unless in particular cases restraint may be deemed necessary." As to *non-commissioned officers*, it is directed in par. 996, A. R.,[90] that they "will not be confined at the guard-house in company with privates, but will be placed in arrest in their barracks or quarters, except in aggravated cases where escape is feared." The phrase "placed in arrest," as here used, evidently imports a mode of arrest similar to that prescribed for officers by Art. 65.

Status of arrest—Treatment. A prisoner is to be presumed to be innocent till duly convicted, and till thus convicted, he cannot legally be punished as if he were guilty or probably so. The arrest by confinement of an enlisted man with a view to trial and for the purposes of trial is wholly distinguished from a confinement imposed by sentence. It is a temporary restraint of the person, not a punishment, and should be so strict only as may be necessary properly to secure the accused. Anything further is unauthorized.[91] The imposition upon soldiers, while confined in arrest, of disciplinary punishments is, in our service,
175 wholly illegal. In one of the Orders last cited,[92] Gen. Hancock condemns as unlawful the treatment of a soldier thus confined who was compelled to carry a heavy log for long periods, and, because of such treatment, remits the sentence subsequently imposed by the court. In a case promulgated by him in Orders,[93] Gen. Dix comments with severity upon the fact that three soldiers, arrested as deserters, were, before trial, besides being heavily ironed, paraded in front of the regiment with their heads shaved. In a further Order,[94] the reviewing authority reflects similarly upon the treatment of a soldier who, on arrest, had been imprisoned in a dark cell for fourteen days with ball and chain.

Placing irons on a soldier, while confined in arrest awaiting trial or sentence, can be justified only when the same may be necessary, or a proper precaution, to prevent an escape or the doing of violence. A resort to manacles may sometimes be required for the reason that no secure guard-house or other sufficient place of

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[86] Clode, M. L., 113; Manual, 28.

[87] Samuel, 641; Clode, M. L., 113; O'Brien, 154.

[88] Simmons § 358; De Hart, 76. As to the form of arrest in cases of retainers, camp-followers and the like, this, in the absence of statutory provision on the subject, must be left to the discretion of the commanding officer, to be guided by the circumstances of the particular case.

[89] G. O. 21 of 1891.

[90] This regulation is taken from an almost identical provision formerly contained in the Queen's Regulations. Simmons § 358; Griffiths, 25. In the existing British law, the arrest of non-commissioned officers is even more closely assimilated than formerly to that of commissioned officers. See Manual, 30.

[91] See O'Brien, 154; G. O. 35, Dept. of the Cumberland, 1869; Do. 23, Dept. of the Lakes, 1870; Do. 106, Dept. of Dakota, 1871; G. C. M. O. 4, Dept. of the Columbia, 1881.

[92] G. O. 106, Dept. of Dakota, 1871.

[93] G. O. 23, Dept. of the Lakes, 1863.

[94] G. O. 35, Dept. of the Cumberland, 1869.

confinement exists at the station. It must always, however, be an exceptional measure, and should be reserved for extreme cases.[95]

Neither hard labor nor severe service should be exacted of a soldier while remaining in arrest.[96] Enlisted men in confinement awaiting trial or sentence should not be assimilated in their treatment to those under sentence, or required to perform labor with them. They should, however be given proper exercise, and may be put on drill or other light duty.[97] If a soldier in arrest be required by some exigency of the service to be employed on anything like continuous
176 military duty, he should first be released from arrest. Placing him on duty would indeed suspend the arrest *per se*.[98]

A soldier, upon and during arrest, is entitled, unless a deserter,[99] to receive his regular pay;[100] his mere arrest cannot affect his right to pay. Nor can he be deprived of any article of property belonging to him, unless there be reasonable ground for apprehending that he may attempt to escape or otherwise violate discipline, and that the possession of such property may facilitate his doing so.[1] In such case the same may be taken in charge by the commander, to be returned at the conclusion of the proceeding.

**TERM OF AND RELEASE FROM ARREST—ARTS. 66 AND 70.** Art. 66 declares that the confinement in arrest shall continue until the soldier is "*tried by court-martial or released by proper authority.*" Art. 70 directs that:—"*No * * soldier put in arrest shall be continued in confinement more than eight days, or until such time as a court-martial can be assembled.*"[2]

**Under Art. 66.** The former provision, while it contemplates that the arrest shall be made with a view to trial, yet justifies the commander in terminating it without a trial, if in his judgment the facts as ascertained do not call for one, or a proper court cannot be assembled within a reasonable time. "Proper authority" to order a release would be the commander who imposed the arrest or who has convened the court,[3] or, where the case has passed beyond his official control, the department commander or other proper military superior at the time. Subject to the conditions of the statute of limitations, a release from arrest constitutes no impediment to a re-arrest and trial at a subsequent date.[4]

177 **Effect of Art. 70 in limiting term of confinement.** The provisions of Art. 70 have already been considered with reference to *officers*. As to *soldiers*, the Article in effect directs that they shall be confined in arrest

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[95] Simmons § 359; Clode, M. L., 113; Id., 1 M. F., 169; Manual 30; G. O. 26, Dept. of Cal., 1866. The following reference by Judge Story, in Steere *v.* Field, 2 Mason, 516, to the law relating to prisoners arrested for debt, is singularly applicable to cases of military prisoners held in arrest preparatory to trial, and shows also how old is the principle governing the general subject:—"By the ancient common law, prisoners were not allowed to be kept in irons, for the reason, assigned by Bracton, *quia carcer ad continendos non ad puniendos haberi debeat.* And Lord Coke significantly observes that where the law requireth that a prisoner should be kept in *salva et arcta custodia*, yet that must be without punishment to the prisoner."

[96] Manual, 30.

[97] Par. 999, A. R. And see Circ., Nos. 3 and 7, (H. A.,) 1890; G. C. M. O. 44, Division of the Atlantic, 1889.

[98] Hough, 401; Griffiths, 72.

[99] Par. 1513, A. R.

[100] Circ. No. 14, (H. A.,) 1890. The theory on which a soldier is held not entitled to be paid for a period during which he is detained in arrest by the civil authorities is that he is absent without leave, and so subjected to the forfeiture prescribed by par. 132, A. R.

[1] Compare Allen *v.* Colby, 47 N. H., 544.

[2] That this article relates only to confinement *preliminary* to trial is remarked in Corbett's Case, 9 Benedict, 274.

[3] See G. O. 33, Fifth Mil. Dist., 1868.

[4] Hickman, 97.

only till a court-martial can, in view of the exigencies of the service, practicably be assembled for their trial; the term of eight days being at the same time indicated as a reasonable period, not in general to be exceeded, for ordering and collecting a court.[5] The significance of the omission from the present form of the Article of the word "conveniently," which was originally inserted before "assembled," has already been remarked upon. In this modification the intent evidently was that the time for the assembling of the court, for the trial of an officer or soldier held in confinement, should no longer be a matter to be determined by the convenience of the commander or the command, but that in every case, where war or other controlling exigency did not prevent,[6] the court should be assembled at the earliest date at which, by the exercise of reasonable diligence, the members could be brought together. O'Brien[7] observes of the Article that its effect is "to make it obligatory on those having authority to assemble the court as speedily as may be. It also," he adds, "makes it a duty to bring all prisoners to trial by the first court having cognizance of their cases, which may convene." If indeed a court, having jurisdiction of the case, were already assembled, it would accord with the spirit of the Article if the accused were ordered before it as soon as practicable, and his detention in arrest thus correspondingly abridged.

**Unreasonable arrests.** In practice, however, enlisted men have not unfrequently been detained in arrest and confinement for long and apparently
178 unreasonable periods before trial, and while the officer responsible in such a case would be amenable to military justice under the general—62d—Article, (as well as to a civil suit for damages,) it would be well if our code embraced a specific article corresponding to the recent 74th of the British articles, now incorporated in sec. 21 of the Army Act, which provides that an officer who "*unnecessarily detains a prisoner in arrest or confinement without bringing him to trial, or fails to bring his case before the proper authority for investigation,*" shall, on conviction, be liable to be cashiered, or to suffer some lesser punishment according to the circumstances of the case.

Where indeed soldiers of our army are detained in confinement for unreasonable periods prior to trial, or after trial and before promulgation of sentence, and have in their sentences been condemned to terms of imprisonment,—while the period of the detention cannot legally be credited upon the term of confinement in executing the latter, the same may well be mitigated and reduced by the reviewing authority, (in approving the sentence,) by a period equal to that of the protracted confinement in arrest.[8] This action has been repeatedly taken in practice.

**PROVISIONS OF ARTS. 67, 68 AND 69.** These Articles, (of which the originals are to be found in the Code of James II,) relate to the commitment of "prisoners" (mainly arrested soldiers) to the guard-house, and to their custody and disposition: they may, therefore, properly be considered in this connection.

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[5] That Art. 70, in limiting the effect of Art. 66, does not make eight days an absolute limit, see Corbett's Case, *ante*. In Hutchings *v.* Van Bokkelen, 34 Maine, 126, a confinement of a deserter for ten days, it not appearing that a court-martial could meanwhile have been assembled, was held not in contravention of the Article. That the provision, "or until such time as a court-martial can be assembled," does not mean that the assembling of a court shall entitle the accused to release from arrest, is a point also noticed in Corbett's Case.

[6] In Delap's Case, a detention of the accused in arrest nearly three and a half months before trial was held not unreasonable, in view of the state of war then existing, (in Florida.) G. O. 13 of 1843.

[7] Page 155.

[8] DIGEST, 170; G. O. 105 of 1874; G. C. M. O. 63 of 1874.

**ART. 67.** This Article provides that:—"*No provost-marshal or officer commanding a guard* [illegible] *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.*"

**Duty and right of officer of the guard.** The proper construction of this Article appears to be that it is thereby made mandatory upon the (provost-marshal[9] or) officer of the guard to receive and keep prisoners committed to his custody by any other military officer, in every case where a written
179 charge of a military offence is presented at the same time with the prisoner,[10] but that, where no such charge is rendered, he is at liberty to refuse to receive the prisoner.[11] That he *may* receive and confine prisoners in the absence of a written charge is illustrated by par. 1001 of the Army Regulations, directing the discharge, (unless otherwise specially ordered,) of prisoners "without written charges" at the next guard-mounting; but that he may also, at his discretion, decline to receive them, under such circumstances, is deemed to be clear from the terms of the Article. Thus, while he may not unfrequently feel warranted in accepting into custody a prisoner upon a verbal charge alone where the committing officer is known to him as an officer in good standing in his own or another regiment or corps, he will yet be authorized, and it will be his duty, to refuse to accept him in a proper case,—as where, for instance, he has reason to believe that the officer is not responsible, or acting in good
180 faith, or that the prisoner has not been guilty of a military offence.[12]

In any such instance he is entitled, before consenting to take the party in charge, to insist upon, as a warrant for the commitment, a duly authenticated written accusation. To require the written statement will indeed be on all occasions the *preferable* course, as that which will best protect the soldier against unfounded arrests, ensure the prisoner against a neglect of his case and improper detention, and conduce to the order and convenience of the command.[13]

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[9] As to this official, not at present known, as such, to our service in general—see Chapter XI.

[10] Wolton *v.* Gavin, 16 Ad. & El. 69, 76. And see Id. 65, where Lord Campbell observes—"the duty of receiving and keeping the prisoner arises *eo instanti*" upon the one condition specified in the Article, *viz.*, the delivery of the written charge, being complied with; adding—"that the burden of making inquiry as to the propriety of the arrest is not cast upon the" officer of the guard, "but that he is bound to receive the prisoner immediately the condition is performed." And see Clode, M. L., 114. In the other principal adjudication upon this Article—Smith *v.* Shaw, 12 Johns., 169—the court remark:—"The Article virtually confers on any officer belonging to the forces of the United States the power of committing as prisoners such as have committed offences cognizable by military law." And see Hough, 473, who also construes the term "forces" (in the corresponding British article) as referring exclusively to the military forces, and observes that it does not preclude the officer from committing a prisoner that may happen to belong to a regiment or corps other than his own. "Forces of the United States," as employed in our Article, would certainly include a detachment of *marines* serving with the army as indicated in Art. 78.

[11] The American authorities, (see O'Brien, 155; De Hart, 73; Benét, 50,) have generally held that the officer of the guard is properly required to receive and confine the prisoner, (if a person amenable to military law and committed by a responsible officer,) whether a verified written charge be delivered with him or not; following here the view and using in substance the language of Simmons, (§ 362,) in treating of the corresponding British Article. But these authorities have not apparently recognized the marked distinction between the form of our article and the British; the latter not containing the word "provided," or any term of similar effect, but consisting of two separate and distinct clauses enjoining distinct and independent obligations.

[12] See the last two notes.

[13] See G. O. 129, Dept. of the Gulf, 1864; Do. 26, Dept. of Cal., 1866.

**The "account in writing," or charge.** It will indeed be comparatively rare, in time of peace certainly, that the committing officer will not be enabled readily to comply with the proviso of the Article. The "account in writing of the crime charged" need not consist of a charge and specification in the form of the technical pleading upon which an accused person is arraigned before a court-martial, but may be of the most informal character, consisting merely of the name or description of the offence in general terms and as designated in common parlance—as "Drunkenness," "Disobedience of Orders," "Larceny," &c.[14] Further, to avoid the embarrassment of executing and filing a separate writing with each commitment, the name of the prisoner, with the offence charged, may conveniently be entered in a guard report book prepared with blanks for the purpose, with a blank also for the signature of the committing officer. Thus the latter, upon the delivery of the prisoner, will simply have to fill out, in the book, the particulars indicated and make the commitment official by his signature opposite, and the Article will be duly complied with. This is the form generally pursued at our military posts.

**The military offence impliedly created by the Article.** It may be remarked that, although the Article fails to assign any penalty for the act
181 of refusing to receive and keep a prisoner when accompanied by a written charge, such act may properly be treated as conduct prejudicial to military order and discipline, and so punishable as an offence under Art. 62.[15]

**ART. 68.** This Article prescribes as follows:—"*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.*"

**Purpose of the Article.** The chief intent of this statute evidently is to preclude the unreasonable detention without trial of the prisoners committed daily to the guard-house at posts, &c., and to secure them a prompt trial by bringing the cases, every twenty-four hours, (or at other brief regular periods,) to the attention of the commanding officer, who, upon an examination of the facts reported, may determine then and there, so far as in his power, whether the parties shall be tried or released.[16] Further, the report being duly made, the commander becomes the officer responsible for the proper disposition of the cases.[17] The commanding officer referred to in the Article is of course the head of the command by the guard of which the prisoners have been held, that is to say the officer commanding the regiment, detachment, garrison, post, &c.

**The offence, how proved.** The offence made punishable by the Article, of failing to make the required report, would be established by proof that no report whatever was made, or that it was not made in writing, or that it did not set forth some one or more of the particulars prescribed, or that it was not made at the specified time.[18]

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[14] In G. O. 33, Dept. of the South, 1864, is a precedent of a case of a Captain and Provost-Marshal of a Division, convicted of refusing to receive a prisoner committed to him by another officer with a written statement of the offence; the charge, though erroneously laid under the specific article, (the then 80th, now 67th,) being a sufficient pleading of an offence under Art. 62.

[15] See Hough, 489; Simmons § 361.

[16] See Hough, (P.) 23.

[17] See Hough, 490.

[18] "It may not be in the power of the officer to give the precise charges which are to be exhibited against the accused, which are indeed subject to be altered by the commanding officer; therefore it is sufficient to exhibit such an accusation in writing, (signed by the party committing, with his name, rank and regt.,) as shall indicate the *nature* of the alleged offence." Hough, 474.

182 **ART. 69.** This Article directs that:—"*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.*"

**Effect and construction.** The object of the Article is to ensure the safe custody of soldiers under arrest and other prisoners, and to prevent their discharge except by the authority of the proper commander. It therefore makes punishable, at the discretion of the court, the *two* offences of *releasing a prisoner without authority* and of *suffering an escape*.

The term "any officer" while no doubt principally contemplating officers commanding post or camp guards, or in charge of places of confinement, will include also an officer to whom a prisoner may be specially committed as a personal trust, whether or not he be furnished with a guard. The term "any prisoner," though having probably special reference to soldiers confined under arrest, or the class of prisoners indicated in the two preceding articles, embraces any other species of prisoner properly committed to the charge of an officer of the army, whether member of the army, camp-follower, prisoner of war,[19] person held as a spy or for a violation of the laws of war, or other party, military or civil.

**Unauthorized release.** The fact of the omission to present any charge upon the commitment of the prisoner would not *per se* authorize his release.[20] Nor would the fact that the offence charged is a trivial one, or that the accused is innocent of the charge, or that the commitment is illegal, have such effect; these being circumstances to be considered and acted upon by superior authority.[21] The "proper authority" specified in the Article is of course the chief of the command by the guard of which the prisoner is held (and to whom the report required by the previous article has been made), or, in
183 the case of a special personal trust, the authority imposing the same, or the military superior to whom the case may have been formally submitted for official action or under whose control it may otherwise have come.[22]

**Suffering an escape.** This was an offence punishable at common law about which much learning is to be found in the reports and treatises.[23] Two degrees or kinds of the offence were recognized—*voluntary escape* and *negligent escape*;[24] the term "escape" being used in criminal law to express the suffering of an escape on the part of the keeper more commonly than the act of the prisoner in getting away, which is technically known as "prison-breach" or "breach of prison." Voluntary escape is defined to be—"where the sheriff intentionally or knowingly permits the prisoner to go at large;" negligent escape—"where the prisoner breaks out of prison and is at large, without the consent, but through the negligence, express or implied, of the sheriff."[25] The former offence was viewed as a graver one than the latter; its degree in law being held to be the same as that of the original crime of the prisoner whose escape had been permitted; so that, if the prisoner were confined for felony, the voluntary suffering

[19] One of the most conspicuous cases of a breach of this specific article during the late war was that of a Lieut. commanding a guard on board a transport, who was convicted of suffering the escape of three Confederate prisoners of war, (commissioned officers,) in his charge. G. O. 8, Div. West. Miss., 1865.

[20] Hough, 480; Id., (P.) 23.

[21] 3 Hough, 480.

[22] Id. And see Simmons § 361.

[23] See Steere *v.* Field, 2 Mason, 486, and cases cited; 2 Bishop, C. L. § 1092–1106; 1 Hale, P. C., 590–605; 2 Hawkins, c. 19; 1 Gabbett, c. 20.

[24] 1 Russell, 418; 2 Bishop, C. L., § 1095.

[25] Adams *v.* Turrentine, 8 Ire., 147.

of the escape on the part of the keeper would be indictable as felony.[26] A "negligent" escape did not rise above the degree of misdemeanor.[27]

It is quite clear, under the general language of the present Article, (and has been thus held by Hough,[28]) that the offence made punishable therein may
184 consist either in a voluntary act or an act of negligence; and it is manifest that the former would properly call for a more severe punishment than the latter.[29]

So, such of the principles of the law relating to the criminal offence as are opposite to military cases may well be here applied. For example, at common law, the fact that the prisoner returned of his own accord did not, *per se*, excuse a negligent escape, (*i. e.* suffering of an escape,) once consummated.[30] Nor did the fact of a recapture of the prisoner have such effect,[31] unless he were immediately pursued and retaken before being lost sight of.[32] The death of an escaped prisoner before recapture did not "purge" the escape.[33] The rule, however, as to what acts will constitute negligence is not so strict at the military as at the common law.[34] Thus, where a prisoner has succeeded in effecting his escape through the insecurity or inadequacy of the guard-house or
185 prison, which it was the business of superior authority to have made secure or sufficient, the officer in charge cannot in general properly be held responsible under this Article. Otherwise, however, where the escape is effected by reason of a neglect on his part to take precautions within his power and duty. As where he neglected to cause the prisoner to be properly restrained or guarded;[35] or where he failed to have him searched when there was reasonable ground to believe that he might have, and he had in fact, an implement suitable for securing his escape concealed upon his person; or where he permitted

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[26] 1 Russell, 418; 4 Black Com., 130; 2 Wharton, C. L. § 1667; 2 Bishop, C. L. § 1095, 1099; Weaver *v.* Com., 29 Pa. St., 445.

[27] Dalton, c. 159, 2 Wharton, C. L. § 1667.

[28] This author, (p. 484,) referring to the corresponding British article, observes that the offence is committed "not only where the officer allows the prisoner to escape, (intending it to take place,) either by preconcert or by giving the opportunity with a criminal intention, but also and equally where, by want of precaution, or the neglect of duty, or disobedience of orders issued relative to the security of prisoners, the escape takes place."

[29] 4 Black. Com., 130; Hough, 481, 485. Blackstone observes that an "officer permitting an escape, either by negligence or connivance, is much more culpable than the prisoner" whose escape is effected. Hough, 487, cites an exceptionally severe and ignominious sentence adjudged in India in 1819, and confirmed, in a case of a native officer, convicted of gross negligence in suffering the escape of an important prisoner, (under circumstances indicating also connivance,) as follows: "To be dismissed the service, to have his saah burnt, and his sword broke over his head, in front of the troops at the station; after which to have a halter tied round his neck, and to be drummed out of cantonments."

[30] Bank of U. S. *v.* Tyler, 4 Peters, 389; Briggs *v.* Cramer, 2 South., 498; Nall *v.* State, 34 Ala., 262. So, in G. C. M. O. 25, Dept. of Cal., 1883, Gen. Schofield, in approving a conviction of a violation of Art. 62 in allowing a convict prisoner to escape, remarks:—"Neither the re-capture of an escaped prisoner, unless the same be immediate, nor the subsequent voluntary return of the prisoner himself, can excuse an escape suffered through a neglect of duty on the part of the keeper."

[31] Bank of U. S. *v.* Tyler, *ante.*

[32] 1 Russell, 419; 2 Bishop, C. L. § 1095; Whitehead *v.* Keyes, 1 Allen, 350.

[33] Whicker *v.* Roberts, 10 Ire., 485.

[34] The common law rule was that nothing short of an act of God, or of the public enemy, or of irresistible adverse force, (as in case of *rescue,*) would excuse a *negligent* escape. (2 Wharton, C. L. § 1668.) It may be added that the strict common law rule that "every liberty given to a prisoner not authorized by law" is a voluntary escape, (Steere *v.* Field, *ante,*) is not applicable to military cases. Such a liberty, if the prisoner was thereby enabled to get away, would be evidence of the voluntary or the negligent act, according to circumstances.

[35] See Hough, 480.

the prisoner to have private interviews with improper persons by whose aid the escape was facilitated.[36]

As to the proof of the offence, it is further held at the common law—and the same principles are applicable here—that, while it should appear that the arrest and commitment were legal,[37] it need not be shown that the prisoner was actually guilty of the offence for which he was arrested,[38] or that the officer had knowledge of his guilt.[39] The latter, at military law, is absolutely required to hold the prisoner duly entrusted to his charge, without any regard whatever to the question of his guilt or innocence—an issue which cannot be, directly or indirectly, taken cognizance of in this proceeding.

It is further held by the authorities that the mere fact of escape, appearing without other circumstances, raises a presumption of at least negligence on the part of the keeper, and that the *onus* of rebutting this presumption
186 then rests upon him;[40] and a similar rule may in general be applied to a case of escape suffered by a military officer."[41]

While the offences of voluntary and negligent escape are distinct, it is yet held that gross negligence may be given in evidence to show a voluntary escape;[42] and further that, under an indictment for a voluntary escape, the defendant may be convicted of a negligent escape, the former offence properly including the latter.[43] So, at military law, where the specification, under a charge of a violation of the present Article, sets forth an escape in its nature voluntary, the charge will be sustained by proof of acts of negligence only, and the accused may be convicted of both charge and specification, the proper exceptions and substitutions being made in the finding upon the latter.

The present Article applies only to officers.[44] A non-commissioned officer, or soldier, (as a sentinel or guard,) permitting an escape, is of course liable, for his offence, to charges and trial under Art. 62. So also is the enlisted prisoner who effects his escape: if his design, however, is not merely to evade his confinement but to abandon the service his offence is *desertion.*

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[36] Id., 479.

[37] 1 Russell, 417; 2 Wharton, C. L. § 1667; 2 Bishop, C. L. § 1094.

[38] 2 Hawkins, c. 28, s. 16; 2 Wharton, C. L. § 1668, note. Nor, as remarked under the head of *unauthorized release,* is it material whether the offence with which the prisoner was charged was a grave one or the reverse. This point, however, may be considered in awarding punishment.

[39] Weaver *v.* Com., 29 Pa. St., 445. Nor can the officer show, *by way of defence,* that the prisoner was in fact innocent of the offence charged. Nor, in a case of an alleged suffering of an escape of a prisoner while *under sentence,* would it be admissible for him to show, in defence, that the sentence was illegal.

[40] "An escape implies the negligence or connivance of the officer." 1 Gabbet, 298. And see 1 Hale, P. C., 601; 1 Russell, 419; 2 Wharton, C. L. § 1668; 2 Bishop, C. L. § 1096; Adams *v.* Turrentine, 8 Ire., 147; Blue *v.* Com., 4 Watts, 215.

[41] See O'Brien, 156.

[42] Smith *v.* Hart, 1 Brev., 146.

[43] Skinner *v.* White, 9 N. H., 204; Fairchild *v.* Case, 24 Wend., 380; Nall *v.* State, 34 Ala., 262.

[44] It may be noted that in U. S. *v.* Clark, 31 Fed., 714, the Court erroneously supposes the Article to apply to a case of escape suffered by a *non-commissioned* officer.

# CHAPTER X.

## THE CHARGE.

187 THE Arrest of the accused is usually accompanied or presently followed by the service upon him of the charge or charges upon which it is proposed that he be tried. Here then may properly be presented the general subject of the military Charge, as framed, preferred, completed and served; leaving the forms of specific charges to be indicated in the Appendix.

The subject will be considered under the following heads:—

I. Nature, form, and requisites of the Charge in general.
II. Rules for framing the Charge derived from the law of Indictments.
III. Rules of military law in regard to the framing of the Charge.
IV. The Preferring of Charges.
V. The Referring of Charges for trial.
VI. Amendment of Charges after reference for trial.
VII. Additional Charges.
VIII. The Service of Charges.

### I. NATURE, FORM, AND REQUISITES OF THE CHARGE IN GENERAL.

**DEFINITION, AND FORMAL PARTS.** The Charge, in the military practice, like the indictment of the criminal courts, is simply a description in writing of the alleged offence of the accused. In the great majority of cases it is the only formal written pleading upon a trial by court-martial.

In our practice this pleading, to which as a whole the name of Charge is applied, is divided into two portions; the first in order being, in contradistinction to the other, technically called "charge," and the second being termed the "specification." The office of the *charge*, in this its relative sense,
188 is to designate the specific military offence, made punishable by an Article of war or other statute, which is attributed to the accused: that of the *specification* is to set forth the acts or omissions of the accused claimed to constitute the offence named in the *charge*.[1]

**OBJECT AND ESSENTIALS.** The purpose and province of the Charge are:—1st. To so inform the accused as to the precise offence attributed to him that he may intelligently admit, deny, or plead specially to, the same; and may be enabled to plead his conviction or acquittal upon any subsequent prosecution on account of the same act; 2d. To advise the court and the reviewing

[1] The difference between this manner of statement and that formerly employed in the British service, where charge and specification were usually blended together, and the pleading was inartificial as compared with our form, is remarked upon in the opinion of Atty. Gen. Cushing in Col. Montgomery's case, (7 Opins., 603,) and may be noticed in James' Collection of Precedents, and the works, especially, of Hough and D'Aguilar. In the late "Rules of Procedure," however, the forms of charges are carefully revised, and the mode of statement is now more nearly assimilated to our own. See Appendix.

authority of the nature of the accusation, and of the Article or other statute upon which it is based, so that the former may rightly and judiciously try, determine, and (upon conviction) sentence, and the latter may understandingly pass upon all the proceedings.[3]

Such being the nature and object of the Charge, it may be said, generally, as to its requisites—1, that it must be laid under the appropriate Article or other statute; 2, that it must specify the material facts necessary to constitute the alleged offence.[3]

189 **ASSIMILATED TO THE INDICTMENT.** In these requisites, and especially in the second, the Charge resembles the Indictment. These particulars, therefore will be better understood by a reference to those rules for the framing of indictments which are most apposite to military pleadings. But our law has prescribed no specific form for the Charge in the case of any offence,[4] and for this reason, and because a succinct directness in diction, as well as in action, is of the essence of the military system, the Charge is very much briefer, simpler, and less technical than is the Indictment.[5] In our practice a charge, and especially a specification, which fails to set out a legal offence, or is indefinite, redundant, or otherwise defective, may be struck out, in whole or in part on *motion*. [See Chapter XVI.] But in general a specification is allowed to stand without objection, provided it sets forth at least a military neglect or disorder, though this may not be the specific offence designated in
190 the charge. Thus the form of the accusation, as framed for trial by a military court, need be and commonly is much less artificial than that of

[3] See 1 Opins. At. Gen., 296; Kennedy, 69; Remarks of J. A. Gen. Sutton in Col. Quentin's Trial, p. 81; Macomb, 25; O'Brien, 234; De Hart, 287, 291–2. As to the similar purpose and use of the indictment, Bronson, C. J., in People *v.* Taylor, 3 Denio, 95, observes:—"Certainty is required to the end that the defendant may know what crime he is called upon to answer; that the jury may be able to deliver an intelligible verdict, and the court to render the proper judgment; and finally that the defendant may be able to plead his conviction or acquittal in bar of another prosecution for the same offence." And see 2 Hale, 187, note 7; 2 Hawkins, c. 25, s. 59; Starkie, 73; 1 Chitty, C. L., 168, 229; 2 Gabbett, 198; Wharton, C. P. & P. § 166; 1 Bishop, C. P. § 506, 507; Gould, 71; Rex. *v.* Horne, Cowper, 682; U. S. *v.* Mills, 7 Peters, 142; U. S. *v.* Cruikshank, 92 U. S., 544; Biggs *v.* People, 8 Barb., 550; State *v.* Stimson, 4 Zabr., 25.

[3] "If any fact or circumstance which is a necessary ingredient in the offence be omitted, such omission vitiates the indictment. * * * Any fact or circumstance laid in the indictment which is not a necessary ingredient in the offence may be rejected as surplusage." 2 Hale, 187, note 7. "The want of a direct allegation of anything material in the description of the substance, nature, or manner of the crime, cannot be supplied by any intendment or implication whatsoever." 2 Hawkins, c. 25, s. 20. "Every fact which is an element in a *prima facie* case of guilt must be stated; otherwise there will be at least one thing which the accused person is entitled to know, whereof he is not informed." 2 Bishop, C. P. § 519. And see 1 Chitty, Pleading, 228.

[4] 7 Opins. At. Gen., 603; Kennedy, 69. Usage, not statute, has dictated the forms of our Charges.

[5] "A specification does not need to possess the technical nicety of indictments at the common law. 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. * * * Hence undoubtedly the most bald statement of the facts alleged as constituting the offence, provided the legal offence itself be distinctly 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 of conviction and sentence." Cushing, 7 Opins., 604. And see People *v.* Porter, 50 Hun., 61. "The charge or charges are, properly speaking, an indictment, and must, in their *substance*, possess all its essential requisites, although in *form* the military judicial procedure is less fettered by peculiar and customary solemnities of expression than the civil." Tytler, 209. And see Remarks of J. A. Gen. Sutton, in Col. Quentin's Trial, p. 81; O'Brien, 232; De Hart, 285, 287. In some instances the form of the indictment has been closely followed in military charges. Note a pointed example in an elaborate and technical specification under a charge of Manslaughter, in G. O. 20, Fifth Mil. Dist., 1868.

an indictment. But in cases of difficulty and importance, the criminal indictment will always be the model of the careful military pleader, both for the statement of essentials and their orderly and logical[6] arrangement.

## II. RULES FOR FRAMING THE CHARGE DERIVED FROM THE LAW OF INDICTMENTS.

**THE CHARGE TO BE CERTAIN.** "An important requisite in all pleading," says Gould,[7] "is *certainty*." This requisite, he adds, "implies that the matter pleaded must be clearly and distinctly stated, so that it may be fully understood by the adverse party, the counsel, the jury and the judges." Stephen[8] writes:—"It" (the pleading,) "must be particular or specific, as opposed to undue generality." This rule, Archbold[9] remarks, is especially to be observed with the *gist* of the pleading; matters of *inducement* or explanation, for instance, not calling for the same precision. It is further well said in this connection by Stephen[10]:—"To combine with the requisite certainty and precision the greatest possible brevity is now justly considered as the perfection of pleading."

191 But this authority[11] subjoins the qualification that—"No greater particularity is required than the nature of the thing pleaded will conveniently admit." Or, as it is expressed by Archbold[12]—"Where the offence cannot be stated with complete certainty, it is sufficient to state it with such certainty as it is capable of." And by the former writer the further exception is mentioned,[13] that—"Less particularity is required when the facts lie more in the knowledge of the opposite party than of the party pleading."

The rule as to *certainty* is, as a general principle, applicable to the military Charge in the same manner as to the criminal indictment or declaration of the civil practice,[14] and will properly be observed in framing specifications. Be-

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[6] "All pleading is essentially a logical process." 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*." Gould, 4.

[7] Page 71. And see 2 Hawkins, c. 25, s. 71, 74; 1 Chitty, P., 169; 2 Gabbett, 197, 227; Wharton, C. P. & P. § 151, 166; 1 Bishop, C. P. § 323; U. S. *v.* Mills, 7 Peters, 142; State *v.* Stimson, 4 Zabr., 25. In the last case the court say:—"But the particularity required is not such as to screen the offender from conviction, or to embarrass the prosecution with useless technicalities."

[8] Page 132.

[9] Page 88, note 1. And see 2 Gabbett, 199, 236; Stephen, 132; Wharton, C. P. & P. § 165. The classification by Gould, (p. 141,) of the averments in civil, applicable also to criminal, pleadings, may be noted in this connection, as follows:—"All facts alleged in good pleading consist either, 1, of the *gist*, or substance, of the complaint or defence; or, 2, of matter in *inducement*," (*i. e.*, introduction or explanation,) or, 3, of matter of *aggravation*;" everything else, he adds, being "*surplusage*."

[10] Page 422.

[11] Page 367.

[12] Page 88, note 1. "Certainty to a common intent," (*i. e.*, a reasonable amount of certainty,) "is all that is required." U. S. *v.* Fero, 19 Fed., 904, citing Stoughton *v.* State, 2 Ohio St., 562.

[13] Page 370. An indictment need not negative what is matter of defence. 1 Bishop, C. P. § 638; U. S. *v.* Stevens, 4 Wash., 547. "In general, all matters of defence must come from the defendant, and need not be anticipated or stated by the prosecutor." 1 Chitty, P., 231. In Sir Ralph Bovy's Case, 1 Ventris, 217, Chief Justice Hale is quoted as saying of the allegation of matter which should come more properly from the other side:—"'Tis like leaping before one come to the stile."

[14] See Tytler, 209, 214; Kennedy, 69; O'Brien, 234; De Hart, 287. While the general rules of pleading are substantially the same in the criminal and civil procedure, the practice of the courts is to require greater strictness in criminal than in civil pleadings; and in the former greater strictness in indictments for the graver, especially the capital, crimes than in those for mere misdemeanors. 1 Bishop, C. P. § 321. "Military offences," says Kennedy, (p. 73,) are, "with a few rare exceptions, of *the nature of* misdemeanors."

cause, however, of the exceptional authority possessed by courts-martial in their findings,[15] of correcting errors and imperfections of detail in specifications, by substituting the true item or term, as indicated by the testimony, for the uncertain or incorrect one originally inserted, a military pleading will more readily admit of an uncertain statement, (in an allegation, for example, as to amount, number, quantity or other particular of description,) than will an indictment.

**NOT TO CONTAIN SURPLUSAGE.** Strictly, any allegation in a Charge, not properly required for the due and full statement of the offence, is
192 surplusage.[16] Stephen,[17] in laying it down that surplusage, which he defines "unnecessary matter of whatever description," is to be avoided, divides it into—(1) "matter wholly foreign," and (2) "matter which, though not wholly foreign, does not require to be stated." Military writers also condemn all "superfluous" or "extraneous matter," [18] which is however to be distinguished from matter of inducement or aggravation. *Mere* surplusage will always be carefully winnowed out of his pleading by the careful draftsman. If allowed materially to encumber a specification, it may prove a source of considerable embarrassment to a court-martial, in bewildering the issue, and particularly in raising in their minds a question whether *proof* of such matter, in whole or in part, may not be called for. In point of fact, however, surplusage never requires to be proved, and is not to be taken into consideration by the court in their findings or judgment. In the civil practice, it is often, where wholly foreign, stricken out on motion, and in the military practice a similar course may be taken. But if left to form a part of a pleading or Charge, it cannot affect its legal validity, since *utile per inutile non vitiatur.*[19]

**NOT TO BE REPUGNANT OR INCONSISTENT.** That is to say, that the material portions of the Charge are not to be opposed in meaning or effect, or to contradict each other. This rule is repeated by all the principal authorities, civil and military.[20] It is an important one, since a failure to observe it may result in nullifying the Charge, or at least the specification in which the repugnancy occurs.[21]

193 **NOR AMBIGUOUS.** That is to say, the Charge must not contain allegations of which the meaning is obscure or equivocal, and which are susceptible of different interpretations.[22]

**NOR ARGUMENTATIVE.**[23] Or, as it is expressed by Stephen[24]—pleadings "must advance their positions of fact in an absolute form, and not leave them to be collected by inference and argument only."

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[15] See Chapter XIX.

[16] See Gould, 41, 142; 1 Chitty, P., 173; 2 Gabbett, 200; Wharton, C. P. & P. § 158; 1 Bishop, C. P., Ch. XXXII.

[17] Pages 422–3.

[18] Griffiths, 61; Hughes, 143; Macomb, 26; O'Brien, 234–5; De Hart, 299.

[19] See Stephen, 424; Gould, 142; 1 Bishop, C. P. § 446, 478.

[20] Stephen, 377; Gould, 144; Starkie, 273; 1 Archbold, 91; 1 Chitty, P., 173, 231; 2 Gabbett, 199, 235; Wharton, C. P. & P. § 256; 1 Bishop, C. P., Ch. XXXIV.; Hough, 41; Kennedy, 76; De Hart, 287.

[21] "Repugnancy is two inconsistent allegations in one pleading. As both cannot be true, and there is no means of ascertaining which is meant, the whole will be as though neither existed." 1 Bishop, C. P. § 489. "It takes off much from the credit of an indictment that those by whom it is found have contradicted themselves." 2 Hawkins, c. 25, s. 62.

[22] Stephen, 378; 1 Chitty, C. L., 231; 2 Gabbett, 200; 1 Bishop, C. P. § 510. But "where a matter is capable of different meanings, that will be taken by the court which will support the proceedings, not that which would defeat them." Chitty, 231.

[23] "The object being to communicate facts and not reasons, an argumentative form of expression, obscuring the facts, is not adequate." 1 Bishop, C. P. § 508. And see Gould, 55; Kennedy, 76.

[24] Page 384.

**MATTER OF EVIDENCE NOT TO BE STATED.**[25] It is not good pleading, in alleging a fact, to state the circumstances proving or tending to prove its truth.[26] Such are the acts, occurrences and matters of description which should properly form part of the testimony of the witnesses. Such indeed are *some* matters of aggravation, although such matters are to a reasonable extent allowed to be recited and are not unfrequently added in a military Charge.[27] But, strictly, the only facts apposite to be stated are those constituting the offence in law. Where, however, the Charge is of a general character, especially where it is laid under the 61st, (or, sometimes, under the 62d Article,) the circumstances, and matters of inducement and aggravation, surrounding the alleged punishable act of the party, and going to characterize it as an instance of the offence charged, are often required to be more fully set forth than in the case of one of the exact offences, and the rule against pleading matters of evidence is not to be so rigorously applied.[28]

194 **NOR MATTER OF LAW.** Any statement of the law, or of conclusions or presumptions of law, is altogether out of place in a good pleading.[29] As it is observed by Gould[30]—"Judges are always presumed to know judicially what the law is; and have therefore no occasion to be informed of it by the pleadings." At to conclusions of law, it is the business of the court to make these for itself, deducing them from the facts as they are stated and appear in evidence. To assume to express such conclusions in a Charge or indictment is irrelevant and impertinent.

**NOR MATTERS OF WHICH THE COURT WILL TAKE JUDICIAL NOTICE, EX OFFICIO.** It is remarked by Stephen[31] that "besides points of law, there are many other matters of a public kind of which the court takes official notice, and with respect to which it is, for the same reason, unnecessary to make allegation in pleading." Such are—the law of nations; the provisions of the Constitution, public statutes, executive proclamations; and, (in the military practice,) the formal General Orders, circulars, and other publications to the army emanating from the War Department; the political frame-work, officers and operations of the government; matters of public history; the powers of the President and heads of departments; the "established and usual course" of the proceedings of Congress; the main geographical features and the local divisions of the country; the "meaning of words in the vernacular language;" the "course of time;" the "legal weights and measures;" the current coins and other cir-

[25] Stephen, 342; 1 Chitty, C. L., 231; U. S. *v.* Bachelder, 2 Gallison, 15; Evans *v.* U. S., 153 U. S., 584; Stokes *v.* U. S., 157 U. S., 191.

[26] Stephen, 342. This author adds, (p. 346,) that this rule tends perhaps more than any other to prevent "minuteness and prolixity of detail."

[27] The statement of the law by O'Brien, (p. 234) that—"All aggravating circumstances of the guilty act must be alleged in the specification," or they cannot be put in evidence, is of course erroneous.

[28] Aa a kindred rule to that excluding matters of evidence, may be noted here the one given separately by Stephen, (p. 353,) that—"It is not necessary to allege circumstances necessarily implied."

[29] Stephen, 345, 346. 1 Chitty, C. L., 231; 2 Gabbett, 199, 229; Wharton, C. P. & P. § 154; 1 Bishop, C. P. § 329, 514, 515; Rex. *v.* Lyme Regia, 1 Doug., 159. In U. S. *v.* Almeida, Whart. Prec., 1061, Kane J. remarks:—"It is not enough, and never has been, to charge against the party a mere legal conclusion, as justly inferential from the facts that are not themselves disclosed on the record. You may not charge treason, murder, or piracy, in round general phrases. You must set out the act which constitutes it in the particular case." In some cases of familiar military offences, of which the constituents are simple and generally the same, this rule is not strictly observed, as in cases of *desertion* for example. See *post*.

[30] Page 43.

[31] Page 349. And see 1 Chitty, C. L., 231.

culating medium.[33] "In fine," adds Greenleaf,[34] "courts will generally
195 take notice of whatever ought to be generally known within the limits of their jurisdiction." All matters of this description, therefore, do not need to be alleged, or enlarged upon, as facts, in the pleading or Charge; such allusion to them as will indicate what is meant or referred to being all that is necessary.[35]

**STATEMENT OF NAME, OFFICE, RANK, &c.** The name of the accused should be given with such particularity as to identify him and distinguish him from any other person.[36] It is held by the U. S. Supreme Court,[37] and generally by the courts of the States,[38] that the middle name is no part of the legal name, and may be omitted in stating it. The good pleader, however, will prefer to add it, or its initial, if within his knowledge; and it must be added where necessary to distinguish the person. Where the accused is known by two names, as in a case of a soldier re-enlisting under an assumed name in violation of the 50th Article of war, and it is doubtful which name is his true one, he may be distinguished by either, the other being added under an *alias*.[39] The rank, office, regiment, corps, capacity, &c., of the accused are, by invariable usage, set forth in a military pleading, and should always be added, whether the accused be an officer or enlisted man, or a retainer, camp-follower,
196 &c.[40] If no military rank, office, or employment were given, the presumption would be that the party was not within the jurisdiction of a court-martial. Where since the date of his alleged offence the accused has been promoted, he should properly be designated at the commencement of the specification as of his present rank, but in describing the commission of the offence, the rank which he held at the time should be stated.[40] As by the words—"he the said A. B. then being," (specifying his former rank and office,) or in terms to such effect. And so, in the case of any other change in the military status, as of regiment, arm, corps, &c., which has intervened since

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[33] See 2 Hawkins, c. 25, s. 100; Stephen, 347–349; 1 Greenl. Ev. § 5, 6.

[34] 1 Ev. § 6.

[35] Stephen, 348.

[36] See Stephen, 301; Starkie, 49, 203; 1 Chitty, C. L., 202; 1 Archbold, 78; Wharton, C. P. & P. § 96.

[37] "The law knows of but one Christian name, and the omission or insertion of the middle name, or of the initial letter of that name, is immaterial." Games *v.* Stiles, 14 Peters, 327. And see Keene *v.* Meade, 3 Peters, 7; Lessee of Dunn *v.* Games, 1 McLean, 321; also 2 Opins. At. Gen., 332, 3 Id., 467.

[38] Hart *v.* Lindsey, 17 N. H., 235; Franklin *v.* Tallmadge, 5 Johns., 84; Roosevelt *v.* Gardiner, 2 Cow., 463; Bratton *v.* Seymour, 4 Watts, 329; Price *v.* State, 19 Ohio, 53; State *v.* Martin, 10 Mo., 361; State *v.* Williams, 20 Iowa, 98; Erskine *v.* Davis, 25 Ills., 251; State *v.* Manning, 14 Texas, 402; People *v.* Lockwood, 6 Cal., 206, &c.

"Junior," or "Jr.," is no part of the legal name. 1 Bishop, C. P. § 687, and cases cited.

[39] See Simmons § 390; and compare 1 Chitty, C. L., 203; 2 Gabbett, 214, 217; Wharton, C. P. & P. § 99, 103; 1 Bishop, C. P. § 681.

[40] Tytler, 214; Kennedy, 70; Simmons § 388; G. O. 22, Army of the Potomac, 1861. It is never necessary in a military charge to set out the fact of the appointment or commission of an officer. "In an indictment against a public officer for a breach of duty, it is sufficient to state generally that he is such officer, without setting forth his appointment to the office." 1 Chitty, C. L., 231. In military charges it is not the practice even to state, by a direct allegation, that the accused, (or other officer referred to,) *is* such an officer; the description of the office being merely added, as a designation, to the name of the party—as "A. B., Captain, First Regiment of Infantry, United States Army;" or "Captain A. B., First Regiment," &c.

[40] See 3 Opins. At. Gen., 548. The mere fact, however, that the rank of the accused is misstated does not vitiate a specification, if there is no question as to the identity of the party. G. O. 38, Army of the Potomac, 1863.

the alleged criminal act. Errors, however, in the statement of rank, regiment, &c., are such as may be corrected by the court in the Finding.

Similar rules apply, though with less strictness, to the statement of the name, office, &c., of a person or officer injured, disobeyed, disrespectfully addressed, &c., by the accused,[41] or other party material to be mentioned in the pleading.[42] If the name of the person is not known, he should be referred to in the specification as "a person unknown," or in words to that effect.

**STATEMENT OF TIME AND PLACE.** While it is laid down as a general rule by the authorities that the *time*, (year, month, and day of the month,) and the *place*, of the alleged criminal act, should be stated with certainty, it is also held that, where not of the *essence* of the offence, the *precise* day and *exact* locality of its commission are immaterial and need not be averred; it being sufficient simply to allege a time and place within the jurisdiction of the
197 court.[43] In military charges there is still greater margin allowable, since the *place* or region of jurisdiction is much more extensive than that of the county, district, State, &c., to which the jurisdiction of the criminal courts is limited. Thus if a specification to a military charge is so framed as to advise the accused of the particular act of offence intended to be alleged, and enable him to plead a former conviction or acquittal if subsequently brought to trial on account of the same act, it will be strictly sufficient in law if it set forth a *time* within the limitation of Art. 103, and a *place* within the United States,[44] (or within the territory of a foreign country when, by reason of war or otherwise, the army is authorized to be there.)[45]

But this latitude need rarely be availed of, and it is always desirable that the time and place should be stated *exactly*, or as nearly so as practicable. Where they are not precisely known, it is the practice to describe the offence as having been committed "on or about" a certain date and "at or near" a certain locality named; the date and locality specified being the nearest ascertainable.[46] Where the offence is one which has been committed from one day to another, or commenced on one day and completed on another, it may properly be alleged in the specification to have been committed on or between certain days
198 named;[47] but if these dates are so far apart that the offence intended to be charged cannot reasonably be distinguished, the pleading is defective,

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[41] G. C. M. O. 61, Dept. of the Mo., 1871. And compare State *v.* Irwin, 5 Blackf., 343; Wharton, C. P. & P. § 109.

[42] See Butler *v.* State, 5 Blackf., 280. If not known by name, the party may be described as a "certain person unknown." 1 Bishop, C. P. § 378; Wharton, C. P. & P. § 111.

[43] 1 Chitty, C. L., 224; 1 Archbold, 85; Stephen, 392; Wharton, C. P. & P. § 120, 139; 1 Bishop, C. P. § 375, 386; U. S. *v.* Burch, 1 Cranch, C. C. 37; Johnson *v.* U. S., 3 McLean, 89; McBryde *v.* State, 34 Ga., 203.

[44] "The Secretary of War directs that it be announced to the Army, for the information and guidance of courts-martial, that although in the specification to charges, time and place ought to be laid with as much certainty and truth as may be practicable, still it is *sufficient in law* to prove the offence to have been committed at any other place and time within the jurisdiction of the court." G. O. 16 of 1853. And see Simmons § 394; De Hart, 288; DIGEST, 230. And compare 1 Opins. At. Gen., 295–6, (Lieut. Gassaway's Case.) That time and place need not be strictly *proved* as laid, see G. O. 6, Dept. of Utah, 1861; Do. 57, First Mil. Dist., 1867; DIGEST, 232.

[45] See Chapter VIII.

[46] Simmons § 394; Harcourt, 115; Macomb, 25; O'Brien, 235; De Hart, 291; DIGEST, 230–31. In the British practice, the word "*between*"—as between certain dates named—is often used in allegations of time. Story, 55. These alternative forms would probably not be regarded as admissible by the criminal courts. See U. S. *v.* Crittenden, Hemphill, 61.

[47] DIGEST, 231. And see Simmons § 394; 1 Bishop, C. P. § 396, 397.

and, upon exception taken by the accused, by motion to strike out,[48] or otherwise, should be required by the court to be amended.[49]

In some cases the offence committed is of a *continuing* character, extending over a considerable period of time or exhibiting a general habit or course of conduct. In such cases where distinct acts cannot readily be separated and attributed to particular dates, it is allowable to charge the misconduct in form somewhat as follows: "This during (or in or between) the months of ———," (specifying the particular months or other periods.[50]) A continued non-payment of a debt charged as dishonorable conduct under Art. 61 may be described as to *time*, thus—"This on or about (a date named) and continuously up to the present time;" or—"This from (a date named) to the present time." In such cases the charge should be *dated*.

As it has been held by the Judge Advocate General, the allegations of time and place may be *omitted altogether*, without affecting the legal validity of the proceedings or sentence, provided the same sufficiently appear from the
199 testimony in the record.[51] Such an omission, however, would be negligent and hazardous, and is now of rare occurrence.[52]

The *hour* of the day or night at which a certain alleged act took place need never be specified, unless part of the gist or essence of the transaction upon which the charge is based.[53] Thus, in a charge against a soldier for sleeping on his post as a sentinel, it will generally be desirable, as more accurate, to designate at what hour, or between what hours, he was found asleep, in order to identify the time with that of his regular turn of duty.[54]

**STATEMENT OF QUALITY, QUANTITY, NUMBER, KIND, VALUE, &c.** Especially where a party is charged with the larceny, embezzlement, &c., of property, it is proper that the quality, quantity, number, kind, value, denomination, &c., of the moneys or articles stolen, appropriated, &c., should be specified sufficiently clearly to identify the same,[55] although the utmost exactness is not required.[56] The *value* of the property stolen is a particular held especially essential to be stated in an indictment for larceny; since "in order to make the

[48] See Chapter XVI.

[49] DIGEST, 231; G. C. M. O. 16, Dept. of the Mo., 1890. And see cases in G. O. 193, Dept. of the Potomac, 1862; Do. 98, Dept. of N. Mexico, 1862; Do. 36, Dept. of the Mo., 1863. In Capt. Trenor's Case, published in G. O. 4 of 1842, the accused was charged with drunkenness on duty between Sept. 1st and Dec. 31st, 1840, and objected to the specification as including "such a length of time as to prevent the possibility of either disproving it or defending himself against it." His objection was sustained by the court, and the charge and specification were "accordingly thrown out." The proceedings were approved by the President.

[50] See instance in G. C. M. O. 10 of 1878. In the case of Brig. Gen. Hull, Printed Trial—Appendix, the time, as of a continuing offence, was set forth in the first charge, thus—"Treason against the United States between the ninth of April and the seventeenth of August, 1812." The third charge is similarly expressed. In the second charge the place, as well as the time, is set forth as follows—"Cowardice at and in the neighborhood of Detroit, between the first day of July and the seventeenth day of August, 1812."

[51] DIGEST, 231; G. O. 64, Middle Dept., 1863, Do. 57, First Mil. Dist. 1867.

[52] See G. C. M. O. 42, Dept. of Texas, 1875, where, no date being given in the specification, and none appearing in the testimony, the proceedings were disapproved.

[53] "It is not necessary to mention the hour in the indictment; except, perhaps, in cases of *burglary*, where it is usually laid for the purpose of showing with more certainty that the offence was committed in the night-time and not during the twilight." 2 Gabbett, 222.

[54] See Simmons § 394.

[55] Stephen, 296; Starkie, 218; 1 Chitty, C. L., 235; 2 Gabbett, 232; Wharton, C. P. & P. § 206; 1 Bishop, C. P. § 576.

[56] See under the rule as to Certainty, *ante*, that only such particularity is required as the nature of the subject reasonably admits of.

stealing of any article larceny at the common law, it must be proven to be of some value."[57] In a military charge there is not the same necessity
200 for accuracy in the statement of quantity, number, or amount, since the court in its Finding can always rectify the item according to the testimony. As to value, a specification which omitted to assign a value to an article alleged to have been the subject of larceny would not be held defective if the article were such as presumably to be of some value, at least to the owner. The value of stolen property is in fact frequently omitted to be stated in a military charge. It should be alleged, however, if only for the purpose of assisting the court in determining whether the accused, upon conviction, may, (in view of the law of the State, &c., as to the punishment,) be sentenced to imprisonment in a penitentiary under Art. 97 of the code.

**STATEMENT OF WRITINGS.** A writing may, ordinarily, be set out *verbatim* or in substance only. But where its terms enter into the very gist of the offence, as in the case of an instrument alleged to have been falsified or forged, a precise copy should be inserted if practicable.[58] So, in all cases where, although it may not be necessary to give it, a copy is professed to be exhibited, it should of course be a copy, *i. e.*, in the exact words of the original.[59] If a writing essential or desirable to be set forth literally has been lost or
201 destroyed, or is in the possession of the accused, the fact will properly be averred by way of explanation of its non-statement, and its substance be given as nearly as practicable.[60] So, where its contents are indecent and improper to be recited, this should be explained, the substance and effect of the paper being at the same time presented. A writing, of which the original is expressed in a foreign language, should in general be given in English, with an averment to the effect that the version is a translation.[61] When the substance

[57] State *v.* Tillery, 1 N. & McC., 11. "It is necessary that some specific value should be assigned to whatever articles are charged as the subjects of larceny. An indictment cannot be sustained for stealing a thing of no intrinsic or artificial value." Wharton, C. P. & P. § 213. The *ownership* of property or money stolen or embezzled should also be set forth. 1 Bishop, C. P. § 581, 582, &c. Where the name of the owner is unknown and cannot be ascertained, he may be referred to as a "person unknown."

[58] Wharton, C. P. & P. § 167; 2 Bishop, C. P. § 403. "Where part only of the written instrument is included in the offence, that part alone is necessary to be set out." De Hart, 293. "In stating a libel or perjury, it is necessary only to set forth so much of the matter as renders the offence complete, provided the part omitted does not in any way alter the sense of that which is set out." 1 Chitty, C. L., 235. In an indictment for perjury it is only essential to set forth the substance of the oath, or that portion in regard to which the perjury is alleged to have been committed. People *v.* Warner, 5 Wend., 271; Campbell *v.* People, 8 Id., 638.

[59] A copy in pleading is usually introduced by some such expression as—"in these words;" "as follows, viz;" "in the words and figures following, to wit;" "of which the following is a copy;" or, more technically, "in tenor following;"—the term *tenor* being employed in pleading to indicate a transcript of the original instrument, in contradistinction to *substance* or *purport*. When the substance only of the writing is to be set out, the ordinary introduction is—"in substance as follows, viz;" "to the effect," (or "purport,") "following, namely, that," &c. See 1 Chitty, C. L., 233; 2 Gabbett, 201; Wharton, C. P. & P. § 168–170; 1 Bishop, C. P. § 559–561, and cases cited. "*Marks of quotation* used in an indictment for libel, to distinguish the libellous matter, are not sufficient, *per se*, to indicate that the words thus designated are the very words of the alleged libel." Com. *v.* Wright, 1 Cush., 64.

[60] Wharton, C. P. & P. § 176.

[61] See 1 Chitty, C. L., 175, where is stated the general rule that indictments, which were at an early period written in Latin, "must be in English." Hale, (2 P. C., 169,) writing about the middle of the seventeenth century, says:—"Regularly every indictment ought to be in Latin, as all pleadings in the courts of law ought to be; and it is of excellent use because, it being a fixed regular language, it is not capable of so many changes and alterations as happen in vulgar languages." In Rex *v.* Goldstein, R. & R., C. C., 473, an indictment for the forgery of a Prussian treasury note, not containing a translation of the same, was held defective.

or purport only of a writing is stated, its terms should be expressed according to their legal effect; that is to say as they operate or take effect in law.[63] In military charges, where the writing is of a brief and simple character—as in the case of a general or special order alleged to have been disobeyed by the accused, or an official communication alleged to be disrespectful, &c.—it is preferable to recite it in full. Where the writing is more elaborate, or contains an extended array of figures or other details, its substance or material portion only will preferably be set out.[64] The original or a copy may however be appended to the Charge, a reference to the same as thereto annexed and forming part of the Charge being made in the specification;[64] this arrangement however is rare in the military practice.

**STATEMENT OF WORDS SPOKEN.** The authorities are quite strict in holding that spoken words, (where not too indecent, in which case their
202 substance may be given,[65]) should be literally set forth in an indictment, when their character and effect—as that they are defamatory, scandalous, blasphemous, &c.—is the gist of the accusation.[66] Similarly in a military charge such words should be recited as uttered, or as nearly so as practicable. Thus a specification to a Charge under Art. 19, or Art. 20, which averred merely that the accused used disrespectful language against the President, or toward his commanding officer, without stating the words or at least their substance, would be defective, and the court, upon exception taken, would properly require it to be amended.

**STATEMENT OF STATUTORY OFFENCES.** In setting forth in an indictment an act made an offence by statute, the *strict* rule requires that the words of the description should be closely followed;[67] and it is always *sufficient*,[68] and safest, to so follow them. It has been held, however, in some of the U. S. courts, that the *exact* language of the statute need not be employed, provided the description be adopted with a substantial accuracy.[69]

As all military offences are statutory offences, this rule, (with its
203 qualification,) applies directly to military charges; but the Articles of

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[63] Stephen, 389; U. S. *v.* Keen, 1 McLean, 441.

[64] Thus, in charging the offence of procuring a double payment, the pay account need not be set forth in full, though this has sometimes been done.

[64] Com. *v.* Tarbox, 1 Cush., 72.

[65] See Bombay R., 2, 3; also instances in G. O. 6, Dept. of Utah, 1861; Do. 32, Div. Atlantic, 1878.

[66] 2 Hawkins, c. 25, s. 59; 2 Gabbett, 232; Wharton, C. P. & P. § 203. In Rex. *v.* How, Strange, 699, it was held that it was not sufficient to allege that the defendant used scandalous, threatening and contemptuous words against a magistrate, but that the words themselves must be set out. In Rex. *v.* Popplewell, Id., 686, the report is—"Conviction for profane cursing and swearing was quashed for want of the particular oaths and curses being set out."

[67] 1 Chitty, C. L., 281; 2 Gabbett, 239; Wharton, C. P. & P. § 220; 1 Bishop, C. P., Ch. XXXIX. "Where the words of the statute are descriptive of the nature of the offence, the indictment must follow the very words, and expressly charge the offence upon the defendant." State *v.* Gibbons, 1 South., 51. "It is a general rule that all indictments upon statutes, *especially the most penal*, must state all the circumstances which constitute the definition of the offence in the Act, so as to bring the defendant precisely within it." State *v.* Foster, 3 McC., 444. "If a part of the description of the offence consists of a negative proposition, it is as necessary in an indictment for that offence to state the negative as the affirmative part of the description." U. S. *v.* McCormick, 1 Cranch, C. C., 598.

[68] U. S. *v.* Armstrong, 5 Philad., 277; People *v.* Taylor, 3 Denio, 93. And see U. S. *v.* Mills, 7 Peters, 142; State *v.* Abbott, 11 Foster, 434.

[69] See U. S. *v.* Bachelder, 2 Gallison, 18; Do. *v.* Deming, 4 McLean, 3. Hawkins, (vol. 2, c. 25, s. 100,) mentions, as a good reason for not requiring the highest exactness in the statement of statutory offences, that—"the judges are bound *ex officio* to take notice of all public statutes." And see 1 Bishop, C. P. § 608.

war, under which nearly all such charges are laid, are so brief, and so simple in their terms, that there is in general no difficulty in framing allegations to meet their provisions. The only two points ruled upon by the authorities in this connection which need be noted here are, (1) that when the Article or other statute specifies an exception or exceptions to its general operation, it will in general be proper to negative the same in describing the offence in the specification;[70] and, (2) that where the Article or other statute enumerates two or more similar forms of offence or phases of the same offence in a disjunctive form, they should, (if averred together,) be averred conjunctively;[71] or, in other words, where criminal acts, which may be imputed in the same count or Charge without duplicity, are stated in the disjunctive in the statute, they should, if pleaded together, be expressed in the conjunctive form.[72] This point will be further illustrated in treating of "double" pleading.

**STATEMENT OF INTENT.** It is laid down, generally, by Chitty,[73]
204 that—"where an evil intent accompanying an act is necessary to constitute such act a crime, the intent must be alleged in the indictment." But in military cases the intent of an act need not be added to the statement of its commission, unless required to be by the terms of the statute on the subject, or, in other words, unless the Article or other statute creating and describing the offence makes the intent, in terms, an element of the criminal act.[74] Thus Arts. 3, 5, 8, 14, 15, 16, 27, 45, 50 and 59 declare that if officer or soldier, as the case may be, "knowingly," or "wilfully," or "knowingly and wilfully," commit a certain act, he shall be amenable to trial and punishment. So, in Art. 60, the terms "knowing," "knowingly," "knowingly and wilfully," "wrongfully and knowingly," and "with intent to defraud," are employed as indicating the purpose with which the different acts denounced must be committed to constitute them offences within the law. In all these instances the *intent* should properly be expressly averred in the Charge, and in the word or words in which it is designated in the statute. On the other hand, in cases of crimes which in their very nature involve a malicious or wrongful intent, as those of manslaughter, robbery, larceny, rape, perjury, &c., specified in Art. 58, or chargeable, (when directly prejudicing the service,) under Art. 62, while the common law form of indictment may be followed, it is allowable to charge the offence simply by its name, without employing in the specification words expressive of the intent, as "wilfully," "maliciously," "feloniously," or the like.

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[70] "If there be any exception contained in the same clause of the statute which creates the offence, the indictment must show negatively that the defendant, or the subject of the indictment, does not come within the exception. If the exception or proviso be in a subsequent clause or statute, or although in the same section, yet if it be not incorporated with the enacting clause by any words of reference, it is, in that case, matter of defence for the other party, and need not be negatived in the pleading." Monthly Law Reporter, 6 N. S., 77. And see U. S. *v.* Pond, 2 Curtis, 85; Com. *v.* Maxwell, 1 Pick., 141; 1 Ben. & Heard, L. C. C., 250, notes.

[71] Stephen, 386; 2 Gabbett, 200; Gould, 55, note; Wharton, C. P. & P., § 161, 162; 1 Bishop, C. P., § 585, 586; Rex *v.* Stocker, 1 Salk., 342; Rex *v.* Middlehurst, 1 Burr, 399; U. S. *v.* Almeida, Whart. Prec., 1061, note; State *v.* Morton, 27 Verm., 310; State *v.* Price, 6 Halst., 203; Rasnick *v.* Com., 2 Va. Cas., 356; Kirby *v.* State, 1 Ohio St., 185. "Where a statute, defining crimes and prescribing their punishment, describes disjunctively under a single head certain offences which are of such a character that a single transaction may include the commission of one or more than one of them, a count of an indictment charging them conjunctively may be sustained by proof of the commission of only one of them." U. S. *v.* Armstrong, 5 Philad., 273.

[72] The 60th Article of war is the most conspicuous *military* statute of the class indicated. But distinct offences, made punishable by the same article, should not be charged in an *alternative* form, but separately. See SEVENTEENTH ARTICLE—Chapter XXV.

[73] C. L., 233.

[74] See Simmons § 407; De Hart, 295; G. O. 28 of 1859.

**DIFFERENT STATEMENTS OF SAME OFFENCE.** It is laid down by Chitty[75] that—"It is frequently advisable, when the crime is of a complicated nature, or it is uncertain whether the evidence will support the higher and more criminal part of the charge, or the charge precisely as laid, to insert two or more counts in the indictment." And Wharton[76] writes—"Every cautious pleader will insert as many counts as will be necessary to provide for
205 every possible contingency in the evidence; and this the law permits." In military cases where the offence falls apparently equally within the purview of two or more articles of war, or where the legal character of the act of the accused cannot be precisely known or defined till developed by the proof, it is not unfrequent in cases of importance to state the accusation under two or more Charges[77]—as indicated later in this Chapter. If the two articles impose different penalties, it may, for this additional reason, be desirable to prefer separate charges, since the court will thus be invested with a wider discretion as to the punishment. Where, however, the case falls quite clearly within the definition of a certain specific article, to resort to plural charges is neither good pleading nor just to the accused. At most, in such cases, a single additional charge under Art. 62 should in general suffice. An unnecessary multiplication of forms of charge for the same offence is always to be avoided.[78] In view of the peculiar authority of a court-martial to make corrections and substitutions in its Findings, and to convict of a breach of discipline where the proof fails to establish the specific act alleged, the charging of the same offence under different forms is much less frequently called for in the military than in the civil practice.

**RULE AS TO DUPLICITY.** An indictment or count in which two or more separate and distinct offences, whether of the same or a different nature, are set forth together, is said to be *double*, and such a pleading is bad on account of *duplicity*.[79]

This rule, however, does not apply to the stating together, in the same count, of several distinct criminal acts, provided the same all form parts of the same transaction, and substantially complete a single occasion of offence. Thus it has been held that assault and battery and false imprisonment, when committed together or in immediate sequence, may be laid in the same count without duplicity, since "collectively they constitute but one offence."[80]
206 So it is held not double pleading to allege in the same count the larceny of several distinct articles appropriated at the same time and place.[81]

A further description of cases is to be noted as not within the rule, or as constituting an exception to the rule,—*viz.*, cases of *statutory* offences or phases of offence of the same nature, classified in the enactment as of the same species and made similarly punishable. In a case of this class it was observed by a

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[75] 1 C. L., 248.

[76] C. P. & P. § 297. And See 1 Archbold, 93; Com. *v.* Webster, 5 Cush., 321.

[77] "The commander who prefers a charge may, in the exercise of a just and legal discretion, when the act may fall under different articles of war, elect under which to charge it, or may charge it variously as in the several counts of an indictment." G. O. 18 of 1859.

[78] See G. O. 19, Dept. of the Columbia, 1872; G. C. M. O. 95, Div. Pacific & Dept. of Cal., 1881.

[79] 1 Chitty, C. L., 253; Starkie, 271; 1 Archbold, 95; Stephen, 251, 262; 2 Gabbett, 201, 234; Gould, 389; Wharton, C. P. & P. § 243; 1 Bishop, C. P., Ch. XXVIII; also Hough, (Practice,) 40; Simmons § 401; Griffiths, 61; De Hart, 298; DIGEST, 229.

[80] Francisco *v.* State, 4 Zabr., 30.

[81] State *v.* Williams, 10 Humph., 101; Lorton *v.* State, 7 Mo., 55; Wharton, C. P. & P. § 252. And see case in DIGEST, 229–30.

U. S. court[82] that the several criminal acts indicated may be regarded as "representing each a stage in the same offence, and therefore properly to be coupled in one count."[83]

So, in military law, the similar acts specified in the separate paragraphs of Art. 60 may, in general, be joined in the same Charge without incurring the fault of duplicity. Thus it may be alleged that the accused did make and cause to be made, and present and cause to be presented, for payment, a claim, &c., knowing the same to be fraudulent, &c.; or did embezzle, and knowingly and wilfully misappropriate and apply to his own use, property of the United States, &c.[84]

207 The point under consideration is illustrative of the rule of pleading statutory offences heretofore considered, that, where acts which may be charged together without duplicity are expressed in the statute disjunctively, they should, when averred together, be expressed conjunctively.

But notwithstanding the form of statement thus sanctioned, the careful military pleader will always preferably set forth *by itself* the form of the offence of the accused *where it can be clearly distinguished*, instead of coupling or blending it with another form in the same specification. Thus, if it is clear that the accused *personally* presented the claim alleged to be fraudulent, he will properly and preferably be charged simply with presenting, and not with presenting and causing to be presented. If it is doubtful whether the claim was presented personally or through another person, the offence may well be pleaded conjunctively according to the forms above cited.

It may be added that *double pleading*, consisting sometimes in joining two or more separate and distinct instances of the same offence, but more frequently in blending *different specific offences, in one specification*, has been a not uncommon fault in our service, and has been repeatedly condemned in Orders.[85]

It remains also to notice, under this head, the two minor points indicated by the authorities—that mere surplusage or immaterial matter cannot avail to make a pleading double;[86] while, on the other hand, matter which is material may have such effect though it be defectively pleaded.[87]

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[82] U. S. *v.* Sander, 6 McLean, 600.

[83] In this case which arose under a statute of March 3, 1825, which provided that any person who should "secrete, embezzle, or destroy a mail of letters," should be subject to a certain punishment, it was held that a count, alleging that the defendant "did secrete and embezzle" a mail, was not bad for duplicity. And see U. S. *v.* Mills, 7 Peters, 142; U. S. *v.* Bachelder, 2 Gallison, 15. In the further case of U. S. *v.* Armstrong, 5 Philad., 273, it was held that a count was good and not double which charged the defendant with "transmitting to and presenting at, and causing and procuring to be transmitted to and presented at, the office of the Commissioner of Pensions a forged writing, for the fraudulent purpose of obtaining a soldier's bounty land, though the only act of the defendant was putting the forged letter with the guilty purpose into the post office at Philadelphia, directed to the Commissioner of Pensions at Washington." See the similar ruling in the late case of U. S. *v.* Hull, 4 McCrary, 274, (and 14 Fed., 324,) and compare State *v.* Haney, 2 Dev. & Bat., 403; Rasnick *v.* Com., 2 Va. Cas., 356; State *v.* Morton, 27 Vt., 310; Clifford *v.* State, 29 Wis., 327; Mackey *v.* State, 3 Ohio St., 362; Starkie, 246; 1 Bishop, C. P. § 586 and cases cited.

[84] But the *stealing* made punishable in the same clause would not properly be charged conjunctively, (or disjunctively,) with *embezzlement* the two being distinct offences in law.

[85] See G. O. 3, 83, Dept. of the Mo., 1863; Do., 49, Dept. of the Ohio, 1864; Do. 9, Dept. of the Gulf, 1866; G. C. M. O. 80 of 1875; Do. 8, Dept. of Texas, 1878. The instances of this fault appear to have been more frequent and marked in the English service. See, for example, the cases, in James' Collection, of Cornet Ashburnham, p. 113; Lieut. Duckett, p. 213; Ast. Surgeon Martin, p. 364; Ensign Gunter, p. 487, &c

[86] Stephen, 259; Gould, 142; 1 Bishop, C. P. § 440; State *v.* Palmer, 35 Maine, 9; Green *v.* State, 23 Miss., 509.

[87] Stephen, 261. And see Gould, 142.

**JOINDER.** Although a count of an indictment may not regularly charge more than one distinct and separate offence, it may, in a proper case, charge that offence against several defendants as having been committed by them conjointly. As it is laid down by the authorities,—"When more than one
208 join in the commission of an offence, all, or any number of them, may be jointly indicted for it, or each of them may be indicted separately."[88] * * * "There are some offences in which the agency of two or more is essential," and in an indictment for which "less than two cannot possibly be joined," as conspiracy and riot.[89] But whenever the offence is, in its nature, *several*, there can be no joinder.[90]

The joining of several persons in one Charge, though not unfrequent during the late war,[91] is not now common in the military practice, but may always be resorted to where a single act of offence has been committed by two or more soldiers or officers in concert and in pursuance of a common intent.[92] The
209 Charge of "joining in a mutiny"—an offence made punishable by Art. 22 of the code—is that which presents the most frequent examples of joinder at military law. But the mere fact that several persons happen to have committed the same offence at the same time does not authorize their being joined in the Charge.[93] Thus where two or more soldiers take occasion to desert, or absent themselves without leave, in company, but not in pursuance of a common unlawful design and concert, the case is not one of a single joint offence, but of several separate offences of the same character, which are no less *several in law* though committed at the same moment.[94]

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[88] Starkie, 34; 1 Chitty, C. L., 255; 1 Archbold, 96; 2 Gabbett, 251; Wharton, C. P. & P. § 301; 1 Bishop, C. P., Ch. XXIX.

[89] See Wharton, C. P. & P. § 305, 306; U. S. *v.* Cole, 5 McLean, 523; Com. *v.* Manson, 2 Ashm., 31; State *v.* Tom, 2 Dev., 574.

[90] Starkie, 42; Wharton, C. P. & P. § 302. Thus two or more cannot be joined in an indictment for perjury. 2 Hawkins, c. 25, s. 89, note 1; Rex *v.* Phillips, Strange, 921. "Or for seditious or blasphemous words, or the like, because such offences are in themselves several." 2 Hale, 174, note 11. "Where the offence indicted doth not wholly arise from the joint act of all the defendants, but from such act joined with some personal and particular defect or omission of each defendant, without which it would be no offence, * * * the indictment must charge them severally and not jointly." 2 Hawkins, c. 25, s. 89. And see 2 Gabbett, 252. In U. S. *v.* Kazinski, 2 Sprague, 7, four parties were jointly indicted for "enlisting and entering" themselves as soldiers in the service of a foreign power, in violation of the neutrality act of 1818. It was held by Sprague, J., that this was an offence" in which but one could have participated;" adding—"No one could be guilty of the offence of another person's enlisting himself, which was the offence in these counts charged. Each of these counts charged four persons jointly with an offence which by law is several only, and can under no circumstances be joint. These counts must be stricken out."

[91] Among the most conspicuous instances were cases in the following Orders, where the number of the accused as joined in the charges and trials were as follows:—Eighteen in G. C. M. O. 6, Dept. of Ky., 1866; Twenty-one in G. C. M. O. 62, Dept. of Texas, 1873; Twenty-three in G. O. 175, Fifth Mil. Dist., 1869; Thirty-two in G. O. 38, Dept. of the Platte, 1867; Thirty-four in G. C. M. O. 521, War Dept., 1865.

[92] DIGEST, 232; Kennedy, 73–74; Hough, (Practice,) 42; Simmons § 402; G. O. 78 of 1872. And see G. O. 10, Dept. of the Platte, 1871, where two soldiers were held properly joined in a Charge for an absence without leave committed together by previous deliberate concert, also Do. 26, Id., 1871, where was approved a Charge in which were joined three soldiers who had conspired to overthrow the guard and escape together from the guard-house, and succeeded.

Par. 1016, A. R. prescribes—"Prisoners will not be joined in the same charge, nor tried on joint charges, unless for concert of action in the same offence.

[93] DIGEST, 232–3.

[94] See DIGEST, 233; Simmons § 402; G. O. 78 of 1872; Do. 58, Dept. of the South, 1871; G. C. M. O. 42, Fourth Mil. Dist., 1868. But see also case of joint absence without leave cited in above note.

Whether in a case in which there may properly be a joinder, the accused shall be charged and tried jointly or separately, is a question of discretion, to be determined upon considerations of convenience and expediency, and in view of the exigencies of the service, by the commander authorized to order the court. The mere fact that different measures of punishment will properly require to be awarded to the different parties, on conviction, can constitute no objection to their being jointly prosecuted.[95]

Under what circumstances and in what manner accused persons jointly charged may procure themselves to be *severed* on the trial, will be indicted in a subsequent chapter.[96]

## III. RULES OF MILITARY LAW IN REGARD TO THE FRAMING OF THE CHARGE.

**AS TO THE WORDING OF THE CHARGE.—Approved forms.** Every military Charge must be predicated upon a violation of an existing Article
210 of war or other statute[97] of the United States, and the mode in which the "*charge*," (as distinguished from the "*specification*,") shall be framed depends in the first place upon the nature of the enactment. The forms of such charge are indeed of two classes: those laid under Articles, (or other statutes,) designating *specific* offences; those laid under the two *general* Articles, or Articles providing for the punishment of offences under a general designation, *viz.*, the 61st and 62d. The charge, where specific, may consist simply of the name of the offence, as "Desertion," "Mutiny," "Misbehaviour before the enemy;" or, referring to the article under which it is brought, it may be expressed as "Violation of the —— Article of War,"[98] or it may combine the two forms and be phrased as "False Muster, in violation of the 14th Article of War," "Disobedience of Orders in violation of the 21st Article," &c.[99] Where the charge is laid under one of the *general* Articles, it may be worded—"Conduct unbecoming an officer and a gentleman," or "Conduct to the prejudice of good order and military discipline;" or it may be framed in this form with the addition of the words "in violation of the 61st or 62d Article of War;" or—though this mode is here more open to objection than where a *specific* offence is charged—it may be simply expressed as "Violation of the 61st or 62d Article," as the case may be.[100]

**Objectionable forms.** The above are the only recognized and regular forms of stating the charge; a charge not following one of such forms, if not fatally defective, must be at least more or less faulty. Thus those loose forms of charge, now much less frequent than formerly, such as "Worthlessness,"
211 "Incompetency," "Habitual Drunkenness," "Unreliability," "General Bad Conduct," and the like, inasmuch as they do not designate any spe-

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[95] See p. 368, *post*.

[96] See Chapter XVI.—"Motion to sever."

[97] A charge for a neglect to comply with an Army Regulation is a charge under Art. 62, a statute.

[98] This form has occasionally been criticized as improper or unsatisfactory, (see G. O. 11 of 1862; Do. 32, Army of the Potomac, 1862; Do. 2, Dept. of the East, 1863; Do. 121, Dept. of the Mo., 1863; Do. 21, Dept. of the Columbia, 1885; O'Brien, 233,) but it is sanctioned by the usage of the service, and is not open to *legal* objection. DIGEST, 225. In *Ex parte* Mason, (105 U. S., 696,) the Supreme Court did not comment upon the charge—"Violation of the 62d Article of War," as unusual or calling for remark.

[99] The Charges, as given in the Appendix, are generally in this form.

[100] In the practice of the *Navy*, more extended forms of charges, such as the following, have been not unfrequent—"Violation of the Twentieth Clause of the Eighth Article of the Articles for the Government of the Navy;" "Culpable inefficiency in the performance of duty in violation of the —— clause of the —— Article," &c.; "Violation of par. 16, page 76, of the Regulations for the Government of the Navy of the United States."

cific military offence recognized by the code, while at the same time applying to the accused a depreciatory and unfair description in advance of trial, are highly objectionable, and have been repeatedly disapproved in Orders.[1] Where indeed the specifications to such charges merely set forth, (as they generally have done,) former instances of arrests or confinements in the guard-house, or former trials and convictions for slight offences, the pleading is wholly insufficient, "such instances not constituting military offences, but merely the punishments or consequences of such offences."[2] So is the Charge insufficient, where the specification sets forth an habitual course of conduct, since the law provides for the trial and punishment not of bad habits but of specific acts of offence.[3] Such Charges indeed, where the specifications allege actual and distinct military disorders or neglects, may be supported, under a principle hereafter to be noticed, as Charges under the 62d Article. In such cases, however, they should properly be formally laid under that Article, as "Conduct to the prejudice of good order and military discipline," with a *separate specification* for each act of misconduct.[4]

212 A further, less faulty, but also improper and unmilitary form, is the use of intensives in connection with the title of the charge;—as "*Positive*, or *Deliberate*, disobedience of Orders," "*Gross* neglect of duty," "*Corrupt* or *Fraudulent* conduct, to the prejudice," &c. The expletive in such cases cannot heighten or affect the quality of the offence, and is wholly superfluous.[5] It is indeed commonly but an expression of the *animus* or estimate of the accuser; but a military charge is no proper medium for the expression of personal feeling or opinion. If the case be an aggravated one, the matter of aggravation, so far as properly descriptive of the alleged offence, may be set forth in the specification,[6] and so far as material to the question of guilt or of punishment, may be brought out in evidence.

**Irregular but allowable forms under Art. 62.** Cases have not been unfrequent in practice where the charge fails either to designate a specific military offence, or to state in an approved form an offence under Art. 62, but where *charge and specification taken together* do make out a statement of a crime,

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[1] G. O. 11 of 1873; Do. 171, Dept. of the South, 1864; Do. 19, Id., 1867; Do. 9, Dept. of the Gulf, 1866; Do. 16, Dept. of the Tenn., 1867; Do. 85, Dept. of the Cumberland, 1867; Do. 21, Dept. of the Mo., 1863; G. C. M. O. 33, Id., 1874; Do. 35, Dept. of the Platte, 1872.

The objectionable form—"Chronic Alcoholism, to the prejudice," &c., occurs in a late G. C. M. O.—No. 4, Dept. of the Platte. 1894, but is not remarked upon.

[2] DIGEST, 227. And see G. O. 11 of 1873; Do. 32, Dept. of the Platte, 1870. To try upon such a charge would often indeed involve a violation of the 102d Article, prohibiting a second trial for the same offence. See DIGEST, 228; G. O. 37, Dept. of Florida, 1866; Do. 69, Dept. of the South, 1870. This class of Charges are frequently subject to the objection of being *double*. For example, in G. O. 26, Dept. of the Columbia, 1870, are published two cases, in which a specification to a charge of "Habitual Drunkenness, to the prejudice," &c., alleges that the accused was drunk, in one of the cases on *nine*, and in the other on *eight* specified occasions, "and at various other times."

[3] G. O. 24, Dept. of Cal, 1865; Do. 43, Dept. of the Ohio, 1863; G. C. M. O. 8, Dept. of Texas, 1873.

[4] A form of specification which was growing into use before 1886, which, with an averment of a particular act of offence, embraced an enumeration of previous convictions, (or arrests and confinements,) of the accused for the same offence or other minor offences, has now been superseded by the Army Regulation, par. 1018, (amended by G. O. 64 of 1892,) authorizing the introduction in evidence of *previous convictions* between finding and sentence. See *post*, Chapter XIX.

[5] See G. O. 11 of 1873, concurring with previous opinions of the Judge Advocate General; also G. O. 21, Dept. of the Mo., 1863; G. C. M. O. 33, Id., 1874.

[6] See the similar case of stigmatizing words added to the charge of "conduct unbecoming an officer and gentleman," in G. C. M. O. 80 of 1875.

neglect, or disorder to the prejudice of good order and military discipline. In such cases, to prevent a failure or delay of justice, the pleading as a whole is supported as a legally sufficient statement of an offence under the 62d Article. In the same manner, where a specific offence is charged by name, but the specification does not state facts proper or sufficient to constitute such offence, but charge and specification together amount to an allegation of an offence included within the general description of Art. 62, legal effect may be given to the Charge as a whole by the court, which may proceed to try and *find* accordingly. This principle, which forcibly illustrates the liberality with which rules of pleading are applied in military cases, rests now upon established usage in our service.[7] It will be further illustrated in the Chapter on the Finding.

213 **THE HEADING NO PART OF THE CHARGE.** The heading or caption by which military charges are commonly prefaced, *viz.*:—"Charges and specifications preferred against A. B.," adding his rank, office, corps, &c., is no part of the Charge or Charges, and may be omitted altogether. The point is one which would scarcely require to be noticed except for the reason that it has been expressly affirmed by Atty. Gen. Gilpin in a specific case, where an erroneous rank attributed to the accused in the heading was (of course) held not to have affected the validity of the Charge.[8]

In this case, it may be added, the *specification* referred to the accused as "the said" A. B. This was irregular: no reference should be made to the heading, but the designation in the specification should be entire and complete within itself, and contain a full description of the accused independently of the heading, even if it but repeats its wording. The heading is even less a part of a Charge than is the "caption" of an indictment.[9]

**THE CHARGE TO BE LAID UNDER THE PROPER ARTICLE.** An offence made specifically punishable by a certain Article must of course be formally charged thereunder: to charge it instead as a violation of an Article relating to a different specific offence, or of the general—62d—Article, will be a serious defect, for which the Charge will properly be struck out on motion of the accused.[10] The effect of a failure to observe this rule is specially illustrated in a case where the Article under which the Charge should have been laid, and that under which it has actually been laid, prescribe different *sentences*, as where the former requires a particular punishment to be imposed on conviction, and the latter leaves the punishment to the discretion of the court; or *vice versa*.[11] But though no such distinction may exist—the two Articles pre-
scribing or premitting the same punishment, or both making the
214 punishment discretionary—the error of the pleading is the same in law.

**Application of the rule illustrated—Charging same offence under more than one Article.** There can be in general but little difficulty in determining under which Article a specific military offence is to be charged, since it will rarely happen that such an offence will be found to be included within the descriptions of two different articles. One instance of such an inclusion is that of the offence of stealing property of the United States, which, in time

[7] See DIGEST, 226.

[8] 3 Opins., 548.

[9] The caption of an indictment is no part of the indictment itself. 2 Gabbett, 278; Wharton, C. P. & P. § 91. It is "merely a preamble to the record." State *v.* Smith, 2 Harr., 532.

[10] DIGEST, 225. And see the charging of specific offences under Art. 62 condemned in G. O. 5, Northern Dept., 1865; Do. 25, Dept. of the Platte, 1871; G. C. M. O. 32, Dept. of the Mo., 1871.

[11] See G. O. 18 of 1859; Do. 287, of 1863; Do. 54, Dept. of the Tenn., 1866.

of *war*, may be charged under Art. 58 as well as under Art. 60; otherwise in time of *peace* when it may, properly, be charged only under the latter article. Another instance is that of the offence of selling or disposing of public property, which is made punishable, generally, by the 60th, and, in certain particular instances, by the 16th and 17th, of the Articles. But the difficulty here is but slight, for where the offence clearly falls within one of these instances, it will properly be charged under the particular article; otherwise under Art. 60. Further, where an officer has committed a specific military offence so dishonorable in its circumstances as also to constitute "conduct unbecoming an officer and a gentleman," he is amenable to trial for the same act under two articles; but here again there is no difficulty, since the offence may be charged under both—the specific article and the 61st.

The principal difficulty in observing the present rule will arise in a case where it is *doubtful* whether the offence is one of a class contemplated by a certain specific article, and therefore properly chargeable under it, or is not within the terms of such article and chargeable only under Art. 62. Thus there may sometimes be a reasonable question whether the making of a false return should be charged under Art. 8 or Art. 62; or a disobedience of an order under Art. 21 or Art. 62; or a mutinous act under Art. 22 or Art. 62; or a case of drunkenness under Art. 38 or Art. 62; or a breach of arrest under Art. 65 or Art. 62. But study and deliberation will commonly solve such questions; and where a serious doubt still remains, the difficulty may be in part avoided by charging the act both as a violation of the specific article and as "conduct to the prejudice of good order and military discipline." Where indeed the offence is *clearly* one cognizable under an Article relating to a distinct offence, to charge it also under the general—62d—Article will be
215 superfluous. Where this is done, however, the court may properly entertain both charges for the purposes of the trial, unless indeed the specific article makes the offence a *capital* one. In that case, as a capital offence cannot be charged under Art. 62, the court will properly grant a motion to strike out the charge laid under this article, as not being within its jurisdiction.[12]

**THE SPECIFICATION SHOULD BE APPROPRIATE TO AND SUPPORT THE CHARGE.** To complete a valid Charge, not only should the *charge* designate the real offence committed, but the *specification* should set forth the legal constituents of such offence, as defined by the statute or by the usage and precedents of the service. It should, by its statement, cover every item of such definition, so as not only to be appropriate to the distinctive charge but inappropriate to any other—except, perhaps, (in a case of an officer,) a charge under Art. 61.

**Should state facts.** Further the specification, to support the charge, should properly set forth *facts*—acts of commission or omission—and not mere inferences or conclusions of law. These, as we have already seen, have no proper place either in an Indictment or a Charge. In a military case, therefore, it is in general defective pleading to allege in the specification merely that the accused did commit the offence indicated in the charge,—as that he did behave himself with disrespect toward his commanding officer, did disobey the order of a superior officer, or did offer violence against such officer, did

[12] Such was the action taken in the case of Lieut. Rogers, where to a Charge for Disobedience of Orders under the 9th (now 21st) Article, and clearly properly so laid, was added a Charge for the same act laid under the 99th (now 62) Article. The latter, being objected to by the accused, was stricken out by the court, and the proceedings were approved by the Secretary of War. G. O. 13 of 1848.

join in a mutiny, did misbehave before the enemy, did commit waste or spoil of private property, &c.;—the *proper* form being to set forth the specific facts and circumstances relied upon as constituting the particular offence
216 charged.[13] In view, however, of the simplicity and directness of the provisions of the military code, a strict observance of this rule is not called for in some instances. Thus it is generally sufficient to allege in a specification to a charge under Art. 47 that the accused *did desert;* and so under Art. 38, that he was *found drunk*, &c.; without specifying in what the desertion or drunkenness consisted or by what acts it was indicated. But, except in such familiar cases, to describe the offenee in the specification merely in the words by which it is designated in the charge, or in the Article, is bad pleading; and, where the description is thus bald, the court, upon the motion of the accused, may properly require the specification to be made more definite or be stricken out.

**Should describe the complete offence.** Lastly, the specification, in its statement of facts, should set forth such facts as will be sufficient, if proved, to sustain, not only the specific charge in contradistinction to any other, but also such charge in its entirety. A specification stating facts which will establish only a portion of the offence charged, or a secondary or incidental offence, will be as insufficient in law as if it stated facts representing an offence of a totally different nature.[14] A familiar instance of a specification not sustaining in its entirety the charge, would be one in which, the charge being desertion, the specification alleged an absence without leave only; or one where under a charge of "robbery" the specification described a larceny only, the averment as to the use of force, &c., being omitted. The fact that the court may *find* guilty of a lesser offence will not excuse the pleader from the observance of this rule.

**Each of several specifications to be complete and independent.** It should be noticed that where there are several specifications, the present rule is to be applied to the framing of each specification precisely as if it were the only specification in the case. While one good specification will sustain the charge, any number of defective specifications will fail to do so. Each specification, therefore, should be entire and sufficient *per se*. Independently of every other specification, and without borrowing from, or referring to, any other, each separate specification should contain all the allegations, substantial and
217 formal, which are necessary and proper both to complete itself and to support the charge as laid.[15]

## IV. THE PREFERRING OF CHARGES.

**PRELIMINARY INVESTIGATION—CHARGES TO BE WELL-FOUNDED.** Only such charges as, upon sufficient investigation, are ascertained to be supported by the facts—are found to be sustained by at least *prima facie* evidence—should be preferred for trial. The preferring of charges, with-

[13] DIGEST, 225; G. O. 37, Army of the Potomac, 1861. See case of Pvt. Macnamara, (Simmons § 413,) where a Charge which merely named the offence without specifying the facts in which it consisted, was held insufficient as being so defective that a sentence could not be predicated thereon.

[14] Compare instance, (in a naval case,) of a specification held not to have supported the charge, in 9 Opins., At. Gen., 223.

[15] See G. O. 12, 33, Dept. of the Mo., 1862; Do. 15, Id., 1863. In the first of these Orders, the fact that the pleader had inserted a general statement of time and place at the end of all the specifications, as applicable to all alike, instead of a separate statement at the end of each, was condemned by the reviewing authority as a marked irregularity.

out a proper investigation of the facts in the first instance—a neglect of duty which may entail, besides a needless waste of time spent in the trial, the arrest and confinement of an innocent person—has been repeatedly severely reflected upon in General Orders.[16] In the British military law, such investigation is enjoined by express statute.[17] A charge indeed should not be preferred at all where the case is susceptible of being properly disposed of, without trial, by the commanding officer.[18]

**CHARGES NOT TO BE FRIVOLOUS OR MALICIOUS.** All charges should be substantial and made in good faith. Where, as the result of imperfect
218 investigation or otherwise, frivolous charges are preferred, or where the charges are actuated by a hostile *animus* and are not in themselves well-founded, they are not a proper basis for a trial by court-martial. When such charges have been tried, they have not unfrequently exposed those preferring them to grave censure and in some cases to severe punishment.[19]

**TO BE PREFERRED AGAINST THE RESPONSIBLE PARTY.** The charge in every case should be preferred only against the person responsible for the act. Where there is any doubt as to which of several persons is the one properly chargeable with the offence committed, they should not all be charged, if by a more complete investigation the guilty party can be distinguished.[20] Further, where superiors and inferiors have offended togther, or superiors have sanctioned offences of subordinates,—whatever proceedings it may be
219 thought proper to take against the latter, charges should certainly be pre-

[16] See G. C. M. O. 70, 1875; G. O. 57, Dept. of the Tenn., 1864; Do. 50, 53, Dept. of the East, 1865; Do. 41, Id., 1868; Do. 10, 13, 17, Dept. of the Lakes, 1867; Do. 33, 38, Dept. of the Platte, 1868; Do. 33, Dept. of La., 1868; Do. 24, Fifth Mil. Dist., 1868; Do. 15, 153, Id., 1869; Do. 26, Dept. of the Mo., 1870; Do. 3, Id., 1872; Circ., Id., Nov. 15, 1871; G. O. 7, Dept. of the Gulf., 1872; Do. 11, Dept. of the Columbia, 1872; Do. 29, 71 Dept. of Dakota, 1873.

[17] "The charge made against every person taken into military custody shall, without unnecessary delay, be investigated by the proper military authority, and, as soon as may be, either proceedings shall be taken for punishing the offence, or such persons shall be discharged from custody." Army Act § 45, (5.) A court-martial should not investigate a vague or defective charge. Simmons § 457.

[18] Commanding officers, in forwarding charges, may well be, and have sometimes been, required in Orders to certify that they have fully investigated the case, and believe that the charge can be fully established. See the excellent G. O. 73 of 1892; also G. C. M. O. 7, Div. of Atlantic, 1887; Circ. No. 10, Dept. of Arizona, 1892.

[19] See a recent case in G. C. M. O. 71 of 1879. In sundry cases reported by James, (see pp. 81–4, 241, 266, 340, 372, 338–9, 583, 604–5, 792,) the preferring of frivolous or baseless charges is severely animadverted upon by the revlewing authority, and in several instances the officers who preferred the same are summarily dismissed the service. In G. O. 86, Dept. of the Mo., 1867, Gen. Hancock observes:—"To prefer accusations which cannot be maintained is highly injurious to the service and reflects discredit upon those who prefer them; and if upon trial the charges are found to be groundless, the officer preferring them should be held accountable and be tried himself for preferring malicious charges." Frivolous charges relating to *personal* matters are condemned by Gen. Crook, in G. O. 2, Dept. of the Columbia, 1870, as follows: "It is to be regretted that the Department Commander should be called upon to convene a court-martial to settle differences of opinion and peccadilloes between officers, which, it seems to him, should be settled among themselves, and not only without trouble, but without their being published to the world." And see remarks of the same Commander, in G. C. M. O. 3, Dept. of Arizona, 1884, as to the impropriety of making personal difficulties between officers the subject of charges.

In G. O., Hdqrs., Totoway, Oct. 30, 1780, General Washington comments upon the charges in the case of Col. Thomas Proctor, of the Artillery, as "vexatious, groundless, and illiberal." He adds—"It is with pain that he has seen several instances, for some time past, in which personal pique has given birth to prosecutions as unjust as they were indelicate and improper."

[20] In certain cases, published in G. C. M. O. 120, Dept. of the East, 1870, where three soldiers were separately charged, tried and sentenced, for the same act as committed by each, the proceedings were all disapproved because it did not appear from the evidence which one was the actual offender and responsible party.

ferred against the former, as primarily responsible and deserving punishment.[21] So, where duties have been improperly performed by soldiers, by reason of their having been assigned to the same when drunk or otherwise unfitted to perform them, by superiors cognizant of their condition, it is the latter who, as primarily responsible for the consequences, should become subject to charges rather than the former.[22]

**ALL EXISTING GROUNDS OF ACCUSATION TO BE PRESENTED TOGETHER—MULTIPLICATION AND ACCUMULATION OF CHARGES.** While charges should be prepared and preferred with as little delay, after they have been investigated and determined to be well-founded, as may be reasonably practicable,[23] care should be taken that *all* the charges and specifications to which the party may be subject be preferred together. Unlike the ordinary criminal procedure, where but one indictment, setting forth (in one or more counts) a single offence or connected criminal transaction,[24] is in general brought to trial at one time, the military usage and procedure permit of an indefinite number of offences being charged and adjudicated together in one and the same proceeding.[25] And, with a view to the summary and final action so important in military cases,—wherever an officer or soldier has been apparently guilty of several or many offences, whether of a similar character or distinct in their nature, charges and specifications covering them all, should, if practicable, be preferred together and together brought to trial; separate *sets* of charges, where they exist, being consolidated.[26] Where all the charges to which
220 a party is amenable are known or can readily be ascertained, and the testimony to establish them is available, to bring one or a portion to trial separately, and the other or remainder to a further trial later, is an irregular proceeding.[27]

What is known as the "*accumulation*" of Charges,—which is the allowing of separate slight offences to pass apparently unnoticed, until a sufficient number have been committed to make up together, when stated in separate specifications, a show of grave misconduct in the aggregate,—has been universally condemned, and the preferring of charges thus reserved has been commonly attributed to a hostile *animus*, to the serious disadvantage of the prosecution upon the trial.[28]

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[21] Compare DIGEST, 379 § 3.

[22] See G. O. 2, Dept. of the Platte, 1873; G. C. M. O. 46, Dept. of Texas, 1880.

[23] Charges should not in general be preferred after the offence has been once passed over, and the accused has been released from arrest and restored to duty, and his misconduct has not been renewed. Surgeon Joliffe's Case, James, 516, Bombay R., 3.

[24] See Sec. 1024, Rev. Sts.

[25] In an old case, (1819,)—that of Col. Wm. King, 4th Infy., there were *thirty-one* specifications. Specifications setting forth distinct acts of offence were especially numerous in cases during the late war; amounting in one instance, published in G. O. 43, War Dept., 1863, to *sixty-one* in number.

[26] See DIGEST, 227.

[27] Such a proceeding is condemned in G. C. M. O. 37, Dept. of the Platte, 1872.

[28] "Delaying to bring forward charges" and "permitting them to lie dormant, justifies the impression that the prosecutor is not actuated by public motives alone in their institution." Simmons § 382. "It is highly improper to hold charges in reserve against an officer or soldier in order that they may accumulate so as to form collectively a crime of sufficient magnitude to justify a prosecution." Macomb, 26. And see Tytler, 162, 163; De Hart, 99; Harwood, 46; Ives, 88; 1 Opins. At. Gen., 295; G. C. M. O. 71 of 1879; G. O. 12, Dept. of the Mo., 1862; Do. 53, Dept. of Va. & No. Ca., 1863; Do. 41, Dept. of Washington, 1868; Do. 10, Dept. of the Platte, 1871; Do. 30, Dept. of the South, 1873; G. C. M. O. 2, Dept. of Texas, 1882; Do. 45, Div. Pacific & Dept. Cal., 1882; DIGEST, 226–7. In two cases reported by James, (pp. 203, 461,) the accuser, an inferior in rank, who had accumulated charges against his superior, the accused, was dismissed the service, in the Order publishing the proceedings. The rule of course does not apply where the offences, though long since committed, have recently all come at the same time to the knowledge of the officer preferring the charges. G. O. 33, Dept. of Arizona, 1871.

Where indeed the dereliction of the party consists in the *habitual* nature of his misconduct—as that he is habitually addicted to becoming drunk—it may be proper to delay preferring the charge till instances sufficient to indicate the fact of habit have transpired; but such delay should not be unreasonably prolonged.[29]

**BY WHOM CHARGES ARE TO BE PREFERRED.**[30] Preferring charges, in a general sense, consists in being the author of, or person responsible for, specific accusations presented against an officer or soldier. The "accuser," referred to in Art. 72, is, in this sense, the preferrer of the charges; and so is the "prosecutor" where he has either originated or adopted the accusation. In *law*, however, and as the term is employed in the present connection, the preferring of charges consists in the formal subscription and authentication of such charges for official purposes. A military charge, by whomever *initiated*, must—to serve as a proper basis for official action and trial—be *formally* preferred by a commissioned officer of the army. Such a charge may *originate* either with the formal preferrer himself, or with any other individual, whether or not in the military or public service. A civilian if first advised or personally cognizant of a serious offence committed by an officer or soldier, may, as properly as any military person, bring the same to the knowledge of the military authorities, and indeed is but performing a public duty in so doing.[31] So, a charge may be advanced in the first instance by an enlisted man. But although a civilian or a soldier may present the charge in writing and duly framed, the *formal* preferment of the same—the legal act—must be by and under the signature of an *officer*.[32] A preferred charge is an official paper, and must be officially subscribed.

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Any officer, of whatever rank, and whether or not exercising command, may legally prefer a charge, and at any time. There is no military status which involves a legal disqualification to prefer a charge;[33] an officer, though himself under charges, in arrest, or under sentence, may not only originate but formally prefer charges with the same *legal* effect as any other officer. But while any officer may legally thus act, the preferring of charges by certain officers is not favored. Thus charges by a junior against a senior in rank, unless ordered to be preferred, or sanctioned, by a common superior, are not encouraged in practice,[34] though peculiar circumstances will sometimes

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[29] See DIGEST, 226. In such case each *instance* should of course form the subject of a separate specification.

[30] Compare, under this head, DIGEST, 233–234.

[31] That the validity of a charge is not affected by the fact that it *originated* with a civilian, see G. O. 33, Dept. of Arizona, 1871; also Gen. Swaim's Case, G. C. M. O. 19 of 1885.

[32] The peculiar practice of the preferring of charges against naval officers by the Secretary of the Navy has no counterpart in the military service. As to the objections to this practice, and its sanction by usage, see Trials of Com. Wilkes, pp. 2–3, and of Com. T. A. C. Jones, p. 367.

[33] In January, 1778, Lieut. Gen. Burgoyne, while a prisoner of war at Cambridge, Mass., preferred a charge against Col. David Henley, of the continental army, commanding at that place, which was entertained by Gen. Heath, (comdg. Eastern Department,) and a court-martial ordered by him thereon, at which Gen. Burgoyne acted as prosecutor. Heath's Memoirs, 149–156.

[34] Such charges have been especially discouraged in the British service, where, in repeated cases, juniors who have preferred *and prosecuted* charges against their seniors have been severely rebuked, and not rarely, if commissioned officers, dismissed, or, if non-commissioned officers, reduced to the ranks. See James, pp. 35, 167, 203–4, 210, 266, 331, 372, 463, 539–40, 543, 533, 600–1, 648, 727, 759. In the review of one of these cases—Col. Quentin's—it is remarked by the Commander-in-chief: "A regard due to the subordination of the service must ever attach a severe responsibility to subordinate officers who become the accusers of their superiors."

justify them.[35] In general, charges will most appropriately be preferred either by the commanding officer of the accused, by a superior in rank, or by the judge advocate of the court,—the latter acting officially and by the direction express or implied of the convening authority. In any case an officer may be ordered by his proper commander, (or by the President, through the Secretary of War or a military representative.) to prefer charges against another officer or an enlisted man.[36]

**AUTHENTICATION.** A charge is officially authenticated and preferred by the formal subscription of the same by the preferring officer with his name, rank, regiment, corps, or office.[37] It is not *essential*, to give a court-martial *jurisdiction* of the offence or the offender, that the charges should be thus authenticated, or signed at all, provided they evidently emanate from an authorized source. Such court, however, might properly defer proceeding to trial, as might also the accused properly object to be arraigned and to plead, where the charges had been omitted to be subscribed in the usual manner.

**TO WHOM TO BE PREFERRED.** Charges are to be preferred to the commander authorized to order, or who would, under the circumstances, 223 most appropriately order, the court. Such commander, (where trial by a general court-martial is proposed,) will be the Division, Department, or Army commander, (or in time of war a commander empowered by Art. 73,) the Superintendent of the Military Academy, or the President. By *preferring to* is meant officially addressing and forwarding to the commander, through the proper military channels, (or directly where permissible,) the formal charges; the same being usually accompanied with a request or recommendation, expressed in the letter of transmittal, that such charges, if approved, be referred to a court-martial for trial. Charges against enlisted men should now be accompanied by the statement, in regard to enlistments, discharges, &c., required by par. 1015, and by the evidence of previous convictions required by par. 1018, A. R.[38]

In the rare cases in which a commander authorized to order a general court-martial himself prefers directly the charges, he will properly prefer them to the court through the judge advocate; unless he be the "accuser or prosecutor" of the accused in the sense of Arts. 72 and 73, when he will prefer them to the President or the "next higher commander," as the case may be.

## V. THE REFERRING OF CHARGES FOR TRIAL.

**BY WHOM AND HOW REFERRED.** Regularly and properly charges can be referred to a general court-martial for trial only by the commander by whom the court has been convened, (or his successor in command,) or by his authority. The referring of charges to the court by the "highest authority on the spot"—as the post commander—has been sanctioned in some Orders, with special view

[35] In Col. T. Chambers' case, (1826,) the charges, for drunkenness, &c., on which he was dismissed, were preferred by a captain of the regiment.

[36] This point was in substance held by Maj. Gen. Brown, as Gen. Comdg. the Army, in G. O. 3 of 1826.

[37] Signing charges as "by order" of a superior is not approved or customary in our practice, though the signing may have been ordered in fact. Otherwise in the British service. Simmons §

[38] It has been observed that, in forwarding charges, to a department commander, the officer forwarding is not entitled to prejudice the accused by adding a statement that his character in the service is "bad," or to that effect. G. C. M. O. 41, Dept. of the Platte, 1893.

to the trial of enlisted men.[39] But unless expressly authorized by the department, &c., commander,—as it sometimes has been where the court was assembled at a post or station remote from his headquarters,—such a reference by an inferior commander is irregular and improper.[40]

224 The reference, by the department, &c., commander, of the charges to the court is not made till the same have been *approved* by him, and such approval is not given till the charges have been examined by the commander, with the assistance generally of the judge advocate or other proper staff officer attached to the command, and if necessary revised and corrected.

Upon their final approval, the charges are, regularly, transmitted from the headquarters to the judge advocate or president of the court—usually and preferably to the former—for prosecution and *trial*. Thus transmitted, they are not subject to the revision or criticism of the court or its members.[41]

## VI. WITHDRAWAL OR AMENDMENT OF CHARGES AFTER REFERENCE FOR TRIAL.

The officer preferring charges is not entitled to have them brought to trial, nor has an accused a vested right in having charges against him adjudicated. The convening authority, representing the United States, may always withdraw charges before trial;[42] may cause or authorize a *nolle prosequi* to be entered as to a charge or specification after the charges have been placed before the court and even after arraignment, and may cause or authorize charges or specifications to be amended. But—so far as concerns the court and the parties—charges duly referred for trial are, in law, ordered to be tried as they stand. Thereafter to assume to amend them without proper authority is a military offence. As will appear in Chapter XVI, the court may strike out a charge or specification on motion of the accused if sufficient cause be exhibited; but, self-moved (or in the absence of an issue) and of its own original capacity, it has no power whatever to amend, modify, discard, or withdraw, or direct to be stricken

225 out, any part of the charges or specifications officially committed to it for trial,[43] except, indeed, in so far as to correct a mere obvious error of

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[39] In an Order of Gen. Scott, (G. O. 57, Hdqrs. of Army, May 20, 1857,) referred to and followed in a few subsequent Dept. G. O., the reference by the post commander is held authorized except where he is himself a member of the court. This however is not a correct statement of the law as now held and observed.

[40] DIGEST, 234; G. O. 67, Dept. of Ark., 1864; Do. 47, Dept. of the East, 1868; Do. 88, Dept. of Dakota, 1869; Do. 2, Dept. of the Platte, 1873; Do. 8, Dept. of Texas, 1874. The irregularity would be *aggravated* where the post commander was himself a member of the court. See G. O. 68, Dept. of Dakota, 1875, where he was the president of the court, and it was held that his action had rendered him liable to challenge.

[41] G. C. M. O. 16, Dept. of Texas, 1893. And see Do. 210, Dept. of the East, 1884.

[42] Street *v.* U. S. 133 U. S., 305.

[43] G. C. M. O. 17, Dept. of the Columbia, 1886; Do. 87, Div. of the Atlantic, 1887; Do. 38, Dept. of Cal., 1890. In the case in the last Order, the action of the court, in directing the judge advocate to insert words in a specification which "magnified essentially the charge against the accused," was properly disapproved. In a further instance in Do. 7, Dept. of the Mo., 1891, the action of the court (in two cases) in changing, upon the request of counsel for the accused, the word "Burglary" to "Larceny" in the 2d Charge, was properly disapproved. The Department Commander, Gen. Merritt, adds—"After charges have been formally referred to a court for trial, the court has no authority to change or amend them upon any material point without the permission of the convening officer. In these cases the best and simplest plan would have been for the court to have proceeded to try the accused on the original charges and then have made the findings accord with the evidence." In a case, in G. C. M. O. 210, Dept. of the East, 1884, where an amended form of charge had been ordered for trial by the Department Commander, the court directed that the original form of the charge be substituted for trial as being,

form.[44] How far the judge advocate may be empowered to amend, &c., will be considered in Chapter XIII. It need only be said here that he can have no authority for this purpose *virtute officii*, but must be thereto authorized—if authorized at all—by the superior by whom he has been detailed.

It may be added that where a command is furnished with a competent officer of the Judge Advocate General's Department, or staff officer acting as such, all charges will have been fully revised before being referred for trial. There will thus rarely be occasion for any considerable amendments at a later stage.

## VII. ADDITIONAL CHARGES.

This is a technical term in military law, meaning new Charges which are advanced *after* the preferment and service of the particular Charge or set of Charges for the trial of which the court has been ordered, or upon which the accused was originally intended to be arraigned.[45] Such Charges may re-
226 late to past transactions which were not known by or brought to the attention of the officer framing or ordering the original Charges, at the time these were preferred; or they may, as is more frequent, arise from acts of the accused subsequent to his arrest on the original Charges. Thus if, after such arrest, he commits a "breach of arrest," an "additional" charge will properly be added in the case, and served upon him. Charges of this class do not require a separate trial, but may and properly should be tried by the same court which tries the original Charges, and at the same time. They must, however, be brought before the court prior to its being sworn. After the court has been duly sworn to try and determine "the matter now before it," further or "additional" Charges (or specifications) cannot legally be entertained by it at that trial, but must await a separate investigation.[46]

## VIII. THE SERVICE OF CHARGES.

**FORM AND MANNER OF SERVICE.** The service of Charges consists in delivering personally to the accused a true copy of the charges and specifications upon which it is proposed to bring him to trial. There is properly in military law no other service of charges than a personal service, since the United States is supposed to have the accused always in custody or within its control.[47] The service is usually made by the judge advocate of the court, the adjutant of the command,[48] or other officer or non-commissioned officer detailed for the purpose.[49] In a case of an accused soldier who is illiterate or imperfectly acquainted with the English language, the charges and specifications should be read and their contents explained to him by the officer making the service.[50]

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in its opinion, preferable. "This action on the part of the court," observes Gen. Hancock, "was an illegal and unwarrantable assumption of authority which cannot be sanctioned." And see the comment of Gen. Wheaton upon a similar case, in G. C. M. O. 16, Dept. of Texas, 1893.

[44] See G. C. M. O. 17, Dept. of the Colorado, 1894.

[45] In a few early cases, "supplementary" charges, so called, were added *after* "additional" charges. See instance in G. O. 72 of 1826.

[46] See the law on this point as stated in DIGEST, 97, 227; also Simmons §415; Kennedy, 81–2; De Hart, 102; G. C. M. O. 39 of 1867; G. O. 13, Northern Dept., 1864.

[47] It may be noted that the entering of a written charge against the prisoner by the officer making the arrest, in the manner indicated in Art. 67, cannot in general answer as a personal service of the formal charges and specifications.

[48] Simmons § 416.

[49] The service may be made by a private soldier or even by a civilian, but this is not usual.

[50] Simmons § 416. And see Rules of Procednre § 14 (B.)

227 In making service it is desirable, in a case of importance, that the officer, &c., should note on the original draft the fact, date and place of the delivery of the copy. It is also proper that he should compare with the accused the original and copy furnished, so that both parties may be assured that a true copy has been served.

**List of witnesses.** Though the accused has no right to demand it,[51] it is yet proper and desirable that there should be appended to the Charges as served upon him a list of the witnesses by whom it is proposed to support them. The accused will thus be the better advised of the source and basis of the complaint, and so better enabled to prepare his defence and to determine what witnesses he will require to rebut or impeach those of the Government. The list, however, is not part of the Charge and is frequently omitted. Though added and served therewith, it will not oblige the prosecution to introduce the witnesses named or any of them nor estop it from introducing such other witnesses as may be deemed material.[52]

**TIME OF SERVICE.** The law indicates no particular time within which charges should be served upon enlisted men, but, in the case of officers, Art. 71 of the code in effect prescribes that, "except at remote military posts or stations,"[53] a copy of the charges shall be served "within eight days after the arrest." At "remote" posts, &c., the time is left indefinite; but in all cases, whether of officers or soldiers, the interests of justice and of military discipline unite in requiring that charges should in general be served either simultaneously with the arrest, or as soon after arrest as is reasonably practicable.[54]

**EFFECT OF DEFECTIVE SERVICE OR NON-SERVICE.** The service of charges, however, is not an *essential* proceeding. So, the fact that there is a material variance between the charges upon which the accused is arraigned and the copy which was previously served upon him cannot avail him as a
228 legal objection in bar of trial, or affect the validity of the judgment of the court.[55] Nor can even the fact that there has been no service at all have such effect. Where, however, such a variance is apparent, or the accused has been served at a time unreasonably close upon the day or hour of trial, or has been neglected to be served at all, the court, in view of the 93d Article of war, will ordinarily justly grant him, if he asks it, such a reasonable *continuance* as will enable him sufficiently to examine the actual charges and prepare his defence or plea to the same.[56]

**SERVICE OF AMENDMENTS, &c.** If after the service of the original charges, and before arraignment, such charges have been materially amended, there should properly be a re-service upon the accused, as soon as practicable, of the amended charges,[57] and service should be similarly made of "additional" charges, if any are preferred.[58]

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[51] Hough, 705; Simmons § 423; G. O. 52, Dept. of the Platte, 1865.

[52] Simmons § 425; DIGEST, 235, 751.

[53] See this term defined in Chapter IX, where also the provisions of Art. 71 have been more appropriately considered.

[54] See Simmons § 416, 417.

[55] Simmons § 418; Griffiths, 61–2. Note in this connection the ruling of the U. S. Supreme Court in the recent case of Johnson *v.* Sayre, 158 U. S., 109, to the effect that the provision of Art. 43, of the naval code, that the accused shall be furnished with a true copy of the charges and specifications "at the time he is put under arrest," has reference to the time of the arrest for trial by court-martial and not to that of a previous arrest, as an arrest to await the action of a court of inquiry.

[56] Simmons § 418; Griffiths, 62; G. O. 52, Dept. of the Platte, 1865.

[57] See Tytler, 218.

[58] Hough, (Practice,) 245.

# CHAPTER XI.

## THE FORMAL ORDERING, MEETING, &c., OF THE COURT.

229 THE subject of this Chapter will be considered under the following heads:—I. The Convening Order, and Orders Supplemental thereto; II. The Meeting and Opening of the Court; III. Preliminary Business; IV. Introduction of Accused; V. Admission and Status of Counsel; VI. The Clerk and other Assistants or Attendants.

### I. THE CONVENING ORDER, &c.

**ITS EFFECT IN GENERAL.** As already shown, a general court-martial is constituted by a military order, issued either by the Commander-in-chief or one of the military commanders specifically authorized for the purpose by statute. In its usual form this Order is a direction to certain officers named to assemble at a certain time and place and form a court for the trial of a person or persons specifically or in general terms indicated, and to a further officer to act as judge advocate of such court.[1] A copy of the Order, written or printed, is properly, and in practice, delivered or transmitted to each of the officers designated. Its particulars illustrate in brief the law heretofore stated at length in regard to the constitution and composition of general courts.

**PARTICULARS—1. THE CAPTION.** This, where the court is convened by a military officer, should indicate the headquarters of the command of the officer who makes the order. As—"Headquarters of the Army;" "Headquarters, Army of the Potomac;" "Headquarters, Department of Cali-
230 fornia;" "Headquarters, First Division, First Army Corps," &c.,—with the *place* at which the headquarters are situated, and the *date*. If issued by the Commander-in-chief, the Order may be headed—"War Department," or "Headquarters of the Army, Washington, D. C.," according as it is issued through the one or the other. If the order proceeds from the Superintendent of the Military Academy, the heading will be "U. S. Military Academy, West Point, N. Y." The caption should not only identify the command, but indicate that it is one of which the commander is authorized to convene a general court-martial: otherwise it is invalid upon its face.[2] That the Order is dated on a Sunday affects in no manner its validity.[3]

**2. PLACE AND TIME OF MEETING.** The Order then proceeds to announce and direct that a General Court-Martial will assemble, or convene, or is appointed to meet, at a certain place, naming a particular post, station, &c.,[4]

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[1] See pars. 1002, 1003, 1007, A. R.

[2] See DIGEST, 548.

[3] DIGEST, 548.

[4] In G. Field O. 4, Dept. of Dakota, 1867, the court is ordered to meet on a transport steamer. In G. O. 76 of 1869, it was directed that—"Military courts will be assembled at posts or stations where the aggregate expenses of trial or examination will be least." Par. 1003 of the present Army Regulations declares—"The place of holding a court is designated by the authority appointing it. Military courts will be assembled at posts or stations where trial or examination will be attended with the least expense."

on a certain specified day, "or," as it is usually added, "as soon thereafter as practicable." The time or place, or both, may be changed by a subsequent Order from the same source.[5] It would not be proper for the court, of its own authority, to depart from either; though if it did so the validity of the proceedings would not necessarily be affected: a general approval of the same by the commander would ratify the irregular action.[6]

**3. THE NAME OF THE PARTY OR PARTIES TO BE TRIED.** The Order then subjoins: "for the trial of"—naming a certain officer or
231 enlisted man—"and such other persons (or prisoners) as may be brought before it;" or, more generally, since it is not necessary to designate any particular person or persons,[7]—"for the trial of such persons as may be brought before it." Where a particular person *is* named, it is usually an officer, &c., whose trial was the original or special occasion for convening the court. The party named, if any, should of course appear to be a person within the military jurisdiction. If the Order specifies that the court is convened for the trial of a certain class of military persons only, its effect is to preclude the trial of persons not within that class. Thus a court would not be authorized to try an enlisted man under an Order directing it to assemble for the trial of "officers."[8]

**4. THE DETAIL OF THE MEMBERS.** The Order then proceeds to name the officers who are to compose the court, observing the principles of law heretofore laid down in regard to the class, rank, number, &c. The number must of course be at least five and not more than thirteen. The detail are arranged in order of rank, but the senior and first in the list need not be, and is not in our practice, designated as "President."[9] The precedence given to certain officers as senior to others in the Order is conclusive on the court till changed, as it may be, by a supplemental Order; but an error in the statement of the rank, or relative position of any member, or of his regiment, corps, or office, will not affect the validity of the Order.[10]

The detail in the original (or a supplemental) Order is the authority for the members named to appear, be sworn and act on the court,[11] and consequently to absent themselves (if necessary) from their posts or stations, and to receive transportation or mileage if the same be otherwise allowable and duly certified.[12]

**5. THE DESIGNATION OF THE JUDGE ADVOCATE.** This usu-
232 ally follows the detail of the members, but the Order is not defective if it fail to name an officer as judge advocate: one may be appointed by a supplemental Order. Sometimes indeed the original Order expressly states that a judge advocate will be designated in a subsequent Order.

**6. CLAUSE ACCOUNTING FOR THE NUMBER, &c., OF MEMBERS.** Where the detail is less than thirteen it is customary to add in the Order, following the language of the 75th Article, a clause to the effect that—"No greater number can be detailed without manifest injury to the service." The early

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[5] See De Hart, 88.

[6] In G. O. 172 and 185, Dept. of the Ohio, 1863, the proceedings were disapproved because the court in one instance, met and acted at a *place*, and, in another, on a *date*, other than as indicated and directed in the convening Order.

[7] See G. O. 52, Div. Pacific, 1865.

[8] DIGEST, 548, and note; G. O. 106, Army of the Potomac, 1862.

[9] See pars. 1002, 1004, A. R.

[10] See G. C. M. O. 100, Navy Dept., 1893.

[11] An officer may be detailed upon a court-martial by telegraph. A telegram, however, to an officer to the effect that he will be, or is to be, detailed by a formal order, will not *per se* authorize his acting as a member. See G. C. M. O. 42, Dept. of the Mo., 1874.

[12] As to the certificate, see *post*.

rulings of the U. S. Supreme Court and the Supreme Court of New York, in which this Article was construed, have been heretofore referred to,[13] and it has been seen that such clause is quite unnecessary, the determination of the Commander that thirteen cannot be detailed without manifest injury, &c., being sufficiently signified by the mere fact of his detailing a less number.[14]

The wording of the clause sometimes is—"No *other* members, or officers," &c.; this form being employed for the double purpose of declaring, not only that no other, *i. e.* greater, *number* can be detailed without manifest injury, &c., but also that no officers of other, *i. e.* higher, *rank* can be selected; the object of the clause in its latter purport being to account for the placing upon the detail of an officer or officers *junior* to the accused, which Art. 79 prescribes shall not be done "where it can be avoided." But it is as unnecessary to account in terms in the Order for making the case an exception to the rule of Art. 79, as it is to explain in terms the not detailing of the maximum number. This form of the clause in question is therefore as superfluous as that first mentioned.[15]

The direction sometimes added here, to the effect that, should some of the members fail to arrive, the court may proceed to business provided the number present is not reduced below the legal *minimum*, is also wholly unnecessary; the rule of law (Art. 73) empowering five to constitute a court under all circumstances being now perfectly well understood.

233 **7. DIRECTION AS TO HOURS OF SESSION.** Where, in the opinion of the convening authority, the exigencies of the service, or other circumstances, require that an exception be made to the general rule, in regard to the proper hours of session, prescribed in Art. 94,[16] it is added in the Order that—"The court will sit without regard to hours."[17] This direction is not unfrequently given in a supplemental Order.

**8. THE CERTIFICATE AS TO TRAVEL.** The Act of June 30, 1882, c. 254, in appropriating, among other things, for the mileage of officers travelling "on duty under orders," added—"the necessity for such travel to be certified by the officer issuing such order." In cases, therefore, where the convening Order details officers stationed at posts, &c., other than the post or station at which the court is to be held, the following certificate is now subjoined:—"The travel involved in the execution of this Order is necessary for the public service,"[18] or in terms to this effect.

**9. SUBSCRIPTION OF THE ORDER.** The original order, (which may be written or printed,) should appear subscribed, in writing or in print, by the President or Secretary of War;[19] or by the military Commander, with his rank and a reference to his command as indicated in the caption. The subscription should be consistent with the caption. Copies of the Order are commonly further authenticated by the signature of the Adjutant General, Assistant Adjutant General, or other staff officer.

**SUPPLEMENTAL ORDERS.** Prior to the organization of the court the Convening Order may be amended, modified, or supplemented by any number of subsequent Orders from the same source,—by which a member or the judge advocate may be relieved, new members added or substituted, the place or time

[13] See Chapter VII.

[14] See DIGEST, 88.

[15] DIGEST, 89.

[16] See this Article as separately considered in Chapter XXV.

[17] G. O. 9 of 1892 declares that when authority is thus given, "the order must state that it is necessary for the sake of immediate example."

[18] See G. O. 86, 131, of 1882.

[19] The subscription by the Secretary is presumably of course by the authority of the President and his act in law. See G. O. 35 of 1850; also Chapter III—ORDERS.

of meeting changed, the hours of session extended, &c. In the record
234 of trial these Orders will properly follow the original Order, so that they may readily be compared therewith, and the authority of the court and of each member, and of the judge advocate, to act as they are shown to act in the proceedings, may clearly appear. Supplemental Orders may also be issued at any stage *pending the trial:* they are comparatively rare, however, after the arraignment.

## II. THE MEETING AND OPENING OF THE COURT.

**ARRIVAL, COMING TO ORDER, AND SEATING OF MEMBERS.** Pursuant to the Convening Order, (and the supplemental Orders, if any,) the officers named in the detail for the court assemble in full uniform[20] at the time and place named, in such building or room as may have been set apart for the purpose by the post, &c., commander, or provided by the quartermaster's department. When five or more have arrived, they may proceed to business: till five appear those present usually adjourn from day to day to await the attendance of at least the minimum number.[21]

A quorum of members being assembled, they are called to order by the senior as presiding officer, and, as the roll is called by the judge advocate, take their seats according to their relative rank alternately at the right and left of the president, in the manner of all judicial bodies. The judge advocate is commonly seated at the table opposite the president, and seats are provided at his right and left for the accused and his counsel, and for the witnesses; the former being also generally furnished with a separate table.

**OPENING TO THE PUBLIC.** It is, in the majority of cases, at this stage that the court is pronounced by the president to be open, or is considered to be open, to the public, the accused being at the same time introduced. Where indeed there is preliminary business to be deliberated upon, of the kind—
235 presently to be considered—which does not require the presence of the accused, the public is also properly excluded till this is transacted: in the discretion of the court indeed the opening may be deferred till the time has arrived for the arraignment. In general, however, the opening of the court either concurs with its original assembling or follows closely upon it. It may properly, therefore, be noticed at this point.

Originally, (under the Carlovingian Kings,) courts-martial, (according to Von Molitor,[22]) were held *in the open air*, and in the Code of Gustavus Adolphus, (Art. 159,) criminal cases before such courts were required to be tried "*under the blue skies.*" The modern practice has inherited a similar publicity. With us, when once opened, the court-martial room—though at any stage of the trial it may be permanently closed at the discretion of the court—is, in general, continued open throughout the investigation, (except when the doors are closed for deliberation on interlocutory matters,) and also during the

[20] As to the wearing of uniform, see remarks in G. O. 29, Dept. of the South; 1872: Do. 43, Dept. of Dakota, 1874.

The more recent G. O. 103 of 1890, in prescribing that the full uniform coat "will be worn on all dress occasions," adds—"except that, when rendered necessary by the state of the weather, the president of a court-martial, court of inquiry, or retiring board, may authorize undress uniform to be worn by the members of the court or board at their sittings."

[21] That a less number than a quorum is authorized to adjourn, see DIGEST, 88.

[22] And see, on this subject, the learned and interesting publication—"Über Öffentlichkeit im künftigen Deutschen Militärstrafprozesse," by M. Gr. Schultheiss, Würzburg, 1893.

closing arguments of the counsel, or till the final clearing for judgment.[23] While thus open the public is allowed to come and go much as in the civil courts. Noisy and improper persons may of course be required to withdraw and if necessary be forcibly excluded. So, if it is determined by the court, as it may be, that its proceedings shall not be reported except officially, newspaper and other reporters may be required not to take notes, under penalty of exclusion if they attempt it.[24] In general, however, such reporters are freely ad-
236 mitted, and sometimes even special accommodation is provided for them.

Where there is difficulty in clearing the court, excluding particular persons, or keeping order, the proper commander at the post, station, &c., may be called upon by the court to furnish, and will properly furnish, a sufficient force for the purpose. In the cases also of this nature which are within the provision of Art. 86, yet to be considered, the court may itself punish as for a contempt.

## III. PRELIMINARY BUSINESS.

Five members having assembled, a *court* is constituted—not a court empowered to proceed to trial, because the members have not as yet qualified for this purpose by taking the oath prescribed by Art. 84, but a court competent to proceed with the *preliminary* business. This business is of two kinds—(1) that which may be transacted before the accused appears or in his absence,—(2) that which can be transacted only in the presence of the accused.

**BEFORE THE INTRODUCTION, OR IN THE ABSENCE, OF THE ACCUSED—Settlement of questions of precedence.** In the great majority of cases, no business whatever is found to be required to be transacted by general courts-martial at this stage, the occasions for such business being removed by the previous proper revision of the charges, framing of the convening order, &c., at headquarters. From time to time, however, an error in such order, caused by a misconception of the relative rank of members, may give rise to a question of precedence on the court. The order itself can of course be amended only
237 by the convening authority; but a slight error of the kind indicated, such for example as may occur from mistaking the date of a commission, may

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[23] "At other times," (*i. e.*, other than occasions of clearing for deliberation,) "except to those persons who have been summoned as witnesses, a court-martial is open to the public, military or otherwise, subject to the capacity of the room or tent in which it is held, and the convenience of the court and parties before it." Simmons § 454. And see Clode, 135–6; De Hart, 94; DIGEST, 318.

[24] See Clode, 139; Hough, (P.) 778; De Hart, 109. In some cases the court has made a special order on the subject early in the proceedinga. See Gen. Whitelocke's Trial, p. 7; Lt. Col. Johnson's do., p. 3; Col. Quentin's do., p. 349; Capt. D. Porter's do., p. 377; Capt. Hurtt's do., p. 5. In the first-named case the reason was assigned that otherwise subsequent witnesses would be advised as to what previous witnesses had testified. On Gen. F. J. Porter's Trial, p. 31, the judge advocate having called the attention of the court to the fact that the testimony as published in the newspapers contained gross errors, the court cautioned the reporters present against a continuance of the same. In U. S. *v.* Holmes, 1 Wallace, Jr., 10–11, it was announced on the trial by Mr. Justice Baldwin:—"We have the power to regulate the admission of persons and the character of proceedings within our own bar. * * * No person will be allowed to come within the bar of the court for the purpose of reporting, except on condition of suspending all publications till after the trial is concluded." But at *military* law, a publication, after an order by a court-martial prohibiting it, would not be punishable as a contempt. See Chapter XVII.

The right to prohibit publications does not authorize the seizure by the court of notes taken in violation of its order. In the case of Ricketts *v.* Walker, Calcutta, 1841, (Hough, P., 718; Manual, 162, note,) a reporter recovered nominal damages against the president of a court-martial for causing the forcible seizure of his notes, which he had continued to take after being ordered to desist.

often be amicably corrected by the members themselves in their taking their proper places without waiting for the formal modification of the order. Where the error is less simple, as where its correction will require a construction of the law by the convening officer, the proper course will be to refer to him the question involved for his determination. Now that brevet rank is no longer operative on courts-martial, questions of precedence are less common than formerly. The most recent question of any importance of this class was whether an officer, while acting as aid-de-camp of the General or Lieut. General, should sit on a court according to his increased rank as such or the inferior rank of his actual military office; and it was held by the Judge Advocate General,[25] and the Attorney General[26] concurring with him, that the former, as being the legal rank of the officer at the time, should determine his relative position on the court.

**Questions as to the sufficiency of the charges.** On looking over the charges in the case to be tried, copies of which will properly have been laid before the members by the Judge Advocate, the same may be found by the court to be so clearly defective upon their face as properly to call for revision before trial.[27] As already pointed out, the court has at this stage no authority of itself to make or direct to be made any material modification of the charges. If, therefore, the necessity for such modification is obvious, the court will at once communicate on the subject with the convening commander, with a view to having the proper correction or re-framing ordered. Or if the judge advocate has already been authorized by such commander to make, with the concurrence of the court, such amendments of the pleadings as may be found desirable, the required changes may be made forthwith.

**Other questions.** The court at this stage may also entertain any serious
238 consideration—suggested by the form or contents of the convening order, or by the charges, or the two together—affecting its own legality or powers as a military body. But unless the defect be a *palpably fatal* one, which, if not corrected, will clearly invalidate the proceedings, the court will not in general, of its own motion, raise an objection calling in question the original authority of the commander, or its own right to exist or to try, but will leave the same to be regularly raised by the *accused*, as presently to be indicated.

**AFTER THE INTRODUCTION OF THE ACCUSED, AND BEFORE THE COURT IS SWORN.** The principal preliminary business of the court at this stage will consist of—1. Entertaining objections by the accused to further proceedings; 2. Entertaining objections by way of challenge to individual members.

1. At this point the accused, being present, may properly raise, (and the court may properly hear and determine,) any objection going to the legal existence of the court or its authority to proceed further in the case. Thus he may object that the court has not been legally constituted or composed, or that it is without jurisdiction either of the person or of the offence or offences charged. Till the charges are regularly before the court, upon the arraignment, an objection to these or to the power of the court to try them, would be premature. But the present stage is an appropriate occasion for raising, arguing and passing upon exceptions to the court as constituted or composed, such exceptions being of a radical character. What objections of this class would be valid and final has already been indicated in the Chapters on the Constitution and Composition of General Courts. The Chapter on Jurisdiction has also exhibited the

[25] DIGEST, 146.
[26] 16 Opins., 551. As to the right of precedence, on courts-martial, of assistant surgeons with the rank of captain, see DIGEST, 176.
[27] See Simmons § 457; De Hart, 111.

grounds on which could be based exceptions to the authority of the court to try the accused. These classes of preliminary objections need not therefore be further considered. It will be sufficient to remark that, in case any of the objections referred to be interposed by the accused and sustained by the court, the president[28] will properly communicate the facts to the convening authority for such action as he may deem expedient.

2. Whether or not any exceptions to the court as a whole be taken at this stage,—and such exceptions are comparatively rare,—this time is the
239 proper one for offering objections to the members by way of *challenge* under the 88th Article of war. The subject, however, of such objections, being an extended one, will best be considered in a separate Chapter.

## IV. INTRODUCTION OF ACCUSED.

**CASES OF OFFICER AND SOLDIER DISTINGUISHED, &c.** The court having no control over the person of the accused outside the court-room,[29] the accused—if an officer—will be conducted to the presence of the court by the adjutant, officer of the day, or other officer detailed for the purpose; or he will be ordered by the proper superior to appear before the court, or to report to the judge advocate for trial; or, (as where not in arrest,) he will appear voluntarily when notified of the time and place.[30] The first form is not commonly resorted to except in a case of close arrest. An enlisted man is usually sent, by the officer of the guard or adjutant, to the court-room under guard, his guard being directed to report to the judge advocate. In the case of a non-commissioned officer a guard may be dispensed with. Upon an adjournment, the accused is remanded, or reverts, to the custody, control, or status which he was under when first introduced.[31] Whether officer or enlisted man, the accused should appear before the court in uniform; officers and non-commissioned officers without their side-arms or sashes.[32]

**PRISONER NOT TO BE INTRODUCED IN IRONS.** The accused should not be introduced with hands or feet fettered, and if he has been previously confined in irons these should be taken off before he is brought into the court-room,—unless there be reasonable apprehension of an attempt to escape, or of violence on his part, or of a rescue. It is a principle as old as the common law that, except where such apprehension is entertained, the prisoner, at his arraignment, should be free in all his limbs before the court, so that he may be in
240 no manner hampered in making his defence.[33] In the practice of courts-martial, inasmuch as the accused is introduced into the court before arraignment in order to be afforded an opportunity to exercise the right of

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[28] See DIGEST, 318 § 17.

[29] Simmons § 356, 473; De Hart, 113; DIGEST, 314.

[30] At the opening of Gen. Hull's trial it is stated, (p. 3,) that the accused appeared "accompanied by an aid-de camp."

[31] Simmons § 473.

[32] See G. O. 29, Dept. of the South, 1872. But see Circ. No. 9, (H. A.,) 1890, as to the clothing to be worn by a *deserter*, "until after the determination of the trial," &c.

[33] "Every person, at the time of his arraignment, ought to be used with all the humanity and gentleness which is consistent with the nature of the thing, and under no other terror or uneasiness than what proceeds from a sense of his guilt and the misfortune of his present circumstances; and therefore ought not to be brought to the bar in a contumelious manner, as with his hands tied together or any other mark of ignominy and reproach, nor even with fetters on his feet, unless there be some danger of a rescous or escape." 2 Hawkins, c. 28, s. 1. And see 2 Hale, 219; Layer's Case, 16 How., St. Tr., 101, 129; Rex *v.* Waite, 1 Leach, 28; 1 Bishop, C. P. § 731, 955; Tytler, 220; Kennedy, 41; Simmons § 473; De Hart, 113; DIGEST, 334–5; People *v.* Harrington, 42 Cal., 165; G. O. 52, Dept. of the East, 1869; Do. 47, Dept. of Dakota, 1871.

challenge, this privilege of freedom from physical restraint is allowed him and enforced by the court from and after his first appearance, throughout the trial.

**DISPOSITION OF ACCUSED WHEN NOT PRESENTABLE, OR ILL, &c.** If the accused makes his appearance improperly dressed, or in a dirty or unkempt condition, the court may require him to be removed and returned with the neglect remedied. If he is intoxicated, he should not be allowed to be arraigned till he is sober. If he be ill, and unable to leave his quarters or the hospital—a fact which should properly be shown by a medical certificate—the court will ordinarily adjourn to a day on which he can probably appear in a condition to plead and defend.

## V. ADMISSION AND STATUS OF COUNSEL.

**PROPER TIME FOR ADMISSION.** It is upon the original introduction or appearance of the accused that his counsel will properly be admitted, if he make application to the court for the purpose.[34] Hughes[35] fixes the proper time for such application as after the plea; De Hart as after the court has been sworn, though he adds that the privilege "may be allowed at any time."[36]

241 It is obvious that, prior to the organization of the court, counsel may be of material assistance to the accused, especially in the presenting of objections to the authority of the court to proceed with the trial, and in the offering and maintaining of challenges: it is at this early stage, therefore, that counsel will most advantageously be admitted.

**THE ADMISSION A PRIVILEGE, NOT A RIGHT.** General Order, No. 29, of 1890, now requires commanders of posts, where general courts-martial are convened, to detail, at the request of an accused, a "suitable officer" as his counsel, if practicable. But in general it is to be said that the admission of counsel for the accused in military cases, is not a right but a privilege only,[37] but yet a privilege almost invariably acceded and as a matter of course;[38] and this whether the counsel proposed to be introduced be a military or civil, professional or unprofessional person.

But being a privilege, it is subject to be restricted by the court. Thus while an adjournment will in general be had, or a continuance be granted, to afford the accused an opportunity to procure suitable counsel, the court will not delay beyond a reasonable time for such a purpose,[39] and at a period of war or other public emergency, when immediate action is called for, may even refuse to delay at all. So the court may sometimes properly decline to admit the particular person offered as counsel,—as where he is an attorney who has been prohibited on account of misconduct from practising in the executive departments, or an officer dismissed for cowardice or fraud and with whom officers are precluded from associating by the 100th Article of war, or a person of notoriously

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[34] A court-martial has no authority to *assign* counsel. The court, however, or judge advocate, will properly advise an ignorant soldier of his privilege to be assisted by counsel if desired. But see G. O. 29 of 1890, cited in text, *post*.

[35] Page 53.

[36] Page 132.

[37] See 1 McArthur, 44; Hough, (A.) 38; Kennedy, 95; Hughes, 53; Macomb, 47; Benét, 94; Digest, 199. *Contra*, De Hart, 318. And see Tytler, 251.

[38] Art. VI. of the Amendments to the Constitution provides that "in all criminal prosecutions" the accused shall "have the assistance of counsel for his defence." The reference here is to prosecutions before the *criminal courts of the United States*, only. Barron *v.* Mayor of Baltimore, 7 Peters, 243; Ex parte Watkins, Id., 573; Twitchell *v.* Com., 7 Wallace, 326; Edwards *v.* Elliott, 21 Id., 557; Walker *v.* Sauvinet, 92 U. S., 90; Pearson *v.* Yewdall, 95 U. S., 294; 1 Bishop, C. L. § 725; Wharton, C. P. & P. § 920. Military courts, however, though not bound by the letter, are within the *spirit* of the provision.

[39] Digest, 110, 311; G. C. M. O. 25 of 1875.

242 bad character, or who is otherwise clearly exceptionable.[40] Further, the court may exclude a counsel guilty of disrespect or other improper behaviour in its presence, or who unreasonably delays the proceedings by repeated technical objections, although such behaviour may not be of a sort made punishable by Art. 86.[41] But where counsel is thus excluded the court will ordinarily allow the accused a reasonable time for procuring other counsel if he desire it.

**STATUS OF COUNSEL.** The strict rule which usage formerly prescribed in regard to the action of counsel on military trials, and especially enforced as against professional counsel, was such as to render their position embarrassing if not indeed humiliating. By this rule they were precluded from all *oral* communication, not being permitted to examine witnesses *viva voce*, or to address the court by statement, motion, or argument, but being required to express themselves either through the accused or in writing.[42] In his recent edition of 1875, (§ 476,) Simmons states that there has not been "any relaxation of the well-established rule of courts-martial as to the silence of professional advisers and their taking no part in the proceedings. On the contrary it has been felt," he adds, that such courts should be "more than ever 243 on their guard to resist any attempt to address them on the part of any but the parties to the trial." But the more recent radical reconstruction of the British military law has done away with the previous usage in this regard; and in the Rules of Procedure (§ 87) it is declared that the counsel both of the prisoner and of the prosecutor at a military trial shall have the same right as the party for whom he appears to call and orally examine and cross-examine witnesses, as well as to make objections and statements, put in pleas, and address the court.

As to the practice before courts-martial of the United States,—while the doctrine in question is quite strictly laid down in the treatises and in sundry Orders, the actual procedure has become much more indulgent and reasonable; not merely military but professional counsel being in general permitted to examine the witnesses and address the court without objection on the part of the members. Occasionally indeed the old rule is insisted upon at the outset, though relaxed later; but more frequently much the same license is allowed at all stages as at an ordinary criminal trial, subject, however, to a restriction of the privilege when counsel by their prolixity, captiousness, disrespectful manner, or other objectionable trait, fatigue or displease the court.[43] Thus, in prac-

[40] In G. O. 73, Dept. of the East, 1865, the admission of a regimental commander as counsel for a member of his regiment, before a court composed entirely of officers of the regiment, was commented upon as improper.

[41] A counsel who was a military man would be liable to charges and trial under the circumstances. See the two cases of officers tried for improper conduct while acting as counsel, published in G. C. M. O. 37 of 1873; Do. 5, Dept. of the Platte, 1874.

[42] No rule of military procedure has been more strictly insisted upon than this. See Tytler, 251; Delafons, 166; Hough, 673; Kennedy, 95; Napier, 93; Hughes, 53; Hickman, 74; Franklyn, 49; Gorham, 39; Macomb, 30; O'Brien, 236; De Hart, 132, 318; Gilchrist, 16; Gen. Hull's Trial, 14; Capt. Thomas Howe's Trial, 253; G. O. 7, 16, Dept. of the Mo., 1862; Do. 52, Dept. of the Pacific, 1865; Do. 52, Dept. of the Cumberland, 1868; Do. 32, Dept. of the Gulf, 1875; G. C. M. O. 113, Dept. of the East, 1871. This doctrine was carried so far in the British practice that professional counsel were not even allowed to read to the court the concluding defence or statement of the accused. Simmons § 586, and other authorities above cited; also Gen. Whitelocke's Trial, 763; Lieut. Hyder's Trial, 106. Warren, (p. 153,) complains that, when acting as counsel before a court-martial, he was permitted only to communicate in whispers with his client!

[43] In some of the cases in which the old rule was enforced, the counsel had either used "scurrilous" language, or had taken up time with inappropriate pleas or motions. See G. O. 16, Dept. of the Mo., 1862; Do. 52, Dept. of the Cumberland, 1868; Do. 32, Dept. of the Gulf, 1875; G. C. M. O. 7, Dept. of the Mo., 1888.

tice, the old rule is mainly held in reserve, to be enforced by the court at its discretion in exceptional cases. Objection to the reading of the final address, or to a closing oral or written argument by the counsel, is now of the rarest occurrence.[44]

**HIS RELATION TO ACCUSED AND COURT.** A properly qualified
244 counsel will of course do his full duty toward the accused while preserving by his deportment the respect of the court. He will only assist the accused in his plea, in the making of such motions as may be desirable, in the production, examination and cross-examination of witnesses, in the adducing of the necessary written evidence and the testing of that offered by the prosecution, and in the statement or argument. Counsel *detailed*, under the G. O. of 1890, above mentioned, have in some instances discovered a tendency to render their services in a perfunctory or imperfect manner.[45] When this appears, and the court is of opinion that the defence of the accused is not being properly presented, it may well adjourn and request the post commander to assign new counsel. Detailed counsel have also in some cases manifested an undue independence toward the court, not treating it with proper courtesy, and, in their arguments commenting disrespectfully upon its rulings.[46] Indifference to the interests of the accused, or a lack of deference toward the court, is, as remarked in a recent Order,[47] "incompatible with a faithful and efficient discharge of the important trust confided" to counsel.

**COUNSEL FOR PARTIES OTHER THAN THE ACCUSED.** The subject of the employment of counsel *to assist the judge advocate* will be remarked upon in Chapter XIII. Where the *prosecuting witness* is properly required to be present during the trial, counsel may be permitted to attend him if he desires it. Such attendance is not of frequent occurrence, but has been acceded to in sundry cases of unusual importance. Whether counsel to represent *other persons interested in the investigation* may be admitted should depend mainly upon their relation, if any, to a recognized "party" in the case, but is a matter in the discretion of the court. In the leading case on the subject, that of Commander Mackenzie of the navy, in which such admission was applied for,—*viz.* by two counsel, (representing the relatives of the officer executed by order of the accused,) who asked to be allowed to be present, independently, at the trial and examine and cross-examine the witnesses, &c.,—the application was
245 denied by the court. In the army such counsel might perhaps have been admitted on the applications of, and to assist, the judge advocate, or prosecuting witness, if any, but scarcely otherwise.

## VI. THE CLERK AND OTHER ASSISTANTS OR ATTENDANTS.

Here may be noticed the minor *personnel* of a military investigation, such as reporters, clerks, interpreters, guards, orderlies, and—where specially authorized—provost-marshals.

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[44] See G. O. 7, Dept. of the Mo., 1862; Do. 7, Id., 1888; Do. 52, Dept. of the Pacific, 1865; also Gen. Porter's Trial, (1862.) In the history of military trials some very able arguments have been delivered by legal counsel; such, for example, as those of Hon. T. H. Benton on the trial of Lt. Col. Fremont, of Hon. Reverdy Johnson on the Assassination Conspiracy Trial, of Jas. T. Brady on the trial of Beall, and of D. D. Field on the court of inquiry in the case of Gen. A. B. Dyer. The ability of the arguments of counsel before French *conseils de guerre* has been especially marked; as for instance the argument of Berryer on the jurisdiction of the court in the case of Marshal Ney, and that of Lachaud on the merits at the trial of Marshal Bazaine.

[45] G. C. M. O. 31, Dept. of the Colorado, 1893; Do. 66, Dept. of the Platte, 1893.

[46] G. C. M. O. 66, Dept. of the Platte, 1893; Do. 24, Dept. of the Columbia, 1894.

[47] Gen. Brooke, in the Order of his Department above cited.

**REPORTERS.** The appointment of the official "reporter" being specially devolved by statute—Sec. 1203, Rev. Sts.—upon the Judge Advocate, his duties, &c., will be remarked upon in Chapter XIII. The authority for his employment is indicated, and his compensation fixed,[48] in pars. 1046 and 1047 of the Army Regulations. The oath of the reporter is prescribed in Circular, No. 12. of 1892.

**CLERKS.** It is declared in the Army Regulations, par. 1046, that—"The convening authority may, when deemed necessary, authorize the detail of an enlisted man to assist the judge advocate of a general court-martial in preparing the proceedings of the court." In a case of special difficulty, or where a protracted trial is involved, an increased number of enlisted men may be detailed as clerks. Such employment does not entitle to "extra" or additional pay. Par. 1048, A. R., directs—"no person in the military or civil service of the government can lawfully receive extra compensation for clerical duties performed for a military court." Either the judge advocate, or the accused, may employ, but at his own expense, a civilian clerk to attend and assist him at the trial. The annual Appropriation Acts no longer, as formerly, provide for "compensation of citizen clerks."[49]

Clerks, unlike reporters, are not required to be sworn.

**INTERPRETERS.** Where any of the proposed witnesses are foreigners
246 who cannot speak our language, or who speak it imperfectly, a competent person is procured by the judge advocate to act as an interpreter on the trial.[50] Interpreters, in our practice, are summoned and paid as witnesses,[51] and sworn as such.[52] Where a regular interpreter has not been obtained, one of the witnesses present may, if competent, be used as an interpreter of the testimony of the others;[53] or a bystander or even one of the court may be resorted to. In an important case, the accused may properly have summoned for him a person as interpreter, by means of whom to correct the translation of an interpreter summoned on the part of the prosecution.[54]

**ORDERLIES, GUARDS, &c.** The necessary attendant or attendants—orderlies, messengers, or guards—will properly be furnished, from the enlisted force present, by the post or local commander, on the application of the judge advocate, whose business it will be to act as messengers for the court and judge advocate, protect the court from disorder, guard public property in the court-room, &c.

**PROVOST-MARSHALS.** In cases of special consequence, involving unusual details of administration, the convening authority, if he deem it expedient, may detail an officer as *provost-martial*, whose duty it will be to serve subpœnas, attachments and notices, take charge of prisoners and witnesses, enforce order in the courtroom, and otherwise execute the mandates of the court and direc-

[48] For the payment of such compensation appropriation is annually made by Congress. See next note.

[49] The only appropriation now is—"For compensation of reporters and witnesses attending upon courts-martial and courts of inquiry, &c." Act approved Feb. 12, 1895.

[50] Interpreters are not often required in our practice. The British authorities, especially with reference to their employment in India, are much more full than ours in regard to the qualifications, &c., of interpreters. See Simmons § 477–479; McNaghten, 137; Gorham, 40; Jones, 68; Rules of Procedure, 27 (D,) 71 (A,) (C.)

[51] Par. 1049, A. R. Where exceptional service is required of an interpreter he may perhaps be further compensated out of the fund appropriated for the contingencies of the army.

[52] The form of oath to be administered to an interpreter is set forth in Circ. No. 12, (H. A.,) 1892.

[53] People *v.* Ramirez, 56 Cal., 533.

[54] O'Brien, 259–260.

tions of the judge advocate. The attendance, however, of such an auxiliary official, though apparently not unfrequent in the British practice[55] has,
247 with us, been more commonly resorted to before State militia courts[56] than before courts-martial of the United States. At the trial of the Conspirators against the life of President Lincoln, &c., in 1865, a "special provost-marshal" was assigned to attend the commission.[57] During the late war provost-marshals were frequently appointed or detailed as executive officials,[58] but, though sometimes acting as judges of provost courts,[59] they were rarely employed in connection with general courts-martial.[60]

[55] See Simmons, § 490. At an early period he executed sentences, and, originally, appears to have been an officer of the Marshal's Court. Grose, 59, 73.

[56] See Maltby, 125; The Militia Reporter, pp. 9, 106, 159, 249; Trial of Lt. Col. Bache, (Pa. Militia,) p. 4.

[57] DIGEST, 315, note.

[58] Provoat-marshals were appointed under the Conscription Act of March 3, 1863, as agents for enforcing the draft, arresting persons avoiding or obstructing the same, &c., under the orders of a Provost Marshal General. Besides these statutory officials, officers of the army were *detailed* to act as provost-marshals for the performance of multifarious duties in the large commands. Every duty indeed which did not clearly fall within the specialty of some particular branch of the service seems to have been devolved upon this invaluable class of officers. Among their occupations may be noted the arresting of marauders, stragglers, deserters, soldiers without passes, spies, disorderly persons, persons violating the laws of war, prisoners of war without paroles, &c., the supervision of paroled prisoners, execution of sentences of death and imprisonment, the examination of deserters from the enemy, the control of the business of sutlers and other trades, the issuing of passes and permits, the care of refugees and freedmen, the charge of captured property, the administering of oaths of allegiance, the regulation of the delivery of the mail and express packages and of the circulation of newspapers, the protection of private property, protecting elections, &c. Among the many Orders prescribing their duties, the following may be cited: G. O. 60, 188, Army of the Potomac, 1862; Do. 10, Id., 1863; Do. 35, Dept. of the Mo., 1862; Do. 22, Dept. of the South, 1864; Do. 146, Dept. of the Gulf, 1864; Do. 23, Dept. of Kans., 1864; Do. 4, and Circ. 3, Dept. & Army of the Tenn., 1864; Do. 65, Dept. of La., 1865; Do. 1, Dept. of Miss., 1865; G. Field O. 3, Army & Dept. of West Miss., 1865; Circ. 12, Dept. of Va., 1865.

The provost-marshal is still recognized in the military code—in Art 67—as an officer who may have charge of prisoners. See Chapter IX.

[59] These *war* courts are remarked upon in Part II.

[60] Gen. Wilkinson, Memoirs, vol. 1, p. 75, expresses the opinion that a court-martial "ought always to be attended by orderly officers and a guard, proportioned to its rank and the solemnity of the inquiry, for the preservation of order and the maintenance of decorum, the escort of prisoners, and the service of precepts."

# CHAPTER XII.

## THE PRESIDENT AND MEMBERS.

248 It is with the appearance of the accused that the capacities, individually and relatively, of the other persons concerned in the proceedings begin to have the special significance which they carry through the trial. It will be well therefore to consider here the peculiar functions of the President and Members, and then of the Judge Advocate.

### THE PRESIDENT.

**WHO HE IS.** In the British law, the president of a general court-martial is a distinct official appointed as such separately from the other members. In our law, prior to 1828, he was in general expressly detailed as such. Since that date he has been simply the *senior member*, and a specific designation of an officer as president, though found in some early cases, is now never made in Orders convening military courts in our service.[1]

The senior in rank of the officers named in the convening order, if present at the assembling of the court, becomes president; if not present, the senior of those who *are* present presides, till a senior to himself arrives or is added to the court. If the presiding officer is removed by any casualty, or is relieved, or absents himself, the senior in rank of the members remaining succeeds him. Throughout the trial it is the senior for the time being who presides. If a junior member is promoted in the army above the senior pending the trial, such member becomes president.[2] It is immaterial what may be the
249 actual rank of the senior,[3] or to what branch of the service he belongs: he is president solely because of his seniority in rank in the army to the other members.

**HIS FUNCTIONS—AS PRESIDING OFFICER.** The only *statutory* function assigned to the president by our law is that of administering the oath to the judge advocate, required of him by the 85th Article of war. The Army Regulations, par. 1005, (employing the language of the Secretary of War in the case of Lt. Col. Backenstos,[4]) declare that—"The president of a court-martial, besides his duties and privileges as a member, is the organ of the court to keep order and conduct its business. He speaks and acts for the court in each instance where a rule of action has been prescribed by law, regulations, or its own resolution." According to the function here assigned him, the president opens

[1] See par. 1004, A. R.

[2] The fact of his promotion and of his taking his seat accordingly as president should be formally entered in the record of trial on the day on which it takes place.

[3] In the British law, the president of a general court, (except in certain special cases,) "shall not be under the rank of a field officer." Army Act § 48, (9.)

[4] See G. O. 14 of 1850, also cited *post*.

the court and calls it to order; announces it adjourned at the close of the session, when adjourned by vote of the majority, or at the hour required by Art. 94; preserves order during the session, checking anything like disorder or indecorum on the part of the members of the court, the judge advocate, the accused, the counsel,[5] the witnesses, or the audience, while at the same time seeing that the rights of every one entitled to consideration are respected;[6] conducts the routine of each day, calling for or announcing the proper proceedings in turn, and takes care that the regular forms of business are duly observed. In the absence of objection, he may direct as to the more familiar points of order and procedure, and will properly take the formal action incidental to the deliberation of the court—such as the submitting to the court of a proposition or motion by a member,[7] the ordering of the courtroom to be cleared when requested by a member, or voted, or when required by law, the declaring of the decision
250 of the court after deliberation had, &c. So, in the absence of objection, or where the acquiescence of the court is to be presumed, he may give assent to a member or the judge advocate leaving his seat for a temporary purpose, to a brief consultation between the accused and his counsel, or other slight matter of indulgence or comity. But in such and all other cases in which he acts as presiding officer, he simply acts for and in the name of the court. Other than as its representative and mouthpiece he has no separate authority. He can make no ruling as to testimony or otherwise, and can announce a ruling only as a conclusion of the court. He can neither act independently of the court,[8] nor can he act against the will of a majority of the court.[9] On the other hand he cannot trench upon the authority of the Commander—as by excusing a member from attendance,[10] &c.

**AS A MEMBER.** In deliberating, voting, and on all occasions of judicial action, the president, in our law, simply counts as a member. As a member he is but the equal of the other members.[11] Upon a question or issue raised he may state his views like any other member, but it is for the *court*, by a majority, to decide.[12] In the British service, "in the case of an equality of votes on the sentence, or any question arising after the commencement of the trial except the finding," the president is given a casting vote.[13] In our law he has no casting vote on any occasion, his vote counting for no more than the vote of any other member.

**AS CHANNEL OF COMMUNICATION WITH THE COMMANDER.** As the official organ of the court it is through him that communications from the convening or reviewing officer should in general be made to the court,
251 and by him that the court should communicate with that authority. As

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[5] Note in this connection the 1st Specification in G. O. 37 of 1873.

[6] "He is responsible that every person attending the court is treated with proper respect." Jones, 70. And see Gorham, 33.

[7] The president is not authorized to decide that a proposition advanced by a member shall not be submitted to the vote of the court. G. C. M. O. 55, Dept. of the Mo., 1884.

[8] As by assuming of himself to revise the record. See DIGEST, 679.

[9] See G. O. 14 of 1850, in which the action of Lt. Col. Backenstos, in assuming as president to adjourn the court against the vote of the majority, is condemned as wholly unauthorized and irregular. In Orders of the Dept. of Dakota, (G. C. M. O. 89, 165, of 1882,) the point is noticed that the president is not authorized to appoint a day to which the court shall adjourn or the trial be continued, or to change the day which has been fixed by the court.

[10] See G. O. 2, Dept. of the Mo., 1862.

[11] See par. 1005, A. R.

[12] G. C. M. O. 55, Dept. of the Mo., 1884.

[13] Army Act § 54 (8.)

Jones[14] writes of the same official in the British law:—"He is the channel of communication between the court and the convening authority." With us also this is deemed to be the regular and official course, though the judge advocate has not unfrequently been made the medium.[15]

**AS A SOURCE OF COMMAND.** The president of a court-martial has no command as such. He cannot, as such, issue an *order*, properly speaking, to a member or the judge advocate, or to any other military person present. A failure, however, to comply with his reasonable and proper directions in keeping order and conducting the business of the court, while it will not subject the delinquent to a charge of disobedience of orders in violation of Art. 21, will render him amenable to trial under Art. 62. It is the duty of the president to call upon members who have absented themselves from a session, or part of one, for an explanation of such absence, but in such requirement, or any other which he may properly make, he does not act in the capacity of commander, and if his requirement is not duly complied with he can only report the fact to the convening authority for *his* action.[16]

**AS AUTHENTICATING OFFICER.** The Army Regulations, par. 1037, direct that the president of a court-martial shall, (with the judge advocate,) authenticate its record by his signature in each case. These acts must be performed by the member who is the senior in rank of the members present at the completion of the proceedings, although during all the proceedings prior to the final another officer may have been senior and president. The *form* of his authentication will be indicated in treating of the Record.

## THE MEMBERS.

**A MAJORITY TO GOVERN.** We have seen that the law gives to each
252 member, the president included, an equal voice, and it is to be added that all questions and issues, which are required to be passed upon by the court in the course of the proceedings, are decided by a majority vote. This general rule applies to the questions which arise upon the finding and in the adjudging of the sentence equally as to the questions and issues raised by challenges, special pleas, objections to testimony, applications for continuance, motions and other interlocutory proceedings; and to questions raised by or among the members themselves equally as to those raised on the part of the accused or judge advocate. The only exception to the rule is that prescribed by Art. 96—that a two-thirds vote shall be required to adjudge a capital sentence. But the finding of guilty which must precede such a sentence may be arrived at by a majority as in all other cases.

**TIE VOTE.** All the members must vote where a vote is required, but a tie vote, when they are of an even number, is no vote, or rather is not a majority and can have no effect as such. That is to say, a proposition upon which the vote is a tie is not carried. The application of this principle to the finding and sentence will be illustrated hereafter.

**MODE OF VOTING.** As to the manner of voting the only provision of the written law is that of Art. 95, that:—"Members of a court-martial, in giv-

[14] Page 70. And Gorham, (p. 33,) observes:—"The president acts in the name of the court *in correspondence.*"

[15] "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." DIGEST, 318.

[16] G. C. M. O. 28, Dept. of Texas, 1884.

ing their votes, shall begin with the youngest in commission," *i. e.* the junior member. The main object of this provision, which, taken from the then existing British code,[17] first appeared in our original Articles of 1775, appears to be to secure the members junior in rank from being influenced in their opinions by the views of their seniors. "In no other way," observes Clode,[18] "could this freedom be secured." The form and rule of voting which usage has prescribed in deliberating upon the Judgment will be noticed in a subsequent Chapter.

253 **THE MEMBERS TO ACT AS A UNIT.** Whatever may be the personal opinions of individuals, and however slight may be the majority by which a result is arrived at, the members in their decision and action must be and appear as a unit. That this is required is but an illustration of the principle that all military action must, as far as practicable, be summary, final and conclusive. Thus a ruling upon a plea or exception is the ruling not of such members as have concurred in it, or of such a majority, but of the court; a finding is the finding of the court, a sentence is the sentence of the court—as a unit. The law ignores differences of opinion—majorities or minorities—*in the result*, and even prohibits the disclosure of the votes and opinions by which such result has been attained. With the civil tribunals a majority of the judges pronounce the judgment of the court, but who constitute the majority is made known, and the minority may, and often do, express their dissenting views.[19] With military courts all dissent is merged and lost in the conclusion reached, whatever it may be, of the court, which thus, to the parties, the public and the readers of its record, appears as an integral and indivisible whole. In view of this principle, no act performed by a part of the court can be legal,[20] nor can an individual member be permitted to take any official action independently of or counter to the court. Thus a member or members cannot legally enter upon the record a *protest* against a ruling or judgment of the majority, *i. e.* the court, even though the same may be in fact erroneous or unjust. So, the president or a member cannot, on a revision, correct an error in the recorded proceedings, but the correction must be made as the act of the court. Individual members may make, independently or in combination, a recommendation to clemency, but this is because the same is a *personal* act, not an official proceeding of the court. These illustrations of the general principle will be separately recurred to hereafter.

254 **NOT TO ASSUME INCOMPATIBLE FUNCTIONS.—STATUS AS A WITNESS.** For example, a member, while acting as such, cannot, at the same time, properly act—even temporarily and briefly—as judge advocate, in recording the proceedings or otherwise,[21] Nor can he, while remaining, *i. e.* without being duly relieved as, a member, act as counsel for the accused.[22] He may indeed, without affecting the legality of the proceedings, testify as a *witness*, even where there are including himself but five members present, since, in so doing, he is not disqualified as, and does not cease to be, a member.[23] But, except when called to testify merely as to character, it is most undesirable that a member should be placed in the position of a material witness upon a

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[17] See Art. VII of Sec. XV, of 1765, in Appendix. Its original is found in the "English Military Discipline" of James II. See Appendix.

[18] Mil. Law, 150. And see, to a similar effect, 2 McArthur, 259; Tytler, 151–2; De Hart, 175.

[19] So, where *juries* disagree, the numbers on either side are commonly (though generally irregularly and improperly) made public.

[20] See Simmons § 530.

[21] See G. O. 2, Dept. of the Platte, 1868.

[22] G. C. M. O. 62, 1874; G. O. 134, Dept. of the Mo., 1863; Do. 119, Id., 1867; Do. 29, Dept. of the Lakes, 1870.

trial where he is to act as a judge. In this connection Gilchrist[24] observes:—"If it is ascertained previous to the assembly of the court, that the evidence of an officer nominated on a court-martial is required, he should be immediately relieved; and if a member, after taking his seat and being sworn in, is called on to depose to facts, justice demands that he should not resume his seat as a member, to decide on evidence he has himself given." So, in a General Order during the late war,[25] the appearing as a witness by a member is disfavored "for the reason that the facts to which he deposes must to some extent be colored with his opinions," and because, when he resumes his seat, he will have "to decide between the degrees of credit to be given to the testimony of other witnesses as compared with his own." But some exigency of the service, or the fact that a small number of officers are available for court-martial duty, will now and then prevail against considerations of this character, and require that an officer personally informed of the facts of the case to be tried should be placed upon the detail and remain upon the court.[26] In such a case it is better that the officer should testify openly as a witness on the stand subject to cross-examination than that he should be exposed to the temptation of com-
255 municating his knowledge to his fellow members in closed court—a proceeding wholly condemned at military law.[27]

**ABSENCE OF MEMBER FROM COURT.** The detailing of an officer as a member of a court-martial is an *order* requiring him to attend and act as such: moreover when an officer has been so detailed for a trial, the accused has a certain right to his presence, if not duly excused or prevented by some sufficient cause from attending.[28] It is clear that a member cannot declare himself to be ineligible, or on any other ground excuse himself from attending;[29] and further that, if not formally relieved by a proper superior, or regularly excluded upon challenge, he can be excused only by illness, or some stringent and for the time insuperable casualty or emergency.[30] When prevented from attending by sick-

[23] Digest, 496, 750–1; Sullivan, 58; Simmons § 511, 947; Clode, M. L., 127–8; G. O. 11, Dept. of the N. West, 1864. And compare People *v.* Dohring, 59 N. Y. 374, 377, where, one of the judges necessary to complete the court having testified as a witness at the trial, it was held that—his "mere absence from the bench, while he was in the witness-box, did not affect the jurisdiction of the court." On Gen. F. J. Porter's trial, Brig. Gen. King, a member of the court, testified as a witness on the merits for the prosecution, without objection by the accused. Printed Trial, p. 203–205. On the trial of Lieut. Devlin of the Marine Corps, in 1852, three of the nine members of the court testified as witnesses on the merits.

[24] Duties of a Judge Advocate, p. 9.

[25] G. O. 11, Dept. of the N. West, 1864.

[26] That is to say, if not challenged off, as he properly may be if his knowledge has in fact prejudiced his mind. See Chapter XIV.

[27] Simmons § 947; Griffiths, 112; Maltby, 68. That a *finding* cannot legally be based upon the individual knowledge of a member—see Chapter XIX.

[28] See G. O. 4, Div. Atlantic, 1874.

[29] See G. O. 66, Dept. of the Platte, 1871; G. C. M. O. 12, Dept. of Arizona, 1893. In a case in Do. 2, Dept. of Texas, 1894, where one member excused himself from attending the court on a certain trial, on the ground that he had other more important official business to attend to, and another that he desired to be present at the payment of his company, their action was properly emphatically condemned by the Department Commander.

[30] G. O. 60, Dept. of the Platte, 1871; G. C. M. O. 4, Dept. of Cal., 1890; Do. 2, Dept. of Texas, 1894; Circ. No. 12, Dept. of the Columbia, 1890. That a member was attending a post council of administration has been held an insufficient excuse, for the reason that the attendance on the general court-martial, enjoined as it was by a superior commander, was a paramount duty. G. O. 10, Dept. of the Lakes, 1867. So it was held an insufficient excuse that the member was engaged on "other duty at the post," since a post commander, unless in some exceptional emergency, is not authorized to place or retain officers on duties interfering with their due attendance on general

ness or other controlling cause, the member is required by the usage of the service to communicate to the president or judge advocate the cause of his absence, so that the same may appear explained upon the record.[31] If the
256 absence is occasioned by sickness, the officer should forward a proper medical certificate in reference to the same, and this should be appended to the record.[32] A court-martial may in general properly adjourn for a short interval to await the recovery of a member temporarily indisposed.[33] A member absent at the organization but coming in on a subsequent day should see to having himself sworn[34] and to his being made subject to challenge.[35]

An obligation to explain his absence—the cause of his detention—rests also upon a member who attends the court at a late stage of a session, or after having failed to be present at a previous session. As already indicated it is the duty in such a case of the presiding officer to call upon the member for the explanation due, and if he refuses to give one, or gives a frivolous or insufficient one, he becomes—upon the facts being reported to the convening authority—amenable to a charge for the offence involved.[36]

The *Court* has of course no authority to permit or excuse an absence by a member, except upon a challenge duly made and allowed under the 88th Article of War.[37]

**RETURN OF ABSENT MEMBER AS AFFECTING LEGALITY OF PROCEEDINGS.** The question has been considerably discussed whether a member who has been absent during a material portion of a trial may legally return and resume his seat. In the majority of the treatises it has been declared that, where evidence has been received during the member's absence, he cannot be permitted to return and act as member without invalidating the judgment of the court.[38]

257 In this country, however, the military practice has not in general accorded with this doctrine. In 1814, upon the question being raised in the leading case of the trial of Brig. Gen. Hull and submitted to the Secretary of War for decision, it was formally held by him that a member who had been obliged to absent himself for an interval from the court could properly return and resume his functions, providing the proceedings had and evidence taken during his absence were read to him as recorded.[39] In consequence of this ruling, a member who had been absent on account of illness for four days on each of which evidence was introduced for the defence, was, with the assent of the accused, re-admitted to the court,—the testimony received in the interim being first read to him,—and continued on the court to the close, taking part

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courts. G. O. 106, Dept. of Dakota, 1871. And see other cases of insufficient excuses in G. C. M. O. 29, Dept. of Texas, 1884; Do. 30, Dept. of Dakota, 1886; Do. 16, Dept. of the Mo., 1887; Do. 6, Id., 1888. If his duties on the court will seriously interfere with his other duties, the member should apply to the proper authority to be relieved.

[31] DIGEST, 494; Simmons § 526; G. O. 50, Dept. of the East, 1863. It is not sufficient to *record* that the cause of absence is "unknown," where the same may be readily ascertained by the court. G. O. 8, Dept. of the Gulf, 1873.

[32] See G. O. 44, Dept. of the Platte, 1871.

[33] Simmons § 526. Hough, (P.) 712, mentions a case in which, a member being sick, the court assembled at his quarters.

[34] G. C. M. O. 29, Dept. of the East, 1893.

[35] G. C. M. O. 25, Dept. of the Colorado, 1893.

[36] The law on this subject is pointedly illustrated in a case in G. C. M. O. 29, Dept. of Texas, 1884.

[37] See Chapter XIV.

[38] Hough, 666; Simmons § 530; Franklyn, 46; Tulloch, 54–5; Jones, 72.; Gorham, 35; O'Brien, 260; De Hart, 92. And see, to a similar effect, 2 Opins. At. Gen., 414; 4 Id., 7.

[39] Printed Trial, Ap., p. 29.

in the findings and sentence of death. On Capt. D. Porter's trial in 1825,[40] when on two occasions a member became sick and unable to attend, the court proceeded with the case with the express understanding, concurred in by the accused, that when the member returned, (as in each instance he did,) the proceedings had during his absence should be read to him from the record. On Com. Mackenzie's trial in 1843,[41] a member who had been absent for two days during which no testimony had been received was re-admitted; but the same member, having subsequently been absent sick for three days during the taking of evidence, it was decided by the court on his return that he should be "excused from further attendance." One of the charges in this case—it is to be remarked—was "murder." On Com. Wilkes' trial in 1864,[42] two members who had been absent on account of illness during the hearing of testimony returned and resumed their seats without objection, the proceedings had and evidence received meanwhile being read to them. In the case of one of them the testimony was read in the presence of the two witnesses who had testified in the interim, they pronounced it correctly recorded, and the member declared that he had no questions to put to them. On the trial by military commission of Dodd and others in Indiana, in 1864,[43] wherever members were absent
258 through sickness or other unavoidable cause, the trial was, with the consent of the accused, proceeded with; the members, with the same consent, subsequently resuming their seats and having read to them the testimony introduced in their absence. In Capt. Downing's case, where a member who had been absent for two days on account of illness was not permitted by the court to resume his seat, the opinion was expressed, (in 1855,) by Atty. Gen. Cushing,[44] that the court had no such power to exclude the member, and that "whether the absent member shall act or not upon his return must depend upon his own views of propriety and not upon those of the court."

In our present practice, members who have absented themselves during the hearing of testimony retake their places in general without objection; and that their action does not affect the validity of proceedings or sentence, (provided five members have meanwhile been present,) is believed not now to be questioned. Such action, however, (which is indeed of rare occurrence,) is irregular and certainly not to be encouraged;[45] and Mr. Cushing, in the opinion last cited, has noted how much less satisfactory it must in general be to hear testimony read than to receive it from the witnesses in person, observing at the same time their manner and bearing. Where indeed there is reason to believe that such action may have resulted in any injustice or material disadvantage to an accused party who has been convicted, the fact will properly induce a disapproval of the findings and sentence or a mitigation of the punishment adjudged.[46]

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[40] Printed Trial, pp. 367, 376.

[41] Printed Trial, pp. 9, 107.

[42] Printed Trial, pp. 136, 145.

[43] Printed Trial, pp. 9, 73.

[44] 7 Opins., 98, 102, 103.

[45] See G. O. 78, Dept. of the Cumberland, 1867; G. C. M. O. 80, Div. of the Pacific, and Dept. of Cal., 1880.

[46] DIGEST, 495. In repeated cases of trials during the war, in which members who had been absent during the hearing of material evidence were re-admitted, to participate in the trial and judgment, and it did not appear that the accused had assented to such re-admission, the proceedings were disapproved by the reviewing authority. See G. O. 91, Dept. of the Ohio, 1864; Do. 36, Mid. Mil. Dept., 1865; Do. 66, Dept. of the Platte, 1871; Do. 2, Id., 1868; Do. 5, Dept. of N. Mexico, 1862; Do. 86, Dept. of the South, 1864; Do. 44, Dept. of the East, 1865; Do. 13, Id., 1866; Do. 107, Dept. of the Mo., 1863; Do. 76, Second Mil. Dist., 1868; Do. 54, Fifth Id., 1870. In most or some of these cases the action taken was probably induced by a consideration of possible injustice done the accused.

**INTRODUCTION OF A NEW MEMBER PENDING THE TRIAL.**

259 The above-cited ruling of the Secretary of War on Gen. Hull's trial covered also the case of a *new member* who, it was held, could be added to the court in the course of the trial, without affecting the validity of the subsequent proceedings, provided he were made acquainted with the proceedings had prior to his introduction. No new member was actually detailed on this trial. The ruling, however, has been recognized in our practice as authorizing the convening authority to add a member or members to the court pending the trial, where necessary to prevent a failure of justice by reason of the court, in an important case, being reduced by some casualty below five.[47] This subject has already been remarked upon in the Chapter on the Composition of General Courts.

**CHANGE OF RANK OR STATUS OF A MEMBER WHILE ON THE COURT.** That an officer is promoted while acting as a member of a court-martial affects in no manner his capacity on the court. The *fact* is properly noted in the record, and may perhaps give the officer precedence over another member or members and thus change his seat, but this is all. And the effect is similar of an appointment of a member to another office, though of the same rank, or of his transfer to another branch of the service;—no such change can, *per se*, modify his *status*, nor will he cease to be a constituent of the court till duly relieved by competent authority.[48]

If a member of a court-martial receives notice that he is retired, or is dismissed or discharged from the service, or that his resignation has been accepted, the fact should be at once noted on the record and the member should thereupon vacate his seat. A retired officer is not eligible to sit upon a court-martial, and an officer, upon being dismissed or discharged, or upon his resignation taking effect, becomes forthwith a civilian.

260 **BEHAVIOUR OF THE MEMBERS.** It is quaintly announced in Art. 87, that—"All members of a court-martial are to behave with decency and calmness," a directory provision dating back in our law to the Articles of 1775, which derived it, in substance, from Art. 48 of the Code of James II. It will be of course for the president, "the organ of the court to keep order," to require an observance of this Article in the first instance.[50] A member who fails to behave with decency and calmness, *i. e.* behaves in a disorderly and disrespectful manner, especially after a warning from the president, though not liable to be proceeded against as for a contempt under Art. 86,[51] will of course be subject to charges under Art. 62 or Art. 61, and this indeed independently of the provision of Art. 87. In a few cases published in Orders, members of courts-martial have been tried for drunken and disorderly conduct and disrespectful language in the presence of the court, and severely sentenced.[52]

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[47] As to the undesirableness of such a measure, where it can be avoided consistently with the interests of the service, see DIGEST, 321; G. C. M. O. 9, Dept. of Texas, 1883. In the General Orders, while the introduction of new members has been treated as an irregularity it has not in general induced a disapproval of the sentence, except where it did not appear from the record that the member had been made acquainted with the evidence taken before his appearance. See G. O. 99, Army of the Potomac, 1862; Do. 46, Dept. of the East, 1864.

[48] See G. C. M. O. 12, Dept. of Arizona, 1893.

[49] DIGEST, 495. In G. O. 104, Dept. of Ky., 1865, the proceedings in fifteen cases are disapproved for the reason that a member of the court acted thereon for part of a day, after having received notice of his muster out of service.

[50] See Hough, 375.

[51] G. O. 14 of 1850; Army Regulations, par. 1006.

[52] See G. O. 1 of 1858; Do. 66, Dept. of the Mo., 1866; G. C. M. O. 9, Fourth Mil. Dist., 1867. That members should not commit the disorder of vacating their seats before the president has announced that the court has adjourned, is noticed in G. C. M. O. 55, Dept. of the Mo. 1884.

**THEIR COURSE UPON THE INVESTIGATION.** While the members may, and in practice not unfrequently do, not only put questions to the witnesses for the purpose of bringing out facts or elucidating the issue, but also take exceptions to questions proposed in the course of the examination, it is not compatible with their function as judges to assume a controversial attitude or anything like an active part upon the trial. In a recent case in the Department of Dakota, it is remarked by Gen. Terry, that "members of courts-martial are not of counsel either for the government or the accused, and it is no part of their business to try a case as such counsel," and that therefore "the frequent interposition of objections by members of a court is a vicious practice and should be discountenanced." [53]

261. **SPECIAL OBLIGATION OF MEMBERS ON BEING SWORN.** The obligations devolved upon members of courts-martial on taking the oath prescribed by Art. 84 will be considered in Chapter XV.

**PERSONAL LIABILITY OF MEMBERS.** The *civil* liability of members to persons aggrieved where the court has proceeded without jurisdiction or otherwise illegally, or has imposed an illegal punishment, is a subject which will be considered in PART III of this work.

As to liability to *military* arrest and charges—the fact that an officer has been detailed and is acting as a member of a court-martial exempts him, as already noticed, in no manner from either. Indeed, an officer who by the commission of a substantial military offence has made himself liable to arrest and trial should not be allowed to remain on court-martial duty. If it can be avoided, however, an officer should certainly not be placed in arrest while sitting upon the court as a member: the proceeding of arrest should be deferred till the close of the day's session or at least to a recess of the court.

**LIABILITY TO PERFORM OTHER DUTY WHILE MEMBERS.** This subject, so far as respects the liability to duty of members of general courts, assembled at the places at which they are stationed, is regulated by par. 1003, Army Regulations, (as amended by G. O. 9 of 1892.) This regulation makes them "liable to duty with their commands during the court's adjournment from day to day." [54] As to officers serving as members of courts at a distance from their proper stations, the general rule is that they are not to be regarded as subject to orders requiring them to perform other duty while they remain members. In an emergency indeed they may be so required; but in such a case the court will, in general, be dissolved or adjourned, or the member or members needed for different duties be relieved.

**AUTHORITY TO RECOMMEND TO CLEMENCY.** This, which is the only *personal, i. e.* unofficial, authority which members of courts-martial may exercise in relation to the accused, will be considered in its proper order in connection with the subject of the Sentence, in Chapter XX.

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[53] G. C. M. O. 142, Dept. of Dakota, 1881; Do. 49, Id., 1883; also Do. 71, Dept. of the Platte, 1890.

[54] It is added—"Courts-martial will, as far as practicable, hold their sessions so as least to interfere with ordinary routine duties." And see on this subject G. O. 5, Div. Pacific, 1868.

# CHAPTER XIII.

## THE JUDGE ADVOCATE.

262 **EARLY USE OF THE TERM.** The province of the Judge Advocate, as now understood, appears to have first become defined in the British Articles of the seventeenth century.[1] Originally known in the English law as "judge-martial," or "-marshal," his prefix of "judge" appears to have been in part derived from the fact that, in addition to his functions as law officer and prosecutor, he was invested with a judicial capacity. Grose, in his "Military Antiquities," (1786,) writes—"The judge-marshal, by some styled auditor-general, and since called judge advocate, was an officer skilled in the civil, municipal and martial laws: his office was to assist the marshal or general in doubtful cases;" and he further shows how, in superintending the administration of justice in the Army, the "judge-marshal" was himself empowered
263 to "judge and give sentence" in certain cases.[2] So, the *Schultheiss* of the early and the *Auditeur* of the later German military law exercised a species of jurisdiction of their own; the latter official named having a vote on the court.[3] The mingling of the two capacities is indicated in the office, which appears to have existed in our colonial period, of "President Judge Advocate," to which, for example, Colonel Caleb Heathcote was appointed in 1770 by the Governor of New York. The designation of "judge advocate" is now, strictly, almost meaningless; the judge advocate in our procedure being neither a judge, nor, properly speaking, an advocate, but a prosecuting officer with the added duty of legal adviser to the court, and a recorder.

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[1] See the "English Military Discipline" of James II, of 1686; also Articles of war of Charles II, of 1666. This officer is also mentioned in the original Mutiny Act of 1689. Grose, vol. I, p. 236, note, gives a form of a commission to the "Advocate of the army, employed in Africa," which is dated Oct. 12, 1661.

[2] Vol. I, p. 235. Of the "judge-marshal" he adds, (citing Sir James Turner,)—"He ought to be a grave and judicious person who fears God, and hates vice, especially bribery. A lawyer he should be, in regard most articles of war have their rise from law, and many cases chance to be avoided in courts of war, where no military article is clear, but must be determined by the civil law, or by the municipal law of the prince to whom the army belongs; and the judge-marshal's duty is to inform the court what either of these laws provides in such cases. Some princes remit the whole justice of the army so absolutely to the judge-marshal that they give him power to punish soldiers who transgress public proclamations, of himself. * * * He may cause delinquents to be apprehended and send them to the regiments to which they belong, with direction to the colonels to call regiment courts of war. * * * All complaints, whether in matters civil or criminal, are to be brought before him; and in many of them he hath power to give judgment himself, without any court, and in others he hath authority to oblige colonels to do justice. * * * Differences among 'camp-followers,' or that happen between any of them and the officers and soldiers, are brought before him, and in them all, after due examination of the whole fact and witnesses, he hath power to judge and give sentence," etc., etc.

[3] Von Moltor and other German authorities noted in Chapter V. And compare the provision, as to the "Advocate of the Army," in Art. 1, (Sec. VI,) of Charles I. Another view of the term "Judge" appears to be that it was applied as substantially synonymous with *Assessor;* the Judge Advocate being regarded as present with the court in the capacity of a *quasi* judicial adviser. See Clode, M. L., 126; Id., 2 M. F., 363.

**THE EXISTING LAW.** The statutes which relate to the appointment, duties, powers, &c., of judge advocates of American courts-martial are the 74th, 84th, 85th, 90th, and 113th of the Articles of war, Secs. 1202 and 1203, Revised Statutes, and the Act of July 27, 1892, c. 272, a. 2, 4. Some of the details of their employment are regulated by pars. 984–986, 1008–1010, 1037–1039, 1041, 1046, 1047 and 1049 of the Army Regulations. Their function, however, is to a considerable extent determined by the usages of the service. These provisions and usages will be referred to in the course of this Chapter, the subject of which will be considered under the heads of:—I. The Appointment of the Judge Advocate; II. His Authority and Duties.

## I. THE APPOINTMENT OF THE JUDGE ADVOCATE.

**THE EARLIER LAW ON THE SUBJECT—PROVISION OF ART. 90 AS AFFECTED BY ART. 74.** The statutory law authorizing the detailing of
264 judge advocates was confused and uncertain till made clear by the introduction in the revised code of 1874 of a new and simple provision—in Art. 74—that, "*Officers who may appoint a court-martial shall be competent to appoint a judge advocate for the same.*" Prior to the revision, the statutory authority for the purpose was that expressed in Art. 69 of 1806, and repeated in the present Art. 90, as follows: "*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.*"

The original of this provision was the early British Article:[4]—"The Judge Advocate General, or some person deputed by him, shall prosecute in His Majesty's name." This, in our code of 1776, was expressed in precisely the same terms except that, in place of the last three words, was substituted—"the name of the United States of America." The succeeding Articles of 1786 prescribed that prosecutions before courts-martial should be conducted by "the Judge Advocate," (as the Judge Advocate General was indifferently styled in the Resolutions of Congress prior to the Constitution,[5]) "or some person deputed by him, or by the general or officer commanding the army," &c.

After the adoption of the Constitution, the Act of March 3, 1797, in reorganizing the military establishment, and making provision for a single Brigadier General as the officer highest in rank in the army, provided further for a "Judge Advocate." His office, however, was discontinued by the operation of the Act of March 16, 1802, by which it was at the same time enacted that:—"*Whenever a general court-martial shall be ordered, the President of the United States*
265 *may appoint some fit person to act as judge advocate, * * * and in cases where the President shall not have made such appointment, the Brigadier General or president of the court may make the same.*" In the code of Articles of 1806, the provision of 1786 was re-enacted in Art. 69. But as there was at that date no "Judge Advocate" of the Army, this article did not substantially affect for the time the operation of the Act of 1802.

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[4] See Art. VI. of Sec. XV. of 1765, in Appendix. The practice indicated by this provision appears to be still in a measure observed in the British procedure. Thus Lt. Col. Story writes, (1886,)—"At home," (*i. e.*, in the United Kingdom,) "a deputy judge advocate is ordered to attend a general court-martial, by the Judge Advocate General, who may, if he thinks fit, depute any qualified officer to officiate as deputy judge advocate at a trial. Abroad, the deputy judge advocate is appointed by the convening officer, the terms of his warrant giving him the authority."

[5] During the Revolutionary War the most important prosecutions, such as those of Maj. Gens. Arnold, Lee, Schuyler, and St. Clair, Col. Henley, Lt. Cols. Enos and Zedwitz, and Major André, were conducted by Lt. Col. Wm. Tudor or Col. John Lawrance, as Judge Advocate General.

Maltby[6] cites this Act as in force in 1813. O'Brien[7] and De Hart[8] refer to it as in operation at the dates of their treatises, January and August, 1846. As late as in 1840 we find a General Order,[9] (issued from Army Headquarters,) authorizing the president of a general court to appoint the judge advocate. But meanwhile the specific officer designated in the Act as "the Brigadier General" had ceased to exist as such; and in March, 1849, the office of Judge Advocate of the Army was revived by Congress.[10] After this date the provision of 1802 became practically obsolete, the Articles of war being now treated as the source of the authority for the detailing of judge advocates for courts-martial.

There were, however, no *deputations* of judge advocates ever made by the officer appoined Judge Advocate under the Act of 1849,[11] and thenceforth the judge advocate was invariably detailed by the authority convening the court, *viz.* the President as Commander-in-chief, or the competent military commander. This usage, based apparently upon a liberal construction of the term "army" in the then Art. 69 as properly including the "department" command referred to in Art. 65,[12] had prevailed to the date of the recent revision in 1874. Meanwhile—it may be added—no deputations of judge advocates for general
266 courts were ever made by the Judge Advocate General, or by any officer of the corps of Judge Advocates of the Army created by the Act of 1862,[13] and none have been made to the present time, although the provision of Art. 69 of the code of 1806, authorizing such a deputing by the "Judge Advocate" has, as already indicated, been continued in Art. 90 of the present code, above cited.

It is thus perceived that, as heretofore remarked, the present Art. 74, which is at once a declaration and an enactment of a long-prevailing usage, comprises in brief the existing law on the subject of the authority to appoint judge advocates for military courts; the provision of Art. 90 being now quite unimportant and in part obsolete.

**CONSTRUCTION OF ART 74.** The statute is simple and easy of construction. A few points, however, may be noticed under it—upon some of which express rulings have been made—as follows:

**1. THE ARTICLE NOT ONLY AN AUTHORITY BUT A REQUIREMENT.** Considered by itself this article is simply an enabling statute, but considered in connection with Arts. 84 and 85, and especially the former, which prescribes the administering of the oath by the judge advocate to the members of the court, it must be construed as a requirement,—as in substance enjoining

[6] Page 123.
[7] Page 853. And see Id., p. 229.
[8] Page 807.
[9] G. O. 19 of 1840.
[10] Meantime certain "division" judge advocates had been authorized by Acts of 1812, 1816 and 1818, and appointed, but their appointment did not materially modify the operation of the existing law. The last of these temporary officers were done away with by an Act of June, 1821.
[11] The author, having discovered no such deputation of record, further verified the statement in the text by a personal reference to the officer himself, the late Major John F. Lee.
[12] De Hart, (p. 307–8,) refers to the "broad interpretation" given to the existing law on this subject.
[13] This corps, by Act of July 5, 1884, was, with the office of Judge Advocate General, consolidated into a "Judge Advocate General's Department," comprising one Brigadier General, one Colonel, three Lieut. Colonels, and three Majors. These officers, like those of the original corps, while sometimes detailed as judge advocates of general courts-martial in special cases, have other and various functions as the law-officers of the Army; being assigned to duties as Judge Advocates of Departments, as Assistants to the Judge Advocate General, and as Professor of Law at the Military Academy.

that whenever a court-martial is appointed a judge advocate shall be appointed for it. And this construction accords with the long-continued usage of the service in regard to the ordering of general courts.

**2. IT APPLIES TO INFERIOR AS WELL AS GENERAL COURTS.** But the above reasoning is equally applicable to the ordering of regi-
267 mental and garrison courts, since Art. 84 requires that the oath shall be administered to the members of these courts also by the judge advocate. That judge advocates are to be detailed for *garrison* courts is also apparently contemplated in Art. 90. The Judge Advocate General, therefore, in December, 1879, held that the authority conferred by Art. 74 was not to be regarded as restricted to officers empowered to order general courts, but was equally exercisable by those empowered to order inferior courts under Arts. 81 and 82. This view was soon after adopted and announced by the Secretary of War,[14] and judge advocates have since been detailed for regimental and garrison equally as for general courts-martial, in our army.

**3. BY WHOM THE AUTHORITY MAY BE EXERCISED.** It is the effect of the Article that the judge advocate is to be appointed, (as in practice he *is* appointed,) by the commander who, (being thereto empowered by the Articles of war,) convenes the court-martial. By the almost invariable usage of our service the court is ordered and the judge advocate appointed in and by the same Order. The authority to detail the judge advocate cannot be delegated to or assumed by an inferior or other commander. At an early period—between 1821 and 1838—a practice, imitated from the British service, prevailed in our army, of delegating, in Orders from the War Department, (or Headquarters of the Army,) appointing courts-martial, to the commander of the post at which the court was to assemble, the authority to select and detail the judge advocate for the same.[15] But such practice, which was without warrant in the Articles of war, has been long since discontinued, and at present the members and the judge advocate are invariably alike detailed, by the officer ordering the court; nor would a commander of less authority be empowered to relieve a judge advocate so detailed or to appoint a new one. Thus, in a case in 1863, where an inferior ("District") commander to the Department com-
268 mander who ordered the court, detailed a judge advocate for the same, in the absence of the judge advocate originally appointed by his superior, the proceedings were disapproved by the latter as reviewing authority.[16]

Nor of course can the *court* appoint a judge advocate, even for a temporary purpose. Thus it was held by the Judge Advocate General[17] that a court-martial was not empowered to direct its junior member to act in the place of the regular judge advocate where the latter had been relieved in the course of a trial without a successor being appointed. In a similar case in the Department of the Platte,[18] where a court had assumed to appoint one of its members judge advocate on the occasion of the one appointed in the convening order being temporarily called to take the stand as a witness, the proceedings and sentence were disapproved by the Department commander.

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[14] In G. O. 15, of February, 1880, since declared by the same authority to be mandatory in its terms. See DIGEST, 296, note.

[15] The last order of this kind noted by the author is dated March 25, 1838. In most of the cases the court was ordered to meet at West Point; in the others at Fort Monroe, Fort Leavenworth, or Jefferson Barracks. The delegation, by the same class of Orders, of the authority to detail also *members* of the court, has been noticed in a previous Chapter.

[16] G. O. 70, Dept. of the Mo., 1863.

[17] DIGEST, 317, 456.

[18] G. O. 2 of 1868. And see an almost identical case in G. C M. O. 27, Navy Dept., 1882.

**4. EXTENT OF THE AUTHORITY.** The authority conferred by the Article is not exhausted by the detailing of a judge advocate for the court at the outset. The judge advocate originally appointed may be prevented by illness from continuing the prosecution, or by reason of his promotion, or some exigency or incident of the service, other duties may properly be devolved upon him. In any such case the officer by whom he was appointed, (or his successor in the command,) may relieve him and appoint another in his stead,[19] and this proceeding may if necessary be repeated.[20] That the judge advocate cannot relieve *himself* from any part of his duty need hardly be added.[21]

269 **5. ELIGIBILITY FOR APPOINTMENT AS JUDGE ADVOCATE.** There is nothing in the present Article or elsewhere in the code to preclude the employment of enlisted men as judge advocates;[22] the usage of the service, however, has sanctioned the appointment as such of commissioned officers only.

Under the general terms of Art. 74, an officer of any corps or branch of the service, whether of the line or staff, may be detailed as a judge advocate. While judge advocates are more commonly selected from officers of the line, it is by no means unusual to detail staff officers as such at remote posts or where the command is supplied with but a limited number of line officers. Under such circumstances, assistant surgeons especially have been thus employed,[23] and the corps of post chaplains, (though its members are legally eligible therefor,) is the only one from which such details are not from time to time made. As already indicated, officers of the Judge Advocate General's Department of the Army are sometimes resorted to for the conduct of prosecutions of unusual importance.

Nor does the *rank* of the officer affect his eligibility under the Article.[24] A general officer may as legally be appointed a judge advocate as may a lieutenant. Except, however, in the rare cases in which the Judge Advocate General or a Deputy Judge Advocate General officiates, the rank of the officer detailed as judge advocate is not usually above that of major.

**6. A CIVILIAN MAY BE APPOINTED.** The Article simply authorizes the appointment of "a judge advocate," without specifying whether or 270 not he shall be a military person,[25] and that he may legally be a civilian has been uniformly held.[26] In the British service the Judge Advocate General and Deputy Judge Advocate General, who formerly officiated at the

[19] DIGEST, 456; Simmons § 532; Hough, (P.) 706–7; Clode, M. L., 126; O'Brien, 260.

[20] In a case published in G. O. 54, Dept. of the East, 1864, it is noted that three judge advocates officiated successively during the trial.

On the other hand, the same officer may be appointed as judge advocate for a number of successive or different courts-martial, provided he be detailed anew in a separate order for each separate court. DIGEST, 296.

[21] That the judge advocate cannot, even with the concurrence of the court, excuse himself from officiating—a point now too well established for discussion—was in substance ruled at the trial of Gen. Wilkinson, in 1815, where the judge advocate having "begged leave, with the permission of the court, to decline" to undertake the responsibility devolved upon him, it was held by the court "that it was his duty to proceed with the trial."

[22] The most recent recorded instance known of an enlisted man acting as judge advocate is that referred to in Joint Resolution, No. 20, of March 3, 1855, where Congress makes an extra allowance to a private soldier of a regiment of Tennessee Volunteers employed in the Seminole war, "in full satisfaction for his services as judge advocate in the regiment in said war."

[23] The practice of employing medical officers as judge advocates dates from an early period in our service. See cases in G. O. 14 of 1832; Do. 57 of 1822; Do. 62 of 1821.

[24] A commissioned officer *without rank*, as a professor of the Military Academy, would be legally eligible.

[25] So Art. 90 simply indicates him as "some person."

[26] DIGEST, 457; De Hart, 99, 316; Benét, 244; Coppée, 57.

principal trials by court-martial within the kingdom, are civilian lawyers.[27] Under the present Rules of Procedure[28] the judge advocate of a general court is required merely to be "a fit person," and while he is in general an officer of the army, it is recognized that he may be a civilian.[29]

In the American military service the judge advocates of courts-martial have from the beginning been, with few exceptions, officers of the army. The "division" judge advocates appointed under the Acts of 1812 and 1816 were civilians with major's pay, but these were superseded by military officers in 1818. In some of the earlier cases a "special judge advocate," who was a civilian lawyer, was designated to act in connection with the regular judge advocate; and in this capacity Hon. Martin Van Buren, (afterwards President of the United States,) was appointed for the trials of Brig. Gen. Hull in 1813[30] and Maj. Gen. Wilkinson in 1815.[31] Between 1818 and the period of the
271 late war,[32] as also during the continuance of the war,[33] the employment of civilians as judge advocates was of rare occurrence.

In our *naval* service, on the contrary, the judge advocates officiating at trials within the United States were, in general, up to a recent period, counsellors at law.[34] Since the passage, however, of the Act of June 22, 1870, by s. 17 of which, (now Sec. 189, Rev. Sts.,) was transferred to the Department of Justice the authority to employ counsel for the executive departments, neither the Secretary of the Navy nor the Secretary of War has been authorized to retain at the public expense a civilian lawyer to act as judge advocate of a court-martial.[35] Thus while the employment of a civilian in this capacity is as *legal* as ever, resort will rarely be had to one, and only in some important and difficult case requiring, for its efficient prosecution, special professional skill and experience. In such a case the Secretary of War, (or the Secretary of the Navy,) will properly call upon the Attorney General, as the head of the Department of Justice, to employ a lawyer to act either as judge advocate, or preferably as counsel to *assist* the regular military (or naval) judge advocate in the conduct of the trial.[36]

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[27] 2 Clode, (M. E.) 362, 364; Hughes, 5; Gorham, 37; Jones, 63. The Judge Advocate General is a member of the existing Ministry and a Privy Councillor. See Manual, 198.

Outside of Great Britain the officiating judge advocates were usually military officers. Hughes, 180; Jones, 64. At trials under martial law, civilians were not unfrequently selected; as at Rev. J. Smith's trial in Demerara, 1823. Simmons (§ 462, note,) states that—"On the trial of the Canadian rebels by martial law, in 1838 and 1839, three persons, one officer and two civilians, were 'jointly and severally' appointed to the duty of judge advocate."

[28] See § 99. (A.)

[29] Manual, 544.

[30] For this trial there was also detailed a civilian as "Assistant Judge Advocate."

[31] At a previous trial of Wilkinson in 1811, Walter Jones, District Attorney for the District of Columbia, officiated as "acting judge advocate," without objection; as also, as "judge advocate and recorder," on a still earlier court of inquiry in 1808.

[32] By the Act of Feb. 18, 1832, c. 19, a special appropriation of thirty dollars is made for the services of a civilian named, as judge advocate on a certain trial "before a court-martial ordered by Gen. Wilkinson during the late war."

[33] Two cases of distinguished civilians who acted as judge advocates at important trials in 1865, are mentioned in the DIGEST, p. 457, note.

[34] 18 Opins. 135. At foreign stations an officer of the navy has generally been detailed. Harwood, 49.

[35] This was expressly held by the Attorney General, in construing the Act in this connection. 13 Opins., 514; 14 Id., 13.

[36] 18 Opins. 135. The employment of counsel to assist in the prosecution of military cases was more frequently resorted to formerly than later or since the organization, in 1862, of a Judge Advocate General's Department in the Army. See De Hart, 318. In an early military case referred to in 2 Journals of Congress, 413, "two counsellors learned in the law" were appointed by Congress "to assist and cooperate with the judge advocate" at the trial.

**LIMIT OF THE AUTHORITY OF APPOINTMENT.** No person other than the official judge advocate can be detailed or can act as judge advocate. This—a point now beyond question, since the existing law clearly makes provision for but one judge advocate—was substantially held in 1814 in Maj. Gen. Wilkinson's case, in which, as already noticed, Martin Van Buren, then
272 a civilian lawyer, was appointed to act as "special judge advocate" in addition to the "army judge advocate." The accused having objected in writing to his appearing in the case, it was ruled by the court that he could not legally do so, and he retired. This action is the more marked for the reason that he had acted in a similar capacity on the trial of Brig. Gen. Hull in the preceding year, and without objection. In a case tried during the late war in which the proceedings were authenticated only by an officer designated as "assistant judge advocate," it was held by the reviewing authority that a sentence certified by such an officer could not be executed, and the proceedings were disapproved.[37] But the rule under consideration does not preclude the detailing of other officers to assist the judge advocate in an important case,[38] or the employment of legal counsel for the same purpose, since such assistants are not thus invested with any of the legal functions of judge advocates.

**PERSONAL QUALIFICATIONS FOR THE APPOINTMENT—1. Fitness**—*i. e.*, a proper training and aptitude for the office. As it is expressed in the act of 1802, heretofore cited, the judge advocate should be a "fit person."[39] This officer has been styled by McArthur[40] "the *primum mobile;*" by Adye[41] "the mainspring of a court-martial." "If he errs," adds the latter writer, "all may go wrong;" or, as it is quaintly expressed by Napier,[42] unless courts-martial have a properly instructed judge advocate, "they must assemble in bodily fear."[43] The question of fitness is of course a relative one. While an officer may readily make himself familiar with the routine of the prosecution of a brief and simple trial, a special training and a considerable
273 share of legal knowledge are required properly to qualify a military man to exercise with skill and completeness the function of judge advocate in a case of real difficulty and importance.[44] To be prepared to meet all the issues that may be raised, and duly to perform all the other duties that may be devolved upon him as judge advocate, in such a case, an officer should be educated not only in the science of the military law,—including the statutory law, regulations, orders and customs, pertaining to the offenses of military persons and their prosecution, trial and punishment,—but also in the general criminal law and its practice and procedure, as well as in that most essential branch of legal learning, the general law of evidence.[45]

**2. Absence of Bias.** As a judge advocate is not subject to challenge, it is important that an officer strongly prejudiced for or against the accused,

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[37] G. O. 29, Dept. of the N. West, 1863.

[38] On the trial, in 1865, of Payne, Herold and others, (as conspirators in the assassination of President Lincoln,) and upon that of Wirz in the same year, by military commission, the judge advocate was assisted in the former case by two officers, and in the latter by one, specially detailed for the purpose.

[39] The same term is used in the present British law. Rules of Procedure, (A.)

[40] Vol. 2, p. 279.

[41] Page 113.

[42] Page 114.

[43] That is to say, "fear" lest by some error they may be exposed to suit or prosecution.

[44] "His qualifications of course must be *of the sort* required by members of the bar." 18 Opins. At. Gen., 137.

[45] On the subject of the qualifications of a judge advocate, compare Hughes, pp. 9–19, 178, *et. seq.* And see Grose, Vol. I, p. 235, cited *ante*, p. 179.

or who has a decided personal interest in the result of the trial, should not be selected as the judge advocate if it can be avoided. Thus, one interested in the conviction of an accused officer, for the reason that, in the event of a dismissal, he will become entitled to promotion, will not be a desirable person to be detailed as judge advocate for the trial, if any other suitable officer can be appointed without detriment to the service.[46] So, one personally inimical to the accused, or seriously at variance with him, is not a suitable person to act as his prosecutor. Where an officer appointed judge advocate is con-
274 scious of any such prepossession, bias, or interest as may materially affect the efficient, fair or courteous performance of his duty, he will properly communicate the facts, in a respectful manner, to the appointing authority, and ask to be relieved.[47] But prejudice or interest, however conspicuous or controlling, on the part of the judge advocate, cannot of course impair the *legal validity* of the proceedings.

## II. HIS AUTHORITY AND DUTIES.

This subject will be considered under the heads of: The authority and duty of the judge advocate—(1) Prior to the meeting of the court; (2) Pending the proceedings and trial; and (3) After the completion of the proceedings.

### 275 Authority and Duty of the Judge Advocate Prior to the Meeting of the Court.

**AS TO PREPARING OR PERFECTING THE CHARGES.** While in the ordinary criminal procedure the indictment is almost invariably framed by the prosecuting attorney,—in the *military* service, where any officer may prefer

[46] In G. C. M. O. 5, War Dept., 1871, in connection with the action of the President upon the case of a Captain of the army, it was remarked as follows: "In his review of this case, the Judge Advocate General calls attention to the fact that the Judge Advocate of the Court was not only a material witness for the prosecution, but, as senior first Lieutenant in the same regiment with accused, was the expectant of promotion to the next vacancy in the grade of Captain. In view of this fact, while there is no ground for doubting that the officer charged with this duty performed it with honest and pure intention, yet certainly his selection for it was unsuitable, inasmuch as by military law and usage it has always been held that the Judge Advocate should be free from personal bias or interest in the result of the proceedings in which he officiates."

[47] In G. C. M. O. 41 of 1875, in a case of a soldier tried upon a charge of having made a false complaint that an officer had improperly assaulted him, which officer was judge advocate of the court and prosecuting witness, it was remarked as follows: "It was not contemplated that a prisoner would be brought to trial before this Court on charges which raised the question whether its Judge Advocate had not himself been guilty of official misconduct. But such was the fact in this case. The Judge Advocate had a personal interest in the conviction of the prisoner, and was also the principal witness against him. Under such circumstances he should have applied to the proper authority to be relieved from duty as Judge Advocate. The proceedings are disapproved." In a case published in G. C. M. O. 18 of 1886, the attitude of the judge advocate is commented upon by the President as follows—"The judge advocate was manifestly disqualified and incapable of properly discharging his duties of judge advocate because of the interest which he took in the conviction of the accused. For this reason he should have requested relief from a duty which he could not perform in justice to himself, the accused, and the service." In a later case promulgated in G. C. M. O. 1, Div. of the Mo., 1890, reference is made to the officiating by an officer as judge advocate on the trial of a soldier, whom he had himself abused and assaulted, as follows—"Lieut. S. committed an unfortunate mistake in acting as prosecutor on the trial of a soldier with whom he had had a personal difficulty. * * * Although the judge advocate of a court-martial is not one of the judges who try the cause, and although there is no provision of law for the challenge of a judge advocate by the accused, yet a nice sense of propriety and due appreciation of self-interest should suggest to an officer the wisdom of requesting to be excused from the duty of prosecutor under such circumstances. Such a request would of course be respected by the commanding general who appointed the court."

charges, the judge advocate of the court has a comparatively limited control over the form of the charges and specifications. He has no *original* authority, *virtute officii*, to entertain charges in the first instance, but can simply act upon such as are transmitted to him to prosecute. In the absence, therefore, of general instructions or specific authority for the purpose from the superior by whom he has been appointed, he cannot, as a general rule, make any material amendments in the pleadings as committed to him.[48] In some instances indeed, where the court was convened for the trial of enlisted men for light or simple offences, the papers have been transmitted and witnesses referred to the judge advocate, with instructions to frame, serve, and prosecute formal charges in the several cases, as the proofs may appear to warrant.[49] But in general, and especially in the more important class of cases, the charges will, regularly, have been prepared by the immediate commander of the accused or the original accuser, and revised by the Commander who is to convene the court, or the officer of the Judge Advocate General's Department or Acting Judge Advocate on his staff, or by the Judge Advocate General, before they reach the judge advocate of the court. In such cases, while the judge advocate may correct obvious errors of form and mistakes in names, dates, amounts, &c., known to him, from having communicated with the witnesses or other-
276 wise, to be incorrect,[50] he cannot properly venture upon material amendments of substance, and certainly cannot assume of his own authority to reject any charge or specification, or to add a new one.[51] Where indeed the judge advocate of the court is an officer in whom a special confidence is reposed, as where he is the Judge Advocate or Acting Judge Advocate of the Department, &c., he may assume a larger discretion in the matter of amending the charges before trial, especially where he has already had to do with their preparation or revision. But in general, in the absence of some special authority or direction from the convening commander, the charges should remain substantially intact in the hands of the judge advocate, who should consider himself simply as a subordinate under orders to perform a particular duty, *viz.* to prosecute the particular charges committed to him by his superior. Where, from the testimony as personally examined by him, he is of opinion that a charge should be laid under a different Article from that selected, or that an additional charge or specification should be preferred, or other material change in the pleadings should be made, it will be proper for him to com-

[48] DIGEST, 458; O'Brien, 235; G. C. M. O. 42, Dept. of the Platte, 1877; Do. 7, Dept. of Texas, 1882; Do. 9, Dept. of Arizona, 1884.

[49] This was sometimes done during the late war, but, as a practice, belongs rather to the past, and to the period before department, &c., commands were furnished with staff judge advocates. In some of the old Orders the judge advocate was specifically directed to prepare the charges after conference with the original accuser, who had not duly formulated the same. See instances in G. O. of Aug. 10, 1819, and Sept. 7, 1820.

[50] See G. O. 25, 36, Dept. of the Mo., 1867; Do. 11, Dept. of the Gulf, 1865; Do. 64, Dept. of Ark., 1865; Do. 17, Dept. of Fla., 1866, Do. 26, 29, Dept. of La., 1868; Do. 35, Fifth Mil. Dist., 1868. A larger authority, however, is attributed to the judge advocate in some of these Orders than would be quite warranted in time of peace. In G. C. M. O. 17, Dept. of the Colorado, 1894, it was held that the judge advocate, after having conferred with the witnesses, was justified in making the charge, erroneously expressed in the alternative, more certain, by striking out matter which was merely surplusage.

[51] DIGEST, 458; G. O. 3, Div. Atlantic, 1876. That he cannot do this even with the concurrence of the court is remarked in G. C. M. O. 36, Dept. of the Platte, 1877.

municate the facts and his views to the Commander by whom he has been detailed, and await his instructions.[54]

**AS TO SERVING THE CHARGES, &C.** The subject of the service of charges has already been considered in treating of the Charge. The service of the charges is a duty usually devolving upon the judge advocate, and should be performed as soon as practicable after the charges have been per-
277 fected, or within a reasonable time before the trial. A list of the witnesses for the prosecution will properly accompany the charges. The accused will also properly be supplied with a copy of the Order detailing the court, so that he may have a reasonable opportunity to consider whether he will interpose challenges to any of the members. Where the Order does not specify the time or place of the particular trial, the judge advocate should notify the accused of the same. He should also promptly furnish him with copies of amended or "additional" charges or specifications, if any such are introduced.

**AS TO SUMMONING, &C., THE WITNESSES.** It is directed by par. 1008 of the Army Regulations that the judge advocate "summon the necessary witnesses for the trial;" and, in order that the trial may not be delayed, it is in general his duty at this stage of the proceedings to summon the material witnesses, both those required for the prosecution[55] and those whose names are furnished him by the accused, who is entitled to have summoned for him his material witnesses.[56] If papers in the possession of a witness are required to be used in evidence, the judge advocate will issue to him a subpœna *duces tecum*, specifying the particular writings. Where any witnesses are so distant, or otherwise situated or occupied, that their personal attendance cannot probably be procured without extraordinary expense, or embarrassment to the service, he will properly submit to the convening authority the question whether they shall be summoned to appear in person or required to give their depositions. If directed to procure their depositions, he will proceed to do so by preparing
278 in concert with the accused the necessary interrogatories and forwarding the same through the proper channels, subject to the provisions of the 91st Article of war.[57] Where not satisfied as to the materiality of a proposed witness, or where the testimony of such a witness will be merely cumulative, he

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[54] "It is a part of the duty of an officiating judge advocate to represent to the officer convening the court any error or omission in the charge, and thereby to anticipate or obviate any delay in the assembly of the court." Simmons § 414. And see De Hart, 313; G. O. 30, Dept. of the Mo., 1867. It is a part of his duty not to go to trial upon a defective indictment, (G. O. 11, Dept. of the Gulf, 1865; Do. 29, Dept. of La., 1868,) if the defect can be duly corrected.

[55] That it is, in general, the duty of the judge advocate, though it may not always be necessary, to summon, (and call to testify on the trial,) the witnesses *whose names have been appended to the charges*—see G. C. M. O. 135, Dept. of Dakota, 1882; Do. 45, Id., 1884.

In Circ. No. 9, (H. A.), 1887, the point is noticed that the judge advocate can only *subpœna* a witness to attend the court. He cannot issue a subpœna to a witness to appear before himself for examination. This must be effected by an *order* emanating from the proper superior, as the post commander.

[56] G. C. M. O. 4, Div. of Atlantic, 1886. No persons, (except perhaps foreign ministers—see Com. Wilkes' Trial, p. 79,) can be said to be legally exempt from being summoned as witnesses on military trials. High public officials, however, will not properly be summoned where their attendance can be dispensed with without serious prejudice to the administration of justice.

[57] As to the law in regard to depositions in military cases, and their form, see Chapter XVIII., and Appendix.

The time and expense of summoning a particular witness or witnesses may sometimes be saved by the judge advocate and accused entering into a written *stipulation* that certain specified facts shall be considered as admitted in the case. See example in Lieut. Devlin's case. Printed Trial, p. 12.

may omit or decline to summon him till requested or instructed to do so by the court or the commander.[58] Where the accused desires the attendance of a witness whom the judge advocate does not think it worth while to summon, the latter may well offer to *admit* in writing at the trial that the person, if present, would testify thus and so. Forms of subpœnas for witnesses, to be issued by the judge advocate, are given in the Appendix.

**Service of summons.** If the witness is at or near the place of trial, or station of the judge advocate, he may be personally summoned by the latter, or by any other officer or individual for him.[59] If he is at a greater distance, a subpœna, or application for his attendance, should generally be forwarded by the judge advocate "through the regular military channels,"[60] to the proper headquarters, in order that the proper orders may be made for his attendance, transportation, &c. The judge advocate should always cause a *civilian* witness to be *personally* served: this to facilitate the compelling of his attendance by attachment under Sec. 1202, Rev. Sts., if found necessary. A personal service will be made either by exhibiting to the witness the original subpœna and causing or enabling him to become informed of its contents, or—and preferably—by delivering to him a copy.[61] The individual making the personal service will properly be instructed by the judge advocate to certify the fact,
279 date and place of service on the back of the original[62] and thereupon return the same to him. Witnesses, on arriving at the place of trial, should report forthwith to the judge advocate.

**AS TO PREPARING THE CASE FOR TRIAL.** The further duty is devolved upon the judge advocate of assuring himself, before going to trial, that the proper evidence is available, and is sufficient to establish the charge.[63] In this connection, it may sometimes be desirable for him to take affidavits, and for the administering of oaths in such cases he is now expressly authorized by the Act of July 27, 1890. In several instances, judge advocates have been severely censured in General Orders for proceeding with the prosecution without duly preparing their cases, or informing themselves whether the witnesses proposed to be called could establish the facts alleged in the specifications. If, after personally examining the witnesses, &c., a judge advocate concludes that he cannot make out a *prima facie* case upon the charges referred to him for prosecution, he should, if there is time, communicate the fact to the convening authority and ask instructions.

A judge advocate entrusted with the conduct of an important prosecution will also, before the trial, look carefully into such points of law—especially questions in the law of evidence—as are likely to arise in the case, and prepare himself by study for presenting or contesting the same.

**AS TO OTHER PARTICULARS.** It devolves upon the judge advocate to make a requisition upon the quartermaster for the proper stationery for his own

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[58] See par. 1008, A. R.

[59] In order to avoid possible expense, a military person should, if practicable, be employed to make the service. G. O. 34, Dept. of the Platte, 1870.

[60] See par. 1010, A. R.

[61] 1 Greenl. Ev. § 315, note.

[62] See form in Appendix.

[63] See the remarks of the reviewing officers in G. O. 63, Dept. of the East, 1864; Do. 36, Dept. of the Mo., 1867. Tytler, (p. 358,) writes: "The judge advocate must instruct himself in all the circumstances of the case, and by what evidence the whole particulars are to be proved against the prisoner. Of these it is proper that he should prepare in writing a short analysis or plan for his own regulation in the conduct of the trial and examination of the witnesses." This last suggestion is repeated by subsequent writers.

use and that of the court at the trial or trials to be had, as also for a room or rooms, or other quarters in which to assemble, (with the necessary furniture, fuel, &c.,) if such have not already been provided. At most established posts, such a room is set apart. He will also properly apply to the assistant adjutant
280 general, post adjutant, &c., for an *orderly* or *orderlies*, as may be required.

If he does not exercise his statutory authority of appointing a *reporter*,[64] (or, in a case of unusual importance, though a reporter be actually appointed,) he may employ, at his own expense, a civilian *clerk*, or may apply to the proper official for an enlisted man to be ordered to report to him for duty as clerk. If an *interpreter* is necessary, he will take measures to obtain one—generally by summoning as a witness a person competent for the purpose.[65]

Where the charges or specifications are unusually numerous or extended, the judge advocate may well have the same *printed*, if practicable, for the convenience of the court upon its assembling and for reference during the trial, as also to facilitate the making up of the record.

### Authority and Duty of the Judge Advocate Pending the Proceedings and Trial.

**THIS CAPACITY IN GENERAL.** "The presence and assistance of an officiating judge advocate," observes Simmons,[66] "is essential to the jurisdiction of a court-martial." O'Brien[67] writes: "A court-martial cannot proceed to any business without that officer." Neither is strictly accurate. But while it is not necessary, (though certainly highly desirable and almost invariable,) that the judge advocate should be present at such preliminary action as a court may take after its first assembling and prior to the appearance of the accused, it is clear that the court cannot enter upon the *trial* without him, since, by Art. 84, he must first qualify them by administering "to each member" the prescribed oath. So, pending the trial, his presence, though it may not always be essential, cannot properly be dispensed with during any material proceeding.[68]

281 It was observed by Kennedy,[69] (who has here been repeated by later writers,) that a judge advocate "appears at a court-martial in three distinct characters," those of Prosecutor, Adviser to the Court, and Recorder; in the last of which only, the author adds, is he subject to the direction or control of the court; being authorized in the other two "to act according to his own judgment and discretion." Except that he cannot properly *obtrude* advice, this statement is substantially correct.

With these principal capacities of the judge advocate are also to be considered, as attaching at this stage to his office under our law, his province as counsel or adviser of the accused, and his authority and duty under Art. 85 and under Secs. 1202 and 1203, Rev. Sts.

**AS PROSECUTOR.**—Legal status in general. From an early period in the British law till 1860, the judge advocate acted as prosecutor in the name

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[64] As to the exercise of this authority, see *post*.

[65] As to clerks, interpreters, orderlies, &c., see Chapter XI.

[66] § 462.

[67] Page 229.

[68] A judge advocate may indeed temporarily absent himself and resume his place without affecting the validity of the proceedings; (Clode, M. L., 126; Benét, 86;) though this "mars their unity," (Coppée, 60,) and, where necessitated for any longer than a very brief period, should induce a suspension of the proceedings, for the time, by the court. Digest, 460.

[69] Page 222. As to the change, later, in regard to the capacity of prosecutor in the British law, see *post*.

of the Sovereign before general courts-martial.[70] But that he should sustain this character, while at the same time acting as official adviser to the court, was viewed by some of the authorities[71] as unjust to the accused and inexpedient, and in 1860 it was expressly prescribed in one of the Articles of war that he "should no longer be the prosecutor."[72] A provision to the same effect is contained in the present Army Act.[73] In the British practice the prosecutor is now a separate official, quite distinct from the judge advocate.[74] He is appointed by the convening authority, "who, in the trial of a soldier, ordinarily selects the adjutant of the prisoner's regiment."[75]

In our law the judge advocate has from the beginning acted as the public prosecutor in military cases. In the articles of 1776,[76] it was enacted that the officer officiating as judge advocate should "prosecute in the name of the United
282 States of America," and a provision to the same effect has been repeated in the code to the present time. No such agency as a "private prosecutor" is known to our law. In practice, the accuser or "prosecuting witness" is often allowed to remain in court, to enable the judge advocate to confer with him during the trial, but the law does not recognize him as having any official part in the prosecution of the charges.

As sole prosecutor, the judge advocate, with us, practically conducts the trial—a function which in the British,[77] and more conspicuously in the French[78] law, is substantially devolved upon the president. In the American law, the judge advocate arraigns the prisoner; swears and examines the witnesses and cross-examines those of the defence; takes exceptions to pleas or testimony offered on the part of the accused, or to applications or propositions made by or for him to the court which he deems inadmissible or objectionable; enters into such stipulations and makes such admissions in regard to testimony, &c., as he may deem expedient;[79] and argues all exceptions taken and issues raised—in the name and as the representative of the United States. So, like the prosecuting attorney in the ordinary criminal courts, he presents, (or may present,) the closing argument on behalf of the Government.[80]

283 **Direction as to the course and conduct of the prosecution.** As prosecutor, the judge advocate, representing as he does the State, and acting under an authority identical with or equal to that of the court, should, as

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[70] Tytler, 206, 349; Adye, 115, 119–120; Samuel, 619; Clode, M. L., 116.

[71] Napier, 113; Warren, 10, 229, 232–3, 253.

[72] See Simmons § 472; Clode, M. L., 125.

[73] § 50. (3.)

[74] Story, Summary of Military Law, 65.

[75] Manual, 596; Story, 65.

[76] No judge advocate was provided for in the original code of 1775.

[77] See Simmons § 430; 2 Clode, M. F., 364, note.

[78] See Alla, 216–221, 257–269. At the French *conseils de guerre* the examination of the witnesses is in general conducted by the president. In important cases, (as at Marshal Bazaine's trial,) the counsel for the accused haa been allowed, by courtesy, to add questions.

[79] In a case in which the court instructed the judge advocate to inform the accused that *it* admitted all he proposed to prove by a certain witness, this action was disapproved as beyond the province of the court; the judge advocate, not the court, being the prosecutor. G. C. M. O. 59, Dept. of the Platte, 1872. So, as illustrating the general subject, may be noticed here the remark of the reviewing authority in G. C. M. O. 55, Dept. of the Mo., 1873, that "the *court* had no authority to instruct the judge advocate whether a certain case should be prosecuted or not, the prosecution being a duty devolving solely upon the judge advocate, for which he is answerable to the convening commander."

[80] He may make an argument whether the accused does or not. G. C. M. O. 11 of 1872. Or he may decline argument; as did the judge advocate, (Judge Advocate General Holt,) on Gen. F. J. Porter's trial, for the expressed reason that the exigencies of the existing war did not justify his taking up the requisite time. Printed Trial, p. 218.

a general rule, be regarded as independent of the court,[81] and therefore as empowered, in the absence of special instructions on the subject from the convening officer, to conduct the prosecution in such mode or upon such plan as may appear to himself most advantageous. Even in the British practice, as it is observed by Simmons,[82] he "is usually permitted to adduce his evidence in the order he may think fit." And in our service, where he is made prosecutor by express statute, he should in general be deemed entitled to the same privilege which is uniformly accorded to prosecuting attorneys in the criminal courts, of presenting such evidence in support of the charge as he may judge to be requisite or desirable and of presenting it in the form which he may consider most effective, of reserving such testimony for the rebuttal as he may regard not so pertinent to the direct examination, and of preserving throughout the logical sequence determined upon by him, in preparing the case, as according with the progressive stages of the history of the offence.[83]

But while thus entitled in general to be left free as to the form of the presentation of his proofs, it is of course incumbent upon the judge advocate, as prosecutor, "to lay before the court the full particulars"[84] of the offences charged. And the only safe rule for him is to put in *all* the material
284 testimony that is available, and not merely cumulative.[85] The court is sworn to "try and determine" the matter before it, and it cannot do so unless placed in possession of all the facts. Thus the court may properly intimate to an inexperienced or careless judge advocate that he has omitted to prove a material allegation in a specification, or to evoke a material circumstance from a witness before the court, or to introduce a material witness whom it desires to have called. On the other hand, it may check an over-zealous judge advocate who is proving too much by needlessly putting in cumulative testimony or otherwise unreasonably protracting the investigation.

**Authority as to entry of nolle prosequi.** It is clear that this authority, that is to say the authority to withdraw a particular charge or specification from the consideration of the court, cannot belong to the judge advocate as prosecutor, his duty as such being simply to prosecute the charges committed to him, without addition or subtraction. Of his own motion, and in the absence of authority from the commander, (for the *court* cannot supply it,[86]) he can no

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[81] See Kennedy, 222; Hughes, 111.

[82] § 571.

[83] In the leading naval case of Capt. Barron, (Printed Trial, 131–2,) the court made a general ruling as follows:—"The order in which the testimony on the part of the prosecution, either verbal or written, shall be exhibited before the court is a subject resting altogether in the discretion * * * of the judge advocate. The court will exercise no control over it, but will hear everything which they ought to hear, and in any order in which it may be thought proper to exhibit it." And see later cases to a similar effect in G. C. M. O. 97, Dept. of Dakota, 1878; Do. 38, Dept. of Texas, 1878; and compare, as to the civil practice, 1 Burr's Trial, 85, 469; Davany *v.* Coon, 45 Miss. 71.

[84] Hughes, 118. And see G. C. M. O. 6, Dept. of Arizona, 1888; also G. O. 23 of 1824, where the President censures a judge advocate for not producing the proper witnesses, who were apparently readily available, to prove the charge.

[85] See G. C. M. O. 36, Dept. of Texas, 1893.

[86] G. C. M. O. 84 of 1887; Do. 23, Dept. of Dakota, 1886; Do. 6, Dept. of Arizona, 1886; Do. 68, Id., 1887. Especially is the court not empowered to authorize a *nolle prosequi* where the accused has been arraigned upon and has pleaded to the charges, since then, (in the absence of a legal withdrawal—see Chapter X,) he is entitled to a verdict, and the proper course for the court is to acquit upon the charge or specification in question. G. C. M. O. 29, Dept. of the Mo., 1886.

The nature of the procedure of Nolle Prosequi is considered in Chapter XV.

more withdraw a charge after arraignment than he can drop one before:[87] should he venture unauthorized to do so—for whatever reason, whether because of a defect in the charge itself, or of a deficiency of evidence to support it, or otherwise—he would be guilty of a military offence. If he is of opinion
285 that a charge or specification should be *nol prossed*, and no authority for the purpose has been imparted in advance, he should apply for the same to headquarters, the court, (if concurring,) meanwhile adjourning over if necessary.[88]

**Duty as a minister of justice.** It was remarked by the judge in a late case in the Central Criminal Court of London,[89] that it is "a general principle of criminal procedure that counsel for the prosecution should consider themselves not merely as advocates but as ministers of justice, and not as struggling for a verdict but as assistants in the ascertainment of truth according to law." Similarly, in a leading criminal case in Michigan,[90] the court observe:—"A public prosecutor is not a plaintiff's attorney, but a sworn minister of justice, as much bound to protect the innocent as to pursue the guilty." So, O'Brien[91] says of the judge advocate:—"He is to use no undue means to secure the conviction rather than the acquittal of the accused." In other words, while he is not "to permit the interests of the public to suffer,"[92] by failing to prosecute "with spirit and resolution,"[93] he is to remember that it is not incompatible but consonant with his capacity as prosecutor to be so far impartial as not only not to obstruct but to facilitate the accused in making such defence or offering such matter of extenuation as may exist in the case.[94]

It is in view of this principle that it has been held by certain courts, both in England and the United States,[95] that the prosecuting officer, in presenting his case, is not at liberty to select those witnesses only whose testimony will conduce to a conviction, leaving the accused to offer the rest, but that it
286 is incumbent upon him to introduce all the witnesses present at the commission of the act charged or cognizant of the same, if attainable, before the accused is called upon for his defence. Thus it is held in one case:[96]—"All the facts constituting the *res gestæ*, so far as the prosecuting counsel is informed of and has the means of proving them, should, on principle and in fairness to the prisoner, be laid before the jury by the prosecution." And in a later case[97] it is remarked:—"The only legitimate object of the prosecution is to show the whole transaction as it was, whether its tendency is to establish guilt or innocence. The prosecuting officer represents the public

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[87] "After charges have been properly referred to a court for trial, none save the convening authority, or the Secretary of War, can order a *nolle prosequi* to be entered." G. O. 98, Dept. of the Cumberland, 1868, (Gen. Thomas.) And see Do. 97, Dept. of No. Ca., 1865; Do. 85, Dept. of the South, 1874; G. C. M. O. 79, Dept. of the Platte, 1877; Do. 13, Id., 1878; Do. 45, 48, Div. Pacific and Dept. of Cal., 1880: also Do. 84, (A. G. O.), 1887; Do. 73, Dept. of the Platte, 1887.

[88] G. C. M. O. 14, Dept. of Cal., 1883.

[89] Regina *v.* Berens, 4 F. & F., 842.

[90] Wellar *v.* People, 30 Mich. 23.

[91] Page 284.

[92] De Hart, 323.

[93] Adye, 119.

[94] See De Hart, 323. "The danger in most cases is that, as prosecutor, he is inclined to be too severe upon the accused, to accept his guilt as a foregone conclusion, and rather to aim to prove it than simply, as is his sole duty, to exhaust all the evidence *pro* and *con*, and let that determine the guilt or innocence of the accused." Coppée, 60. And see the subject of "Absence of bias," *ante*.

[95] Regina *v.* Holden, 8 C. & P., 606; Regina *v.* Stroner, 1 C. & K., 650; Maher *v.* People, 10 Mich., 225–6; Hurd *v.* People, 25 Mich., 416; Wellar *v.* People, 30 Mich., 16.

[96] Maher *v.* People, *ante*.

[97] Hurd *v.* People, *ante*.

interest, which can never be promoted by the conviction of the innocent. His object, like that of the court, should be simply justice, and he has no right to sacrifice this to any pride of professional success." In the opinion of the author, this rule, though not followed by some other authorities who "regard it as properly within the discretion of the prosecuting officer to produce such witnesses and such only as he thinks best,"[98] is believed especially to commend itself to adoption in the court-martial practice, and particularly in cases of enlisted men, and of officers undefended by competent counsel.[99]

**AS ADVISER TO THE COURT, AND IN HIS RELATION TO THE SAME.**—**His duty in general.** As already noticed, one of the three principal functions assigned to the judge advocate of a court-martial is that of "adviser to the court in matters of form and law."[100] In this capacity a twofold duty is devolved upon this officer:

1. He is bound to *furnish his opinion* on any question of law, practice, or procedure, arising in the course of the trial, when the same is required of him
287 by the court.[1] It is the right of the court to call upon him for such advice and assistance, but if the preparation of the opinion demands unusual labor, the court will properly adjourn to give him time to consult the authorities, &c. In general the opinion of a competent judge advocate, thus furnished, will be accepted as decisive by the court.[2] But even if wholly dissented from and in no respect followed, the judge advocate is entitled, for his own justification, and not by way of protest but as a part of the proceedings, to have such opinion incorporated in the written record: it should also be so recorded for the information of the reviewing authority.[3]

2. While it will be irregular for the judge advocate, except when his opinion is thus asked, to interpose his views in regard to any question which it is within the province and discretion of the court to determine, yet if the action proposed by it to be taken upon such a question will clearly transcend some statute, regulation, order or usage, or an established principle of law, it will then be his *duty to point out the fact.* In other words, where the error of the court is simply one of judgment, the judge advocate, though, in his opinion, such error may work injustice in the case, should remain silent: otherwise where the action, if taken, will manifestly contravene an article of war or other law of the service, or legal principle properly governing the procedure of courts-martial,—here he is authorized, and it is indeed his duty, respectfully to *caution* the court against the apprehended illegality.[4]

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[98] See 1 Bishop, C. P. § 966 *c.*

[99] See remarks of Lord Brougham in Parliament, as cited by Clode, 2 M. F, 363–4. There is here to be noted, as a further branch of his function as prosecutor, the duty devolving upon the Judge Advocate, under par. 1018, A. R., to furnish the court in proper cases with evidence of *previous convictions* of the accused, if any.

[100] Kennedy, 222.

[1] See Tytler, 352–355; Simmons § 466; Kennedy, 224–5; Stocqueler, 113; Hughes, 120; Hickman, 137; XIV. Law Mag., 13; Maltby, 121–2; O'Brien, 283, De Hart, 325; Benét, 201; Coppée, 57.

[2] See Simmons § 470; Kennedy, 228; Hughes, 127. Note the special consequence attached to the advice and opinion of the judge advocate in the British law by the Rules of Procedure, § 101 (F,) explained in the same Rule by the declaration that—"at a court-martial, he represents the judge advocate general."

[3] Tytler, 354–5; Hough, (A.) 71–2; Kennedy, 226–7; XIV Law Mag., 14; Hughes, 123–128; Maltby, 122; O'Brien, 283; De Hart, 324–6. *Contra,* Simmons § 496 and note. In G. O. 5 of 1857, the Secretary of War remarks:—"The court refused to admit on their record an argument of the judge advocate, objecting to an application by the defence for delay. It was the duty of the judge advocate to make the objection, and the argument by which he sustained it was very proper. It was a part of the proceedings which ought to have been entered on the record." And see G. O. 17, Dept. of Florida, 1866; Do. 50, Dept. of La., 1869.

[4] See Benét, 201; O'Brien, 283; De Hart, 325.

**HIS ATTITUDE WHEN THE COURT IS CLOSED.** Up to a recent
288 date the judge advocate invariably remained, as an *assessor*, with the court when closed for deliberation, advising it if required to do so, and calling attention to formal errors if any, but carefully refraining from any expression of opinion that might influence the votes of the members.[6] But however scrupulous he might be in this regard, the accused had certainly good ground for complaining that *he* was excluded while the judge advocate was admitted at so important a stage of the proceedings,[6] and the apparent unfairness of the practice not unfrequently evoked serious criticism.[7] But now, by the Act of July 27, 1892, c. 273, s. 2, it has been specifically prescribed on this subject as follows:—"*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.*" Under this statute the judge advocate now retires from the court room, (with the accused, &c.,) whenever the court clears for deliberation, either on the finding and sentence,[8] or upon any interlocutory matter such as a challenge, an objection to evidence, &c. And hereafter when a question
289 arises, in closed session, as to which the opinion of the judge advocate is desired, the court must be re-opened, and such opinion sought and rendered in the presence of the accused, subject to such exception or right of reply as he would be entitled to at any other open stage. In practice the occasions of such requiring of opinion have as yet been rare.

**As to preserving the votes of the members.** The point was at one time considerably discussed, whether the judge advocate should preserve the written votes of the members given upon the findings or sentence. The only reason for preserving them would seem to be that, in their absence, the judge advocate, (or a member,) would not be enabled or would be less able to testify as to the same if called upon to do so by a "court of justice"—the contingency indicated in Arts. 84 and 85.[9] But these Articles do not *require* that he should hold himself prepared to give such evidence. Moreover the written votes are no part of the official record or papers, but mere personal memoranda. Further, if they are preserved, they may endanger the discovery, by unauthorized persons, of the votes or opinions which the judge advocate and members also have sworn not to make public.[10] The question involved is really one which concerns less the judge

[6] See generally, upon this subject, Simmons § 612, 636; Kennedy, 229, 230; Stocqueler, 113; Hickman, 137; Bombay, R., 31; Macomb, 58; De Hart, 327–8; O'Brien, 283, 284; Benét, 201–2; Coppée, 60.

[6] The leading case in which the prevailing practice was asserted was that of Capt. Amos Binney, reported in "The Militia Reporter," p. 180, (1810.) Here, upon the court clearing to consider an objection to evidence, the accused claimed that he had a right to remain and be heard equally with the judge advocate. The court ruled that he must retire in accordance with the established practice, and because, if they allowed him to remain, they might violate their oaths in regard to the disclosure of the votes and opinions of members. They also ruled that they could not exclude the judge advocate, for the reason that it was the custom that such officer should be present at deliberations, and that the Article which required him to be sworn not to divulge any vote or opinion, &c., evidently contemplated that he should be present.

[7] See Warren, 229, 232, 233, 254; also Report of Judiciary Committee of Senate, No. 1337, of Feb. 18, 1885.

[8] In a case which has occurred since the Act took effect, where the judge advocate was allowed to remain with the court during the making up of its judgment, it was deemed best to disapprove the sentence as fatally irregular. G. C. M. O. 73, Dept. of Dakota, 1892. In the opinion of the author, the sentence is not invalidated in such a case.

[9] 1 McArthur, 323; Tytler, (edit. of 1800,) 371.

[10] See Simmons § 614; Kennedy, 237; Tytler, xiii (Opinion of J. A. Gen., Sir Chas. Morgan;) Stocqueler, 114; Griffiths, 176; Benét, 127.

advocate than the members, since the latter may, under certain circumstances, become amenable to a civil suit for damages for their action upon the court. And now that the judge advocate is excluded from deliberations in closed session, it is especially appropriate for the members to decide this question for themselves. To destroy such papers is believed to be the almost uniform practice in our service.[11]

**The personal relations of court and judge advocate.** In this connection the personal relation proper and desirable to be maintained between the judge advocate and the court may well be touched upon. It is clear, as indicated by De Hart,[12] that such acts on the part of the judge advocate as the expressing of opinions where the same are not requested or warranted, the raising of points as to unimportant matters, the interposing of petty objections to testi-
290 mony, and the exhibition of testiness or irritability, can only bore and worry an assemblage of military men, and incline them to override the judge advocate in the positions taken by him.

On the other hand, within his separate province, the judge advocate is entitled to be recognized by the court as occupying a position as independent as its own, and, wherever a proper and adequate occasion presents itself, is authorized not only fully to express but to accentuate his views, even at the risk of offending some member or members who may entertain opposite opinions. But where the judge advocate is a person uniting tact with skill, he will rarely find it necessary to assert himself as against the court. The latter perceiving him to be master of his case, and not dogmatic but simple and dignified in his manner of presenting it, will come to respect his opinions, and to consult and follow him as a legal adviser. Thus a mutual deference and confidence will arise, which will not only do away with much of the irritation incident to the collisions of an extended trial, but will result in a harmonious and effective dispatch of business.

**Amenability of judge advocate for misconduct before the court.** It need hardly be added that while the judge advocate cannot of course be placed in arrest by the court or its president,[13] he may be made amenable, under the 62d or other appropriate article, for any marked disrespect or disorderly behaviour in its presence, upon a representation made by it of the facts, or formal charges preferred, to the proper superior. So, for disturbing the proceedings as indicated in Art. 86, he may become punishable as for a contempt. The author, however, is not aware of any precedent in our service of a conviction by court-martial of an officer for misconduct of this character in the capacity of a judge advocate.[14]

**AS COUNSEL OR ADVISER OF, AND IN HIS RELATION TO, THE ACCUSED.—Particulars already considered.** Under the head of the province of the judge advocate prior to the trial, we have noted the duties, devolving upon him at that stage, of serving (and explaining where necessary) the charges, furnishing a copy of the convening order, giving notice of time and place
291 of trial, summoning witnesses for the defence, &c. We have now to inquire how far the judge advocate is called upon to counsel or assist the accused pending the trial or in connection therewith, and, generally, as to his official relation to the accused.

**Effect of Art. 90.** This Article declares that the judge advocate, "*when the prisoner has made his plea, 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*

[11] See this subject also considered in Chapter XIX on the Finding.

[12] Page 328. And see Coppée, 60.

[13] Chapter XII. And see McNaghten, 170–1; Dionst, 461.

[14] But see British precedents referred to by Hough, (P) 704; also case of Major Browne reported in James, 504.

*the prisoner the answer to which might tend to criminate himself."* This is a most imperfect and ineffective provision; objecting to leading questions is but a single feature of the function of counsel, and, as to questions "to the prisoner," these are now unknown in our practice.[15] This provision, (derived from the Articles of 1786, illustrates the fact that the entire Article is in the main obsolete and futile, and might well, as already indicated, be omitted from the code.[16]

Nature and extent of his function as counsel, &c. It is clear that the judge advocate cannot act in a *personal* capacity of counsel to the accused, since such a character would be incompatible with that of public prosecutor. Thus it is clearly only in an *official* relation that he can advise or assist the accused. We have already seen that a judge advocate is bound to consider himself not merely as a prosecutor but as a "minister of justice;" the common law doctrine being that the prosecuting official in a criminal proceeding was "the assistant of the court in the furtherance of justice."[17] This doc-
292 trine is applied to the military procedure by Simmons,[18] in holding that it is "in consonance with the custom of the service that the judge advocate should only interfere to the extent to which the court itself is bound to interpose." In our practice, however, no strict rule has been prescribed or observed on this subject; and how far the judge advocate shall properly counsel and assist the accused is left to depend in the first instance on whether he is furnished with competent personal counsel, and secondly on his own intelligence and ability to defend himself. Where he is without counsel, and especially where he is an ignorant or inexperienced soldier, the judge advocate will properly render him, both in and out of court,[19] such assistance as may be

[15] Except indeed in a case—of course not contemplated by this Article—where, under the recent Act of March 16, 1878, the accused goes on the stand as a *witness* in his own behalf, when he is examined and treated like any other witness. This Article has in view an *inquisitorial* examination.

[16] The declaration that—"The judge advocate shall prosecute in the name of the United States," is the only provision that is of any significance. This part of the Article might well be incorporated with Art. 74, the remaining portion being dropped from the code.

[17] Regina *v.* Thursfield, 8 C. & P. 269. And see Regina *v.* Berens, 4 F. & F. 842. The origin of this doctrine is the maxim or rather fiction of the common law that on an indictment for treason or felony, as the prisoner was not entitled to defend by counsel, the judge acted as his counsel. 4 Black. Com., 355; 1 Bishop, C. P. § 296; 2 McArthur, 41.

[18] § 468. "In his duty toward the prisoner, indeed, he is not obliged to go farther than the court itself: the court sits for the purpose of doing justice, and is bound to take care that the prisoner does not suffer from his ignorance, inexperience, or incapacity." Pipon & Col., 40. And see XIV Law Mag., 13; Macomb, 81; Benét, 196. Lord Brougham, in a debate in Parliament, described the judge advocate as: "the assessor of the court—standing between the prisoner and the court." Clode, M. L., 126.

[19] The distinction taken by Kennedy, (p. 235,) and repeated by some of our writers, (O'Brien, 285; De Hart, 309; Benét, 196,) that a judge advocate may more properly or fully assist an accused *out* of than *in* court, has no place in our law and is not regarded in practice. At what stage or stages the judge advocate will best or most properly advise or assist the accused will depend upon the circumstances of each case. The doctrine as stated by Simmons, (§ 468, and see Pipon & Col., 40,) may be noted here—that the accused has a "*right* to the *opinion* of the judge advocate, either in or out of court, on any given question of law arising out of the proceedings." This rule, (repeated by De Hart, p. 312,) is now declared in the Rules of Procedure, 101 (A.,) as follows:—"The prosecutor and the prisoner respectively are, at all times after the judge advocate is named to act on the court, entitled to his opinion on any question of law relative to the charge or trial, whether he is in or out of court, subject when he is in court to the permission of the court." But this doctrine too has no place in our law, where the judge advocate differs from the same official in the British procedure in being the prosecutor and in not representing the Judge Advocate General. With us he furnishes no opinions except when requested to do so by the court. The court indeed may ask his opinion at the instance of the accused. But official opinions *out of court* are unknown in our practice.

compatible with his primary duty of efficiently conducting the prosecu-
293 tion.[20] In addition to aiding him before the trial in collecting his proofs and preparing his defence if he has one,—(and he will especially guard against even suggesting his pleading *guilty* if the case has any merits whatever,[21])—he will properly assist him in presenting in due form such challenges as he may desire to urge,[22] in offering his plea or pleas general or special, and in bringing out the full testimony of the defence on the trial,[23] as well as such circumstances of extenuation as may exist in the case;[24] and will further advise him of his right to be furnished with counsel, to take the stand as a witness, and, generally, as to his rights and privileges at all stages of the case.[25]

It is in omitting to bring out in evidence existing matters of defence or extenuation, that judge advocates are most liable to fail in furthering complete justice in military cases. Though the defences and excuses set up by enlisted men in their statements to the court, especially in connection with pleas of guilty, are not unfrequently fabrications, they are by no means always so; and where there is no sufficient reason to doubt the good faith of the accused, the representations made in his statement, if not already sufficiently tested by evidence on the trial, may and in justice should be investigated, so far as the circumstances and exigencies of the service will reasonably permit. That it is incumbent on the judge advocate, (as well as on the court,) where the statement of the accused is inconsistent with his plea of guilty, and, in asserting facts constituting a substantial defence, indicates that the plea has been ignorantly made, to assist him to establish such facts in evidence before the case is finally closed,—has been repeatedly urged by the Judge Advocate General,[26] and by reviewing officers in General Orders.[27]

294 The relation of the judge advocate to the accused makes it further proper that, where the latter is unskilled or ignorant, the former should assist him in the preparation of his concluding statement or address, reading it also for him to the court if desired.[28]

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[20] See Tytler, 355; Stocqueler, 113; Macomb, 80; Coppée, 20; G. O. 45, Third Mil. Dist., 1868; Queen's Regulations, Sec. VI § 84. The judge advocate should not, "in his zeal as prosecutor," be induced to "overlook the interests of the prisoner." G. C. M. O. 3, Dept. of Arizona, 1883. (Gen. Crook.)

[21] "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." DIGEST, 458. And see G. O. 45, Third Mil. Dist., 1868.

[22] See G. C. M. O. 19, Dept. of the Columbia, 1882.

[23] In G. O. 42, Dept. of the Platte, 1871, it was remarked that the judge advocate, where the accused was without counsel, might properly take exception in behalf of the latter to a legally objectionable question put to a witness by a member of the court.

[24] DIGEST, 458–9; G. O. 45, Third Mil. Dist., 1868.

[25] G. O. 75 of 1887.

[26] DIGEST, 588–590. A view similar to that expressed in the text is contained in the Bombay R., p. 53.

[27] See the following G. O. or G. C. M. O., in which the views on this subject of the Judge Advocate General are concurred in, or similar views are advanced, by military commanders: G. C. M. O. 2 of 1872; Do. 31 of 1876; Do. 34, Northern Dept., 1865; Do. 46, Dept. of the South, 1868; Do. 7, Id., 1869; Do. 28, Dept. of the Platte, 1869; Do. 89, Id., 1870; Do. 24, 68, Id., 1871; G. O. 31, Dept. of Cal., 1872; Do. 55, Id., 1874; Do. 98, Dept. of the East, 1872; Do. 14, 43, 68, Id., 1873; Do. 81, 83, 98, Dept. of Dakota, 1873; Do. 8, Id., 1876; Do. 19, 33, 38, Dept. of Texas, 1873; Do. 11, 16, 18, Id., 1874; Do. 45, Id., 1875; Do. 5, 74, Dept. of the Mo., 1875; Do. 61, Id., 1876; Do. 29, Div. Atlantic, 1874; Do. 23, Id., 1875; Circ., Dept. of the Gulf, Oct. 12, 1863.

[28] See Benét, 117. That a judge advocate cannot, independently of the court, assume, on account of its objectionable character, to reject a "statement" proposed to be offered by the accused, and require him to substitute another, was properly held in G. O. 31, Div. Atlantic, 1873.

It is to be added, however, in this connection, that where the accused is provided with capable counsel, or, being an officer or person of unusual intelligence, is fully competent to conduct his own defence, the relation of the judge advocate toward him is so far modified that the former may be required, in the interests of justice, to assume a controversial if not an aggressive attitude. It will then indeed be his duty to resist the introduction by the accused of objectionable testimony, to contest any inadmissible special pleas or unreasonable motions made by him, and generally, while courteous in his treatment of him and strictly fair and considerate of his rights, to maintain with the zeal and energy of a champion the cause of the United States.

**AS RECORDER.**—In general. The duty of the judge advocate as recorder or registrar of the proceedings is not, in our law, as is that of prosecutor, attached to his office by statute, but by long established custom. This, while one of the principal functions of the judge advocate, is one in the exercise of which he is less independent than in any other, being here subject in the main to the direction and control of the court. That it is the court which really makes the record, the judge advocate being little more than its agent in the
295 matter, is recognized in the Army Regulations, which, in par. 914, provide that—"every court-martial shall keep a complete and accurate record of its proceedings." But while the court is primarily responsible as well for the form as for the substance of the record, the judge advocate is chargeable with any lack of due carefulness which he may display in making it up, as well as for any omissions, inaccuracies, or other errors, which are traceable to his own negligence.[29]

The Record thus being a history not properly of a prosecution by the judge advocate but of an investigation and judgment by the court, will be more suitably considered hereafter in a separate Chapter.

**AUTHORITY AND DUTY UNDER ART. 85—Disclosure of "vote or opinion."** This Article provides that there shall be administered by the president of the court to the judge advocate, before the trial is entered upon, an oath that he "*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.*" This provision amounts, in the first place, to a prohibition of the disclosure, either directly or indirectly, by the judge advocate, in making up the record or otherwise, of the vote or opinion of any member, not only upon the finding but also upon any *interlocutory question* determined by the court. And a disclosure of the combined vote of *all* the members is a breach of the oath: thus a statement in the record that a vote or finding was "unanimous" has properly been held to constitute a violation of the prohibition of this Article, (as well as of the 84th,) since it is a disclosure of the opinion of each individual member.[29]

296 In regard to a corresponding article in the then British code, the view was expressed by Hough[31] that the judge advocate, though forbidden to disclose votes and opinions of members, was "not precluded by the

[29] In G. C. M. O. 29, Dept. of Texas, 1884, the following comment is made by Gen. Stanley upon the performance of his duty as a recorder by a judge advocate—"The judge advocate's want of appreciation of his duties is amply illustrated in the record of this case. A more incoherent, inaccurate, incomplete and utterly unreliable record of proceedings than the one now under review has seldom reached a reviewing officer." *Contra,* note the commendation, by Gen. Wheaton, in G. C. M. O. 9, Dept. of Texas, 1893, of the extra care shown by a judge advocate in so preserving his original minutes of the proceedings of a trial, that the formal record lost in the mail was enabled to be duplicated.

[30] See DIGEST, 98.

[31] Page 373, note.

Article to state any circumstances within his knowledge which may not be recorded on the proceedings, which the commander-in-chief should be confidentially informed of," so long, he adds, as the same did not extend to the discovery of the views of any particular member but concerned only its "general opinion." And Macomb,[32] upon this subject, writes:—"It is not inconsistent with his oath or duty for the judge advocate to communicate to the proper authority his views of the proceedings of the court." The occasions, however, will certainly be rare when the judge advocate will be justified in making a communication of such a character. And now, since the enactment of the statutory provision of July 27, 1892, by which the judge advocate is excluded from closed sessions, it will be most rarely that he will ever *know* the vote or opinion of a member, or be able to disclose such, either before a court of justice or otherwise.

**Divulging of the sentence.** Although the judge advocate is not present at the making up of its judgment by the court, the sentence, if any, with the findings, must be communicated to him in order that the same may be entered in the record, and that such communication shall be made is contemplated by the terms of the 84th Article, as amended by the legislation of July 27, 1892. As to the divulging by him of the sentence when thus imparted to him—there is nothing in the form of his oath, as prescribed by Art. 85,[33] to preclude the judge advocate from making known the sentence to the reviewing officer *prior* to the forwarding to him of the completed record. In practice, however, this is not often done, the custom of forwarding the proceedings immediately upon the termination of the trial doing away in general with any occasion for communicating the sentence before it would regularly become known from the record itself.

297 Unless the word "sentence" in the Article is construed as meaning *judgment*,—and no sufficient authority is perceived for such a construction,—it would not, strictly, constitute a violation of the oath for the judge advocate to disclose the fact of an *acquittal* by the court. But such a disclosure, made to the accused or any person other than the reviewing authority, would be so clearly contrary to the *spirit* of the Article and to the usage of the service, and so manifestly a breach of official confidence on the part of the judge advocate, as properly to render him amenable to a charge under Art. 62.[34]

Being prohibited from divulging the sentence "to any but the proper authority," the judge advocate can not of course communicate it to a clerk or reporter employed to write out the proceedings, but must himself enter it in the record in his own writing.[35]

**AUTHORITY AND DUTY UNDER SEC. 1202, REV. STS.—Effect of the provision.** This statute, by which provision is made for the issuing of process of attachment of witnesses by judge advocates, is as follows:—"*Every judge*

[32] Page 34. And see O'Brien, 259.

[33] This part of the oath in the British law is:—"You do swear that you will not, *unless it is necessary for the due discharge of your official duties*, divulge the sentence of this court-martial until it is duly confirmed." Rules of Procedure § 27, (A.)

[34] In a recent Order—G. C. M. O. 11, Dept. of the Mo., 1882—Gen. Pope, in passing upon a case of a soldier acquitted by a general court-martial, remarks as follows:—"After the close of this case the court directed the judge advocate to communicate to the *post commander* the fact of the acquittal of the accused. To this the judge advocate took exception on the ground that he felt bound by the nature of his oath not to so divulge the finding of the court, and had therefore respectfully to refuse to obey its mandate. These facts appearing of record, the Department Commander rules that the court exceeded its authority in the premises."

[35] Neither findings nor sentence can properly be printed in the record with a typewriter. Circ. No. 12, (H. A.,) 1883; G. C. M. O. 11, Dept. of the Columbia, 1892.

*advocate of a court-martial*[36] *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.*"

This statute, which would properly be included in the code as an article of war, was originally a provision of an Act of 1863, the first legislation on the
298 subject.[37] In transferring this provision to the Rev. Sts. the words "or court of inquiry" which followed the words "court-martial" were omitted. The authority conferred, therefore, while it may legally be exercised by judge advocates of inferior as well as of general courts, can not be exercised by recorders of courts of inquiry.

The authority is in terms vested solely in the judge advocate, and it is by him alone that the process can be initiated. No power is conferred upon the *court*, nor does the mandate, like the writ of a civil tribunal, issue in its name.[38] The judge advocate, however, will sometimes properly *consult* the court as to the desirableness of resorting to an attachment; especially where any considerable time may be required for the service and return of the same, and an unusual adjournment may thus be necessitated. He will also properly resort to it whenever the court, in its desire to secure the best or material evidence not otherwise procurable, calls upon him for the purpose.[39]

**Nature of the authority.** To authorize a resort to an attachment under this statute, there must have been a formal subpœna duly issued by the judge advocate and duly served upon the witness, and not complied with by him.[40] The authority to issue the compulsory process is co-extensive with the authority to issue the subpœna, and with the jurisdiction of the court. The judge advocate of a court-martial convened at any place within the United States may issue an attachment to compel the attendance before it of a witness resident or being at any other place therein,[41] and whether he be a military person or civilian.[42] It was, however, for securing the attendance of *civilian* witnesses that the enactment was originally designed.

299 **Service of the process.** As to the mode of executing the process, it was held by the Attorney General[43] that, in view of the omission in the Act to indicate to whom the process should be directed or by whom it should be served, the judge advocate might legally direct it to some military officer, who would thereupon be "charged with the duty of executing it." Upon this ruling was issued G. O. 93 of 1868, now incorporated in par. 1009 of the Army Regulations, by which it is enjoined that the judge advocate issuing the process, "will formally direct the same to an officer designated by the Department Commander for that service;"[44] and it is added that "the nearest military

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[36] That this means court-martial in the *army*, and that the judge advocate of a *naval* court-martial is invested with no such power, has been ruled by the Attorney General. 19 Opins., 501.

[37] See 3 Jour. Cong., 392, (November, 1779,) where it is recommended by Congress to the State authorities to grant writs, on the application of judge advocates, to compel the attendance of witnesses before courts-martial.

[38] "The attachment is 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." DIGEST, 757.

[39] See G. C. M. O. 32, Dept. of the Columbia, 1882.

[40] DIGEST, 757; G. O. 93 of 1868; 1 Greenl. Ev. § 315, 319. As to the proper mode of service, see *ante*. Par. 1009, A. R., indicates that it "may be served by any person whatsoever."

[41] See DIGEST, 757–8, and note.

[42] 12 Opins. At. Gen., 501; 19 Id., 502.

[43] 12 Opins. At. Gen., 501.

[44] In view of the regulation, it would not be proper for the judge advocate to direct the process to a U. S. Marshal or other civil official. See DIGEST, 753, 758.

commander will thereupon furnish the necessary military force for the execution of the process, if force be required."[45] Where the attachment is to be served at a locality not within the Department, &c., it may be forwarded directed in blank, the name of a proper officer being left to be inserted by the commander at the place of service or other superior authority. The occasions, however, upon which resort has been had to the authority given by the statute have not been very numerous:[46] this because of the defects in the law next noted.

**Defects of the law.** In addition to not indicating in what manner the attachment is to be served and executed, the Section under consideration may be deemed to be defective in not providing for compelling the witness to *testify*. In the absence of any such provision, and in view of the fact that Art. 86 does not authorize punishing as for a *contempt* a witness refusing to testify,[47] it follows that a civilian witness, though duly attached and compelled to appear, may, with entire impunity, refuse, if he see fit, to give any testimony whatever; no power to compel him, or to attempt to compel him, to depose being vested either in the judge advocate[48] or the court. This is a serious defect in the military law, calling for an amendment either of Art. 86 or of Sec. 1202.

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**AUTHORITY AND DUTY UNDER SECTION 1203, REV. STS.—Exercise of the authority.** This section, which might also well have been inserted in the code as an article of war, and of which the original is a provision of the Act of March 3, 1863, c. 75, is expressed as follows:—"*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 short-hand. The reporter shall, before entering upon his duty, be sworn, or affirmed, faithfully to perform the same.*"

The power to appoint the reporter is perceived to be vested exclusively in the judge advocate; it thus cannot be exercised by the court, nor is it essential that the court should concur in an appointment.[49] Inasmuch, however, as the court is responsible for the record which the reporter is to write, the judge advocate will be careful to employ as reporter such a person only as will be acceptable and satisfactory to the court, and will properly discontinue the employment where the appointee does not prove thus satisfactory.

The expense of a short-hand reporter should of course be incurred only in an important case, and a General Order of 1880, incorporated in par. 1046 of the Army Regulations, declares that the employment of such a reporter shall be authorized only "in cases where the authority appointing the court may consider it necessary." As imposing a restriction upon a power conferred by statute, the legality of such an order may be doubted; in itself, however, it is a proper and desirable regulation, and should of course, (till rescinded or modified,) be

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[45] See DIGEST, 758–9.

[46] The most ample use known to have been made of this process in any instance was on the trial of McRae and others, by military commission, in North Carolina, in 1867, when it was resorted to to compel the attendance of *five* persons as witnesses.

Forms of the Attachment are given in the Appendix.

[47] See Chapter XVII.—"Art. 86: Its general effect," and *note* referring to rulings on this subject.

[48] The provision of Sec. 1202, that the judge advocate "shall have power to issue process to compel a witness to appear *and testify*," can clearly not be construed as vesting a judge advocate with power to employ *force* against, or to *punish*, a witness. The words "and testify" have reference only to the effect and purpose of the process of attachment.

[49] DIGEST, 659.

strictly observed by the judge advocate, especially as its observance may
301 be a necessary condition to the receiving by the reporter of his compensation.

**Status, compensation, &c., of reporter.** The judge advocate will properly supervise the performance of his duty by the reporter, giving him the needful instructions. By whom the reporter shall be sworn is not indicated in the law: in practice he has been sworn by the judge advocate, who is now certainly thereto authorized by the legislation of July 27, 1892.[50] Although it is prescribed in general terms in the Section that the reporter "shall record the proceedings and testimony," it is clear, in view of the provisions of Arts. 84 and 85, that he cannot, any more than an ordinary clerk, properly be permitted to remain with the court after it is cleared for its final deliberation, for the purpose of recording the findings and sentence.[51]

The statute, in authorizing the appointment of short-hand reporters, contemplates of course that they shall be properly compensated, and par. 1047 of the Army Regulations, now fixes their compensation at an amount "not to exceed ten dollars a day," and "in special cases" a certain rate "per folio for taking and transcribing notes," &c. It is added—"Reporters will be paid by the Pay Department, on the certificate of the judge advocate." The annual Appropriation Act for the Army contains an express appropriation—"for compensation of reporters (and witnesses) attending upon courts-martial and courts of inquiry."

### Duty of the Judge Advocate after the Trial and Completion of the Proceedings.

It is a part of the duty of the judge advocate to give certificates of attendance to the civilian witnesses, including such as may have attended to testify by deposition, in order that they may receive their legal allowances for attendance and travel. Such certificates may indeed be given pending the trial, when the witnesses are not required to be detained till its completion. The law does not authorize the payment of witness fees *in advance* in
302 military cases. The allowances and compensation of witnesses before courts-martial are set forth in Art. LXXVI of the Army Regulations.[52]

Besides making out the proper certificates for witnesses and reporters, the only duties devolving upon the judge advocate after the proceedings of the court have been finally terminated and authenticated, are to complete the formal record, (annexing the exhibits, &c.,) and forward the same to the proper reviewing authority. The perfecting of the record will be referred to in the Chapter on the Record.

**THE FORWARDING OF THE RECORD.** This duty is enjoined upon the judge advocate by the 113th Article of war, but this Article is defective in requiring judge advocates of general courts to forward the proceedings in all cases direct to the Judge Advocate General. In this general requirement the Article is not in harmony with the provisions of Arts. 104 and 109, requiring the approval of the proceedings, &c., by the officer ordering the court; and the existing practice does not accord with it except in cases of records of courts which have been ordered by the President. The practice, and proper procedure, in the first instance, are therefore now indicated in the Army Regulations,

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[50] In Circ. No. 12, (H. A.,) 1892, the form of the oath is prescribed as follows—"You swear that you will faithfully perform the duties of reporter to this court. So help you God."

[51] Digest, 264, 660. But the fact that he was allowed to remain would not affect the *legal validity* of the finding or sentence. Id., 98, 264.

[52] And see Circ. No. 1, (H. A.,) 1886; Do. No. 10, Id., 1889.

par. 1041, as follows:—"The judge advocate shall transmit the proceedings (of general courts-martial) without delay to the officer having authority to confirm the sentence." Proceedings of courts ordered by the President are required, by par. 985, to be "sent direct to the Secretary of War;" and proceedings of courts "which require the confirmation of the President, but have not been appointed by him," and those which, under par. 1023, specially require the action of the Secretary of War, "will be forwarded direct to the Judge Advocate General."

A judge advocate is amenable to trial for neglect of duty in unreasonably delaying to forward a record. The General Orders of the Department of Virginia[53] contain a case of an officer convicted of the offence of neglecting, for thirteen days after their completion, to forward certain records of a military commission of which he was judge advocate, "thereby," as it is added in
303 the specification, "unnecessarily prolonging the imprisonment of" an accused "who had been acquitted by the said commission." In a further case in the Department of the Lakes,[54] in which the proceedings were not transmitted by the judge advocate to department headquarters till at the end of a month after the completion of the trial, the reviewing authority, Gen. Robinson, remarks:—"No amount of extra duty required of any officer can excuse him for such delay as this while acting as judge advocate." And he adds that the judge advocate should promptly forward the record, not only because directed to do so by the Army Regulations, but because "common justice to the prisoner requires that he should be speedily punished if guilty or released if innocent."

In another Order[55] the point has been noted that a judge advocate should not defer sending forward a record till he can accompany it with records of other cases tried by the same court, but should in general transmit each record separately as soon as completed.

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[53] G. O. 36 of 1866.
[54] G. O. 10 of 1867.
[55] G. O. 10, Dept. of Texas, 1873.

# CHAPTER XIV.

## CHALLENGES.

304 IN a previous Chapter we left the Court ready to proceed to be organized for the trial, subject to such objections, or challenges, as might properly be taken to the members. To this stage we now recur.

**THE WRITTEN LAW ON THE SUBJECT.** The only statutory law relating to the matter of challenges is the 88th Article of war, of which the original was the 71st Article of the code of 1806. The existing Article is as follows:—"*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.*"

The Army Regulations, par. 1037, direct that the record of the court shall show that previously to the swearing of the court the accused was "asked if he wished to object to any member, and his answer to such question." The question here indicated as to be addressed to the accused is, in practice, preceded by a reading to the accused of the order or orders constituting the court and detailing the members by their names and official descriptions.

In considering the subject of the present Chapter, we will commence with a Construction of the provisions of the Article, thus disposing of several questions of importance, and examining next the Procedure under it, will conclude with a review of the Grounds of Challenge, as indicated and illustrated both by the military authorities and the rulings of the civil courts.

### I. THE ARTICLE CONSTRUED AND CONSIDERED.

"**MEMBERS.**" This general term necessarily includes the president
305 and subjects him to challenge in precisely the same manner and to the same extent as any other member. The "members" only being made liable to objection, it follows that the judge advocate, not being a member, is not challengeable under the Article.[1] Any objection which the accused may have to the judge advocate must be addressed to the convening authority.[2]

In the term "members" are of course embraced not only the members originally detailed, (including both those present when the court is first assembled and the opportunity of challenge is first exercised by or extended to the accused, and those, if any, who may arrive and take part on a subsequent day,) but also members who may be added to the court to replace those dropped upon challenge or relieved by order.[3] For, as to all members who come, under whatever circumstances, to act upon the court, the accused has the same right, and should be offered the same opportunity, of objection under the Article. In several cases published in General Orders, the proceedings have been dis-

[1] Simmons § 465, 499; Kennedy, 52; Hough, (A.) 48; Napier, 88; Clode, M. L., 126; Franklyn, 24; Rules of Procedure, 25, (B.;) O'Brien, 240; De Hart, 116, 312; DIGEST, 103, 457; G. O. 28, Dept. of Arizona, 1876. The point was much contested in some of the earlier cases. In the leading case, for example, of Capt. Porter, U. S. N., in 1825, the liability of the judge advocate to challenge was elaborately urged by the accused in argument, but not recognized by the court.

[2] Simmons § 465; Benét, 70; Capt. Loring's Trial, Militia Reporter, 21.

[3] Simmons § 499; Hough, (A.) 50; Kennedy, 56; McNaghten, 174; Hughes, 42.

approved because it did not appear that the accused had been afforded the opportunity of challenge as to members joining, or added to, the court after its first organization or assembling.[4]

So, where a court-martial has been required to be dissolved, and a new court of some of the same members has been substituted, for the reason that by the operation of challenges or otherwise the first court was reduced below five members, the members of the second court are liable to challenge though they may have been so subject, and may even have been unchallenged in fact (unsuccessfully) on the original court.[5]

306 **"OF A COURT-MARTIAL."** This term includes, with general, also regimental and garrison courts;[6] and the members of these courts are accordingly challenged in our practice, though much more rarely than the members of general courts. The term does not embrace a court of inquiry[7] nor a military commission; and no other provision exists in our code by which the challenging of members of either of these bodies is authorized: *in practice*, however, the right of challenge is recognized before each.

**"MAY BE CHALLENGED BY A PRISONER."** Here is authority for the taking of exceptions to members *by the accused only*. It is uniformly held, however, by the authorities that the same right may, and in a proper case should, be exercised by the prosecution;[8] and in practice judge advocates, occasionally though not frequently, do interpose challenges on the part of the United States. Resting, as such action really does, on long-continued *usage*, it is now too late to dispute its authority. Were the question a new one, it might well be argued that the statute, in specifically extending the privilege to the "prisoner" only, was properly to be construed as excluding the prosecutor.

**"ONLY FOR CAUSE STATED TO THE COURT."** This provision excludes *peremptory* challenges,[9] *i. e.* challenges preferred without any reasons assigned therefor. Of these a certain number were, in capital cases, allowed to the prisoner, *in favorem vitæ*, by the common law, and are now allowed to
307 both parties in civil and criminal cases by the laws of most of the States and of the United States.[10] At military law, however, in England, the same were not formally sanctioned by usage,[11] and are now precluded by statute:[12] in the American military code only challenges for legal cause have ever been permitted.[13]

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[4] G. O. 68 of 1863; Do. 12, Dept. of the Gulf, 1865; Do. 2, Dept. of the Platte, 1868; Do. 5, Fourth Mil. Dist., 1868; G. C. M. O. 18 of 1889; Do. 6, Dept. of the Miss., 1865.

[5] See De Hart, 89–90.

[6] Field officers' courts, however, are not subject to challenge under the Article, "because, being composed of but one member, there is no authority competent to pass upon the validity of the challenge." DIGEST, 99–100.

[7] Simmons § 340; DIGEST, 136. In the Joint Resolution of Congress, of Feb. 13, 1874, authorizing the special Inquiry in the case of Brig. Gen. Howard, it was provided,—"that the accused may be allowed the same right of challenge as allowed by law in trials by court-martial." This exceptional provision would have been unnecessary if the right had *legally* attached to courts of inquiry in general at military law.

[8] That the right is "mutual" or "reciprocal," *i. e.* possessed by the judge advocate equally with the accused, see Adye, 167; Tytler, 225; Hough, 944; Id., (P.) 664; McNaghten, 103; Hughes, 41; Macomb, 31; Maltby, 28; O'Brien, 240; De Hart, 118; Benét, 70; Lee, 60; G. O. 11, Dept. of Cal., 1865.

[9] Maltby, 28; De Hart, 114, 118.

[10] See Sec. 819, Rev. Sts.

[11] Williamson, 85; 2 McArthur, 273, 275; Tytler, 221; Simmons § 500; Kennedy, 51; Griffiths, 47; Bombay, R., 11.

[12] Army Act § 51.

[13] As has been well said by Gen. Terry,—"the allowance of a challenge is not a matter of discretion," but one to be determined "in accordance with established principles and rules of law." G. C. M. O. 134, Dept. of Dakota, 1884.

A "cause stated" is, properly, not merely a general statement or assertion, as that the member is prejudiced, biased, &c. The facts and circumstances in which the alleged prejudice, &c., is deemed to consist should in each case be set forth, to fully meet the requirement of the Article. The objection should be specific, or as much so as the challenger can reasonably make it."[14]

**"THE COURT * * * SHALL NOT RECEIVE A CHALLENGE TO MORE THAN ONE MEMBER AT A TIME."** That is to say, challenges to the *array*[15] shall not be entertained; or, as Simmons expresses it, "a prisoner cannot challenge the court generally," or "the whole of the members collectively."[16] Thus objections which go to the jurisdiction, constitution, composition, &c., of the court *as a body* cannot be entertained by a court-martial *as challenges* under the present Article.[17] And, though the accused may deem all the members to be prejudiced or otherwise personally subject to exception,
308 and though his grounds of objection may be the same to each member, he cannot include them all in a general challenge, but is permitted to challenge them singly only.[18] He may indeed challenge all in succession if he sees fit,[19] but the court will only receive and pass upon a challenge to one member at a time, not entertaining a further objection till that previously offered has been determined.[20]

Where a party has several distinct grounds of objection to one member, the better practice is for the court to require that they be offered separately, in such order as the party may prefer.

## II. PROCEDURE UNDER THE ARTICLE.

**AT WHAT STAGE CHALLENGES MAY BE OFFERED.** The regular and appropriate occasion for the interposing of challenges is when the accused, by the reading of the order or orders detailing the court, is informed as to the members present, and before the court is sworn.[21] It is then that the accused is formally asked by the judge advocate, in accordance with the army regulation heretofore cited, if he has "any objection to any member," and it is then that, (like the prisoner before a civil court at the corresponding point of its proceedings,) he must present such objections as he knows or believes to exist, if he desires to take advantage of the same. If at this time he fails to present

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[14] DIGEST, 101. And compare Mann *v.* Glover, 2 Green, (N. J.,) 203.

[15] So called in reference to the whole body of jurors as "arrayed, or arranged on the panel."

[16] § 496. And see DIGEST, 102–3; G. C. M. O. 8, Dept. of the Platte, 1873. In Capt. Drane's case, (1847,) the accused challenged the array on the ground that not one-half of the members were his superiors in rank; the objection was not sustained. In Com. Wilkes' case, in 1864, the accused challenged the array on the ground that the Secretary of the Navy, who, in accordance with a peculiar usage confined to the navy, had preferred the charges, had also selected the court. The court refused to entertain the challenge.

[17] Compare Brooks *v.* Davis, 17 Pick. 150; Clark *v.* Van Vracken, 20 Barb. 281.

[18] See G. C. M. O. 8, Dept. of the Platte, 1873.

[19] Simmons § 497, note; DIGEST, 103; G. O. 37, Dept. of Kans., 1864; 5 Opins. At. Gen., 707.

[20] Simmons § 497. In a case in G. O. 24, Dept. of the Platte, 1869, the proceedings were disapproved because of the action of the court in entertaining a challenge offered by the accused to two members at the same time, "in violation of the plain provisions" of the Article.

[21] Hough, 943; Griffiths, 47; De Hart, 125. "The regular practice is to challenge jurors as they come to the book to be sworn." People *v.* Damon, 13 Wend. 352. "The proper time for challenging is between the appearance and swearing of the jurors." Williams *v.* State, 3 Kelly, 453.

such objections, he is held to have *waived* them, and cannot be allowed to interpose them at any subsequent stage.[22]

309 But valid objections may exist at this time, not known to the accused, (or to his counsel, if he has one,[23]) and of the existence of which he could not by reasonable diligence have been informed.[24] In such event, it is permitted to the accused, (as to the prisoner under similar circumstances at a criminal trial,[25]) to take his exception as soon as the facts justifying it are brought to his knowledge, although this may not be till some time after the court has been sworn and at a late stage of the trial.[26] Again, pending the trial, a member who has been duly sworn at the proper time, and has taken part in the proceedings, may, by some expression of opinion or other act, render himself, as may a juror under similar circumstances, subject to challenge, and he may thereupon be challenged accordingly, whatever be the stage of the proceedings.[27] In all such cases the military practice, in the

310 interest of justice, follows that of the civil courts in allowing the challenge to be interposed.[28] The occasions, however, of challenges offered to members of courts-martial, after the court has been sworn, whether for causes previously existing but not known or for causes subsequently arising, are extremely rare.

**ORDER OF CHALLENGES.** In the British law, objections to members are raised in the order of their rank, beginning with the lowest in rank.[29] In our

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[22] Not replying or offering an objection when the question is put "may be considered by the court as tantamount to his having *no* objection." D'Agullar, 101. "If a cause of challenge known to the prisoner prior to his arraignment has been waived by him, it cannot subsequently be urged." De Hart, 125. And see DIGEST, 102. "The rule of the common law is that neither party has a right of challenge after the juror is sworn, for cause then existing." U. S. *v.* Morris, 1 Curtis, 35. "If a party knows of any prejudice entertained by a juror, and makes no exception when the jury is empanelled, however good his cause of challenge then is, it must be deemed to be waived." Fox *v.* Hazleton, 10 Pick. 277. And see case of Lieut. Armstrong, 17 Opins. At. Gen. 397.

[23] The rule that—"the knowledge of the counsel is the knowledge of the party, and notice to him is notice to the party," (State *v.* Fuller, 34 Conn. 280,) while applicable to military cases, would not ordinarily be so strictly applied as in a civil case.

[24] The furnishing to the accused before the trial of a copy of the order detailing the court has already, (see Chapter XIII,) been recommended as affording him an opportunity to prepare such challenges as he may propose to offer when the court assembles.

[25] "It has always been held that if a juror prejudge the case, and it is unknown" at the outset, "it is ground for challenge subsequently." Sellers *v.* State, 3 Scam. 416. In this case, and others, new trials were granted because a juror, on being challenged and interrogated before he was sworn, had stated that he had not formed or expressed an opinion, whereas it subsequently appeared that he had in fact done so.

Where the party, "though knowing of the objection, forgot to raise it at the proper time," he is not entitled to raise it subsequently. Barlow *v.* State, 2 Blackf. 114. "If the party, before the juror is sworn, neglects to avail himself of means of information, readily accessible by which he could inform himself of the objection, the law fixes him with knowledge, and will not allow him to take advantage of his laches." See Bailey *v.* Trumbull, 31 Conn. 581; Quinebaug Bk. *v.* Leavens, 20 Id. 87; Fox *v.* Hazleton, 10 Pick. 277; Gillespie *v.* State, 8 Yerg. 507.

[26] See Tytler, 231; Hough, 943, note; Id., (A.) 49; McNaghten, 173; De Hart, 124.

[27] "It has always been allowable to challenge a juror after he is sworn for a cause thereafter arising, for the reason that the act of the juror which constitutes the new ground of challenge places him in the same relation to the remaining portion of the trial as that in which a juror challengeable at the outset stands to the whole investigation; for the trial after the arising of the new ground can be no more impartial than can be the trial from the beginning with a juror biased or otherwise disqualified in advance." People *v.* Bodine, 1 Edmonds, 44. And see State *v.* Fuller, 34 Conn. 280; Mynatt *v.* Hubbs, 6 Heisk. 322, and cases cited.

[28] Where an accused officer, having a valid objection to a member of the court, omitted to raise it at all at the trial, it was held that he must be deemed to have consented to the court as composed, and was estopped from raising the objection at a later period as ground for impeaching the validity of the sentence. Lieut. Keyes' Case,—in DIGEST, 102, 15 Opins. At. Gen., 432, and 15 Ct. Cl., 533; also 17 Opins. 397.

[29] Rules of Procedure § 25, (E.;) Simmons § 497.

practice no such rule obtains; the accused, (or judge advocate,) being permitted to challenge members, where he objects to more than one, in such order as he may deem expedient.

**FORM OF PRESENTING CHALLENGES.** A party availing himself of the opportunity of challenge may state his objection verbally or in writing. In our practice, challenges are generally expressed orally: the court, however, in a proper case, as where the grounds of objection are exceptional in their nature, or vaguely declared, or are apparently frivolous or actuated by personal feeling, may require the challenge to be presented in writing. As observed by De Hart,[20] the challenge should "always be stated in becoming and respectful terms"—a rule particularly to be observed where personal prejudice or hostility is ascribed to the member. The court may properly decline to entertain a challenge clearly frivolous,[21] as well as one expressed in unnec-
311 essarily offensive language. But where the challenge merely states facts, which if proved will constitute a valid objection, the court cannot refuse to consider the same, however grave or injurious to the member may be the charge involved.

The court, according to the practice already noted, will require the party, where he has several distinct grounds of objection to a member, to present them *seriatim*, and will consider and pass upon the same separately, precisely as if they were challenges to separate members. Under the pretext or form of a second or further objection, a party should not be permitted to reiterate, in substance, an objection already overruled.[22]

**RESPONSE TO THE CHALLENGE BY THE MEMBER.** The objection being presented, the member excepted to may or may not respond to the same, in his discretion.[23] If he does so, admitting that the objection as stated exists, and the same is a valid and relevant one, the court will properly hold the challenge to be sustained; indeed, in such a case the member himself will often express a wish to be excused.[24] If, on the contrary, he does not admit the facts alleged, he may, by a statement or explanation, (which he is
312 always at liberty to make,[25]) satisfy the challenging party that he is in error and induce him to withdraw his challenge. Thus it is not

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[20] Page 116.

[21] See De Hart, 118, 127; G. O. 13, Dept. of the Potomac, 1867.

[22] Compare Mann *v.* Glover, 2 Green, 195. As already indicated, where a valid ground of challenge exists which the accused, through ignorance, fails to present in a proper form, he should be so instructed and assisted by the judge advocate or the court as to be enabled to have the full benefit of the same. See G. C. M. O. 19, Dept. of the Columbia, 1882.

[23] That the court cannot properly *require* him so to respond, see G. O. 2 of 1858. The mere statement of an accused, not admitted by the member, is not sufficient to support a challenge. See G. C. M. O. 35, Dept. of Dakota, 1884; Do. 42, Id. 1892. The mere fact that the member does not respond should not necessarily be regarded as an admission of the ground of challenge, and the contrary ruling in G. C. M. O. 74, Div. of Atlantic, 1887, is not, as laying down a general principle, concurred in.

[24] But see *post*, to the effect that the member cannot be excused at his own request, but only on a challenge regularly passed upon and sustained.

[25] "The challenged member may admit and ask to withdraw, or explain." Hough, (P.) 799. "The usual practice is for the member to rise and admit, or deny the truth of the objection, or to explain it." O'Brien, 240. And see Simmons § 500; Bombay, R., 11; DeHart, 115.

In the civil practice, opportunity is afforded to jurors, in justice to themselves, to explain away any injurious imputations involved in the challenges as offered. Thus in Taylor *v.* Greely, 3 Greenl. 204, the court say:—"The testimony of the juror himself is to be heard in explanation of the language or conduct imputed to him." In McFadden *v.* Com., 23 Pa. St., 17, it is observed:—"A juror, like every other person publicly assailed, ought to be heard in vindication of his character.

unusual for a member objected to for prejudice against the accused, to disclaim having any such feeling or bias as imputed and to state that he is aware of no reason why he cannot judge impartially in the case. Upon such a declaration made in evident good faith, the accused will, in the majority of cases, cease to press his objection.[36]

**TRIAL OF THE CHALLENGE.** But where the statement of the member fails to satisfy the challenging party, and the objection is insisted upon; or where the member makes no response to the challenge, it is open to the party either to submit the question of the validity of the challenge to the court simply upon his own statement and that of the member, if any, or, (as is in general the proper course where the member fails to make an admission or to state facts,) to proceed to try the challenge by the offer of evidence,[37] like any other issue.[38]

This evidence may include not only the testimony of witnesses, as well as such documentary or other written proof as may be relevant,[39] but also the testimony of the member himself brought out upon an examination instituted by the challenging party.

313 That the challenging party is entitled, if he desires it, to subject the challenged member to an examination by interrogatories, in the same manner as a juror may be subjected to examination in the criminal practice,[40] is well settled.[41] Some of the authorities indeed refer to this examination as properly had upon oath, like the examination upon the *voir dire* in the civil courts.[42] But our military law makes no provision for swearing the member under the circumstances; and, in the absence of such authority, it is clear that for the court, before it organizes, to assume to administer to him the oath of a witness, or any oath, would be a proceeding without warrant of law.[43] But,

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[36] O'Brien, 240.

[37] A court should not allow a challenge "upon its mere assertion by the accused without proof, and in the absence of any admission on the part of the member." DIGEST, 101. The admission of an objection unsupported by evidence and "without any reason shown beyond a mere supposition or prejudice of the prisoner, tends in effect to introduce into courts-martial the allowance of peremptory challenge—a practice wholly unknown to our military code." G. C. M. O. 66 of 1875.

[38] That the proceeding upon a contested challenge is a trial upon an issue joined, see Clark *v.* Van Vracken, 20 Barb. 281. "A challenge raises an issue of fact, and unless the fact be admitted by the other side, it is to be determined, like any other issue, upon competent evidence." Gen. Merritt, in G. O. 42, Dept. of Dakota, 1892.

[39] See Simmons § 500; De Hart, 116. That any relevant and proper testimony is competent to show the true state of mind of a challenged juror where his statement or personal examination has failed to disclose bias on his part, see Bickam *v.* Pissant, Coxe, 220; State *v.* Benton, 2 Dev. & Bat., 212; People *v.* Reyes, 5 Cal., 347. "As to the *mode* of proving a challenge, the law of evidence is the same as in other cases. Proof may be made by records, papers, or witnesses, either to support the challenge or to disprove it." State *v.* Spencer, 1 Zahr., 199.

[40] "In order to arrive at the condition of the person's mind who is offered as a juror, a party is permitted to ask of the person himself questions the answers to which may tend to show whether he is prejudiced or not in the cause which he is about to undertake to decide." People *v.* Reyes, 5 Cal., 349. And see Lohman *v.* People, 1 Comst. 384; Justices *v.* Plank R. Co., 15 Ga., 54; State *v.* Benton, 2 Dev. & Bat. 222.

[41] O'Brien, 240; G. O. 21 of 1853. In this Order and also in G. O. 8, Div. Pacific, 1870, the proceedings of a trial were disapproved because the right of personal examination of the member was denied to the accused by the court.

[42] See O'Brien, 239; Ives, 92; G. O. 35 of 1867.

[43] "The court must decide on the *assertion* of the party challenging, of the officer challenged, and of the witnesses examined; for it has no authority to receive evidence *on oath*, before the administration of the prescribed oath to the members." Simmons § 500. And see, to a similar effect, De Hart, 116; DIGEST, 101. At this stage indeed of the proceedings, no oath whatever can legally be administered either by the president or judge advocate.

[But *now* such oath might perhaps be regarded as authorized under s. 4, c. 272, of the Act of July 27, 1862.]

though not sworn as such, he is *examined* as a witness,[44] and the examination is therefore to be governed by the rules which specially govern the examination of a juror under similar circumstances, the principal of which is that questions shall not be asked the answers to which will tend to criminate the party, or will directly attach to him disgrace, as by the confession of dishonorable
314 or disreputable acts.[45] The exemption, however, from answering such questions is held, in the case of a juror, to be a *personal privilege* which may be *waived*.[46]

As to the *other* witnesses who may be offered, these also can not be sworn; no authority to swear witnesses at this stage being conferred by the code of Articles or other statute.[47]

It is to be added that the other party, if he thinks proper to contest the challenge, may take part in the examination by putting questions in the nature of cross-interrogatories to the member or witnesses. He may also introduce counter-witnesses or other evidence relevant to the issue.[48] It is very rare, however, that the trial of a military challenge is thus far extended.

Either party, or both parties, may make argument upon the evidence.

**CHALLENGE BY THE JUDGE ADVOCATE.** The challenges desired to be offered on the part of the prosecution, if any, are in practice interposed *after* the full exercise of his right by the accused,[49] and in a similar form and manner.

**THE DELIBERATION BY THE COURT.** The trial of the challenge, which is commonly conducted in open court, having been completed, the court is in general cleared for deliberation upon and determination of the matter of the objection,—a proceeding, it may be remarked, for which it is not required to be, and is not in practice, sworn.[50] Where indeed the ground of challenge,
315 admitted or shown to exist, is manifestly valid, (as in the case of a challenge distinguished, as will hereafter be indicated, in the civil practice as a challenge "for principal cause,") the court need not go through the form of clearing, but may well pass upon and allow the challenge at once as they sit.

Upon a clearing or deliberation, the challenged member usually and properly withdraws from the court, that is to say, does not remain with it:[51] if however he stays, he takes no part in the discussion or decision. His remaining cannot indeed affect the validity of the proceedings, but his withdrawal is desirable as

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[44] "The juror becomes merely a witness, and he may be examined as a witness. He will be exempt from answering such questions as witnesses are exempt from answering, and from no others." Justices *v.* Plank R. Co., 15 Ga., 55.

[45] O'Brien, 239; G. O. 21 of 1853. "A juror may be asked such questions as do not tend to his infamy or disgrace." 5 Bac. Abr., 367. "It cannot be asked a juror if he has been either charged with, imprisoned for, or convicted of, a crime." Jones *v.* State, 2 Blackf. 477. The exemption of a member of a court-martial from being required to give criminating testimony should be held to include testimony implicating him either in a military or a civil offence.

If the inquiries addressed to the member by the accused bring out unfavorable opinions of the accused himself, these, if given in good faith, are "official and privileged." G. O. 2 of 1858. It is added in this Order that if an answer "goes too far" in injurious reference to the accused, "the court should interpose."

[46] Boon *v.* State, 1 Kelly, 622; Sprouse *v.* Com., 2 Va. Cas., 375.

[47] [But see *now* the provision of the Act of July 27, 1862, noted on the previous page.]

[48] Compare State *v.* Spencer, 1 Zabr., 199, as cited in note *ante*.

[49] Hough, 944, note; Id., (A.) 45; De Hart, 125.

[50] See De Hart, 116.

[51] Hough, (P.) 779; Id., (A.) 48; Simmons § 500; Kennedy, 51; Napier, 87; Griffiths, 47; Bombay R., 11; Hughes, 42; Macomb, 31; De Hart, 115; Benét, 69; Coppée, 65; DIGEST, 101.

Under the Act of July 27, 1892, the judge advocate retires here, with the accused, equally as at a final deliberation on the judgment.

promoting freedom of discussion [52] and may properly be requested by the court. In an early leading case,[53] a member of a general court-martial, for a refusal, *expressed in grossly disrespectful terms*, to retire when so requested, was brought to trial and convicted upon a charge of "conduct to the prejudice of good order and military discipline." The member indeed cannot be compelled to withdraw against his will, nor will the mere fact of his omitting or declining to withdraw constitute a military offence, but in general his sense of propriety and justice will induce him to retire of his own accord and as a matter of course.

That the court, including the challenged member, may consist of but five persons, can constitute no reason why he should not withdraw. That four members of a general court are competent, at this stage of the proceedings, to determine the matter of a challenge offered to a fifth member, is well
316 settled in our law: [54] the member does not cease to be a member because of being challenged. So, also, two members of a regimental or garrison court may, and must, pass upon an exception taken to the remaining member. But where, of a general court consisting of five members, four have duly allowed a challenge to the fifth member, who has accordingly retired from the court, the four remaining are not competent to entertain a further challenge; that is to say, three of the remaining four cannot legally pass upon a challenge to the other member.[55]

In deliberating upon the subject of the challenge as offered, it will be for the court to inquire, *first*, whether the ground of objection advanced is a valid one; *secondly*, whether its existence in the particular case is established. What are valid grounds of challenge at military law will be considered presently. As to the question of the sufficiency of the proof, the court will properly bear in mind two principles: *1st*, that the burden of maintaining the challenge, and establishing that the member does not stand indifferent,[56] rests upon the challenging party, and that a member, like a juror, is presumed to be qualified till he is shown to be the contrary; [57] *2d*, that where any reasonable doubt exists of the indifference of the member in the case to be tried, it will be safer and in the interest of justice to sustain the objection and excuse him.[58] And this although the court may thus be reduced below the legal minimum and it may not be convenient to recomplete it. For, the convenience of the service

[52] Simmons § 500, (edit. of 1863.) Attorney General Cushing, in remarking, (7 Opins., 284,) upon "the course to be pursued by an arbitrator, judge, or other member of a plural body," when for any legal cause "precluded from participating in the decision" of such a body, observes that "it is generally held that in such case he ought not to participate in the deliberation which precedes the decision. The reason assigned," he adds, is that "if the person who has not the right to concur in the decision, participate in the deliberation, or be so much as present even, it is impossible to know whether he has or has not influenced the result."

[53] See G. O. 1 of 1858.

[54] O'Brien, 240; DIGEST, 88. And see G. O. 24, Dept. of the Platte, 1869; G. C. M. O. 10, Dept. of Texas, 1873.

[55] This was actually done in one case; the proceeding being of course disapproved by the reviewing authority. See G. C. M. O. 72, Dept. of Dakota, 1882.

[56] The law aims to exclude bias, &c., from a jury so far as the infirmity of human nature and the imperfections of human institutions will permit." State *v.* Benton, 2 Dev. & Bat. 215. "Exact and absolute impartiality is not to be had. The utmost that can be attained is that jurors should be as impartial as the lot of humanity will permit." Com. *v.* Hill, 4 Allen, 591. And see Burr's Trial, 370, 416.

[57] U. S. *v.* Watkins, 3 Cranch C., 579; State *v.* Benton, 2 Dev. & Bat. 214; People *v.* Stout, 4 Parker, 108; Stewart *v.* State, 15 Ohio, 155; Holt *v.* People, 13 Mich., 227; People *v.* Brotherton, 47 Cal., 388.

[58] Black *v.* State, 42 Texas, 377; R. R. Co. *v.* Munkers, 11 Kans., 223; Hole *v.* People, 13 Mich., 224.

is less to be regarded than the obligation to administer justice. The majority of military writers certainly lean rather in favor of supporting
317 challenges than rejecting them,[59] and the proceedings of courts-martial have been not unfrequently disapproved in General Orders for the reason that valid objections to members have failed to be allowed.[60]

**THE DETERMINATION OF THE CHALLENGE.** After such free interchange of views as may be desirable, a vote, in the manner prescribed by Art. 95, is taken upon the objection;[61] the question to be voted upon being—Shall the challenge be allowed? A majority of course decides. Where there is a tie, it should be held, upon the analogy of all deliberate assemblies,[62] that the objection is not sustained; and to this effect has also been the practice of the civil courts.[63] Simmons[64] indeed declares that "when the votes are equally divided the decision is given in favor of the challenge being allowed," and this statement has been repeated by O'Brien.[65] In the absence, however, of positive law or regulation, such a rule could rest only upon usage, and no usage to this effect can be said to exist in our service. So, the British rule that where there is a tie vote upon a challenge, the president of the court shall have a casting vote,[66] has not—it need hardly be observed—been adopted in our law. In the procedure of American courts-martial, a tie vote upon an objection to a
318 member, as upon any other proposition, is *no vote*, *i. e.* is not the indispensable majority, and the objection is not sustained.[67]

**PROCEDURE UPON A DECISION.** The court having come to a conclusion upon the cause of challenge assigned, the doors, (the court having cleared,) are opened, and, the parties and the member who had retired being present, the decision is announced by the president. If it is that the challenge is not sustained, the member retakes his seat and the proceedings continue in the regular course. If the reverse is the result, and the member is, as it is commonly phrased, "excused," he withdraws permanently; whereupon the court, if five members still remain, goes on with its business.[68] If the sustaining of the challenge has reduced the number to four, the court, as it cannot legally proceed, adjourns and reports the fact through its president to the convening authority. The latter, if he deems it expedient, will issue an order adding to the court a

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[59] Kennedy, 54; Napier, 94; De Hart, 115; Benét, 69; Coppée, 67; G. C. M. O. 66 of 1875; G. O. 13, Dept. of the Potomac, 1867.

[60] See G. C. M. O. 82 of 1868; G. O. 16, Dept. of the Ohio, 1865; Do. 11, Dept. of Cal., 1865; Do. 13, Dept. of the Potomac, 1867; Do. 14, Dept. of La., 1868; Do. 20, Dept. of Arizona, 1870; Do. 45, Dept. of the South, 1873; Do. 5, Dept. of the Gulf, 1873; Do. 36, 47, Dept. of Dakota, 1874; Do. 15, Id., 1875; G. C. M. O. 10, 71, Dept. of Texas, 1873; Do. 44, Id., 1875; Memo., Dept. of the Columbia, June 19, 1874. But "while courts are prone—and justly so—to deal liberally with prisoners in the matter of challenges, it should not be forgotten that this right to protection may degenerate into a means for annoying officers against whom prisoners are prejudiced." G. C. M. O. 35, Dept. of Dakota, 1884. (Gen. Terry.)

[61] See Pipon & Col., 51.

[62] "An equal division upon a question is a decision of it in the negative." This, on the ground that—"the votes given for the negative" are "sufficient in number to neutralize the votes given on the other side." Cushing, Law and Practice of Legislative Assemblies § 303.

[63] See U. S. *v.* Watkins, 3 Cranch C., 443.

[64] § 497. And to this effect is now the statute law, as to challenges of members other than the president. Army Act § 51. (5.)

[65] Page 240.

[66] Army Act § 53. (8.)

[67] See DIGEST, 747.

[68] After a challenge interposed by the accused has been acted upon, it is proper for the judge advocate to ask him if he has any "further objections." G. C. M. O. 67, Dept. of Dakota, 1882.

member or members, or detailing a new court altogether.[69] As already indicated, members thus added will be liable to challenge in the usual manner; and, in the event of a new court being appointed, embracing any of the members of the former court, these will become again subject to challenge in the same manner as when upon the original detail.[70]

**A MEMBER EXCUSABLE ONLY UPON CHALLENGE.** It remains to remark that the proceeding authorized by Art. 88 is the only one by which a member may be relieved from attendance by the court. Nothing is now better settled in our military law than that, except upon a challenge duly made and sustained, the court is not empowered, for any reason or purpose, to ex-
319 cuse a member;[71] nor, of course, can a member in any case excuse *himself*.[72] Simmons[73] and Kennedy[74] have sanctioned the court's permitting a member, excepted to for personal prejudice or hostility, to withdraw voluntarily if he desires it, without his objection being regularly passed upon; and their view has been inconsiderately repeated by O'Brien,[75] and De Hart.[76] Our Article, however, clearly conveys no authority for the excusing by the court of members at their own request, and such action has been repeatedly condemned in General Orders.[77] Where an officer detailed upon a court-martial deems himself disqualified, from prejudice or otherwise, to sit upon a particular trial, he should, if there is time, communicate the facts to the convening authority and ask to be relieved.[78] Where this cannot be done prior to the trial, the member, before being sworn, should make known the fact of the objection either directly to the party interested in raising the same,[79] or preferably to the court in the presence of the parties, so that one or the other party may formally take the exception unless he elects to waive it.[80]

## III. THE GROUNDS OF CHALLENGE.

**CLASSIFICATION.** At the common law, the causes for challenge to jurors were divided into four classes: those *propter honoris respectum*, (on account of a respect for nobility;) *propter delictum*, (on account of
320 crime;) *propter defectum*, (on account of defect, that is to say personal or legal incapacity;) and *propter affectum*, (on account of favor or bias.)[81]

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[69] In the British practice, members excused or challenged may be replaced by officers detailed to attend the court for the purpose and called "waiting officers." Rules of Procedure § 17, (D.,) and Second Appendix. At an early period in our army a similar purpose was served by "supernumerary" officers. De Hart, 115; O'Brien, 240. This practice has been referred to in Chapter XII.

[70] De Hart, 89.

[71] DIGEST, 103. And see G. C. M. O. 27, 83, Dept. of Dakota, 1881; Do. 13, Id., 1887; Do. 25, Id., 1889; Do. 62, Id., 1889, and 26, Dept. of the Mo., 1889, (where a member was excused to act as counsel for the accused;) Do. 30, Dept. of Dakota, 1886, (where the member, a surgeon, was excused to enable him to attend to his medical duties.) It does not affect the absolute illegality of the exercise of the power that the accused does not object. Do. 31, (H. A.,) 1887.

[72] G. O. 66, Dept. of the Platte, 1871, Do. 78, Dept. of Dakota, 1892. *Contra*, see Sackville's Trial—a precedent without authority in this country.

[73] § 500.

[74] Page 54.

[75] Page 239.

[76] Page 118.

[77] See G. O. 21 of 1853; Do. 66, Dept. of the Platte, 1871; Do. 43, Id., 1875; G. C. M. O. 73, Dept. of Texas, 1873; Do. 25, Dept. of Arizona, 1880. *Contra*—G. O. 34, Dept. of the Gulf, 1875.

[78] DIGEST, 103; G. O. 43, Dept. of the Platte, 1875. And see G. C. M. O. 25, Dept. of Arizona, 1880.

[79] See G. C. M. O. 73, Dept. of Texas, 1873.

[80] See G. O. 66, Dept. of the Platte, 1871.

[81] Co. Litt. 158, b. And see Simmons § 502.

**CHALLENGES PROPTER HONORIS RESPECTUM.** This kind of challenge, says Coke, could be taken only to a "peere of the realm or lord of parliament, for these, in respect of honor and nobilitie, are not to be sworn on juries."[83] And he adds:—"When any of the commons is to have a tryall, either at the King's suit, or between partie and partie, a peere of the realm shall not be impanelled in any case."[83] It need hardly be observed that no challenge, answering to or resembling this one, is known to the procedure of the courts of this country, where every man is the peer of every other man before the law.

**CHALLENGES PROPTER DELICTUM.** The term "*delictum*" refers to an infamous crime, that is to say a crime affixing infamy, in the legal sense, upon the offender,—as a capital crime or a felony.[84] Of the crime which is the ground of challenge the juror must have been duly convicted, and the proper proof to sustain the challenge is the *record* of such conviction.[85] An instance of a valid challenge of this class would be most rare in the military practice, and no case is known in which one has been interposed.

**CHALLENGES PROPTER DEFECTUM.** Challenges of this class are of two kinds: 1. Those based upon some physical or mental defect; 2. Those based upon an incapacity created by law.

1. Of the former class—"unsoundness of mind, or such defect of the mind or the organs of the body as render him incapable of performing the duties of a juror,"[86] as also sickness, deafness, and intoxication,[87] are specified by the authorities as causes properly exempting a juror from serving, and con-
321 stituting ground of challenge. So, at military law, Hough[88] states it is one of "the legitimate causes of challenge that the officer from age, deafness or other infirmity, is incompetent to discharge the duties of a member."

2. The legal incapacity upon which the *second* class of challenges *propter defectum* is based is one created by statute or established by the common law. Certain of the incapacities at common law, as alienage and minority, are adopted by the statutes of most of the States as legal disqualifications in the case of jurors, and, under the provisions of Sec. 800, Rev. Sts., the same facts would be held to be valid grounds of challenge in the federal courts.

But neither alienage nor minority would be recognized as such grounds at military law, where neither the age, nativity, nor civil status of officers is matter of positive statutory regulation, and where it is required of members of courts-martial in general simply that they shall be commissioned officers, and shall have military rank.[89] If indeed a member has not been duly commissioned or appointed, or if his commission has been vacated by operation of law under Sec. 1222 or 1223, Rev. Sts., by his accepting or exercising the functions of a civil office, or his accepting or holding an appointment in the diplomatic or consular service, he will be challengeable *propter defectum*. So, if he has not military rank—as would be the case if one of the permanent pro-

[83] Co. Litt., 156, b.
[83] Id. And see 2 Gabbett, 391.
[84] Co. Litt., 158, a; State *v.* Squaires, 2 Nev. 230; Tytler, 225; Adye, 176.
[85] 2 Hawkins, c. 43, s. 25; Tytler, 225; Adye, 176.
[86] State *v.* Squaires, 2 Nev. 230.
[87] Schœffler *v.* State, 3 Wis. 828; Jesse *v.* State, 20 Ga. 164; Pierce *v.* State, 13 N. H. 555.
[88] Page 943, note. "The members should not be deaf, or blind, or laboring under any illness that may prevent their constant attendance." Id., 48. And see D'Aguilar, 102.
[89] Chapter VII, *ante*.

fessors of the Military Academy were to be detailed upon a court-martial[90]—he would be similarly challengeable.

Further, a challenge of this class will be valid in a case of an officer incapacitated by statute from sitting upon the particular or any court. Thus an officer of the regular army detailed upon a court for the trial of militia, or an officer of marines placed on a military court when not detached for service with the army, or a retired officer sitting upon any court-martial, would be subject to challenge *propter defectum.*

322 **CHALLENGES PROPTER AFFECTUM.** This is by far the most numerous class of challenges taken to jurors, and so to members of military courts. It includes all the grounds and facts of objection from which an inference of bias or partiality on the part of the juror or member must be, or may be, inferred.

Challenges for principal cause and for favor. Here may be noted an old distinction in the law of challenge, especially applied to challenges *propter affectum,*[91] by which challenges to jurors are distinguished as (1) challenges "for cause" or "for principal cause," (sometimes termed "principal challenges,") and (2) challenges "to the favor," or "for favor."

Of "*principal*" challenges of this class the cause alleged is a specific fact of such a nature that, being admitted or proved to exist, it raises *per se*, and necessarily, a presumption of bias or prejudice which cannot be rebutted and the effect of which is absolutely to exclude the juror. Of such causes, among the most conspicuous are the following;—declared enmity; fixed and decided opinion on the merits; having been summoned as a material witness on the merits; relationship within a certain degree; direct personal interest in the result of the trial; having served on the grand jury which found the indictment; having sat upon a former trial of the defendant; having conscientious scruples which will influence a verdict.

Of challenges of this class "*for favor*," that is to say for being in favor of one side or the other, the grounds are not such as, of themselves, imply bias; the question of their sufficiency in law being wholly contingent upon the testimony, which may or may not, according to the character and significance of all the circumstances raise a presumption of partiality. Such are challenges founded upon the personal relations of the juror and one of the parties to the case; their relationship, when not so near as to constitute "principal cause;" the entertaining by the juror of a qualified opinion or impression in regard to the merits of the case; his having an unfavorable opinon of the character or conduct of the prisoner; his having taken part in a previous trial of the prisoner for a different offence, or of another person for the same or a
323 similar offence; or some other incident, no matter what, (for the grounds of challenges "to the favor" are as various as the influences that affect human feeling,[92]) which, alone or in combination with other incidents, may have so acted upon the juror that his mind is not "in a state of neutrality" between the parties. In brief, as remarked by the court in a leading case, the distinction between these two classes of challenges is that, in the former, the conclusion that the juror is incompetent is a conclusion of *law* on ascertained facts;

[90] See Chapter VII, *ante.*

[91] It may be remarked that the challenges of the three classes already noticed—*propter honoris respectum, propter delictum,* and *propter defectum,* are all properly "principal" challenges; the privilege, crime, or incapacity, in any case, needing but to be shown to exist to substantiate the objection as a matter of course.

[92] "A challenge to favor applies to any man where there is sufficient reason to suspect he may be more favorable to one side than to the other." Rollins *v.* Ames, 1 N. H. 350.

in the latter, the question whether he is so or not, is a question of *fact* to be determined by the particular circumstances in evidence.[93]

**Special grounds.** Keeping this distinction in mind as of value in passing upon military as well as civil cases, we will proceed to consider the chief grounds of challenge of the present class,—*propter affectum*,—which, as has been said, comprises the great majority of the exceptions which come to be taken to members of courts-martial. Some of these will be found to be peculiar to the military practice, but the greater part are common to that both of civil and military courts.

These grounds of exception will be examined in order under the following heads:—1. Opinion formed or expressed; 2. Interest; 3. Relationship; 4. Personal prejudice or hostility; 5. Intimate or peculiar personal relations;
324 6. Having taken part in a former trial or inquiry; 7. Being a material witness in the case; 8. Miscellaneous grounds.

**OPINION FORMED OR EXPRESSED—Expressed opinion—It need not proceed from ill will.** Whether an opinion formed and expressed upon a case shall be held to affect the competency of a juror, or a member of a court-martial, properly depends upon its nature and extent, irrespective of any personal feeling of ill will, or the reverse, on the part of the juror or member;[94] such personal feeling in fact, when entertained, being treated as a separate and distinct ground of challenge.

**Must be positive and definite.** The opinion, properly to disqualify the juror or member, should be a positive and unqualified one. As remarked by the court in an adjudged case,[95] an opinion, necessarily to exclude a juror from the panel, must be "absolute, unconditional, definite and settled, in distinction from one which is hypothetical, conditional, indefinite and uncertain. The mind must be, for the time being, settled and at rest upon the question of the prisoner's guilt, or upon the question to be tried."[96] Such an opinion would ordi-

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[93] People *v.* Bodine, 1 Denio, 308. And see Freeman *v.* People, 4 Id., 9; People *v.* Stout, 4 Parker, 110; Mann *v.* Glover, 2 Green, 204.

"Principal" challenges were heretofore specially distinguished in practice from challenges to the favor in that while the former were passed upon by the court, the latter were determined by sworn "triers"—two indifferent persons, usually members of the bar, or jurymen already found competent—who, being designated for the purpose by the court, heard the evidence *pro* and *contra*, and decided, as a question of fact, whether the juror was biased. Now, however, in a considerable number of the States, as also in the federal practice, (see Sec. 819, Rev. Sts.,) triers are done away with, and all disputed challenges are decided by the court.

For this reason Thompson, Law of Trials, vol. 1, p. 47, is of opinion that "the distinction between these two kinds of challenges has so far disappeared in this country that it may now be disregarded." In illustrating, however, the science of this branch of the law, it is still of interest and of use.

[94] The opposite common law doctrine that the expressed opinion, to constitute valid cause of challenge, must proceed from ill will or malice, (King *v.* Edmonds, 4 B. & Ald. 471,) has (except in New Jersey—State *v.* Spencer, 1 Zabr. 198; State *v.* Fox, 1 Dutch., 588,) never prevailed in this country.

[95] People *v.* Stout, 4 Parker, 109.

[96] The decided opinion must of course be serious, not "jocular." Monroe *v.* State, 23 Texas, 210. It must also be one made in good faith, not for the purpose of getting rid of serving as a juror. U. S. *v.* DeVaughan, 3 Cranch C., 84. Where a juror, in expressing a positive opinion on the merits, had also expressed a wish for the success of one of the parties to the suit, the court, in holding the opinion a sufficient ground for setting aside the juror, added:—"Much more is the actual wish or desire that one party should so prevail, a good cause. Such wish or desire is partiality itself, not merely evidence of partiality." Justices *v.* Plank R. Co., 15 Ga. 54.

narily be one either based upon personal knowledge of the facts, or acquired from some reliable source—as from a party to the case, from hearing the evidence upon a previous trial or preliminary investigation, from conversations with witnesses, &c. But if the opinion be positively fixed and definite, it is not essential that the source from which it is imbibed should be an
325 authentic one. If the mind of the juror or member be possessed by a clear and settled opinion, it should be held to disqualify him, however or whencesoever derived.[97] A decided opinion, it may be added, need not be expressed in a public manner: Hough[98] mentions a case of an opinion, casually expressed in private, which was held sufficient ground of challenge.

**Transient opinion or impression, insufficient.** On the other hand, an impression or cursory opinion upon the merits of a case or the guilt or innocence of the accused, which has taken no decided hold upon the mind, and will fail to influence the judgment in the presence of sworn testimony, will not, as it is held generally by the authorities, properly exclude a juror or member of a military court, upon challenge. Such, chiefly, are the slight impressions or shifting opinions so frequently formed upon public rumor or common report, as well as those gathered from such material as the gossip of acquaintances, casual conversations with persons who were not witnesses and have no personal knowledge of the facts and, especially, articles in *newspapers*.[99] In a case in New York, the court, referring to impressions derived from the source last mentioned, remark:—"It is quite obvious that if jurors are on such grounds to be
326 rejected, it will be impossible at the present day to administer justice in cases sufficiently exciting to inspire a newspaper paragraph."[100]

**Hypothetical opinions.** Of this general description are also the opinions characterized in the books as "hypothetical;" that is to say, opinions derived chiefly from rumor, hearsay, or other imperfect information, which, proceeding upon the supposition "that the facts are as they have been represented or assumed to be," take, when expressed, a hypothetical form. As where the juror declares that he has formed an opinion, if what he has heard is true; or, if what he has heard or read is true, he believes the prisoner to be guilty or innocent, as the case may be. This belief, the continuance of which is conditional

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[97] "It is the preconceived opinion that renders him incompetent, and not the source from which that opinion is formed or derived." State *v.* Gillick, 7 Iowa, 307. If the opinion be decided, it is no matter that it be formed "from the report or hearsay of others. Many men form their opinions from the statements of their neighbors in whom they have confidence. Indeed, there are many men who have more confidence in the expressed opinions of their intelligent neighbors than they have in their own." Reynolds *v.* State, 1 Kelly, 229. The fact that a juror has made up his mind on *insufficient* grounds is held *especially* to indicate a disqualifying bias. See 1 Burr's Trial, 370.

[98] Precedents, 715.

[99] The general rule that a juror must be superior to all exception "must not be carried to such a length as to run the risk of defeating the ends of justice by excluding from the panel persons who have expressed an indefinite opinion of the merits of a case, where * * * it has become a subject of general conversation." Irvine *v.* Bank, 2 W. & S., 190. "Sustaining challenges on (such) slight grounds tends to place the administration of public justice in the hands of the most ignorant and least discriminating portion of the community, by whom the safety of the accused may be endangered and the proper administration of the laws put to hazard." Moran *v.* Com., 9 Leigh, 651.

[100] Sanchez *v.* People, 4 Parker, 535. And see State *v.* Medlicott, 9 Kans., 280; People *v.* Mather, 4 Wend., 230; People *v.* Bodine, 1 Edmonds, 56; People *v.* Hayes, Id., 582; U. S. *v.* McHenry, 6 Blatchford, 503; 1 Burr's Trial, 370; Hall *v.* Commonwealth, 89 Va., 171.

upon the proof on the trial according with the information of the juror, is held, in general, not to constitute a sufficient ground of challenge.[1]

**Test of intermediate opinions.** Where the opinion of the juror is something more than slight, but at the same time is not positive, being in fact an opinion falling between the two extremes described, this test of its sufficiency to exclude upon challenge has been applied by the courts, *viz.—whether it is so fixed as to require evidence to remove it.* If the answer of the juror when interrogated on this point, or the drift of the evidence on the hearing, is in the affirmative, it is held to be generally safer to conclude that his mind
327 is so far preoccupied as to render him incompetent.[2] In a case in California,[3] where a juror stated, upon challenge, that he had formed an opinion which it would require evidence to remove, the court observe:—"In the mind of this juror" the prisoner "is held guilty before a single witness testifies against him; reversing the rule of law that presumes a person innocent until his guilt is *prima facie* established by evidence."

But the drift of the more recent rulings is to the effect that, though the opinion of a juror be so far fixed that it will require evidence to remove it, yet if he feels assured, and so declares or makes oath, that he can impartially try the case and give a verdict in accordance with the testimony on the trial, he will properly be accepted as competent, and this especially where his opinion has been formed upon report or rumor.[4]

**The opinion should be as to guilt or innocence.** It is a general rule that the opinion of the juror, to affect his competency, should be one upon the merits of the case, that is to say—where a verdict is to be rendered—upon the guilt or innocence of the accused.[5] Thus, as he held in several cases, a belief merely that a homicide or a murder has been committed is not an opinion as to the guilt of the party charged.[6] Nor, as ruled in a further case,[7] is
328 a belief, that the prisoner killed the person for whose murder he is indicted, such an opinion; for "the killing," as remarked by the court,

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[1] In State *v.* Sater, 8 Iowa, 420, the hypothetical opinion held not to disqualify the juror was—"if what he had heard should be proved upon the trial, he had an opinion made up." In Burk *v.* State, 27 Ind., 432, the court observe of a similar declaration: "It was equivalent to saying—'if the facts shall be as I have heard, then I have an opinion; if not, then I have none; and I have no opinion as to the truth of those facts.'" Upon the general principle that hypothetical opinions do not disqualify, see further—State *v.* Potter, 18 Conn., 166; People *v.* Mather, 4 Wend., 243; Durell *v.* Mosher, 8 Johns., 445; People *v.* Fuller, 2 Parker, 17; People *v.* Stout, 4 Parker, 71; Mann *v.* Glover, 2 Green, 201; State *v.* Benton, 2 Dev. & Bat., 213; Haugen *v.* Ry. Co., 53 N. W., 769; State *v.* Sheerin, 12 Mont., 539; Thompson, Law of Trials, vol. 1, p. 74.

[2] Cancemi *v.* People, 16 N. Y., 501; Fahnestock *v.* State, 23 Ind., 231; Moses *v.* State, 10 Humph., 456; Cotton *v.* State, 31 Miss., 504; Alfred *v.* State, 37 Miss., 296; Olive *v.* State, 11 Neb., 1; Vance *v.* State, 19 S. W., 1066; People *v.* Shufeldt, 61 Mich., 237; Halsted *v.* Manhattan Ry. Co., 11 N. Y. S., 44. But where the declaration of the juror was to the effect that, while it would require *some* evidence to change his opinion, the same would readily yield to evidence, he was held to be competent. Guetig *v.* State, 66 Ind., 94.

[3] People *v.* Gehr, 8 Cal., 359. And see Sam *v.* State, 13 Sm. & M., 190.

[4] State *v.* Williamson, 106 Mo., 162; Blair *v.* State, 5 Ohio Cir. Ct., 496; Greenfield *v.* People, 74 N. Y., 277; Com. *v.* McMillan, 144 Pa. St., 610; Washington *v.* Com., 86 Va., 405; State *v.* Dent, 41 La. An., 1082; State *v.* Baker, 33 W. Va., 319; Reed *v.* State, 32 Texas, Cr., 25; People *v.* Wah Lee Mon., 59 Hun., 626; Thompson, Law of Trials, vol. 1, p. 78. And see Guetig *v.* State, noted above.

[5] Where the juror entertains a decided opinion as to guilt or innocence, it is held to be unnecessary, and in fact improper, to ask him whether it, (the opinion,) is that the prisoner is guilty or innocent. State *v.* Shelledy, 8 Iowa, 503; People *v.* Williams, 6 Cal., 206.

[6] See O'Brien *v.* People, 48 Barb., 274; State *v.* Thompson, 9 Iowa, 188; Cargen *v.* People, 39 Mich., 549.

[7] Lowenberg *v.* People, 27 N. Y., 336.

"being but one element of the crime, is consistent with the prisoner's innocence of murder." A general unfavorable opinion of the prisoner as a bad man has been held insufficient *per se* to disqualify a juror;[8] and the same has been held as to the entertaining of such an opinion in regard to persons in general when charged with crime,[9] or in regard to violence and crime in general.[10]

An opinion upon a question of *law* involved in a case will or will not disqualify a juror or member, according as it does or does not amount to an opinion upon the guilt or innocence of the accused. A juror or member who was of opinion that the act charged was not a crime or offence would properly be held incompetent on challenge.[11] So a fixed opinion that a statute under which a party is indicted is unconstitutional must necessarily disqualify a juror, since it involves a conclusion that he is not guilty in law;[12] but an opinion that the statute is constitutional and in force has been held not to affect the juror's competency, since it is merely an opinion upon an abstract legal question.[13] Similarly it was held no objection to jurors that they thought the law under which the prisoner was accused "a good law;" for, as the court remark, "such opinion has no tendency to prove or disprove the issue."[14]

Where a juror had no opinion, or only a hypothetical opinion, on the merits, it was held that the fact that he had made up his mind as to the *punishment* proper to be inflicted on the prisoner in case of a conviction, did not affect his competency.[15]

329 **Effect of personal disclaimer of bias in connection with opinion.** The assertion of a juror under examination that his opinion in regard to the case is not such as to influence his action on the trial will properly carry considerable weight except where such opinion is one of a decided character, as where it will require positive evidence to remove it. In that event his personal declaration that the opinion will not bias his judgment or affect his verdict, will not in general,—it has frequently been held,—avail of itself alone to remove the objection taken to him upon challenge.[16] But the authorities are not uniform upon this point, and the effect, as above noticed, of sundry of the more recent rulings is to accept the juror where his disclaimer is a confident one.

In a case of a challenged member of a court-martial, while a disclaimer by him of bias will always be deferred to with respect, the same—it is believed—

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[8] Monroe *v.* State, 23 Texas, 210; People *v.* Mahoney, 18 Cal., 180; Anderson *v.* State, 14 Ga., 710; G. C. M. O. 44, Dept. of Cal., 1883. Otherwise, however, where such opinion has become so fixed as apparently to bias the mind. See Willis *v.* State, 12 Ga., 444.

[9] People *v.* Reynolds, 16 Cal., 129.

[10] Davis *v.* Hunter, 7 Ala., (N. S.,) 135.

[11] 1 Bishop, C. P., § 917; Com. *v.* Buzzell, 16 Pick., 153.

[12] Com. *v.* Austin, 7 Gray, 51; Pierce *v.* State, 13 N. H., 536.

[13] Com. *v.* Abbott, 13 Met., 120.

[14] McNall *v.* McClure, 1 Lans., 32. And see U. S. *v.* Noelke, 17 Blatchford, 554.

[15] State *v.* Bill, 15 La. An., 114. And see Com. *v.* Buzzell, 16 Pick., 155.

[16] Sam *v.* State, 13 Sm. & M., 194; Morton *v.* State, 1 Kans., 472; Armistead *v.* Com., 11 Leigh, 663; Goodwin *v.* Blachley, 4 Ind., 440; Willis *v.* State, 12 Ga., 447; Hudgins *v.* State, 2 Kelly, 176; People *v.* Gehr, 8 Cal., 362; Olive *v.* State, 11 Neb., 1; Greenfield *v.* People, 74 N. Y., 277. It is "not to be considered aa any disparagement of the *bona fides* of the juror" that he should be held incompetent notwithstanding such a declaration. Willis *v.* State. In Hudgins *v.* State, the court offer a natural explanation which, no doubt, accounts for many cases in which this declaration is made, in good faith, by jurors:—"The juror may think himself free from bias or prejudice because he harbors no grudge or personal ill will toward the accused."

will properly fail to convince the court of his neutrality in the case where it appears that he has recently entertained decided views concerning the criminality of the accused.[17]

**OPINION FORMED BUT NOT EXPRESSED.** In the great majority of cases of challenge for opinion, the opinion entertained by the juror has naturally also been expressed, and thus in fact made known to exist. In a comparatively few cases only has the question come to be raised whether the mere formation of an opinion, without its being expressed at all, will affect the juror's competency. In Callender's case,[18] (tried in 1800,) it was held
330 by Chase J. that the juror "must have delivered as well as formed the opinion." This doctrine was affirmed upon Burr's trial, (in 1807,) by Chief Justice Marshall in the following terms:—"The rule is, that a man must not only have formed but declared an opinion in order to exclude him from serving on the jury."[19] The same view has been taken in some of the subsequent cases; the ground being mainly that persons are more apt to be tenacious of and to abide by expressed opinions than those which remain unexpressed.[20] The opposite, however, *viz:*—that an opinion once fully formed in the mind, though not stated, will disqualify equally as if declared,—has been held in other and more numerous cases.[21] Upon principle, the latter ruling certainly seems the one to be preferred. It is the formation of the opinion which is the material and principal process; the expression is but incidental. The formation constitutes the prejudgment and preoccupation of the mind; and if the opinion is already decided, it scarcely becomes more so by being expressed. Some habitually silent persons do not readily assert their convictions; and some who are secretive brood over them till they become even the more intense for not being uttered. Some again hesitate to declare their sentiments concerning the acts of others, either from an aversion to gossip and scandal, or from a sense of honor and justice which will not permit them to do a possible injury in a case of any doubt, or in one in which there may be extenuating circumstances. Thus the better reasons are deemed to be clearly on the side of holding that the *expression* of the opinion should not be regarded as essential to disqualify the juror or member of court-martial, upon challenge, where the same is admitted or clearly shown to have been deliberately formed and to be of a decided character.

**OPINION FORMED OR EXPRESSED IN THE PREFERRING OF CHARGES.** The subject of challenges for opinion may be concluded by noticing the class of military cases in which the fact that a member of the
331 court-martial was the officer who *preferred the charges* has been urged as ground of objection, generally on the part of the accused. In repeated cases, published in General Orders, where it appeared that a member had preferred or initiated the charge, and had done so, not ministerially under the orders of a superior, but after a personal investigation of the facts, and was

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[17] See DIGEST, 100; G. C. M. O. 66 of 1879. In a case in G. C. M. O. 23, Dept. of Dakota, 1888, where a challenged member had investigated the case, and preferred the charges, it was held that the challenge should have been sustained, notwithstanding a disclaimer of present prejudice by the member.

[18] Wharton's State Trials, 697.

[19] 1 Burr's Trial, 44.

[20] Boardman *v.* Wood, 3 Verm., 570; Noble *v.* People, Breese, 30. And see State *v.* Morea, 2 Ala., (N. S.,) 277.

[21] State *v.* Potter, 18 Conn., 172, and cases cited; Com. *v.* Buzzell, 16 Pick., 155; Rathbun *v.* People, 21 Wend., 509; State *v.* Johnson, Walker, (Miss.,) 399.

thus actually the accuser,[22] a challenge offered to him has been held valid; and, where the court has ruled otherwise their ruling has been disapproved.[23]

The objection in this class of cases is aggravated where the member challenged as having preferred the charges is also the person primarily affected by the offence committed,—as where the charge is that his own order was disobeyed by the accused,[24] or that disrespect was shown himself,[25] or that his own property was stolen,[26] &c.,—especially as, in such cases, he is also generally
332 the principal, or a material, witness.[27] Here, indeed, an additional objection—that of personal prejudice or hostility—may combine with that of having formed or expressed an opinion.

**PERSONAL PREJUDICE AND HOSTILITY.** Under this head are intended to be included:—1, Decided prejudice not amounting to positive enmity; 2, Feelings of actual enmity, animosity, malice or confirmed ill will.

**Personal prejudice.** The term "prejudice," as here employed, is to be distinguished from prejudice in its original sense of prejudgment. In *this* sense it has already been considered in treating of *opinion:* in its present sense it has reference to a sentiment in regard to the accused personally, *i. e.* as an individual or as an officer or soldier.[28].

The personal prejudice under consideration may be proved by evidence of any decided unfriendly or unfavorable language, opinion, action, &c., of the juror or member challenged. Thus it was held good cause of exception to a member that he had applied abusive and degrading epithets to the accused, (a soldier,) on the occasion of his arrest.[29] So, a decided expression of opinion by a member as to the unfitness of the accused, (an officer,) for any official position was held to charge him with sufficient prejudice to constitute

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[22] See construction of the terms "accuser and prosecutor," (in Art. 72,) in Chapter VI; also DIGEST, 100.

[23] "It is difficult to believe that an officer who has made a preliminary examination into alleged facts, and has so far satisfied himself of the guilt of the accused as, in effect, to prefer charges against him," (involving here grave offences,) "can bring to the trial of the case a mind so free from bias as to ensure to the accused the impartial trial to which he has an undoubted right." G. C. M O. 82 of 1868. (Gen. Grant.) The deliberate preferring of charges by the member was "a most unequivocal expression of opinion." G. C. M. O. 1, Dept. of Texas, 1880. (Gen. Ord.) And see G. O. 16, Dept. of the Ohio, 1865; Do. 14, Dept. of La., 1868; Do. 20, Dept. of Arizona, 1870; Do. 45, 57, Dept. of the South, 1873; Do. 5, Dept. of the Gulf, 1873; Do. 36, Dept. of Dakota, 1874; Do. 18, Id., 1875; G. C. M. O. 13, Dept. of the Platte, 1873; Do. 10, 71, Dept. of Texas, 1873; Do. 44, Id., 1875; Memo., Dept. of the Col., June 19, 1874; Do. 88, Dept. of the Mo., 1883; Do. 18, Dept. of the East, 1884; Do. 2, Id., 1894; Do. 44, Dept. of Texas, 1893; Do. 23, Dept. of the Platte, 1884. See also, in this connection, G. O. 87, Dept. of Kans., 1864, where the fact that the same *court* had previously caused to be preferred against the accused the very charge upon which he was arraigned was held valid ground of challenge to *all* the members, severally, as being "evidence of the formation of an opinion" on the merits, and indeed "tantamount to an expression of that opinion."

On the trial of Col. T. H. Cushing in 1811, (Printed Trial, p. 7,) the accused objected to a member on the ground that he had *intended* to prefer charges against the accused identical in part with those in the case. The member admitting the fact, the objection was sustained.

[24] DIGEST, 100.

[25] See case in G. C. M. O. 13, Dept. of the Platte, 1873; also Trial of Lieut. Stanley, U. S. N., p. 323.

[26] Simmons § 507.

[27] DIGEST, 100; G. C. M. O. 51, Dept. of the Col., 1881; Do. 19, Id., 1882.

[28] As to the effect of personal prejudices in biasing the mind of a juror, see Mann *v.* Glover, 2 Green, 203.

[29] G. O. 47, Dept. of Dakota, 1874.

333 ground of challenge.[30] Prejudice may also be implied from the relation of the member toward the subject matter of the charge, as where the violence or other misconduct for which the accused is to be tried was aimed at the member himself or resulted to his injury.[31]

Whether expressed or implied, the prejudice must be of a definite and positive character. A general objection interposed by the accused to a member on account of "some unpleasant circumstances growing out of their official relations" was held in Gen. Twigg's case to be indefinite and insufficient.[32]

**Prejudice of commanding officer.** Simmons,[33] (who is repeated by some of the later authorities,[34]) states in general terms that challenges have been admitted to members as being the commanding officers of accused persons, on the supposition that they might as such be prejudiced through "previous imperfect or *ex parte* knowledge of the circumstances inducing the trial." It is quite clear, however, that the mere fact that a member is the commanding officer—colonel, captain, &c.—of the accused is no foundation for a valid challenge.[35] Other circumstances must be shown fixing *actual* prejudice on the commander before an objection taken to him can properly be held sufficient. In our practice, the principal instances in which a challenge to a member who was a commanding officer has been sustained have been those of cases in which either he was the preferrer of the charge or real accuser,[36] or those in 334 which other causes combined to disqualify him—as that he was a material witness for the prosecution, or the very person against whom the offence of the accused has been committed.[37]

That it is in general inexpedient that the immediate commander of an accused, officer or soldier, should be placed upon a court ordered for his trial, is remarked by Simmons and subsequent writers.[38] In small commands, however, it is sometimes unavoidable.

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[30] G. O. 11, Dept. of Cal., 1865. That the objection must be *personal* is illustrated in a case, published in G. O. 72, Dept. of the East, 1865, of a volunteer soldier, where the action of the court in allowing a challenge to a member on the "absurd" ground that he had a known and avowed prejudice against volunteer soldiers in general, was disapproved by the reviewing authority. So, on the Trial by Military Commission, in 1864, of Milligan and others, page 73, an objection interposed by Milligan to a member who was a volunteer colonel from Mass.,—"because he is from a locality where there are extreme prejudices against Western men, and he is likely to be influenced by those prejudices,"—was, of course, disallowed. See in this connection the case referred to in DIGEST, 77, where the fact that a member had stated that he did not consider the accused officer a gentleman was held a good ground of objection, one of the charges to be tried being "Conduct unbecoming an officer and a gentleman." The sufficiency of this ground, however, may well be questioned.

On the trial of Capt. Kelly of the British navy in 1802, (Printed Trial, p. 3–4,) the court sustained a challenge by the accused to a member who had sat on a previous court-martial held for the trial of two seamen of his, (the accused's,) ship, which court, in its judgment, had "conveyed a censure" on the accused.

[31] DIGEST, 100.

[32] G. O. 4 of 1858.

[33] § 510.

[34] De Hart, 122; Benét, 73; Coppée, 65.

[35] DIGEST, 100; G. O. 73, Dept. of the South, 1873.

[36] See G. O. 13, Dept. of the Potomac, 1867; Do. 16, Dept. of the Ohio, 1865; Ives, 91. Simmons (§ 510) writes that a challenge of a member as being a commanding officer should "obviously be allowed" where he has "taken an active part in promoting the prosecution or in bringing forward the charge." See G. C. M. O. 18, Dept. of the East, 1884.

[37] See Trial of Lieut. Stanley, (U. S. N.) p. 323.

[38] See—with Simmons § 510—Harcourt, 110; Bombay R., 7; De Hart, 122.

**Personal hostility, enmity, or malice.** This is a valid ground of challenge equally in the civil and the military practice. In a case in Georgia[39] the court observe:—"The law requires that jurors should be * * * not liable to an objection on account of malice, ill will, hatred, revenge, * * * * or the like." On Burr's trial,[40] a certain grand juror was objected to for that he "entertained a bitter personal animosity against" the defendant; and a sentiment of this nature being admitted by the juror to exist, the challenge was sustained. That the feeling must be a personal one, directed at the individual, and that it need have no connection with the facts of the particular case, has also been specifically held.[41]

Among military authorities, Tytler[42] mentions "malice or hostile enmity expressed by word or deed against the prisoner," as one of the "causes of challenge impossible to be overruled;" and other later authorities notice the same as among the decided grounds of exception.[43]

The existence of the hostile feeling is generally shown by the language or acts of the challenged juror or member—as his having charged the challenging party with a grave crime;[44] his having publicly libelled him;[45] his having
335 initiated against him a malicious suit or prosecution,[46] or grave charges on personal grounds; his having had a serious quarrel or difficulty with him in a personal or official capacity; his having been foiled or antagonized by him in a contest for appointment, promotion, &c.; his having been in *any* manner injured by the challenging party and consequently cherishing revenge or bitterness against him,[47] &c. In an adjudged case[48] the point is noticed that hostility once felt but no longer entertained will not properly affect the competency of the juror.

**INTEREST.** Personal interest—pecuniary or other—in the result of a trial is a cause of challenge which has been chiefly confined to jurors in civil actions. The principle involved, however, is applicable to criminal cases; so that a juror or member who has a direct personal interest in the fact or question involved or to be decided, *i. e.* to whom any reasonably certain substantial advantage or detriment may result from the event of the proceeding, ought not, if objected to, to be permitted to sit on the court. This ground of challenge has been recognized by some military writers,[49] but, except in a single instance, it is one that is most rarely urged.

**Claim to promotion.** This instance is that of the objection sometimes taken by an accused officer to a member, that the latter will become entitled to promotion on account of seniority, upon the accused being dismissed the service.[50] This objection is especially apposite in cases where a sentence of dismissal is mandatory upon a conviction of the offence charged. It may, however, also properly be made in a case where a dismissal may legally be imposed in the discretion of the court, and where, in view of the nature of the charge,

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[39] Monroe *v.* State, 5 Ga., 142.

[40] Vol. 1, p. 41–43.

[41] Brittain *v.* Allen, 2 Dev., 120.

[42] Page 225.

[43] See Simmons § 503; Kennedy, 54; Maltby, 30; Macomb, 31; O'Brien, 238, 239; Ives, 91.

[44] Palmer *v.* Bogan, Cheves, 52.

[45] Lewis *v.* Few, Anthon, 75.

[46] Co. Litt., 157, b.; People *v.* Bodine, 1 Denio, 305.

[47] See Coppée, 66. As where the member was the very person against whom the offence had been committed. G. C. M. O. 13, Dept. of the Platte, 1873.

[48] People *v.* Vermilyea, 7 Cow. 369.

[49] O'Brien, 238; De Hart, 119.

[50] Clode, M. L., 127; Benét, 73; Coppée, 66; Ives, 90; DIGEST, 101.

such sentence is a probable one. It may also not improperly be taken in a case where a sentence of suspension for a certain term would be a reasonable and appropriate punishment for the offence, and where within
336 such term a right to promotion, by reason of the compulsory retirement of a common senior, or otherwise, would accrue to the member if the accused were to be deprived of the same by the execution of such sentence.

**Advancement in files.** That a member will by the dismissal of the accused be merely advanced one "file" or number in the line of seniority toward promotion will in the majority of cases be too remote an interest to form a valid objection.[51] Cases however may occur in which such interest is not thus remote, and the court may in its discretion properly sustain the exception,—as where the number to which the member will be advanced is the *first* in the line of promotion to a higher grade; or where it is the *second*, and the senior officer at the head of the list is soon to be retired, or, by reason of the compulsory retirement of a common senior or otherwise, to be promoted.

**RELATIONSHIP.** No instance is known in which this ground of challenge—familiar to the common law[52] and recognized in the modern civil practice[53]—has ever been taken to a member of a court-martial. The detailing upon such a court of an officer so nearly related to the accused as to make it proper for the judge advocate to object to him on the ground of relationship must needs be of the rarest occurrence. That a member was a near relative of the judge advocate would not, *per se*, warrant a challenge on the part of the accused. Where, however, a near relationship existed between a member and the officer who preferred the charges and was prosecuting witness, or between a member and the person immediately injured or affected by
337 the alleged offence of the accused,[54] ground for an exception by the latter might well exist. In such cases indeed it would not be the kinship of the parties which would constitute the legal objection, but the close personal relation and affiliation to be implied therefrom.

**INTIMATE PERSONAL RELATIONS.** Under the old common law a considerable significance was attached to the existence of personal relations between a juryman and a party to a legal proceeding, implying friendship, fellowship, dependence, &c.[55] Later, Blackstone[56] designated as causes of "*principal* challenge," that the juror "is the party's master, servant, counsellor, steward or attorney, or of some society or corporation with him." At present, however, all such situations would generally be considered as affording grounds of challenge "to the *favor*" only; the question whether the relations of the juror and party were so intimate that the former could not well stand indif-

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[51] DIGEST, 101.

[52] "For that the law presumeth that one kinsman doth favor another before a stranger." Co. Litt., 157, a. And at an early period the rule was adopted that the relationship must be within the ninth degree to exclude a juror. Finch's Law, 401; 1 Chitty, C. L., 541; 3 Black. Com., 363; 1 Bishop, C. P. § 901; Simmons § 504. This is still the general rule in the United States, except where a different one may have been substituted by statute. The law of descent of the *civil* law, however, has been adopted in this country instead of that of the *canon* law followed in England. See Churchill *v.* Churchill, 12 Vt. 661.

[53] See the American authorities above cited; also 1 Burr's Trial, 415; Jacques *v.* Com., 10 Grat. 690; State *v.* Perry, 1 Bus. L., 331; Schœffler *v.* State, 3 Wis. 828; O'Connor *v.* State, 9 Fla. 215.

[54] See Jacques *v.* Com., 10 Grat. 690.

[55] Co. Litt., 157, b.

[56] 3 Com., 363.

ferent on the trial being determined in each case by the special circumstances in evidence.[57]

Cases, however, of this general class would not be frequent in the military practice. That a member, for instance, was of the same company or regiment as the accused,[58] or even that the accused was his commanding officer, would not, of itself, be regarded as a valid ground of challenge on the part of the judge advocate. In such cases other circumstances must combine and be exhibited in evidence to establish between the parties that intimate relation
338 which would properly constitute adequate cause of objection to the member. Hough[59] cites a case where two members of a court-martial, "who had been the private advisers, counsellors, and associates of the prisoner up to the very day of trial," were held properly excluded, upon a challenge taken by the judge advocate: here the relation of friendship was combined with one analogous to that of counsel and client.[60] Where indeed a member of a military court is *in fact* subject to be biased by any intimate friendly, social, or other personal relation binding him to the accused, he should be set aside upon the challenge of the judge advocate with the same reason that a member subject to be biased by a hostility entertained toward the accused should be set aside upon an objection interposed by the latter.

**HAVING TAKEN PART IN A FORMER TRIAL OR INQUIRY.** This ground of challenge, which is but another aspect of the general subject of challenge for *opinion*, will be considered under the following heads:—1. Former trial of the same case; 2. Former trial of a different case involving the same or a similar question; 3. Having been a member of a previous court of inquiry in the same case; 4. Having been a member of a regimental court from which an appeal is taken under Art. 30.

**Former trial of the same case.** It is a settled principle of the civil procedure that where a juror in a case has taken part in a verdict, or in a vote upon a verdict, (as where the jurors were divided,) at a previous trial of the same case, he is *necessarily* incompetent to sit in the pending case and will be set aside on challenge. This, "not," to cite the language of Chief Justice Marshall on Burr's Trial,[61] that he is "suspected of personal prejudices, but" that "he has formed and delivered an opinion and is therefore deemed to be unfit to be a juror in the cause."

Otherwise, where there was no verdict or vote upon a verdict at the
339 previous trial,—as where the case was dismissed by the court without proceeding to verdict. In such a case the juror is not challengeable

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[57] See Mann *v.* Glover, 2 Green, 204. The objection noticed by Blackstone, that the juror is "of some society or corporation with" the party has not been favored by courts in this country. Thus in a leading case in New York—Purple *v.* Horton, 13 Wend. 9—the court say that such a doctrine "would exclude every stockholder in the same bank, every member in the same church, and every associate of the same benevolent society;" and it is accordingly held not to be a valid ground of challenge to a juror by a party to a suit that the juror and the other party are both *freemasons*. In a further case in the same State—People *v.* Jewett, 3 Wend. 314—it is declared to be no objection that jurors belong to "any particular association or fraternity."

The mere fact of an *intimate acquaintance* between a juror and the accused will not constitute ground of challenge. Moore *v.* Cass, 10 Kans. 288.

[58] Simmons § 509; Hough, (A.) 51; D'Aguilar, 102; De Hart, 124.

[59] Precedents, 664.

[60] In a case in G. C. M. O. 23, Dept. of Texas, 1887, a challenge was interposed by the Judge Advocate, (but not sustained by the court,) on the ground that the member challenged had assisted the accused in the preparation of his case, and had interested himself too much in his behalf to be quite impartial on the trial.

[61] Vol. 1, p. 416. And see Herndon *v.* Bradshaw, 4 Bibb, 45; Briggs *v.* Byrd, 12 Ire., 377; State *v.* Fox, 1 Dutch. 595; State *v.* Benton, 2 Dev. & Bat., 213.

"for principal cause," [62] though, if his mind has been in any manner biased,—as by his having heard evidence, arguments, &c., he will be liable to challenge "for favor." [63]

Similarly an officer of the army, who had been a member of a court-martial on a certain trial, would properly be excluded from acting upon a new trial for the same offence where one had been ordered or granted; [64] and this whether or not the former court had jurisdiction of the case, or whether the proceedings of the former trial were legal or illegal. Thus Attorney General Grundy, in holding that the proceedings in a certain naval court-martial had been invalidated by a fatal omission therein, and that, in order to the trial of the accused, a new court must be organized, adds:—"The officers who sat on the former should all be excluded from the second trial. They have formed and expressed opinions upon the case which would disqualify them from serving as jurors in a criminal case in a common law court; and I can see no reason why officers under the same circumstances should not be excluded from a court-martial, especially as they are the triers of the facts as well as the law." [65]

But where the proceedings were terminated before a finding was reached, as by the number being reduced below a minimum, or the entry of a *nolle prosequi*, or because of some military exigency, an officer who was a member would not properly be excluded upon challenge from the subsequent court or trial, unless it appeared that the effect of the previous investigation had been so to bias his judgment that he no longer stood indifferent between the parties.

**Former trial of a different case involving the same or a similar question.** In the criminal law, neither the fact that a juror has served as such on a previous trial of the same party for a separate instance of the same offence
340 or for a similar offence; [66] nor that he has taken part in the trial and conviction of another and distinct offender separately indicted for an offence of the same character; [67] nor even that he has similarly acted upon the trial of an accomplice jointly indicted for the same offence but who has been permitted to sever for trial, [68]—is held to be a "principal cause" of challenge, *i. e.* necessarily to disqualify the juror. A challenge "to the favor," however, may be allowed in such cases, where it is satisfactorily shown that the juror, by reason of having heard the testimony on the first trial, or otherwise, has actually become biased by an opinion for or against the present defendant. [69]

In cases of this class at military law a similar test is to be employed. While it is certainly not *per se* valid ground of challenge to a member that he has taken part in a previous trial of the accused for a like offence, or in a trial for the same offence of another officer or soldier between whom and the present accused there had been criminal concert, yet if the previous hearing has induced the formation of an opinion as to the guilt or innocence of such accused, the member is of course properly subject to exception. [70]

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[62] Durell *v.* Mosher, 8 Johns., 445. And see Atkinson *v.* Allen, 12 Vt. 621.

[63] See Whitner *v.* Hamlin, 12 Fla., 18, (a case deemed otherwise of doubtful authority.)

[64] And so would a member or members who had acted on "a previous court by which the same accused had been tried for the same act, though under a different charge." DIGEST, 101.

[65] 3 Opins., 398.

[66] Com. *v.* Hill, Allen, 591; U. S. *v.* Watkins, 3 Cr. C., 443.

[67] State *v.* Sheeley, 15 Iowa, 404.

[68] U. S. *v.* Wilson, 1 Baldwin, 78; Adye, 174.

[69] U. S. *v.* Wilson, *ante.*

[70] Simmons § 513–9; Macomb, 31; De Hart, 121; Benét, 75.

An officer is not properly competent to sit on a court-martial, who, as a member of a previous *board of survey*, has joined in an opinion or finding unfavorable to the merits of the case to be tried.

**Having** been a member of a previous court of inquiry. The fact that a member of the petit or trial jury in a criminal case was a member of the grand jury which found the indictment has uniformly been held to constitute conclusive ground of principal challenge;[71] and so the fact that a member of a court-martial was a member of a court of inquiry previously held in the same case has been regarded at military law as a sound objection to the member.[72]

341 Whether the objection is to be held equally valid where the court of inquiry only reported evidence as where it expressed an opinion in the case, is a question as to which different views appear to have been entertained by military writers, but the weight of authority is in favor of the affirmative[73] and good sense and good reason certainly concur. In the practice of American courts-martial the fact of having been a member of a previous court of inquiry by which the charges were passed upon is uniformly treated as an objection in the nature of a challenge for "principal cause."[74]

If the investigation by the court of inquiry related not to the actual charges to be tried but to a similar matter or one involving a similar question, the member would properly be held subject to challenge according as such investigation had or not impressed upon him an opinion as to the merits of the case.[75]

**Having served on a regimental court from which an appeal is taken.** All the authorities, English and American,[76] agree that in the case of an appeal, (taken in our law under the 30th Article of war,) from a regimental to a general court, a member who has acted on the former court will necessarily be excluded from the latter, upon challenge as for "principal cause." This for the reason that the regimental court, in every such case, has not only formed but expressed a specific opinion and conclusion.

**BEING A MATERIAL WITNESS.** The fact that a juror has been summoned by either party as a material witness in the same proceeding is held to be a "principal cause" of challenge.[77] This on the ground that a

342 witness is likely to be a partisan and either to have a personal prejudice or a decided opinion in the case.[78] Similarly, it is in general a valid exception to a member of a court-martial that he is to be a material witness to the *merits:*[79] otherwise, however, where he is to be called upon simply to testify as to character,[80] or as to some interlocutory point not material to the

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[71] Stewart *v.* State, 15 Ohio, 159; Barlow *v.* State, 2 Blatchford, 114; Rice *v.* State, 16 Ind., 298; Gillespie *v.* State, 8 Yerg., 507; State *v.* Benton, 2 Dev. & Bat., 213.

[72] See authorities referred to in next note.

[73] That is to say, of those who have expressed a decided opinion on the subject. See Simmons § 512; McNaghten, 177; Hough, (P.) 771; De Hart, 120; Coppée, 66; Benét, 75; Harwood, 68; DIGEST, 101. Hough, (P., 645, note,) well observes—"Whether they *give* an opinion matters not; every man *thinks* an opinion."

[74] See G. O. 11, Dept. of Cal., 1866; also case of Major S. Babcock, C. E., Am. S. P., M. A., vol. 2, p. 805. But in Col. Henley's case, (1778,) in which Gen. Burgoyne was prosecutor, four members, including the president, of the previous court of inquiry served on the court-martial, without challenge or objection being interposed.

[75] See Tytler, 223.

[76] Tytler, 224; Adye, 173; 1 McArthur, 275; Delafons, 137; Hough, 943; Simmons § 508; De Hart, 119; Benét, 75; Coppée, 66.

[77] Co. Litt., 157, a; Com. *v.* Joliffe, 7 Watts, 585. Otherwise, where he is to testify as to a matter not affecting the question of guilt or innocence—as that the place of the offence was in a certain county. State *v.* Vari, 14 S. E., 392.

[78] Com. *v.* Joliffe, *ante.*

[79] See Simmons § 511; D'Aguilar, 102; Bombay R., 12; De Hart, 123; Benét, 74; Coppée, 66; DIGEST, 100. [A somewhat conflicting view in G. C. M. O. 134, Dept. of Dakota, 1884, is, in the opinion of the author, too broadly stated.] *A fortiori* where he is the *prosecuting* witness. It does not make him less objectionable that he is to testify in an official capacity. G. C. M. O. 17, Dept. of the East, 1892.

[80] See authorities cited in last note; also Com. *v.* Joliffe, 7 Watts, 586.

main issue, or slight detail. It is not essential, however, that the member should have been formally summoned.[81] If it is the fact that he is relied upon and is to be used as a material witness to the merits, he is equally subject to challenge whether he has been summoned or not. Otherwise a party, by avoiding summoning his witness, might secure his remaining on the court, to his own undue advantage and the detriment of public justice.[82]

If a member has given material testimony on a previous trial or investigation of the same case,[83] or on a previous trial or investigation of another case or matter of the same or a similar nature,[84] the question whether he should be allowed to sit in the pending case will depend on the weight of the evidence which may be offered to show either that he is prejudiced or that he has formed an opinion; the objection being in the nature of a challenge "to the favor."

While the mere fact that an officer is to be a material witness in a case to be tried does not *disqualify* him from sitting as a member of the court,[85]
343 it is agreed by the authorities that he should not be detailed as such if it can be avoided without serious prejudice to the service.[86] But in the absence of a challenge he cannot, as heretofore indicated, be excused by the court.

If a member is called upon in the midst of a trial to be a material witness, he may then be challenged by the party against whom he is to testify, provided it was not known to this party, at the outset, that he was to be used as a witness.[87] But if not challenged, the court has no power to relieve him, nor can he relieve himself; the order of the convening authority being necessary for such a purpose.[88]

**MISCELLANEOUS GROUNDS.** Certain other grounds of challenge which have been recognized as valid in the civil practice may here be noticed. These are—that the juror has been tampered with;[89] that he has been bribed;[90] that he is characterized by a moral obliquity;[91] that he will not convict on circumstantial evidence;[92] that he has taken an oath or assumed an obligation as a member of an association or combination which prevents his standing indifferent between the parties;[93] that he has conscientious scruples in regard to

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[81] The mere fact that the member was an important or material witness in the case, (whether or not formally summoned,) was held sufficient ground of challenge in cases in G. O. 4, Dept. of the West, 1861; Do. 20, Dept. of Arizona, 1870; Do. 18, Dept. of Dakota, 1875; also on Trial of Lieut. Stanley, (U. S. N.,) p. 323. And see Pipon & Col., 51.

[82] In Com. *v.* Jolliffe, 7 Watts, 586, it is remarked by the court that if a party should purposely omit to summon a juror whom he designed to use as a witness, this fact "might be a cause of challenge to the favor."

[83] See Harper *v.* Kean, 11 S. & R., 298.

[84] See Delafons, 136; Hough, (P.) 684.

[85] See authorities cited in next note; also Bell *v.* State, 44, Ala., 393.

[86] Sullivan, 58; Simmons § 511; Hickman, 17, 246; Clode, M. L., 127; O'Brien, 239; De Hart, 123; Benét, 74; G. O. 11, Dept. of the N. West, 1864. And see Hacker's Trial, 5 How. State T., 1181.

[87] See *ante*, p. 208.

[88] DIGEST, 103. And see, *ante*—*"A member excusable only upon challenge,"* p. 214.

[89] Co. Litt., 157, b; Knight *v.* Freeport, 13 Mass., 217.

[90] Co. Litt., 157, b; U. S. *v.* Morris, 1 Curtis C., 35; Tytler, 225; Maltby, 30; O'Brien, 238.

[91] McFadden *v.* Com., 23 Pa. St. 12.

[92] Gates *v.* People, 14 Ills., 433; Jones *v.* State, 57 Miss., 684; State *v.* Pritchard, 15 Nev., 74; Griffin *v.* State, 90 Ala., 596; Blair *v.* State, 5 Ohio Cir. Ct., 496; State *v.* Leaho, 80 Mo., 247.

[93] Fletcher *v.* State, 6 Humph., 249; Com. *v.* Livermore, 4 Gray, 20; People *v.* Reyes, 5 Cal., 347.

the imposition of the death penalty which will affect his verdict;[94] that he does not speak English;[95] that he has not sufficient intelligence.[96]

344 None of these grounds are likely to arise in a military case. Should indeed an exception in the nature of any of those mentioned be taken before a court-martial, the determination, under the Article, of its "relevancy and validity" may be assisted by a reference to the authorities here cited under the similar subject.

**CONCLUDING REMARK—LIABILITY TO CHALLENGE NOT DISQUALIFICATION.** In the course of this Chapter, jurors and members of courts-martial against whom valid causes of objection exist, have, in some instances, been said to be "incompetent" and "disqualified." These words are frequently employed in the reports and treatises as convenient terms, but it must not be inferred from their use that it is intended that the juror or member is, by reason of his liability to challenge, disqualified to act on the court, or that his acting thereon impairs the legality of the proceedings. In an adjudged case in New York,[97] it is held:—"A challenge to a juror does not go to the jurisdiction of the tribunal: though a juror may be incompetent as such, the trial is not invalidated." And in a case in North Carolina[98] the court observe:—"There was good cause of challenge to the juror. But that does not vitiate the trial: * * * by not making the objection the party waived it." So, at military law, where the party entitled, under Art. 88, to object waives, or fails to take, his objection, or where the same, being made, is improperly overruled by the court,—while the reviewing authority may, and, in the latter contingency, generally will, *disapprove* the proceedings, the legal validity of the finding and sentence is, in neither case, affected.[99]

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[94] U. S. *v.* Cornell, 2 Mason, 104; U. S. *v.* Wilson, 1 Baldwin, 78; U. S. *v.* Ware, 2 Cranch C., 477; and many cases in the State reports. The rule is held to be the same where the death penalty is discretionary, *viz.* where the statute enjoins death or some lesser penalty as imprisonment in a penitentiary. Gross *v.* State, 2 Carter, 329.

[95] Fisher *v.* The City, 4 Brewst., 395.

[96] State *v.* Roundtree, 32 La. An., 1144.

[97] Clark *v.* Van Vracken, 20 Barb., 281.

[98] Briggs *v.* Byrd, 12 Ire. 381.

[99] Case of Lieut. Keyes, DIGEST, 102; Do., 15 Opins. At. Gen., 482; Do., 15 Ct. Cl., 533; Do., 109 U. S. 336. Opin. of At. Gen., in Lieut. Armstrong's Case, 17 Opins. 397. That an accused does not, by a plea of *guilty*, waive any advantage to which he may be entitled by reason of an improper disallowance by the court of a challenge interposed by him to a member,—see G. C. M. O. 88, Dept. of Dakota, 1878.

# CHAPTER XV.

## ORGANIZATION — ARRAIGNMENT — CONTINUANCE — NOLLE PROSEQUI.

345 In this Chapter will be considered the subjects of—I, The Organization of the Court by the swearing and qualifying of the members; II, The Arraignment of the Accused, and herein of Standing mute; III, Continuance and Adjournment; IV, *Nolle Prosequi* or Withdrawal.

### I. THE SWEARING OF THE COURT.

The accused (and judge advocate) having fully exercised, or been afforded an opportunity to exercise, the right of challenge of members of the court accorded by Art. 88 of the code, the members, (if at least five in number,) proceed to complete their organization as a court, for the trial, by formally qualifying themselves as prescribed in Art. 84; the oath of the judge advocate being taken, under Art. 85, next subsequently.[1]

**THE OFFICIAL OATH.** Article 84 is as follows: "*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,*

346 *according to the provisions of the rules and articles for the government of the armies of the United States, and if any doubt 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.'*"[2]

[1] In a *naval* case, in which the statutory order of the oaths was reversed, this irregularity was held not to have affected the legal validity of the proceedings, inasmuch as the accused took no exception at the time. 13 Opins. At. Gen., 374. And see G. C. M. O. 10, Navy Dept., 1893.

[2] Art. 48 of the Code of James II, from which our Article is in part derived, directs that the members "shall take an oath for the due administration of justice according to these Articles, or, (*where these Articles do not assign any special punishment,*) according to their consciences, the best of their understandings, and the custom of war in the like cases."

**THE ADMINISTERING OF THE OATH—To be repeated on every trial.** This oath, being required to be administered to the court before proceeding "upon any trial," must be taken anew before the trial of each and every case tried by the same court.[3] No such procedure is recognized as swearing a court *generally* at the outset for all the cases to be tried by it. The court must be qualified separately for every case precisely as if this were the only case to be adjudicated; such qualifying being an essential preliminary to its being authorized to "try and determine" the same.[4]

**The accused to be present.** The Article does not require that the oath should be administered in the presence of the accused, and it is not
347 *essential* that he should be present when the same is administered. Being, however, already legally present for the purpose of exercising his rights under Art. 88, he properly continues to be present at the qualifying of the court; and it is a well-established usage of the service, specifically recognized in the Army Regulations—par. 1037—that the oath should be administered in his presence.

**Form of administering.** The form of administering the oath is as follows: The Members and the Judge Advocate having risen in their places, the latter reads aloud the form, prefacing it by addressing the members, by name and rank as given in the Order, as follows—"You, A. B., Colonel, &c., C. D., Major, &c., E. F., Captain, &c., (and so on,) do, severally, swear that you will well and truly try and determine," &c.; each member—though this is not an essential feature—properly keeping his right hand raised during the reading,[5] or assenting at the end by an inclination of the head. No Bible or copy of the Evangelists is used in our service.

**To be taken by every member separately.** The Article requires the administering of the oath to "each member." While all the members present are sworn together at the same time, they are not sworn collectively, *i. e.*, as a court or body, but separately and individually as members. So, a member not present at the organization, but taking his seat later in the day or on another day, must be then separately sworn; and so must a member subsequently added to the court by the convening authority.[6]

**Members may affirm.** It is declared in Sec. 1, Rev. Sts., that "in determining the meaning of the Revised Statutes, * * * a requirement of an oath shall be deemed complied with by making affirmation in judicial form." Any member therefore who objects to being sworn may be affirmed; the word "affirm" in the place of "swear" being used in addressing him, as his name occurs in the order of rank, thus: "You, A. B., C. D., &c., do severally
348 swear, and you, E. F., do affirm, &c." In affirming, the reference to the Deity at the end of the oath should be omitted.

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[3] See O'Brien, 246; De Hart, 129; Macomb, 34; Benét, 80; Harwood, 76; Army Regs., par. 1037; G. O. 60 of 1873. And compare, as to a similar construction of a corresponding provision of the *militia* code of Mass., Coffin *v.* Wilbour, 7 Pick., 150.

A contrary view expressed by Atty. Gen. Berrien in 1829, (2 Opins., 297,) on the authority of Tytler, (p. 230,) was dissented from by Atty. Gen. Taney in 1831, (2 Opins., 460.) Tytler's view has been long since abandoned in the British practice. See Kennedy, 45; Harcourt, 75; Simmons § 440, 521, 527.

[4] See DIGEST, 96–97; Simmons § 440. In G. C. M. O. 7, Dept. of Cal., 1891, the proceedings were held void where a member who had not been sworn sat on the court during a material part of the trial. In the author's opinion, this would not necessarily require a disapproval, if there were *five* other duly qualified members on the court.

[5] See O'Brien, 240; Macomb, 32; De Hart, 128. The two first named writers state that the members repeat the words of the oath after the judge advocate. This, however, has long since ceased to be the practice.

[6] DIGEST, 97; G. O. 46, 56, Dept. of the East, 1864.

**Oath not otherwise to be varied.** A member, however, would not be entitled to have the form of the oath further varied as to himself on the ground that, as expressed in the Article or administered in practice, it was not binding upon a person of his religious belief. Every officer of the army, whatever his religious opinions, accepts, on entering the service, the provisions of the military code as obligatory upon him, and he cannot refuse to undertake or to abide by the prescribed obligation in this instance. A member, however, may properly be allowed to *accompany* the ceremony by any form, not inconsistent with the directions of the Article, by which the oath may in his estimate be rendered more obligatory as to himself. Thus a Roman Catholic may take in his hand, &c., a copy of the Evangelists, or an Israelite a copy of the Pentateuch.[7]

**THE NATURE OF THE OBLIGATION.** The oath, which some writers have remarked upon as investing the court with a two-fold capacity assimilated to that of judge and jury,[8] contains several distinct engagements which may briefly be noticed here, to be illustrated from time to time hereafter.

These engagements are:—

1. **To "try and determine according to evidence."** Here the member binds himself not to be influenced by any private knowledge or extraneous information which he may have in regard to the case, but to decide it by the testimony, oral and written, which may be duly laid before the court on the trial.[9]

2. **To try, &c., "the matter now before" the court.** By these words the members engage to pass upon the specific offences alleged against the
349 accused, of which they will properly have been advised by having had the charges read or laid before them, as heretofore indicated. Moreover, having thus bound themselves to pass upon the particular charges presented, they cannot, after they have once been sworn, legally entertain new or "additional" charges or specifications setting forth further offences. Such new offences must be made the subject of a separate trial by the same court, or be referred for trial to a separate court; or the proceedings before the original court may be discontinued, and the court be re-organized, and re-sworn to try all the charges old and new.[10]

3. **To "duly administer justice without partiality, favor or affection."** This is the obligation, express or implied, of all judges, and secures, or should secure, for the accused, however grave the charges, a perfectly fair trial and full opportunity to make defence. Where the proper challenges have been duly passed upon, the members will be prepared to proceed to administer justice with strict impartiality. If any member, however, is at this stage conscious of any such partiality, favor or affection as would materially influence his judgment in the case, he should apply to the convening authority to be relieved, since he could not properly take the oath.

4. **To administer justice, &c., "according to" the Articles of war.** The member here undertakes to administer justice, not according to his own private views of justice or his personal opinion as to what the law should be, but in

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[7] See Clode, M. L., 126; Simmons § 447.

[8] See Kennedy, 9; Simmons § 440; Benét, 78.

[9] See Adye, 187; G. O. 21, Dept. of the Ohio, 1866; G. C. M. O. 41, Dept. of Texas, 1874. Compare Rex *v.* Rosser, 7 C. & P., 648.

The testimony must be that of course which is introduced upon the particular trial. The court cannot, under its oath, allow its conclusions to be affected by evidence taken at another trial. G. O. 29, Dept. of the Platte, 1869.

[10] Simmons § 415, 458; Griffiths, 61; De Hart, 102; Benét, 91; Dig. 97; G. C. M. O. 39 of 1867; G. O. 13, Northern Dept. 1864.

strict compliance with the actual statutory provisions of the military code, relating to the offence or offences charged.[11] The Articles, where their import is not clear, may often be interpreted by a reference to the corresponding articles of the earlier American codes, and of the British code, as construed by the standard authorities.

**5. In case of doubt, to administer justice according to his conscience, best understanding, and the custom of war.** In certain cases the Articles of war fail fully to define the offence made punishable, and in most cases do not prescribe a particular sentence to be imposed in any event, but leave the
350 punishment to the discretion of the court. In such cases of "doubt," the member will be guided by his "conscience," (*i. e.*, his moral sense, or natural feeling of justice,[12]) and his "understanding," (or intellectual faculty,) in determining whether the accused was actuated by the guilty *animus* essential to the offence charged, and in estimating the amount of criminality involved in his act and thus the measure of punishment adequate thereto. He will also, where necessary or appropriate, recur to the custom of war or military usage, as indicating whether certain acts are to be considered as constituting a certain offence, whether a certain defence is to be regarded as valid and sufficient, whether a particular punishment is or not sanctioned by the practice of the service, &c. But with what is here written is now to be taken into consideration the code of *maximum* punishments, prescribed by the President, for enlisted men, in accordance with the Act of September 27, 1890.

The customs of the service have already, (in Chapter IV,) been treated of as a component part of the law military, and need not therefore be here dwelt upon.

**6. Not to divulge the sentence, or the votes or opinions of the members.** This—the "obligation of secrecy"—was introduced into the oath at an early period,[13] the purpose of its adoption being described to be to protect the members from such resentment or other prejudice as might ensue upon their personal action on the court being made known, and thus the better to secure their independence and promote the ends of justice.[14] A further purpose might well have been to prevent—in case of conviction—the judgment of the court coming to the knowledge of the accused, and of other persons perhaps implicated with him, till the moment at which it would be legal to proceed with the execution of the sentence, thus guarding against escapes and facilitating the efficient administration of the punishment.

351 **The obligation, how violated.** The Article, in imposing this obligation of secrecy, had no doubt mainly in view disclosures made in conversation, or otherwise personally and extrajudicially, by the members. The violations, (few indeed in number,) which have occurred have, however, mainly consisted in statements made in the written record of the trial; as a statement, for instance, that the vote was unanimous; or that all the members concurred in the finding or sentence, or in a vote on a single charge or specification; or that certain members designated composed the majority or the minority upon

[11] DIGEST, 97; G. C. M. O. 41, Dept. of Texas, 1874.
[12] See O'Brien, 244.
[13] See Clode, M. L., 130.
[14] Tytler, 227–9; 1 McArthur, 306–8; 1 Clode, (M. F.) 168; Stocqueler, Hist. Brit. Army, 50; Macomb, 33; Benét, 78. The obligation is compared by Clode, (M. L., 130,) to that which, on grounds of public policy, is imposed by their oath upon grand jurors.

some *issue*,—as the issue upon a challenge or a special plea,—voted on in the course of the proceedings.[15]

The disclosure of the vote or opinion of a member or members upon any material *interlocutory question*, raised during the trial and passed upon by the court when cleared for deliberation, would also be a substantial violation of the obligation assumed by the oath, although no *issue* were joined upon such question. Otherwise, however, where the question thus acted on was one quite immaterial to the merits of the case.[16]

For a member to disclose *his own* vote or opinion would, as remarked by Hough,[17] be equally at variance with his sworn engagement as if he were to divulge that of another member.

While the members, by the last clause of the oath, are precluded from divulging the *sentence* only, it is clear that a member could not properly
352 divulge the fact of an *acquittal*. Such a disclosure would not indeed be a violation of the *oath*, but, as indicated in considering the obligation of the judge advocate under the 85th Article,[18] it would be a breach of official trust and duty, and would constitute an offence under Art. 62.

**The obligation, how discharged.** As to the *sentence*,—when the same has been promulgated in General Orders, or otherwise made public by the proper superior authority, the member is no longer bound to secrecy in regard to its terms. As to *votes or opinions* of the members, an individual member is authorized to divulge the same only when "required to give evidence thereof" before "a court of justice."[19] By the term "court of justice" was evidently intended a civil or criminal court of the United States or of a State: a court martial[20] could scarcely have been contemplated.

A member, when duly summoned as a witness before a civil court for the purpose indicated, is not only authorized but obliged, if the testimony required of him on the subject be material, to make the disclosure of the vote, &c., if the same be known to him; and this whether testifying in person or by deposition. It will be contempt if he refuses.[21]

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[15] See Sullivan, 78; Tytler, 324; Simmons § 615; De Hart, 179; DIGEST, 98. It is no justification for a statement in the record of the vote on the sentence or other subject, that such statement was intended for the eyes and consideraion of the reviewing officer only. G. C. M. O. 28, Dept. of Texas, 1883.

[16] Thus, in G. C. M. O. 113, Dept. of the Mo., 1868, it was held not to be "conduct to the prejudice of good order and military discipline" for a member of a general court to make known the vote and opinion of other members, "given while the court was considering, with closed doors, a subject in no way connected with the case then properly before it for trial;" and it was added by the reviewing officer, (Gen. Sheridan,)—"The oath administered in compliance with the 69th, (now 84th,) Article of war, is binding only in matters pertaining to the case which is actually being tried."

[17] Page 372; Id., (P.) 738. In a case in G. C. M. O. 24, Dept. of the Platte, 1875, Gen. Ord disapproved, as contrary to the spirit of Art. 84, the action of the president of the court in adding over his signature to the Finding in the record a statement to the effect that, for reasons specified, he disagreed with the majority in a certain finding,—thus disclosing his own opinion.

[18] See Chapter XIII.

[19] On the trial of Maj. Gen. McDougall, one of the charges of which he was convicted was the relating publicly of matters which had occurred at a Council of War, and disclosing Gen. Heath's opinion thereat. (G. O., Hdqrs., Newburg, August 28, 1782.)

[20] In the late British articles of war, the words *"or a court-martial"* were added after the words "court of justice." In the present Army Act (§ 52) the term employed is—"unless thereunto required in due course of law."

[21] See *In re* Mackenzie, 1 Pa. Law J. R., 356.

Upon the taking of the oath by the members, the court is *duly organized* for the trial, and the presiding officer may, properly, make formal announcement to that effect.

## II. THE ARRAIGNMENT OF THE ACCUSED.

**THE ACCUSED TO BE FREE OF UNNECESSARY RESTRAINT.** The court being now duly qualified and organized for the trial, and the accused being before it and ready to plead, the next proceeding is the formal arraignment. To this the accused, in the military as in the civil procedure, is
353 entitled to come free from shackles, irons or other bonds, except in some extreme case where an attempt to escape or to do violence is to be apprehended;[22] and he is entitled to remain similarly unrestrained pending the trial.[23] A failure, however, strictly to observe this rule will not affect the legal validity of the proceedings.[24]

**FORM OF ARRAIGNMENT.** The arraignment is the calling of the prisoner to the bar of the court to answer to the charge or charges on which he is to be tried.[25] In the practice of courts-martial it consists in reading to the accused the charges and specifications, and demanding of him whether he is guilty or not guilty of each, separately and in order. The order pursued where there are several charges is to arraign first on the 1st, 2d, and succeeding specifications of the First charge, and then on that charge; next on the separate specifications of the Second charge, and then on that charge; and so with the rest. In our practice the arraignment is conducted by the judge advocate, both he and the accused properly standing during the ceremony. Where two or more prisoners are to be tried together on joint charges, each is separately arraigned.

The reading of the charges and specifications, besides being the formal and proper basis for the questions which are to succeed and the answers which are to follow, will be useful in affording the accused an opportunity to compare the copy as previously served upon him with the draft on which he is arraigned and so detect any variance that may exist. It is not, however, *essential* to an arraignment that the charges and specifications be read on this occasion. If they are numerous or elaborate, and if the accused has assured himself that the originals have not been modified since his receipt of the copy, he may well—the court assenting—waive the reading, as at criminal law the defendant may waive the reading, on arraignment, of the indictment.[26]

354 So, by consent of parties, (and with the assent of the court,) the arraignment may be further simplified by the omission of the questions usually addressed by the judge advocate to the accused as to how he pleads to the several charges, &c., and by the entry in the record of a general plea of guilty or not guilty as made to the whole, or of this plea to a part and a special plea or pleas to another part of the pleadings, or of a special plea or pleas to the whole—as the case may be. Where this form is resorted to, it is generally in connection with a waiver of the reading of the charges.

**ANSWER OF THE ACCUSED.** The *answer* to the arraignment, (which is no part of the arraignment itself,) will ordinarily consist of the plea of the *general issue* or of a *special plea*. In some cases, in lieu of a plea, a *motion*—

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[22] 2 Hawkins, c. 28 § 1; 1 Bishop, C. P. § 731; Simmons § 473; Macomb, 30; O'Brien, 235–6; De Hart, 113; G. O. 52, Dept. of the East, 1869; Circ., Dept. of the Mo., Feb. 19, 1872.

[23] See DIGEST, 334, and authorities cited in note.

[24] Circ. No. 11, (H. A.,) 1886.

[25] 2 Hale, 219; 4 Black. Com., 322.

[26] Goodin *v.* State, 16 Ohio St., 344–7. And see 1 Bishop, C. P. § 783.

as a motion to quash or strike out—will be first made. It is possible, however, that the accused will make no answer whatever to the arraignment, but will remain wholly silent. Before proceeding, therefore, to consider in a separate Chapter the subject of Pleas and Motions, we will pause here to notice the rare contingency of *standing mute.*

### Standing Mute.

**THE LAW ON THE SUBJECT.** At an early period of the English law, in all capital cases except treason, if the prisoner stood mute, and the jury to which the question was referred,[27] found that he did so from obstinacy or malice; or if he persisted in answering "foreign to the purpose;" he became liable to the "*peine forte et dure*,"[28] a barbarous mode of punishment and torture not finally done away by legislation till the reign of Geo. III. In other cases, (and in all cases of felony after the date of this legislation,) where the prisoner stood mute or refused to plead, the court proceeded—as if he had pleaded guilty—immediately to conviction and sentence;[29] and to the same effect appears to have been the practice of the earlier British courts-mar-
355 tial.[30] But, by a later statute of 7 & 8 Geo. IV, criminal courts, upon prisoners refusing to plead, were authorized to order a plea of not guilty to be entered; and in the present Rules of Procedure, (§ 35, A,) it is specifically directed that if the accused before a court-martial "refuses to plead, or does not plead intelligibly, a plea of not guilty shall be recorded on each charge."

In this country, it was specifically adjudged in a federal court in 1818 that the penalty of *peine forte et dure* was unknown to the laws of the United States.[31] Moreover a series of statutory provisions, dating from 1790, have—as the law is stated in Sec. 1032 of the Revised Statutes where they are now consolidated—enacted that—"*When any person indicted for any offence against the United States, whether capital or otherwise, upon his arraignment stands mute or refuses to plead or answer thereto, it shall be the duty of the court to enter the plea of not guilty on his behalf in the same manner as if he had pleaded not guilty thereto.*"[32]

At *military* law, the first enactment on the subject was that of Art. 70 of the code of 1806, and this has been repeated in Art. 89 of the present code, of 1874, as follows:—"*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.*"

**PROCEDURE.** The application of the Article being restricted to cases where, from "obstinacy and deliberate design," the accused will not submit himself to be duly arraigned, it may become necessary for the court—where the accused stands mute, (or what is equivalent,[33] refuses to plead,) or answers

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[27] See, as to this procedure, *post*, p. 238.

[28] As to the description and history of this penalty, see 2 Hale, 319; 4 Black Com., 327–9; 1 Chitty, C. L., 426; Adye, 152; Tytler, 234; Delafons, 173; De Hart, 137.

[29] 1 Chitty, C. L., 425; 4 Black Com., 325; Rex *v.* Mercier, 1 Leach, 183; U. S. *v.* Hare, 2 Wheeler, C. C., 300; De Hart, 137–8.

[30] Simmons § 555. And see Tytler, 234–5.

[31] U. S. *v.* Hare, 2 Wheeler, C. C., 301.

[32] See U. S. *v.* Hare, *ante.* A similar statute exists "in probably all our States." 1 Bishop, C. P. § 733*a*.

[33] 2 Hawkins, c. 30, s. 1; 4 Black. Com., 324; Tytler, 233; O'Brien, 247; De Hart, 137. O'Brien, (p. 150,) includes also within the description of *standing mute* the case of an accused who, after a special plea interposed by him has been inadmissible by the court, pertinaciously adheres to the same, refusing to plead to the merits. And see Benét, 108.

foreign to the purpose, and it is not clear that he does so from mere wilfulness—to satisfy itself by an investigation whether he acts from contumacy only or from some cause beyond his control.

In such a case, in the civil practice, a jury is ordinarily empannelled
356 to try and determine whether the party is mute, &c., from malice or self-will, or *ex visitatione Dei*—that is to say, from a natural impediment or some other physical or mental infirmity. If the jury find that the silence, or refusal, results from the latter cause, the trial is, or not, proceeded with, according to the capacity of the prisoner to plead and defend with proper intelligence. If not found capable, he is remanded to custody for such disposition as the existing statute law may direct.[34]

In the military procedure, such an inquiry devolves of course upon the court, which, therefore, proceeds, with the assistance of such testimony, medical or other, as may, through the judge advocate, be made available, to determine the preliminary question.[35] If it find the accused to be apparently insane or idiotic, it suspends the proceedings, reporting the facts to the convening authority, for such action as he may think proper to take or to recommend to be taken by the Secretary of War—as, for example, a discharge from the service, or a committal to the Government Hospital for the Insane.[36] If again—a contingency which must be of still rarer occurrence in the Army—the accused be found to have lost, wholly or in part, the faculty of speech or hearing, he may, if sufficiently intelligent and able to communicate his thoughts and wishes, plead and defend through an interpreter, as in the civil practice: if not thus intelligent or capable, his case will properly be reported by the court to the convening officer, for discharge or other appropriate action. If, on the other hand, the court determine that the accused stands mute, &c., "from obstinacy and deliberate design," it will proceed as indicated in the Article; the accused himself remaining liable to a separate charge and trial (by a different court) for such offence as may, if his conduct has been aggravated, have been involved in his acts or words. If these indeed amount to a menace or a
357 disorder disturbing the hearing, the court may be justified in proceeding as for a contempt under Art. 86.[37]

It will be seldom, however, in practice that a court-martial will be required to proceed as enjoined in Art. 89; and but a few instances of such proceeding are to be found published in the General Orders.[38]

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[34] See 2 Hawkins, c. 30, s. 5; 4 Black. Com., 324; 2 Gabbett, 318; De Hart, 138; Rex *v.* Jones, 1 Leach, 102; Rex. *v.* Mercier, Id., 183; Rex *v.* Steel, Id., 451; Rex. *v.* Pritchard, 7 C. & P., 303; Rex *v.* Dyson, Id., 305; Rex *v.* Halton, Ry. & Mo., 78; Queen *v.* Goode, 7 Ad. & El., 536; Ley's Case, 1 Lew., 239; Thompson's Case, 2 Id., 137; Frith's Case, 22 How. S. T., 307; Com. *v.* Braley, 1 Mass., 102; Com. *v.* Moore, 9 Id., 402; Com. *v.* Hathaway, 13 Id., 299; Com. *v.* Hill, 14 Id., 207; Com. *v.* Tyree, 2 Va. Cas., 266; Matter of Turner, 5 Ohio, 544. And see, in this connection, Freeman *v.* People, 4 Denio, 9.

[35] On the subject of this inquiry by a court-martial, see Griffiths, 57; O'Brien, 248; Benét, 95.

[36] Under Sec. 4843, Rev. Sts.

[37] But a mere neglect to plead is not a contempt. Perrin *v.* Oliver, 1 Minn., 202.

[38] See cases in G. O. 96, Dept. of N. Mex., 1862; G. C. M. O. 62, Dept. of Va., 1865, where, upon the accused answering foreign to the purpose when arraigned, the court caused a plea of not guilty to be entered on the record, and proceed with the trial. A more conspicuous case was that of C. L. Vallandigham, tried by military commission in 1863, who, denying the jurisdiction of the court, refused to plead to the charge; whereupon the plea of not guilty was entered as authorized by the Article. Printed Trial, p. 12; G. O. 68, Dept. of the Ohio, 1863. A recent marked case is that of Lieut. B. F. Handforth, published in G. C M. O. 88 of 1887, where the accused stood mute as to the charge (under Art. 61) and all the three specifications. And see a later case in G. C. M. O. 28, Navy Dept., 1891.

## III. CONTINUANCE.

It is upon the arraignment and before the plea that application is, more frequently than later, made to the court for a continuance. The subject of continuances will therefore best be considered at this point.

**ART. 93.** This subject is now regulated by the 93d Article of war, which is as follows:—"*A court-martial shall, for reasonable cause, grant a continuance to either party, for such a 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.*"

**CONSTRUCTION AND EFFECT OF THE ARTICLE, IN GENERAL.** This provision, which appears first as an Article of war in the revised code of 1874, was originally sec. 29 of the Act of March 3, 1863, ch. 75. Prior to this statute the only provision on the subject was that of a paragraph, (now numbered 1014,) of the Army Regulations, which directed that:—"Application for extended delay or postponement of trial will, when practicable, be made to the authority appointing the court. When made to the court, and if in the
358 opinion of the court it is well founded, it will be referred to the convening authority to decide whether the court should be adjourned or dissolved." This regulation, which had in view applications to be made only or mainly by the accused, and to be made to, or finally passed upon by, the convening authority, was practically *superseded* by the statute, which authorizes either party, indifferently, to apply to the court for continuances, empowers the court alone to grant the same, and permits them to be granted at any stage of the proceedings. The Article in effect transfers to the court a function—similar to that exercised by the civil courts in continuing cases from one term or session to another[39]—which the regulation had devolved upon the convening officer. Applications to delay the trial, or rather the assembling of the court for the trial, made before the date designated in the Order for such assembling, must of course always be addressed to that officer; but such applications are of rare occurrence.

The Article, by the words "shall grant," &c., is deemed to entitle the party to the continuance asked, (or to some continuance,) as a *right*, upon his showing "reasonable cause" therefor.[40] Thus the chief question under the Article is as to what constitutes reasonable cause. Before considering, however, the ground for continuance, we will notice certain minor points as follows:—

**THE TIME FOR MAKING THE APPLICATION.** The Article, in providing for the granting of continuances "as often as shall appear to be just," is deemed to authorize the making of applications or motions for the
359 same *at any time pending the trial.* But while sufficient causes for granting such applications may not unfrequently arise at later stages of

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[39] The Article, however, though employing the more legal term "continuance," in lieu of the more colloquial "postponement" used in the regulation, does not employ it in the strict sense in which it is commonly used in the civil practice, but in a more general sense as including any temporary stay of proceedings, to be granted by the court at the instance of a party. See *post*—"Duration of the continuance," p. 240.

[40] See DIGEST, 109. A refusal by a court to grant a continuance, where reasonable cause therefor is exhibited, while it will not affect the legal validity of the proceedings, will, if the accused appears to have been thus prejudiced in his defence, or to have otherwise suffered injustice, "properly constitute good ground for disapproving the sentence, or for mitigating or partially remitting the punishment." DIGEST, 109. And see G. C. M. O. 35 of 1867; Do. 128 of 1876; G. O. 24, Dept. of Arizona, 1874; Do. 63, Dept. of Dakota, 1872; Do. 40, Fourth Mil. Dist., 1869.

the proceedings,[41] yet where the ground for a continuance exists and is known prior to or at the arraignment, the proper time for making the application is upon the arraignment and before the plea.[42] If the facts which would warrant the granting of the application are fully known at this time by the party, and he does not then present his motion but goes on to plead to the general issue, he may usually properly be held to have *waived* his title to a continuance based on such facts.

**BOTH PARTIES EQUALLY ENTITLED UNDER THE ARTICLE.** The opinion has been expressed by some of the authorities, (writing prior to the enactment of the present Article,) that a continuance should be granted more readily to the accused than to the prosecution, in a case at least where the ground presented is the absence of a material witness.[43] The existing Article, however, avoids making any distinction between the parties, and the court should in general make none, whatever the ground of the application, but should look to the reason offered for the claim rather than to the source from which it proceeds.

**DURATION OF THE CONTINUANCE.** The Article declares that a continuance shall be granted "for such time as may appear to be just," except in the single case where the accused is "in close confinement," (a term explained in a previous Chapter,[44]) when, it is provided, "the trial shall not be delayed for a period longer than sixty days." As the limit in the excepted case is thus broad, it may be inferred that it was contemplated that continuances might be allowed for very considerable periods, approximating in duration even to the continuances from term to term granted in the civil courts. In Capt. Howe's case,[45] the trial, for a reason hereafter to be noticed, was, at the instance of the accused, suspended for nearly two years. This
360 indeed was exceptional, but in general it may be said that the period for which a continuance may legally be granted is without other limit than such as the exigencies and convenience of the service or the interests of justice may impose. In practice, a continuance for a longer period than a month is rare.

**NUMBER OF CONTINUANCES.** The Article further authorizes the granting of continuances "as often as shall appear to be just." Continuances may thus be renewed, or new ones may be allowed, without any fixed limit as to number. A proper occasion for the renewal of a continuance would be presented where a material witness had not arrived at the time expected and to which the original postponement had extended, but there was reasonable ground to believe that he would arrive presently. So, where a continuance has already been granted for one cause, the court would be authorized to accede to a subsequent application based upon a new ground, provided the same could not have been anticipated at the time the former was presented, and is itself sufficient and properly evidenced.[46] But it is to be observed that, to sustain a new and especially a reiterated, application, a stricter measure of proof should ordinarily be required than in the case of the original motion: this indeed

[41] Simmons § 535; Kennedy, 66–7; Clode, M. L., 136; O'Brien, 246; De Hart, 129.
[42] See Kennedy, 66; De Hart, 129.
[43] See Simmons § 533; De Hart, 132; Benet, 87. The view expressed is founded upon a ruling on Col. Quentin's Trial, p. 35.
[44] Chapter IX—"ARREST."
[45] 6 Opins. At. Gen., 506.
[46] See Moore *v.* McCulloch, 6 Mo., 448.

appears to be the view of the civil courts.[47] It may be added that, under the wide discretion permitted it, to allow a stay of proceedings when and as often as it may deem just, a court-martial, like a civil court, may grant a continuance at the trial of *an issue formed upon a special plea* as well as at any other stage. But here too a stricter rule as to proof may in general property be applied than where the trial is upon the general issue.[48]

361 **GROUNDS FOR CONTINUANCE.** It was declared by Lord Mansfield in Rex *v.* D'Eon,[49] that—"no crime is so great, no proceedings so instantaneous, but that, *upon sufficient grounds*, the trial may be put off." A similar condition is expressed in our Article of war by the words "*for reasonable cause.*" Whether the cause stated in any case is a reasonable one, the court alone is empowered, in its discretion, to determine. But on this subject there are certain general rules which, though not absolute or imperative, have been recognized as properly guiding the discretion of the court; and these rules, which are in general also applicable to the military practice, will be referred to in considering the principal grounds for continuances—as follows:

1. **Absence of a material witness.** This is the most frequent of such grounds, both upon civil and military trials. In the case last above cited,[50] Chief Justice Mansfield clearly lays down the rules governing the granting of a continuance for this cause. "Three things," he observes, "are necessary to put off a trial—1. That the witness is really material and appears to the court so to be; 2. That the party who applies has been guilty of no neglect; 3. That the witness can be had at the time to which the trial is deferred." In our own law, it is directed by par. 1013 of the present Army Regulations, (par. 887 of 1861,) as follows:—"Upon application by the accused for postponement of trial because of the absence of a witness, it should distinctly appear on his oath—1st, that the witness is material, and why; 2d, that the accused has used due diligence to procure his attendance; 3d, that the accused has reasonable ground to believe, and does believe, that he will be able to procure such attendance within a reasonable time stated."

**The affidavit or atatement.** This regulation is in terms confined to the case of an application by the accused. But the statute of 1863, (Art. 93,) enacted since the date of the original regulation, having provided for the granting of continuances to either party indifferently, the judge advocate, when the motion comes from him, may properly be called upon to make a similar
362 statement, though his oath to the same need not be required. In practice the accused is generally sworn to his statement by the judge advocate. But—the regulation being directory only—the taking of the oath, and even the making of the formal statement, may be waived by the opposite party, and in practice is, with the consent of the court, not unfrequently dispensed

[47] "On a first application, a less degree of diligence would satisfy the court than on a second or third application." * * * The court "would continue to require greater diligence on each successive application." Shook *v.* Thomas, 21 Ills., 89. And see 1 Bishop, C. P. § 951 *a*. Where a second application is made on the same ground as a previous one, it should be based upon new facts which have arisen since. Peru Coal Co. *v.* Merrick, 79 Ills., 112; Wilson *v.* State, 33 Ga., 207. A second application for continuance on account of an absent witness should show renewed diligence to secure his attendance used since the first continuance. Powers *v.* Lockwood, 9 Johns., 132; St. John *v.* Benedict, 12 Johns., 418.

[48] See Wade *v.* Birmingham, 2 Chitty, 5.

[49] 1 W. Black., 514.

[50] Rex *v.* D'Eon, 1 W. Black., 514; Id., 3 Bur., 1514.

with where the continuance asked is but for a brief period, and there is no reason to question the good faith of the party applying.[51]

But as a general rule, and especially where the continuance will entail an unusual delay, or is asked for at an unusual stage of the proceedings, the preferable course is for the party to present with his application the statement indicated in the regulation, setting forth explicitly therein the three points enumerated.

*In the first place*, therefore, he will properly state, not only that the witness is *material* but *how* he is material, and this by specifying as to what feature of the case he is to testify and what it is expected that his testimony will be in substance or effect.[52] And this testimony should appear to be substantial and appropriate to the issue of guilt or innocence under the specific charge, not testimony as to character merely,[53] or testimony which is only cumulative or reiterative as to a point already sufficiently exhibited in proof.[54] The main object, it may be noted, in specifying the facts proposed or expected to be proved by the witness is, not only that the court may better judge as to his materiality, but that the opposite party may have an opportunity to *admit* such facts or that the witness will so testify, and the occasion for a
363 continuance thus be done away with. Where indeed, as is not rarely the case in a criminal proceeding, the personal appearance and statement of the witness will be of manifest and material advantage to the party applying for the continuance, he ought not in general to be deprived of the same by anything short of an unqualified admission and stipulation of record, by the opposite party, that the witness, if present, would testify as to certain facts, and that his testimony would be true.[55]

*Secondly*, the party applying for the continuance should set forth in his affidavit or statement sufficient facts to show that he has used *due diligence* to secure the attendance of the witness—as that, without fault of his own, he has but just been advised of the existence or of the whereabouts of the witness; or "that he has endeavored without effect to serve on him a subpœna, specifying the exertions used;"[56] or that the witness has been duly served but refuses or neglects to appear and that an attachment has been or is about to be issued for him; or that he has been duly summoned, or ordered to attend, but residing, or being stationed or on duty, at a great distance from the station of the court, has not had time to reach the same;[57] or that he has been unavoidably detained *en route*, or that, having once attended in obedience to a summons or order, he has, without the fault or knowledge of the applicant,

[51] "While the court may refuse the application if the regulation be not followed, it may, in its discretion, refrain from insisting that the same be strictly complied with, and accept a modified form." DIGEST, 108.

[52] See Simmons §533; O'Brien, 246. If the witness is material, it cannot affect the right to a continuance that his testimony is to be used in *rebuttal* only. G. O. 63, Dept. of Dakota, 1872.

[53] Wharton, C. P. & P. § 592; King *v.* Jones, 8 East, 34; People *v.* Wilson, 3 Park. 199; G. O. 28, Dept. of the Lakes, 1871. Where, however, the proposed testimony as to character is really important to the accused, and the judge advocate is not prepared to admit it, the court may properly grant a reasonable continuance.

[54] See People *v.* Thompson, 4 Cal., 238; Parker *v.* State, 55 Miss., 414; also Mull's Case, 8 Grat., 696; Rhea *v.* State, 10 Yerg., 258; DIGEST, 108. This general rule may also be departed from in a proper case.

[55] Compare Goodman *v.* State, 1 Meigs, 197; People *v.* Vermilyea, 7 Cow. 369.

[56] Wharton, C. P. & P., § 591.

[57] Or that he has been recently separated from his witnesses, by the change of station of his regiment or company. See case in DIGEST, 109 § 3.

withdrawn or disappeared, and cannot be found, &c. And in every case, where the existence of the witness has been known, the party should state, not in general terms merely that due diligence has been used, but specifically what acts have been done by him and efforts made to procure his attendance.[58] Where the witness is absent on account of illness, the party should cause this fact to appear by a medical certificate or medical testimony, or, if such cannot be obtained, by some other reliable means of information.[59] From the
364 facts exhibited the court will judge whether a reasonable diligence has been employed, or the party has been chargeable with laches; if the latter is apparent the application will regularly be denied.[60] And so will it be denied where there is reason for believing that the witness is absent by the procurement or connivance of the applicant himself.[61]

*Thirdly*, the party, in his affidavit or statement, should fix a date, not unreasonably distant, within which he should show, by facts specifically set forth, that he is reasonably justified in believing that he will be enabled to secure the presence of the witness at the court.[62] Where indeed, in the opinion of the court, it does not appear that the personal attendance of the witness may reasonably be expected to be secured within the time named, a continuance may still be granted for the purpose of enabling the party to obtain the *deposition* of the witness—the ground next to be noticed.

365 2. Time to procure the deposition of a distant witness. Where this is the ground for the continuance sought, the application should be presented as soon as practicable, and should satisfy the court that the testimony is material and that the witness, from physical causes or otherwise, cannot attend the court in person, or, by reason of the distance of his residence or station, the duty on which he is engaged, or other circumstance, cannot attend without undue expense or unreasonable delay, or serious prejudice to the service.[63]

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[58] Wharton, C. P. & P. § 591; Pence *v.* Christman, 15 Ind., 257; Brady *v.* Malone, 4 Iowa, 146; People *v.* Thompson, 4 Cal., 438.

[59] Wharton, C. P. & P. § 591; 2 McArthur, 32; Simmons § 533; Maltby, 64; Macomb, 36; O'Brien, 246–7; De Hart, 131.

[60] "It must be shown that the absence of the witness is not attributable to any neglect of the applicant." Simmons § 533. And see Kennedy, 67; Maltby, 64; O'Brien, 246. In Capt. Powlett's case, (2 McArthur, 28,) one of the reasons for which the court-martial refused a continuance to the accused was that he had not "taken the proper measures for preventing" witnesses, who had been at hand, from going abroad and thus absenting themselves at the time of the trial. Clode, (M. L., 136,) remarks: "A postponement to get up evidence, which ought to have been ready at the opening, would not be regular." In civil cases it is held not due diligence to rely on the mere *promise* of the witness to attend; and where this has been done by a party, he will not be allowed a continuance on account of the absence of the witness. Freeland *v.* Howell, Anthon, 198; Day *v.* Gelston, 22 Ills., 102; State *v.* Cross, 12 Iowa, 66; Mackubin *v.* Clarkson, 5 Minn., 247; Campbell *v.* Blanke, 13 Kans. 62; Hensley *v.* Lytle, 5 Texas, 500;—even where the witness has in fact been subpœnsed by the opposite party. Moore *v.* Goelitz, 27 Ills. 18.

[61] Wormley *v.* Com., 10 Grat., 658. On the other hand, a continuance will not be denied where the party, though apparently chargeable with laches, has really been prevented from securing the testimony by reason of the acts or omissions of the other party or his agents. U. S. *v.* Duane, J. B. Wallace, 10.

The accused in a military case cannot be charged with laches where the attendance of the witness has been prevented by superior authority,—as where the witness is detained on duty in the field or on other active service. See case in G. O. 63, Dept. of Dakota, 1872, noted in DIGEST, 109; also case referred to in Id., 109, § 3.

[62] Simmons § 533, Kennedy, 67; Macomb, 35–6; O'Brien, 246; De Hart, 130; DIGEST, 108. A "reasonable expectation" of procuring the testimony is a "standing requisite." U. S. *v.* Duane, J. B. Wallace, 8.

[63] See Burris *v.* Wise, 2 Ark., 33; Waskern *v.* Diamond, Hempst., 702; Hawley *v.* Stirling, 2 Cal., 470.

The non-return of a deposition, for which interrogatories have been sent, may also constitute good ground for a brief continuance, where the moving party has not been chargeable with laches in having it executed or procuring its return.[64]

3. Absence of written or documentary evidence. The reasonableness of this as a ground for continuance is illustrated in an English case,[65] where, in granting a postponement to enable the defendant to procure a copy of a judgment of a distant tribunal, the court observe: "The absence of such a document is equivalent to the absence of a witness." In a military case, the occasion for moving for a continuance on this ground would most frequently arise where it was desired to obtain, for use in evidence, a certified copy, which could not be made and forwarded without some delay, of a record of trial, or other record or official document on file in the War or Treasury Department, or other public depository of the United States or a State. The court, before granting the motion, should be satisfied that the written evidence is material to the issue, that the party has not, by neglecting at a previous time to procure the original or a copy, forfeited his claim to the postponement sought, and that the
366 writing can be procured without an unreasonable delay. Where the record or paper is of a simple character, an admission by the opposite party as to its existence and contents may sometimes well be accepted as doing away with the occasion for a continuance.

**OTHER GROUNDS.** Other recognized grounds for the granting of continuances are such as—the sickness of the accused as established by the proper medical evidence;[66] the temporary illness of the judge advocate;[67] the death, illness or absence of the counsel for the defence, in an important case, where considerable time is required to enable the accused to supply his place;[68] the serious indisposition (shown by medical testimony) of a material witness occurring pending his examination or when he is about to be called upon to testify.[69] So, a reasonable continuance may properly be granted the accused to enable him to procure counsel at the outset of the proceedings where he has not

[64] See Marsh *v.* Hulbert, 4 McLean, 364; Blagg *v.* Phœnix Ins. Co., 3 Washington, 5; Martin *v.* Anderson, 21 Ga., 301; Vaiden *v.* Abney, 7 La. An., 57; Hogan *v.* Burleson, 25 Texas, 35; Miles *v.* Danforth, 32 Ills., 59. In the last case the motion was granted, though it appeared that the commissioner had not yet met the witnesses; it being held that as the latter were volunteer soldiers in active service, the moving party was not chargeable with laches in not procuring the deposition to be promptly taken.

[66] Mackenzie *v.* Hudson, 1 Dow. & Ry., 159.

[68] Wharton, C. P. & P. § 597; Simmons § 535; Kennedy, 45; Griffiths, 29; Clode, M. L., 136; Maltby, 64; Macomb, 36; O'Brien, 247; De Hart, 131. The fact of the illness may be presented by the judge advocate, the counsel for the accused, or the accused himself if able to come into court.

[67] See O'Brien, 247. In the event, however, of a merely temporary indisposition of the judge advocate or the accused, the court will ordinarily itself *adjourn* for a brief period, without any motion for a continuance being made. And where the illness seems likely to be protracted, the court may prefer to adjourn and report the fact to the Commander rather than to allow a continuance moved by a party. See *post*—"Continuance as distinguished from Adjournment," p. 246.

[68] "It would be contrary to natural justice that a party should be compelled to have his cause tried when the attorney who has all along had the management thereof is prevented by sickness from attending trial." Hayley *v.* Grant, Sayer, 63. And see R. I. *v.* Mass., 11 Peters, 229; Schultz *v.* Moore, 1 McLean, 334; Hunter *v.* Fairfax, 3 Dallas, 305; Hill *v.* Clark, 51 Ga., 122; Rossett *v.* Gardner, 3 W. Va., 531; Marrero *v.* Nunez, 3 La. An., 54.

[69] Simmons § 533.

yet had a sufficient opportunity to do so.[70] It is also sometimes "reasonable cause" for a continuance that the accused, having been brought to trial presently upon his arrest or upon the service of the charges, has not had time
367 to prepare his plea or defence;[71] or that a material amendment has been made in the charges or an additional charge has been introduced which he has not had sufficient time to examine or answer prior to the arraignment;[72] or that the case is one presenting grave questions of law or other unusual difficulties requiring extended study and preparation.[73] A further ground may be the pendency of other proceedings, in a similar or the same case, before another court-martial or a civil court; on account of which a continuance may properly be asked and granted, either because these proceedings will probably so illustrate and facilitate the investigation on the proposed trial as to make it desirable to suspend the same till such proceedings are terminated; or because a due respect for the civil authority requires that such suspension should be had. Thus in Capt. Howe's case,[74] the trial by court-martial was, (as above mentioned,) suspended for two years, (not indeed by a formal continuance, but upon the same principle,) for the reason that the accused had already been arrested, indicted, and held to bail by the civil authorities on account of the same act which formed the subject of the military charge, and for the purpose of awaiting the result of the criminal proceedings.

**TRIAL OF THE ISSUE ON AN APPLICATION FOR CONTINUANCE.** Upon an application for a continuance under the Article, all facts and circumstances relied upon by the party to sustain his motion should properly be laid before the court; and, where desirable, he may fortify his statement or
368 affidavit by the statements and affidavits of other persons.[75] He may annex to, or incorporate or present with his own statement such orders, communications, or other written evidence as may be apposite. To support his motion, he may also introduce witnesses, (to be sworn by the judge advocate;) and the opposite party, if he *contests* the application, may offer counter affidavits and rebutting witnesses; and both parties may make argument.[76] For in such a case a regular and legal *issue* is joined, and, (although the proceedings, being preliminary merely, should be as brief as practicable,) an issue to be duly tried and determined. But where the *accused* applies for a continuance upon a recognized ground, and furnishes a satisfactory state-

[70] Simmons § 475, 536. DIGEST, 110; G. C. M. O. 25 of 1875. So, it may be proper to accord a brief continuance to a party desiring to procure an interpreter, clerk, or stenographer, where the necessity or expediency of employing such assistance is sufficiently made to appear.

[71] Kilmarnock's Case, Foster, 2; State *v.* Lewis, 1 Bay, 1.

[72] Hough, 31; Id., (P.) 667; Simmons § 418; Griffiths, 62; O'Brien, 250; DIGEST, 109. A further ground may consist in the fact that a material amendment is allowed by the court to be made in the charges after arraignment or pending the trial. DIGEST, 109, 235. Important unexpected testimony given on the trial, which could not reasonably have been anticipated, may also furnish ground for a continuance. DIGEST, 751.

[73] And so where, from some unforeseen accident or casualty, the party has been deprived of the opportunity to prepare for trial. See Torrey *v.* Morehouse, 1 Johns. Cas., 242; Nixen *v.* Hallett, 2 id., 218; Farr *v.* McDowell, 1 Bay, 31.

[74] 6 Opins. At. Gen., 506. To the grounds here enumerated may be added one other, recognized in the civil practice and which may under some circumstances be applicable to a military case, viz: the prevalence of a state of public excitement and prejudice precluding for the time an impartial trial. See Rex *v.* Gray, 1 Bur. 510; Com. *v.* Dunham, Thach., 516; Jim *v.* State, 15 Ga., 535; Nelson *v.* State, 2 Swan, 483.

[75] See King *v.* Siberil, 1 Ken., 356; Maltby, 64.

[76] See Simmons § 533. But see DIGEST, 108, note.

ment or sufficient evidence to warrant it, his application, except perhaps as to the extent of time asked for, will not often be contested by the judge advocate.

It may be added that, in general, the facts set forth in an affidavit for a continuance, if frankly and fully stated, are to be taken to be *prima facie* true, and, if not disputed by the opposite party, are to be acted upon as substantially true by the court.[77]

**CONTINUANCE AS DISTINGUISHED FROM ADJOURNMENT.** In conclusion may be noticed the distinction between *continuances*, which are granted to a party upon his application therefor under the authority of the Article of war, and *adjournments*, which are properly brief intermissions of its business taken by the court itself of its own accord or as its own act. An adjournment may sometimes accomplish the purpose of a continuance and render one unnecessary. Thus, for some such object, not likely to involve a long delay, as to enable the accused to procure counsel, or the judge advocate a clerk; to secure the presence of a witness who is *en route* and expected presently; to give time for the recovery of a party, counsel, witness, or member, who is temporarily ill, &c.—a voluntary adjournment by the court for a day, or for a few days, or from day to day for a brief period, will often be adequate without a resort to an application for the formal continuance contemplated by the Article. Even a *recess* taken by the court for a part of a day will sometimes be sufficient.

369 **Extent of authority to adjourn.** An adjournment is not to be resorted to merely for the convenience of the members.[78] It should be taken to some particular day; to adjourn subject to the call of the president would be irregular; to adjourn subject to the call of the judge advocate would be quite without the sanction of military usage.[79] In war, or when otherwise specially prompt action is required, the court may adjourn to the quarters of a sick member and there hold a session,[80] or to the quarters of a sick witness for the purpose of taking his testimony.[81] In a case of necessity a court-martial may even adjourn to a different station or locality, but such an adjournment should, regularly, be specially authorized or subsequently ratified by the Commander. An adjournment *sine die* or "without day" has no legal significance, and no more effect than a simple adjournment; a court-martial being a creature of orders and having, as has heretofore been noticed,[82] no power to dissolve itself or terminate its own existence.[83]

## IV. NOLLE PROSEQUI OR WITHDRAWAL.

**DEFINITION.** At or before the arraignment, (or later pending the trial,) it may happen that it will be expedient for the government to enter a *nolle prosequi* as to the charge, or, where there are several charges, to one or more

[77] See Wick *v.* Weber, 64 Ills., 167; Quincy Whig Co. v. Tillson, 67 Id., 351.

[78] "While courts have the unquestioned right to adjourn from time to time in the interests of the public service, and while they are the judges of what the public service may require, yet an adjournment prompted by the caprice, or made to suit the convenience of the members or a part of them, involves the offence of disobedience of orders on the part of those members who vote for it." G. C. M. O. 161, Dept. of Dakota, 1882. (Gen. Terry.)

[79] "The future meetings of the court should not have been left to the discretion of the judge advocate." G. C. M. O. 9, Dept. of Texas, 1883. (Gen. Augur.)

[80] Hough, (P.) 712, 721.

[81] Hough, (P.) 744; Kennedy, 45; DIGEST, 146. And note instance in G. C. M. O. 37, Dept. of the East, 1870.

[82] Chapter V.

[83] DIGEST, 145; G .C. M. O. 142, Dept. of the Mo., 1870.

of the charges or specifications. The term is derived from the common law formula according to which the prosecutor comes into court and *fatetur se ulterius nolle prosequi*. It is thus a declaration of record on the part
370 of the prosecution that it withdraws the charge or specification from the investigation and will not pursue the same further at the present trial.

**AUTHORITY AND OCCASION FOR.** It is a prerogative of The State that it may always withdraw in whole or in part a prosecution. As it has already been indicated, a *court-martial* has no authority *of its own motion* to withdraw a charge, nor has a *judge advocate*, in his capacity of prosecuting officer or otherwise, any such authority.[84] The authority to *nol. pros.* must be exercised by the superior who, as the representative of the United States,[85] ordered the court, or must be obtained from him. The principal grounds for this proceeding, when duly authorized, will be—the fact that the charge, &c., is discovered to be substantially defective and insufficient in law; that it is ascertained, (which indeed may not be done till the trial is quite or nearly concluded,) that the allegations cannot be proved, or that the testimony available is not sufficient to sustain them; that the criminality of one of the accused, where there are several, cannot be established; that it is proposed to use one of the accused as a witness, &c.[86] As will be noticed in the next Chapter, this proceeding is the proper one, where a valid plea of pardon is interposed by the accused. The entry of a *nolle prosequi* is sometimes also resorted to in anticipation of a motion to quash, or after such a motion has been made and because of it.[87]

371 **EFFECT.** A withdrawal of a charge or specification is not *per se* equivalent to an acquittal, or to a grant of pardon, and cannot be so pleaded. It simply removes from the pending case the particular charge, &c., without prejudice to its being subsequently renewed in its original or a revised form. In the criminal procedure, indeed, a *nolle prosequi* cannot in general be entered, after arraignment and plea, without the consent of the accused, who, in the view of the law, is deemed, in the event of such action, to be entitled to a verdict which he may plead in bar of a second trial; so that, if the entry is made against his consent, it is held to be tantamount to an acquittal.[88] But this doctrine cannot properly be applied to cases before courts-martial, where the proceedings are conducted under military orders, and where, when charges are withdrawn from prosecution, they are so withdrawn by the order,

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[84] See ante, p. 192, and notes.

[85] "There can be no doubt of the power of the President to order a *nolle prosequi* in any stage of a criminal proceeding in the name of the United States." Atty. Gen. Wirt, in 5 Opins., 729. And see U. S. *v.* Corrie, Brunner, 686.

[86] In G. O. 64, Dept. of the Cumberland, 1867, it was properly held to be "no ground for a *nol. pros.*" that to proceed with the trial would prejudice the interests of the service in detaining the accused, and an officer present as a witness, from important duties. In G. O. 75, Dept. of the South, 1870, where the judge advocate, with the assent of the court, entered a *nol. pros.* to certain charges and specifications, on the ground that three of the most material witnesses had absented themselves without authority from the court-room and could not be found, and the remaining witnesses could not prove the case, this action was disapproved by Gen. Terry, and it was remarked that—"the reason assigned, unless the court was satisfied that every proper effort had been made to procure such evidence, ought to have been considered by the court as insufficient."

[87] See State *v.* Buchanan, 1 Ire., 59, where a motion having been made to quash, the prosecuting attorney *nol. prossed* as to a defective count, retaining the rest of the indictment. As to the Motion to quash or strike out, see Chapter XVI.

[88] See 1 Bishop, C. P. § 1394; Wharton, C. P. & P. § 447; U. S. *v.* Shoemaker, 2 McLean, 114; U. S. *v.* Farring, 4 Cranch C., 465; Com. *v.* Tuck, 20 Pick., 366; Com. *v.* Scott, 121 Mass., 33; Mount *v.* State, 14 Ohio, 301; Reynolds *v.* State, 3 Kelly, 53.

(or, what is equivalent, the sanction,) of the official superior who created the court and directed the trial—an order which binds the judge advocate, the accused and the court alike.

**PRACTICE.** In the military practice, the *nolle prosequi* has mostly been resorted to at the outset of a trial and especially where a special plea or motion to strike out has been allowed by the court. The objectionable charge or specification being thus formally withdrawn, the trial proceeds on the other charges and specifications. If, at a *later* stage of the trial, it is found that a charge or specification cannot be sustained, or it is determined for other reason that the same shall not be pursued, while it will be legal to enter a *nol. pros.* thereto, it will be the preferable course, as well as most just to the accused, not to do so, but to allow the accused to be formally *acquitted* thereon at the finding.[89]

[89] See G. O. 64, Dept. of the Cumberland, 1867; G. C. M. O. 79, Dept. of the Platte, 1877; Do. 6, Dept. of Cal., 1872.

# CHAPTER XVI.

## PLEAS AND MOTIONS.

372 **ANSWER TO THE ARRAIGNMENT.** The accused, upon being arraigned, may, (where he does not stand mute, or ask a continuance before pleading,) answer to the arraignment in several forms. He may proceed at once to plead "guilty" or "not guilty" to the charge and specifications, (or "guilty" to some and "not guilty" to others;) or he may interpose, by way of special plea or motion, an objection or objections to his being tried at all; or he may similarly object to being tried on some particular charge or charges, specification or specifications, while pleading the general issue as to the rest. He is not indeed limited to one special plea or motion, but may offer such number as the law or facts may justify, before—in the event of their disallowance—resorting, as he may then do, to the plea of "guilty" or "not guilty."[1]

**PRELIMINARY OBJECTIONS.** We have already seen that at an earlier stage, *viz.* prior to the swearing of the court, and at the point at which challenges are usually offered, the accused, being present, may raise any objection properly going to the legal existence of the court,—as that it has not been legally constituted or composed; or to its authority to proceed with the trial,—as that it is without jurisdiction of the person or the offence. Such objections are indeed good at any time; they may therefore be taken at the stage now reached, *viz.* upon the arraignment. The objection, however, that the court is an illegal body, whose proceedings must be void *ab initio*, is a radical defect which is most appropriately raised and determined at the earliest stage, and the grounds for such objection, have already been considered in the Chapters on the Constitution and Composition of General Courts-Martial.

373 The plea of want of jurisdiction, on the other hand, being based mainly upon the descriptions and averments of the charges, which are not formally before the court till the arraignment, may properly be, and in practice generally is, reserved till this time.

**DIVISION OF THE SUBJECT.** The subject, therefore, of the *answer to the arraignment* may be presented under the following heads, indicating the different forms in which such answer may mostly fitly be made:—I. Plea to the Jurisdiction; II. Motion to quash or strike out; III. Special pleas in bar; IV. Plea of Guilty or Not Guilty.

### I. PLEA TO THE JURISDICTION.

**ITS EFFECT.** That this plea, (which is to the effect either that the person of the accused, or the offence charged, is not within the jurisdiction of the court,) is one which may legally be made and entertained, is now fully settled in our military law and practice. In other words, a court-martial is authorized

[1] See 4 Black. Com., 338; Tytler, 242; Maltby, 60; O'Brien, 250.

to pass upon the question of its own authority to proceed to *try* under the convening order.[2] Its conclusion indeed upon such question is in the nature of a recommendation and not final; and if, having determined that it has not jurisdiction, it is thereupon *ordered* by the convening officer to take cognizance of the case, it will be its duty to comply. As we have already seen, a court-martial is a creature of orders, and, except as to the exercise of an authority specifically devolved by statute, is subject to the orders of the proper superior equally as is any officer or body of officers in the army.[3]

**THE SUBJECT ELSEWHERE CONSIDERED.** The subject of this plea, however, need not here be dwelt upon. In Chapter VIII, under the title of the Jurisdiction of General Courts-Martial, have already been fully exhibited the occasions and grounds for such plea in general, and in Chapter XXII are indicated the special grounds upon which the same may be offered upon a trial before an Inferior Court. The situations and circumstances therefore which justify this plea need not here be reiterated.

## II. MOTION TO QUASH OR STRIKE OUT.

374 **ITS NATURE AND SCOPE.** By means of this convenient and effective motion on the part of the accused,[4] may be raised and decided in a summary manner all the objections which in the civil practice may be taken by the plea to the jurisdiction, the demurrer, the plea in abatement, or the motion in arrest of judgment. It is in effect a species of informal and commonly oral plea,[5] much availed of in the criminal courts, as a ready and effectual means of disposing of objections in general to the indictment, by effacing the same, or a separate count, from the record. As remarked in an adjudged case,[6] the motion to quash, as compared with the other forms of procedure above mentioned, "is a more easy and equally effectual mode of getting at the whole matter: everything may be heard upon it." This motion, though it has not received from military writers[7] the attention to which it is entitled, is not unfrequently resorted to in the modern military practice, where it is commonly distinguished as the *motion to strike out*. In this practice, in which the demurrer as such is not appropriate, and the plea in abatement, being dilatory and captious in its character, is rarely employed, and in which also the motion in arrest of judgment is unknown, the motion under consideration, from its simplicity, directness, and efficiency, is deemed to have a peculiar aptness and value.

375 **FORM OF THE MOTION.** There is no prescribed form for this motion, which may either be oral or in writing.[8] It should not, however, be made in general terms, but its precise ground or grounds should be distinctly specified.[9] Otherwise indeed the court may decline to entertain it.

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[2] See Tytler, 143; 5 Opins. At. Gen., 707.

[3] Chapter V, *ante*.

[4] It may also be made by the *prosecution* with regard to a *special* plea interposed by the accused, claimed to be insufficient in form or substance.

[5] See 1 Bishop, C. P., § 761.

[6] Nichols *v.* State, 2 Halst., 539. And see State *v.* Wishon, 15 Mo., 503; State *v.* Dayton, 3 Zabr., 49.

[7] Simmons indeed, (§ 568,) remarks in substance that the accused may offer, by way of *plea*, an objection to the charge on account of a want of specific allegation as to some material matter. And see, (as repeating him,) Macomb, 37; De Hart, 145–6; O'Brien, 249. It may be observed that there is no subject in regard to which military writers in general are more incomplete and uninstructive than that of Pleas and Motions; the matter of pleas proper being repeatedly found confused on the one hand with that of motions, and on the other hand with that of defences.

[8] In practice, it is commonly oral. See *ante*.

[9] See State *v.* Maurier, 7 Iowa, 408.

**AT WHAT STAGE TO BE INTERPOSED.** As has already been indicated, this motion is one to be made upon the arraignment and before a plea to the general issue. But as its effect, if granted, is to save time and simplify the proceedings, a criminal court will always permit an accused, who has pleaded not guilty, to withdraw his plea for the purpose of interposing this motion,[10] and a court-martial will properly do the same.

**OCCASION AND USE OF THE MOTION.** "Whenever," writes Bishop,[11] "an indictment cannot be proceeded with advantageously to public justice, or without doing a wrong to the defendant," it may, on proper motion, be quashed. As in the ordinary criminal procedure, so in that of courts-martial, this motion may and properly will in general be made, with regard to a charge or specification, on one, (or more,) of the grounds following, *viz:*— that the person described or offence charged is not within the jurisdiction of the court, (though this point is more commonly taken by way of a special plea to the jurisdiction;) that the charge does not set forth facts sufficient to constitute the alleged offence; or that, for a non-observance in the pleading of the rule of certainty or some other or others of the rules heretofore laid down as governing the framing of charges, the accused is actually prevented from making a proper plea or defence. As in the civil practice, the ground of the motion most frequently relied upon will be that the charge or specification does not set forth the intended offence, or any legal offence; this motion being really, in its commonest application, a substitute for the demurrer.[12] The motion, however, is not unfrequently made on account of the serious indefiniteness of the substance of a specification.[13]

376 **ADDRESSED TO THE DISCRETION OF THE COURT.** This motion being of a summary and aggressive character, in the nature of a raid upon the indictment, it is agreed by the authorities that it is in all cases wholly *within the discretion of the court* whether or not it will allow a proceeding the effect of which is to eliminate the entire basis and material of the prosecution or an important part of it.[14] While in a clear case the motion will generally be granted, in a case of any doubt the court will commonly prefer not to accede to so abrupt a method, but to leave the accused to take advantage of the alleged defect on the general issue.[15] A court-martial will also the more hesi-

[10] Nichols *v.* State, 2 Haist., 539.

[11] 1 C. P., § 758.

[12] See State *v.* Robinson, 9 Foster, 274; Thomasson *v.* State, 22 Ga., 499; Com. *v.* Chapman, 11 Cush., 422.

[13] Compare State *v.* Rutherford, 13 Texas, 24, where a count was quashed on motion because—"so vague, uncertain, and indefinite that he (the accused) is unable to understand what he is called upon to defend." And to a similar effect, see Rex *v.* Heffer, 1 Ry. & M., 210.

Indefiniteness of averment as to *time* and *place* in a specification may properly furnish ground for this motion. See instance in G. C. M. O. 78, Dept. of Dakota, 1892. In sustaining the motion, the court should require an amendment if practicable. G. C. M. O. 16, Dept. of the Mo., 1890.

It may be added here that where there are in the case two charges against the accused in substantially the same form and for the same offence, whereby, without material advantage accruing to the prosecution, the defence must be embarrassed, a motion to strike out one of them may properly be made and allowed. Compare State *v.* Tisdale, 2 Dev. & Bat., 160.

[14] Nothing is better settled than that the court is not *bound* to quash an indictment before trial. State *v.* Burke, 38 Maine, 574. "It is a matter of discretion whether an indictment shall be quashed in any case; it is not *ex debito justitiæ*. In an important and doubtful case I would not do it." Hornblower, C. J., in State *v.* Hageman, 1 Green, 323.

[15] See 1 Bishop, C. P., § 768.

tate where the charge moved to be struck out has been preferred or revised by high military authority, and there is thus an unusually strong presumption in favor of its completeness and sufficiency in law. The test which the civil courts usually apply to an indictment or count moved to be quashed is the question whether it will support a legal judgment: if it will, the motion is not granted.[16] With a court-martial the corresponding test would be whether a finding of guilty upon the charge or specification which is the subject of the motion would convict the accused of a legal offence for which sentence could properly
377 be adjudged, or of one the trial of which could be pleaded in bar of a second trial for the same offence.[17] The granting of the motion being discretionary with the court, a refusal to allow it cannot affect the legality of the proceedings.[18]

**NOT IN GENERAL TO BE GRANTED EXCEPT FOR A DEFECT OF SUBSTANCE.** Although motions to quash have been allowed in the civil practice for "gross deficiency in the formal requisites,"[19] the better general rule is that to warrant the granting of the motion the defect must be of a substantial character and not one of form merely.[20] So, in a military case, the court will properly disallow a motion to strike out a specification on account of a mere defect of form, (except where of an unusually aggravated character,) or even for a slight substantial defect where it can be at once or presently remedied by an amendment on the part of the judge advocate.

**ADMISSION OF EVIDENCE IN SUPPORT OF THE MOTION.** This being a summary proceeding, it is the general rule that it must be based upon a defect appearing on the face of the pleading. This rule, however, is held not to preclude the court from aiding its discretion by taking into consideration extrinsic facts admitted by the prosecution or exhibited in evidence by affidavit.[21] In military proceedings there can in general be no objection to thus showing some fact of a simple character essential to fully sustain the motion and which will enable the court at once to determine it. But facts which are in issue between the parties cannot be shown in this connection, and if proof of such facts is necessary to sustain the motion, the same will properly be denied, and the accused be left to his defence.

378 **PROCEEDING UPON THE GRANTING OF THE MOTION.** The court, instead of allowing the motion in terms, may, as already indicated, permit the judge advocate, if he desires it, to amend the defective pleading, provided an adequate amendment can at the time be made. But if the motion is specifically granted, and it relates to the only charge or all the charges in the case, the court will communicate, through its president, to the convening authority, the action taken, and await his orders; meanwhile, if thought desirable, proceeding with any other case that may be ready for trial. If the motion as granted has related to but one or a portion of two or more charges

[16] Hawkins, c. 25, s. 146; State *v.* Dayton, 3 Zabr., 49; State *v.* Baldwin, 1 Dev. & Bat., 195; Com. *v.* Eastman, 1 Cush., 189; U. S. *v.* Pond, 2 Curtis, 265.

[17] Thus a motion to strike out a charge of "conduct unbecoming an officer or a gentleman," or other specific charge, should not be granted where the specification will at least support a valid finding of "conduct to the prejudice of good order and military discipline."

[18] State *v.* Putnam, 38 Me., 297; Com. *v.* Eastman, 1 Cush., 189.

[19] 1 Chitty, C. L., 302. And see U. S. *v.* Crittenden, Hemphill, 61.

[20] State *v.* Dayton, 3 Zahr., 53; Bell *v.* Com., 8 Grant., 603. The statutes of some of the States contain express provisions to the effect that indictments shall not be quashed for defects not prejudicing the substantial rights of the defendant upon the merits. See, for example, the Indiana statute referred to in Dukes *v.* State, 11 Ind., 560.

[21] See 1 Bishop, C. P. § 763.

or specifications, the court will proceed with those left unassailed precisely as if they were the only charges originally in the case; their validity not being affected by the striking out of the other or others.[32] If, however, the remaining charges or specifications be of a comparatively unimportant character, the court may in its discretion communicate with the convening authority before proceeding to try the same.

The commander, on receiving the report of the court, may, if he disapproves its action, order it positively to proceed to try the charges,[33] or require it to reconsider such action in the same manner as upon a final judgment. Or, whether disapproving or concurring, he may direct the court to proceed with the trial upon the remaining charges or specifications; or, if all the charges, &c., be eliminated, or those left be such as not to make it worth while to pursue them alone, he may direct the judge advocate to abandon the prosecution altogether. Or he may transmit to the court new or amended charges, to be tried with those of the former set which remain, or, where none remain, to form the basis of a new prosecution.[34] In either of these cases, whether
379 the charges be altogether new or amended, the proceedings should be commenced *de novo;* the accused being again offered the opportunity of challenge, and the court being resworn.[35]

## III. SPECIAL PLEAS IN BAR.

Under this Title will be considered, as special pleas in bar of trial in military cases—The Plea of the Statute of Limitations; The Plea of Former Trial for the same offence; and the Plea of Pardon. To these will be added a reference to certain Inadmissible Special Pleas.

### The Plea of the Statute of Limitations.

As pointed out in Chapter VIII, the objection, in a military case that the statutory limitation of prosecution has taken effect, is, by the present weight of authority, not one going to the jurisdiction of the court, but *matter of defence only.* As such, while it may be taken advantage of upon the general

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[32] State *v.* Woodward, 21 Mo., 266; Simmons § 568. But quashing an indictment as to one of several *joint* defendants, and upon his motion, quashes it as to all. 5 Bac. Abr., 96; People *v.* Eckford, 7 Cow., 535.

[33] As to the exercise of this power, see "*Procedure on Special Plea, in general,*" *post.*

[34] In the same manner as, after an indictment has been quashed, "a new and more regular one may be preferred." 1 Chitty, C. L., 304.

[35] *Motion to sever.* Here may be noticed a motion which will regularly be made at the arraignment, *viz.* the motion by one of two or more *joint* accused to be allowed to "sever," *i. e.* to be tried separately from the other or others. Except where the essence of the charge is combination between the parties, (as in mutiny,) the motion may properly be granted for good cause shown. (See Manual, 496; Pratt, 68; English Rules of Procedure, 15.) The more common grounds of motions for severance are that the mover desires to avail himself on his trial of the testimony of one or more of his co-accused, or of the testimony of the wife of one, or that the defences of the other accused are antagonistic to his own, or that the evidence as to them will in some manner prejudice his defence. This motion has most rarely been presented to the court in our military practice. It was made by several of the accused on the trial by military commission of Milligan, Bowles, and others, in Indiana, in 1864, and by McRae, on the trial, by a similar tribunal, of McRae, Tolar and others, in North Carolina, in 1867, but in each case was overruled. Where the *prosecution* desires to use one of two or more joint accused as a witness against another or others, the practice is not to move to sever but to enter a *nol. pros.* as to such one.

issue,[26] it is preferably disposed of at the outset of the proceedings by the special plea now to be considered.[27]

**THE STATUTE.** The military statute of limitations consists of
380 the 103d Article of War, which embraces all offences and dates from the code of 1806, and an amendatory Act, relating to the offence of *desertion* alone, of April 11, 1890. The original Article is as follows—"*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.*" And the following is the amendment—"*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 obsence 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.*" The effect of the two enactments is that, whenever an accused is brought to trial for an offence committed more than two years before the date of the order convening the court—or, in a case of desertion in time of peace, more than two years after the end of his term of enlistment—he may specially plead that the statutory limitation has taken effect and he is not amenable to trial, and that, if the fact appears to be as pleaded, the prosecution shall cease.[28]

Prior to the enactment of 1890, the question was actively disputed whether the 103d Article applied to prosecutions for desertion; the conclusion of the Judge Advocate General and Attorney General[29] that it did so apply,
381 though sustained by the courts,[30] not being adopted by the Secretary of War.[31] The amendment might possibly be viewed as still leaving the question open as regards desertion in time of war. But upon a fair construction of the two statutes taken together, in connection with the judicial rulings

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[26] 1 Bishop, C. P. § 799; Wharton, C. P. & P. § 317.

[27] Statutes of limitation are "available as a defence," only "when they are at the proper time specially pleaded." Gormley *v.* Bunyan, 138 U. S., 623, 635.

[28] See a recent case in G. C. M. O. 73 of 1892, where a plea of the limitation, interposed by an alleged deserter, who properly sustained by the court—no evidence of any absence from the jurisdiction being, apparently, available on the part of the prosecution.

[29] See the previous edition of this work, vol. 1, p. 353.

[30] In Davison's case, in 1880. (*In re* Davison, 4 Fed., 507,) Choate J. clearly and ably expresses himself on this point as follows—"It is insisted on the part of the respondent that by 'absence' is here meant absence from the post of duty, and that this article has no application to desertions. It is certainly a startling proposition that there is no limitation at all upon prosecutions for the offence of desertion; that one who has once been a deserter is subject during the whole of his natural life to be brought before a military court and tried and punished for this offence, even in extreme old age. Yet this is seriously contended by the learned counsel for the respondent. The statute does not require, nor in my opinion admit of so strict and narrow a construction. There is nothing in this article itself clearly indicating that it does not extend to every military offence. As it is the only article limiting the time of prosecutions the presumption is very strong that it extends to every military offence; for, with the single exception of the crime of murder, the almost universal policy of the criminal law is to prescribe a term within which the offender shall be brought to trial." And see Same Case in 21 Fed., 618; *In re* White, 9 Sawyer, 49; *In re* Zimmerman, 30 Fed., 178.

[31] See opinion of Secretary Cameron, cited in the previous edition, vol. 1, p. 354–5. This is pronounced by Sawyer J., in *In re* Zimmerman, *ante*, as "a manifestly unjustifiable ruling."

referred to, the only reasonable interpretation that can be adopted is that the term "any offence" in the Article properly includes any form of desertion not specifically provided for in the amendment.

**BEGINNING AND END OF THE PERIOD OF LIMITATION.** I. The point at and from which the limitation is to *begin to run* is seen to be not the same in the two enactments. In the original Article, as in most criminal statutes of limitation, the point fixed is the date of the commission of the offence. In the body of the amendment of 1890 the same date is indicated to be observed, but this indication is materially qualified by the subsequent inconsistent proviso that "said limitation shall not begin until the end of the term for which said person was mustered into the service"—a carelessly drawn provision, as shown by the use of the term "mustered" instead of *enlisted*. This condition, engrafted upon our code from the German military system,[32] was designed of course to extend the period for the prosecution of deserters, but it is quite unequal in its operation. Thus a soldier deserting a short time prior to the expiration of his term of enlistment must be prosecuted, if at all, within about two years; while one deserting presently after his entering upon his enlistment, (which, under existing law, must be for five years,[33]) need not be prosecuted till at the end of nearly seven years. Thus the
382 longer a soldier remains in the service, with the more chance of impunity may he desert it. It is believed that this discrimination is not founded on good reason, but that the term of limitation should be the same in all cases. It is in general of doubtful expediency to introduce into the American military practice a rule derived from a foreign code, and especially where such rule is based upon a theory not tenable in our law. The theory upon which this rule is founded is that desertion is a "continuing offence," *i. e.* is an offence which, when once committed on a certain day, continues to be committed anew on every successive remaining day of the term of enlistment of the soldier, so that, being committed on the last day of the term equally as upon the original day, the limitation should not begin to run till after such last day. But this refinement is not deemed to be applicable to desertion in our law. A "continuing offence," as the maintaining of a nuisance, is one which *per se*, and without regard to the intent, if any, of the offender, works injury to individuals or the public so long as it is not abated, and is thus viewed as committed indifferently on every and any day of its maintenance. But desertion consists in an offence of which the gist is a particular intent and one which must be entertained at a particular time, viz. at the moment of the unauthorized departure. Thus, in the view of the author, a desertion is, as a legal offence, committed but once, being complete and consummate on the day on which the soldier quits the service with the *animus non revertendi;* the "continuing offence" thereafter committed being *not* the desertion but the simple minor offence of *absence without leave involved in it*, and which of course continues till the deserter's apprehension or voluntary return.[34]

It is believed that the most practical and the preferable rule of limitation in military cases that could be adopted would be to prescribe that the period of the limitation should commence in all cases with the day of the date of the offence as consummated and run from that date a certain term, say two years, in the cases of all offences except desertion, and a somewhat longer term, say three years, in cases of desertion.

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[32] See 15 Opins. At. Gen., 159.

[33] [Now fixed at *three* years, by the Act of August 1, 1894.]

[34] See the first edition of this work, (1886,) pp. 355–358.

II. The point at which the period of limitation is to terminate, or from which such period is to be reckoned back, is also, it has been perceived,
383 quite different in the two statutes which make up our military law of limitation; it being in the Article the date of "the issuing of the order" for the trial, *i. e.* the order convening the court, and in the Act of 1890 the date of "the arraignment" of the accused. The former provision is subject to the criticism that it allows of an indefinite interval between the date of the order and that of a trial had thereunder, without the right of the government to prosecute being affected.[35] This consequence, however, is one which has not often ensued and is not likely to ensue in practice, especially in view of the directions, designed to secure prompt trials, of Arts. 70 and 71. The latter provision is objectionable in that an accused in whose case the period of the limitation was nearly expired, could, by postponing for a short time—as by an illness real or pretended—his being arraigned, escape a prosecution. Such objection might indeed generally be avoided by specially authorizing the court to convene at the hospital or at the quarters of the sick man for the purpose of the arraignment, adjourning thereupon till he should be well enough to go to trial. The general rule of limitation in the British military law[36] is that no person shall be tried for an offence committed "more than three years before the date at which his trial begins;" the day or occasion on which the trial is to be considered as beginning not however being indicated. The rule prescribed by the U. S. Revised Statutes, for offences triable by the federal courts, is that the indictment shall be found within a certain number of years after the commission of the offence. In the military procedure the service of the charges upon the accused would best correspond with the finding of the criminal indictment. It is certainly desirable that a point of time should be fixed by law as that from which, uniformly in all cases, the limitation is to be reckoned back or at which it is to cease to run; and that fixed by the original 103d Article, being familiar to the service as having been the legal limit since 1806, may, though not free from objection, well be considered as upon the whole the preferable one.

**EXCEPTED CASES—ABSENCE: MANIFEST IMPEDIMENT.** The
384 original Article excepts from the limitation those cases in which, either "by reason of having absented himself," or by reason of "some *other* manifest impediment," the offender "shall not have been amenable to justice" within the period of the two years. The *absence* here indicated was defined by Choate J., of the U. S. District Court, in 1880,[37] as being "such an absence as interposes an impediment to the bringing of the offender to trial and punishment. It means absence from the jurisdiction of military courts—that is, absence from the United States."[38] This is the same absence as that subsequently *specified* in the Amendment, which may thus be regarded as construing the term "absence" in the original provision.

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[35] Captain Howe's Case, 6 Opins. At. Gen., 512. And see Id., 413; G. C. M. O. 85, Dept. of the Mo., 1869.

[36] "Except in the case of the offence of mutiny, desertion or fraudulent enlistment." Army Act, sec. 161.

[37] *In re* Davison, 4 Fed., 510.

[38] It was held by the Attorney General, (14 Opins., 267,) that "absence," as here used, "meant absence from the reach or jurisdiction of the military authorities," or absence "where the military authorities by reasonable diligence could not make" the party "amenable to justice." But this is vague, and the definition of Judge Choate is considered the preferable one. It is the same indeed as had been previously adopted by the Judge Advocate General. Edition of 1886, p. 358.

As to the signification of the term "manifest impediment"—this, as held by the court in the case of Davison last cited,[39] refers to such conditions as the being held as a prisoner of war in the hands of the enemy, or the being imprisoned under the sentence of a civil court upon conviction of crime—during the whole or a portion of the period of limitation. More generally, the Attorney General defines this term as meaning "something akin to absence," *i. e.* "want of power or physical inability to bring the party charged to trial."[40] Circumstances falling short of this would not constitute an impediment under the Article. Thus the mere fact that by means of fraud, deceit, or otherwise, the commission of the offence had been concealed from the military authorities, would not be sufficient to affect the amenability of the offender.

Laches cannot be imputed to the Government;[41] on the other hand it is estopped from claiming that because not informed of an offence it could
285 not prosecute it.[42] It need hardly be added that a delay to prosecute beyond the period of the limitation, caused by the fact that it was not convenient or deemed advantageous for the Government to prosecute before, can clearly not be treated as an "impediment." The party, if he is to be tried, is, as remarked by Attorney General Black, *entitled* to "a trial within the two years; he cannot be deprived of that right at the option of those who have the power to try him. If," it is added, "his superior officers could create impediments which would justify a delay beyond the prescribed period, the time of limitation would be a mere matter of discretion."[43]

As to cases of desertion in time of peace,—absence from the jurisdiction being alone specified in the amendment of 1890 as excepting such cases from the operation of the limitation, it is especially clear that a mere concealment of himself or of his identity, or other fraud or deception practiced by a deserter, by means of which he has avoided being brought to trial within the period of limitation, is not an "impediment" in the sense of the article;[44] it is indeed the business of the Government, supplied as it is with the forces and facilities for the purpose, to follow up a deserter with such diligence as to preclude, if practicable, such a result. Thus, that a soldier, on deserting, has enlisted in the Navy or the Corps of Marines, will not constitute such an impediment, because, while so enlisted, he is present within the jurisdiction of the United States and within the reach of the military authorities.[45]

**PLEADING AND PROCEDURE IN VIEW OF THE ARTICLE.** As the statutory limitation is, according to the weight of authority, "matter of defence," it is not necessary, in a case in which the two years have expired, to allege in the specification the facts relied upon to except the case from
386 the operation of the statute. Though it may affirmatively appear from the specification, (in connection with the convening order,) that the

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[39] *In re* Davison, 4 Fed., 510.

[40] 14 Opins., 267.

[41] U. S. *v.* Kirkpatrick, 9 Wheaton, 720; Raymond *v.* U. S., 14 Blatchford, 52.

[42] In a case in G. O. 33, Dept. of the East, 1869, in which it was claimed on the part of the prosecution that as "the Government did not know of the offence early enough to bring the accused to trial within two years," there had been an impediment in the sense of the Article, the reviewing commander, Gen. McDowell, well decided—"The accused cannot be deprived of his legal right by the inattention, delay, neglect, oversight, or any other fault or failing on the part of the Government. He is not responsible for them, and cannot be made to suffer by reason of them."

[43] 9 Opins., 184.

[44] 14 Opins. At. Gen. 52, 266–8. The ruling to a contrary effect in G. C. M. O. 55, Div. of Atlantic, 1890, must be held to be bad law.

[45] 14 Opins. At. Gen., 265; G. C. M. O. 63, War Dept., 1874.

period of the limitation has fully elapsed, the charge is yet good in law and the specification not subject to be struck out on motion. If excepting facts exist they may well be averred, but to aver them is not essential either to give jurisdiction or to complete the pleading.

The specification and order showing, (as, where the fact exists, they almost invariably will,) or the fact being, that the limitation has taken effect, the accused, if he desires to raise the objection, (for he may, according to the late rulings, *waive* it if he sees fit,[47]) will (preferably) proceed to raise it by his special plea, orally or in writing; supporting the plea, where the essential fact does not appear from the record, by appropriate testimony. The plea being made, and proved by the record or otherwise, it will devolve upon the posecution 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.

Inasmuch as the objection may also be taken advantage of under the *general issue*,[48] the prosecution should, in any event, unless the accused expressly waives his right, be prepared to prove, and should prove in the course of the trial, the excepting fact or facts.[49]

**THE LIMITATION NOT AFFECTED BY PROVISIONS OF OTHER ARTICLES—Article 48.** It has been ruled by the Judge Advocate General and the Attorney General that the provision of the 48th Article of war, that a deserter shall be liable to render service to the United States for a period equal to that of his unauthorized absence, and shall remain triable for his desertion although the term of his enlistment may have elapsed prior to his apprehension, &c., cannot affect the operation of the 103d Article by extending the period of the limitation in cases of deserters.[50] The two Articles,
387 the 48th and 103d, (as amended,) are sections of the same code and, not being necessarily repugnant, both must be allowed full effect; and, in the absence of any expression to the contrary, the former provision must be regarded as subject to the general restrictions contained in the latter.

**Article 60.** So, as has been held by the same authorities,[51] the provision of Art. 60, by which certain offenders are made amenable to justice after their discharge or other separation from the military service, is to be applied subject to the limitation of Art. 103.

**Article 71.** It might indeed be argued that this Article, in declaring that officers once arrested and released from arrest according to its terms "may be tried within twelve months after such release," rendered such officers subject to trial only within that period, and this notwithstanding that the two years' limitation of Art. 103 might still have a considerable time to run. But as both Articles are embraced together in the same code, full force is to be given to each so far as practicable. It is therefore deemed to be the reasonable construction to be placed upon the concluding clause of Art. 71 to view it as if there were added thereto the words—"subject to the provisions of Art. 103;" the effect thus given to it being that the "twelve months" are neither to extend nor reduce the time within which an offender is held amenable to trial by the latter Article.

It will thus be seen that the military statute of limitations admits of no exceptions to its operation other than such as are indicated in the statute itself.

[47] That the opinion of Atty. Gen. Wirt, (1 Opins., 383,) that the limitation could not be waived, has been in effect overruled by recent decisions of the U. S. Circuit Court, see Chapter VIII.

[48] See *ante*

[49] See G. O. 68 of 1829; Do. 52, Dept. of the South, 1870.

[50] DIGEST, 125; 13 Opins. At. Gen., 462; 15 Id., 156; 16 Id., 170, 396. And see *In re* Bird, 2 Sawyer, 33.

[51] DIGEST 124; 14 Opins. At. Gen., 53.

THE PLEA OF FORMER TRIAL FOR THE SAME OFFENCE.

**SIMILAR AT MILITARY AND AT CRIMINAL LAW.** This is the plea by which an accused party avails himself of the principle incorporated in the 102d Article of the military code, *viz:*—"*No person shall be tried a second time for the same offence.*"

In the criminal procedure the defendant takes advantage of this principle by means of one of the two pleas of former acquittal, (*autrefois acquit,*) or former conviction, (*autrefois convict,*) according as he has been acquitted or convicted at the former trial. But these two pleas are governed by the
388 same rules,[52] and each is but the declaration of the same fact—that a trial has been had. The rulings thereupon by the civil courts will therefore be applicable to similar cases at military law.

**FORMER TRIAL AND "JEOPARDY" IDENTICAL.** That no man shall be liable to be twice tried or punished for the same offence, was an ancient maxim of the common law, which derived it from a still earlier period.[53] Whether or not recognizable, as has been supposed, in Magna Charta,[54] it may certainly be traced in the precept of the Roman civil law—*non bis in idem.*[55] Brought over to this country by our ancestors as one of their common law privileges,[56] it was incorporated in the Constitution of the United States in a form similar to that in which it originally appears in the early cases and writings in criminal law,[57] as follows—"*nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.*" And the same or a similar provision is contained in the Constitutions of a majority of the States. That it takes this form is explained by the fact that, at the period of its origin, all the considerable offences in regard to which this right of defence would be asserted were felonies punishable capitally or by dismemberment.[58] In the present state of the law, indeed, the provision, as worded in the Constitution, applies, strictly, to but two or three crimes, as treason, murder, and piracy; but, construing it in the light of its original bearing and its manifest spirit, the U. S. courts generally have viewed it as covering in principle all other crimes,[59] and have held the phrase "put in
389 jeopardy" to mean practically the same as *tried,*[60] thus giving to such provision substantially the effect of the declaration expressed in the military statute.

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[52] 1 Chitty, C. L., 463; State *v.* Elden, 41 Maine, 169.

[53] U. S. *v.* Gibert, 2 Sumner, 38, 42.

[54] U. S. *v.* Gibert, *ante;* Burns *v.* People, 1 Park., 184; State *v.* Townsend, 2 Harr., 543.

[55] Klock *v.* People, 2 Park., 682.

[56] McGinnis *v.* State, 9 Humph., 49; State *v.* Cooper, 1 Green, 370.

[57] U. S. *v.* Gibert, 2 Sumner, 39–41; Vaux's Case, 4 Coke, 45.

[58] Com. *v.* Roby, 12 Pick., 502; State *v.* Elden, 41 Me., 169; People *v.* Goodwin, 18 Johns., 200.

[59] U. S. *v.* Gibert, 2 Sumner, 19, 45; 1 Bishop, C. P. § 990.

[60] U. S. *v.* Perez, 5 Wheaton, 579; U. S. *v.* Haskell, 4 Washington, 409, U. S. *v.* Gibert, 2 Sumner, 38; U. S. *v.* Shoemaker, 2 McLean, 114; U. S. *v.* Watkins, 3 Cranch C., 443; U. S. *v.* Riley, 5 Blatchford, 204; 1 Opins. At. Gen., 294; DIGEST, 118. "This clause in the Constitution may be considered equivalent to a declaration of the common law principle that no person shall be twice *tried* for the same offence." Com. *v.* Roby, 12 Pick., 502. It is "an explicit and solemn recognition of the maxim of the common law that no man shall be twice tried for the same offence." Hartung *v.* People, 26 N. Y., 182. [It may be noted, however, that the rulings of the *State* courts on this subject are variant; some holding that a prisoner is in "jeopardy" when he has once been put on his trial before a jury duly empaneled and sworn.]

**MEANING OF "TRIED" AND "TRIAL."** In so ruling, these courts have further held that the "jeopardy" or "trial" means the prosecution of a case to a verdict; that unless the case has proceeded at least to an acquittal or a conviction, there has been no trial and therefore no jeopardy.[61] Similarly the word "tried" in Art. 102 is to be interpreted as meaning *duly prosecuted before a court-martial to a legal conviction or acquittal.*[62] After such a conclusion the Article prohibits a further trial of the accused except, (as will hereafter be indicated,) by his own waiver and consent.

**IMMATERIAL WHETHER THERE HAS BEEN A SENTENCE ADJUDGED.** It is further held by the weight of authority that, to complete the trial, no judgment or sentence is requisite.[63] Thus, while in the military procedure a sentence properly follows at once and as a matter of course upon a conviction, a court-martial will properly hold an accused to have been "tried" in the sense of the 102d Article, when he has been duly acquitted or convicted, without regard to whether, in a case of conviction, a sentence or a legal sentence has been adjudged.[64]

**IMMATERIAL WHETHER ANY OR WHAT ACTION HAS BEEN TAKEN ON THE PROCEEDINGS BY THE REVIEWING OFFICER.**

Further where the accused in a military case has been once duly acquit-
390 ted or convicted, he has been "tried" in the sense of the Article, although no action may have been taken upon the finding or proceedings by the reviewing authority. Nor has he been any the less "tried" where the finding has been formally *disapproved,* by such authority.[65] For the finding is no less a consummation in law of the *trial,* though, from a cause beyond the control both of the accused and the court, such finding has been rendered ineffectual.

**TO SUSTAIN THE PLEA, THE FORMER TRIAL MUST HAVE BEEN A LEGAL ONE.**

1. **It must have been before a competent court having jurisdiction.** If the former court either had no legal origin or existence, or was without jurisdiction of the offence or the person, the trial was a nullity, there was in law

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[61] See authorities cited in last note. A verdict of a *jury* is indeed not essential; the trial may have been had before a judge similarly authorized to hear and determine. State *v.* Hodgkins, 42 N. H., 476; State *v.* Andrews, 27 Mo., 267.

[62] And this is also the rule of the British military code. Army Act, sec. 157.

[63] This was the view of Justice Story, in U. S. *v.* Gilbert, 2 Sumner, 58, with which is the very decided weight of modern authority.

[64] So it is quite immaterial whether an adequate or inadequate punishment may have ensued. DIGEST, 120.

[65] DIGEST, 119–120. And see Macomb, 72; O'Brien, 277; Bombay R., 45. A contrary ruling was made on this point by the Secretary of War in 1844, in the case of Lieut. D. C. Buell, on the ground that a disapproval renders a finding inoperative. And a similar view was expressed by Gen. Canby in G. O. 32, Dept. of La., 1866. But though a finding may be nullified by the act of a higher power, it is no less a complete and legal conclusion by the *court* of the *trial;* and to hold that a finding, if disapproved, cannot be pleaded in bar of another trial would be to subject an officer or soldier to be tried a second time or an indefinite number of times at the will of his commander, where he was acquitted when the latter thought he should be convicted, or if convicted, was not, in the commander's opinion, punished with sufficient severity. But the Articles of war, while making an approval by the commander necessary to the *execution* of the judgment of the court, (Art. 104,) have not provided that such action shall be essential to complete a *trial.*

no trial, no jeopardy, and the plea cannot be sustained.[66] Thus if, upon
391 a plea of former trial, it appeared that the alleged "trial" was an investigation by a "court of inquiry,"[67] or by a court not duly constituted or composed—as where it was convened by an unauthorized officer, or was made up, (in whole or in material part,) of officers not qualified to sit on the trial; or that it was a trial by a regimental or garrison, or a summary, court of a capital offence,[68] or by a general court of an offence cognizable exclusively by a civil court;—in any such case there would have been no former trial in law, and the plea would not be tenable.

**2. The former indictment, or charge, must have been legally sufficient.** It has further been uniformly held that the indictment upon which the accused was first brought to trial must have been valid and sufficient in law, and that if it was materially and in substance defective there has been no jeopardy upon which the plea can be based.[69] And the test applied to the indictment in such cases is—whether the same was one upon which a valid judgment could have been pronounced, or a judgment or sentence not liable to be reversed on account of defects in such indictment.[70] Similarly, in a case of a military charge of which the specification, by reason of the omission of some material averment, is substantially defective, an acquittal or conviction upon such charge will not protect the accused against a further prosecution for the offence intended to be but not alleged.[71] So—though such case will be rare—a charge upon which an accused has been acquitted or convicted may be so vague and indefinite as that the finding had thereon will be no bar to a second trial for the same offence properly pleaded.[72]

**3. The proceedings of the former trial must have been without fatal defect.** To make tenable the plea under consideration, the proceedings
392 of the former trial must have been "according to law;"[73] or, as it is expressed by Bishop,[74] all the "preliminary things of record," necessary to sustain the verdict must have been "complete." Thus if upon a military trial the court is omitted to be sworn as provided in the 84th Article,[75] or for

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[66] 2 Hawkins, c. 35, s. 10; 1 Chitty, C. L., 458; Wharton, C. P. & P., § 438; Stevens *v.* Fassett, 27 Maine, 282; State *v.* Elden, 41 Id., 170; Marston *v.* Jenness, 11 N. H., 162; Com. *v.* Roby, 12 Pick., 502; 11 Opins. At. Gen., 140; De Hart, 141; DIGEST, 118–119. "We think the party accused, not having been tried before a tribunal legally constituted, may be brought to trial before a competent tribunal; * * * for this is not the case of re-hearing the charge, but a case in which there has been no trial at all, the court having been illegally constituted." Opinion of Crown Lawyers in Boatswain Maxwell's Case, tried by naval court-martial in 1828. Hickman, 124. In G. O. 16, Northern Dept., 1865, it was held that there had been no "former trial" because the court, at the time of the supposed trial, had in fact been duly dissolved, and had therefore no legal existence. And see G. O. 72 of 1841.

[67] See Marston *v.* Jenness, 11 N. H., 156; Wilkes *v.* Dinsman, 7 Howard, 123.

[68] See G. C. M. O. 32, Dept. of the East, 1892.

[69] 2 Hawkins, c. 35, s. 8; 1 Chitty, C. L., 452, 462; 2 Gabbett, 334; Wharton, C. P. & P. § 507; U. S. *v.* Shoemaker, 2 McLean, 117, 120.

[70] 2 Hawkins, c. 35, s. 8; 1 Chitty, C. L., 454; Com. *v.* Olds, 5 Litt., 140.

[71] See DIGEST, 119.

[72] See De Hart, 145. And compare U. S. *v.* Shoemaker, 2 McLean, 120; Com. *v.* Hatton, 3 Grat., 623.

[73] Com. *v.* Goodenough, Thach., 133.

[74] 1 C. L. § 1020. There must not have been what is known as a "mis-trial." See DIGEST, 119.

[75] See 3 Opins. At. Gen., 398.

any cause is reduced to less than five members at the finding,[76] or its proceedings are invalidated by other fatal defect,[77] its acquittal or conviction will not constitute a legal trial pleadable in bar of a subsequent prosecution. But the defect must be absolutely fatal, not merely a serious irregularity furnishing ground for disapproval.

**4. The finding itself must have been complete and valid.** It may happen that although the proceedings at the former hearing were regular and legal down to the finding, *this* may have been so erroneous or imperfect as not to constitute legal jeopardy.[78] Thus a jury, in convicting, may find but a part of the matters put in issue in the indictment;[79] or may make a special finding omitting to include some essential element of the crime, as malice;[80] or may find the defendant guilty of an offence wholly distinct in law and fact from that charged.[81] So, a court-martial may find the accused not guilty of the specification, where there is but one; or not guilty of all the specifications, and yet
393 guilty of the charge;[82] or not guilty of the specific offence charged but guilty of another and distinct specific offence not included in it;[83] or not guilty of "conduct to the prejudice of good order and military discipline," but guilty of a specific offence;[84] or it may in its finding of guilty on the charge make such exceptions from the specification or charge as not to leave enough to constitute the offence charged or any offence.[85] In all such cases there will have been no legal finding and therefore no legal trial upon which the present plea can be predicated.

**DISCONTINUANCE BEFORE FINDING NOT EQUIVALENT TO ACQUITTAL OR AMOUNTING TO JEOPARDY.** It remains to notice the principle, applicable equally to civil and military cases, that where, instead of a complete trial on the merits, the proceedings are discontinued by some interlocutory action, the accused, though not in fault, is not to be regarded as having been acquitted or put in jeopardy. Thus where an indictment has been duly abated by the entry of a *nolle prosequi*, or on a motion to quash, demurrer, or other proceedings;[86] or where the trial has been broken off by reason of the

[76] DIGEST, 87, 88, 119. And compare Brown *v.* State, 8 Blackf., 561, where, it appearing from the record "that the cause had been tried by eleven jurors, the court held the trial to be a nullity, set aside the judgment, and remanded the cause for another trial." And see 1 Bishop, C. L. § 1040.

[77] See Macomb, 41.

[78] The accused must be *legitimo modo acquietatus*. Vaux's Case, 4 Coke, 45.

[79] "No judgment can be given on a verdict which leaves undecided any part of the matter put in issue." King *v.* Hayes, Ld. Raym., 1518. And see U. S. *v.* Watkins, 3 Cranch, 570; State *v.* Sutton, 4 Gill, 497. Or where the verdict is not "responsive to the indictment." State *v.* Dingee, 17 Iowa, 232.

[80] Webber *v.* State, 10 Mo., 40.

[81] Com. *v.* Smith, 2 Va. Cas., 327; State *v.* Spurgin, 1 McCord, 252; State *v.* Valentine, 6 Yerg., 533; State *v.* Mead, 4 Blackf., 309; Wright *v.* State, 5 Ind., 527.

[82] See this form of finding disapproved as a nullity in G. O. 60, Army of the Potomac, 1861; Do. 95, 107, Id., 1862; Do. 6, Dept. of Cal., 1865; Do. 9, Dept. of the Gulf, 1873.

[83] See this finding similarly disapproved in G. O. 14, 27, Army of the Potomac, 1864; Do. 231, Fifth Mil. Dist., 1869.

[84] See this finding similarly disapproved in G. C. M. O. 78, Dept. of the Mo., 1874; Do. 6, Dept. of the Gulf, 1876.

[85] See findings of this nature disapproved in G. O. 34, Dept. of the Mo., 1863; Do. 20, 54, Northern Dept., 1864, Do. 28, Dept. of the N. West, 1865; Do. 41, Dept. of the Platte, 1870; Do. 6, Id., 1871.

It should be noted here, as applicable generally, that though for any of the causes mentioned the trial may not have been a legal one, yet if the accused, having been convicted thereon, has *undergone a sentence* thereupon adjudged, he is not again amenable to trial for the same offence. 1 Bishop, C. L. § 1023; Com. *v.* Loud, 3 Met., 328.

[86] People *v.* Barrett, 1 Johns., 69; Stevens *v.* Fassett, 27 Maine, 282, 1 Bishop, C. L. § 1014, 1021.

death or disability of a juror or the judge, or of the defendant himself;[87] or where by reason of an irreconcilable difference of opinion among the jurors the jury has been discharged[88]—the defendant has not been legally "tried"
394 and cannot plead *autrefois acquit* upon a separate trial for the same offence. So, at military law, neither a mere arraignment,[89] nor an arrest followed by a discharge without trial,[90] nor a service of charges withdrawn or dropped without prosecution, nor a withdrawal of the charges after arraignment or pending the trial,[91] nor a discontinuance of the proceedings, by the order of the convening authority, for any cause before a finding,[92] nor a permanent interruption of the same by reason of war or other exigency, nor a failure of the court to agree upon a finding, followed by a dissolution[93]—will amount to an acquittal or a "trial" of the accused.

**THE OFFENCE FOR WHICH THE FORMER TRIAL WAS HAD MUST BE THE SAME AS THAT WHICH IS THE SUBJECT OF THE PENDING TRIAL.** This, or the shorter phrase—"the offences must be the same," is substantially the form in which the proposition is usually expressed.[92] Strictly, however, the more accurate statement would be, that, to sustain this plea, the offences must be either:—(1) Identical, or (2) So related, from the fact that one is included in the other, that an acquittal or conviction of the one necessarily puts the accused in jeopardy of the other.

**IDENTICAL OFFENCES.** The identity must, it is held, be one both *in law and in fact;* for, as remarked by Chief Justice Shaw in Commonwealth *v.* Roby,[93]—"It is obvious that there may be great similarity in the facts where there is a substantial legal difference in the nature of the crimes; and, on the contrary, there may be considerable diversity of circumstances where the legal character of the offences is the same. As where most of the facts are identical, but by adding, withdrawing or changing some one fact, the nature of the crime is changed."

395 The identity need be *substantial* only:[94] it is not essential that the indictments or charges should be expressed in the same language. The circumstance alone that different words are used in setting forth the offences does not indicate that they are not the same, for the same offence may be expressed in different terms in two indictments or charges.[95] In a case of doubt, the usual test of their identity is, the determination of the question whether the same evidence will support both.[96]

**INSTANCES OF OFFENCES HELD NOT IDENTICAL BUT DISTINCT.** Where, by the application of this test, the offences are ascertained to be not identical but distinct, a plea of former trial cannot of course be sustained.[97]

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[87] 1 Bishop, C. L. § 1032; Wharton, C. P. & P. § 508; U. S. *v.* Shoemaker, 2 McLean, 117; U. S. *v.* Haskell, 4 Washington, 402.

[88] U. S. *v.* Perez, 9 Wheaton, 579; 1 Bishop, C. L., § 1033, and cases cited; Kelly *v.* U. S., 27 Fed., 616.

[89] Compare State *v.* Benham, 7 Conn., 418.

[90] De Hart, 142, 145; Benét, 100; 1 Opins. At. Gen., 294; Marston *v.* Jenness, 11 N. H., 156.

[91] DIGEST, 119.

[92] See 1 Bishop, C. L. § 1049.

[93] 12 Pick., 503. And see State *v.* Elden, 41 Maine, 170; Burns *v* People, 1 Park., 182.

[94] See 2 Gabbett, 330.

[95] 1 Bishop, C. L. § 1050. And see Wilson *v.* State. 24 Conn., 57, 69.

[96] 1 Bishop, C. L. § 1051; Com. *v.* Olds, 5 Litt., 139; Com. *v.* Curtis, Thach., 207; State *v.* Birmingham, 1 Busbee, 122; Durham *v.* People, 4 Scam., 173; Simco *v.* State, 9 Texas Ap., 338, Rex *v.* Sheen, 2 C. & P., 634.

[97] 1 Chitty, C. L., 452.

Offences relating to the same subject matter may yet be quite distinct in that the one is not characterized by some essential fact and legal element necessary to constitute the other. For example, a trial for *embezzlement* cannot be pleaded in bar of a trial for the same act charged as *larceny*, or *vice versa*, since the former offence, which consists in the appropriation of property by the party to whose charge it has been committed by the owner, is quite distinct from the latter, which is a taking without the consent and against the will of the owner. So, of the two offences of the larceny of certain articles and of the receiving and concealing of the same articles; these offences being distinct in that the latter is characterized by an *animus* quite other than that of conversion to the party's own use, an essential feature in larceny.[98] So, the offences of larceny of certain property and burglary with intent to commit a larceny of the same property are held to be so distinct that a trial for the one cannot be pleaded in bar to a trial for the other.[99] So, a conviction or acquittal of a simple assault and battery has been held to be no bar
396 to a trial for the same assault with intent to commit a felony.[100] And a conviction of assault and battery has been declared no bar to an indictment for manslaughter for the killing of the same person, who had meanwhile died of the assault.[1]

Further, two or more offences, though committed at the same time, by the same act, and as parts of the same transaction, may, if separable, be wholly distinct in law, so that a conviction or acquittal of one cannot be pleaded in bar to a trial for another. Thus a person by the same blow, shooting, or other violence, may kill or injure two different individuals; but a trial for the murder, manslaughter, or assault and battery of one of them will furnish no defence to a trial for the same act committed against the other.[2] So, where articles of property belonging to different owners are stolen at the same time by the same person, a conviction or acquittal on an indictment for stealing property of one of the owners will not, as it has been held,[3] (though the authorities on this point are variant,) bar a trial for stealing articles belonging to another.

These remarks and rulings are applicable to military cases. To add instances from the military service of distinct offences committed at the same time and in and by the same act,—the offence of mutiny, or joining in mutiny, may involve with it a violation of Art. 21; so, the offence of behaving with disrespect to a commanding officer may concur with that of a disobedience of his order; so, the offence of disobedience of orders, or of absence without leave, may concur with the offence of misbehaviour before the enemy. Yet a trial for one of these concomitant offences would not operate as a legal bar to a subsequent prosecution for the other.

**Military and civil crimes involved in same act.** A further class of offences, apparently identical but distinct in law, may here be noticed. These are the offences which, though involved in the same act, are distinct in this, that, while one is an offence against the ordinary criminal law of a State or of the United States, the other is a breach of military dis-
397 cipline made exclusively punishable by the Articles of war. Thus a soldier convicted by a general court-martial, under Art. 21 or 22, of an

[98] Foster *v.* State, 39 Ala., 229.

[99] Wilson *v.* State, 24 Conn., 57; State *v.* Warner, 14 Ind., 572; Howard *v.* State, 8 Texas Ap., 447.

[100] State *v.* Hattabough, 66 Ind., 223.

[1] State *v.* Littlefield, 70 Maine, 452; 1 Bishop, C. L., § 1059.

[2] Wharton, C. P. & P. § 468, 469; State *v.* Standifer, 5 Port., 531; Vaughan *v.* Com., 2 Va. Cas., 273; Greenwood *v.* State, 64 Ind., 250

[3] Wharton, C. P. & P. § 470; 1 Bishop, C. L. § 1061, and cases cited.

offering of violence or mutinous act which resulted in the killing of a superior officer, would remain liable to an indictment for murder in a State or U. S. Court, on account of the homicide involved; and *vice versa*. Where indeed the offences are crimes of which military courts are invested with jurisdiction concurrently with the criminal courts, (as for example, the crimes cognizable by courts-martial under Art. 58, in time of war,) the same are not distinct but identical in law, and an acquittal or conviction of one of such offences, or rather of the actual single offence, in a civil court, will be a complete bar to a prosecution of the same in a military court, and *vice versa*.[4]

The subject of double amenability for and jurisdiction of military and civil offences involved in the same acts has been considered in a previous Chapter.[5]

**OFFENCES OF WHICH THE ONE IS INCLUDED IN THE OTHER.** The cases in which offences are so far included the one within the other, and at the same time so legally related to each other, that an acquittal or conviction of the one will bar a trial for the other, may be divided into three classes, as follows:—

1. Cases where the offence which is the subject of the pending trial is included within the offence which was the subject of the former trial, and is one so related to it in law that under an indictment for the major offence there may legally be a conviction of the minor.[6]

Here a previous conviction or acquittal of the major offence will be a bar to the prosecution for the minor; in other words a conviction or acquittal of the whole is a conviction or acquittal of every part. Thus an acquittal upon an indictment or charge for murder is a bar to a subsequent trial for the same homicide charged as manslaughter, since the latter crime is necessarily included in the former, which is also unlawful killing with the
398 additional element of deliberate evil purpose, and since under an indictment for murder there may legally be a conviction of manslaughter. So, a verdict upon a trial for robbery is a bar to a trial for a larceny of the property taken, since every robbery includes a larceny, (with the additional element of force or intimidation,) and since also there may legally be a conviction of larceny under an indictment for robbery. So, for similar reasons, a trial for an assault and battery may be pleaded to a prosecution for the assault. Similarly, at military law, a conviction or acquittal of desertion may be pleaded in bar of a trial for the minor offence of the absence-without-leave included in it. Nor can one tried for any specific military offence be subsequently tried for the disorder or neglect, to the prejudice of good order and military discipline, which may have been involved therein.[7]

2. Cases where, under an indictment or charge for the major offence, the accused has actually and legally been convicted of the minor included offence, and is again brought to trial for the major offence.

In such cases the accused has been fully tried for the major offence and convicted of such part of it as he was found to have committed. Such con-

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[4] Coleman *v.* Tennessee, 97 U. S., 513–5; People *v.* Gardner, 6 Park., 143; G. O. 29, Dept. of the N. West, 1864; Do. 32, Dept. of La., 1866; 1 Kent Com., 341, note; DIGEST, 49.

[5] See Chapter XIII, p. 124, and cases cited.

[6] "A former conviction is a bar to a trial for any offence of which the defendant might have been convicted under the indictment and proof in the first case." State *v.* Nunnelly, 43 Ark., 68.

[7] See DIGEST, 118. In G. O. 55, Dept. of the Tenn., 1866, an acquittal upon a charge of assault and battery with intent to kill—a specific offence made punishable by the present Art. 58—was properly held to be a bar to a second trial for the same battery, charged as a disorder "to the prejudice," &c.

viction thus operates as a perfect bar.[8] For, as it is expressed in an adjudged case[9]—"The jury, in contemplation of law, render two verdicts, one acquitting the accused of the higher crime charged in the indictment, the other finding him guilty of an inferior crime. * * * The verdict of manslaughter is as much an acquittal of the charge of murder as a verdict pronouncing his entire innocence would be." Upon the same principle, if an accused, charged with robbery, were convicted of larceny only, he could plead such conviction in bar of a second trial for the robbery. So, a conviction of absence-without-leave under a charge of desertion; or of "conduct to the prejudice of good
399 order and military discipline" under a charge of "conduct unbecoming an officer and a gentleman" or under a charge of any specific military offence, is a bar to a subsequent trial for the offence originally charged.

3. Cases, the reverse of those of the 1st class, where, after a trial for a minor offence which is included in a certain major offence, the accused is brought to trial for the latter.

Here, by the weight of modern authority, the former trial is held pleadable in bar, provided the minor offence is one of which there could be a legal conviction under an indictment or charge for the major.[10] The principle of course is that, as the accused, upon the second trial for the major offence, is legally liable to be convicted of the minor included offence, he is by this trial again put in jeopardy for an offence for which he has already been once tried.[11] Upon this principle an acquittal, upon an indictment for manslaughter, is held pleadable in bar to a second trial for the same homicide charged as murder;[12] a conviction upon an indictment for larceny is similarly held to bar a trial upon a charge of robbery founded upon the same transaction;[13] and a conviction of an assault is held to be a bar to a trial for the battery committed at the same time.[14]

Courts-martial being governed in general by the rules of evidence applicable to criminal cases,[15] a trial upon a charge of absence-without-leave would properly be held pleadable in bar of a subsequent trial for a desertion charged to have been actually committed in and by the same unauthorized absenting of himself by the accused; and a trial for a disorder or neglect under Art. 62, in bar of a subsequent trial for a specific offence which the same disorder or neglect was claimed to have amounted to.

**THE FORM OF THE PLEA, AND THE EVIDENCE TO SUSTAIN**
400 **IT—Form of the Plea.** "This plea," to employ the description of Chitty,[16] "is of a mixed nature, and consists partly of matter of record and partly of matter of fact. The matter of record is the recital of the former indictment and acquittal or conviction; the matter of fact is the averment of the identity of the offence and of the person."

In the military practice, therefore, the plea, (which should preferably be in writing,) will properly consist of a statement to the effect that, by a court-

[8] Wharton, C. P. & P., § 465; 1 Bishop, C. L., § 1056, Hurt *v.* State, 25 Miss., 378; Grennan *v.* People, 15 Ills., 517; State *v.* Norvell, 2 Yerg., 27.

[9] Hurt *v.* State, *ante.*

[10] 1 Bishop, C. L. § 1057; And see Com. *v.* Squire, 1 Met., 264–5.

[11] 1 Bishop, C. L. § 1057.

[12] 2 Gabbett, 33; 1 Bishop, C. L. § 1058; Wrote's Case, 4 Coke, 45; Holcroft's Case, Id., 46; Com. *v.* Curtis, Thach., 206; Com. *v.* Roby, 12 Pick., 504.

[13] State *v.* Lewis, 2 Hawks, 98.

[14] State *v.* Chaffin, 2 Swan, 93, where the court say: "The one is a necessary part . . of the other; and if he be now punished for the battery, he will thereby be twice punished for the assault" included in it.

[15] See Chapter XVIII.

[16] 1 C. L., 459.

martial convened by a certain described order, the accused was, on or about ———, (giving the prior date or time of the trial,) duly tried upon a charge of ———, (reciting the charge and specification or specifications in full or in substance,) and was duly acquitted or convicted of such charge, &c.;[17] and that the offence for which he was so tried and acquitted, or convicted, is the same with the offence set forth in the charge to which the plea is made. Or if the offences are not identical, an averment should be substituted to the effect that the offences are so related that the conviction or acquittal of the former operated as a bar to a trial for that which is the subject of the pending prosecution. While the plea in a military case need not be so technical as in the criminal procedure, a mere general plea that the accused had been previously tried for the same offence, without any of the particulars above indicated, would, strictly, be insufficient, and the court would be justified in declining to entertain it without amendment.[18] A plea, indeed, thus or otherwise imperfect in form, (or a plea showing on its face that the former court was an unauthorized body or without jurisdiction, or that the charge was an insufficient basis for a finding, or that the finding was not a legal one, &c.,) would be liable to be *struck out on motion* of the judge advocate. The court, however, would properly afford the accused reasonable time to amend and complete his plea.

401 **Explanation of variance.** If there appear on the face of the plea any material variance between the two charges, as to name of person, description of property, place, date, &c., such variance should properly be explained by a special averment of fact sufficient to reconcile the two in law; otherwise the plea may run the risk of being disallowed.[19] So, where, since the former trial, the rank, or office, regiment, corps, &c., of the party has been changed, an averment will properly be added stating the fact and explaining the cause of the change and exhibiting the identity of the accused.

**Evidence to sustain the Plea.** The burden of the proof of the plea is of course upon the accused.[20] It will be for him to establish—(1) the existence of a record of a legal acquittal or conviction; (2) the fact of the identity of the person and offence. The quality and extent of the evidence required in a particular case will depend upon the issue made: the prosecution may traverse, orally or by written "replication," either the entire plea or one or more of its averments.[21]

**Proof of the record.** The record in a military case is commonly proved by a copy of the original as recorded in the Judge Advocate General's Department, (or—if a record of an inferior court—at the Headquarters of the military Department,) authenticated by the legal custodian in the form usually practiced for the purpose. If the accused, prior to the arraignment, has not had a reasonable time within which to procure the copy, he will be entitled to a continuance under Art. 93.[22] The judge advocate, however, may admit the

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[17] A copy of the Order of publication of the proceedings, (if any was issued in the original case,) exhibiting the charges, findings, &c., may well be incorporated with or appended to the plea. As to the use of the same as *evidence*, see *post*.

[18] Compare Atkins *v.* State, 16 Ark., 573; Wortham *v.* Com., 5 Rand., 677.

[19] Compare State *v.* Risher, 1 Rich., 219.

[20] Com. *v.* Daley, 4 Gray, 209; Wharton, C. P. & P., § 481, 483. That the accused must prove his plea; that the court cannot accept it as true on his mere statement without evidence—see G. O. 33, Dept. of Arizona, 1877.

[21] Wharton, C. P. & P. § 483; Duncan *v.* Com., 6 Dana, 295.

[22] 2 Gabbett, 334; 1 Chitty, C. L., 459; State *v.* DeWitt, 2 Hill, 241-2; Com. *v.* Myers, I Va. Cas., 232.

existence of the record and its contents as stated in the plea, contesting only the legality of the finding or the identity of the accused. It will then not in general be necessary to procure a copy of the record: a copy indeed of the General Order promulgating the proceedings of the former trial, and setting forth the convening of the court and the trial, the charges and specifications
402 in full, and the findings, may in such case be quite sufficient for the use of the parties and to inform the court. If it is the legality of the trial which is contested, the issue must be determined upon the record itself, (or the Order as presenting its main features;) no extrinsic evidence being admissible to vary or contradict it.[23] If upon the face of the record, (or from the Order as its substitute,) it appears that the court was not legally constituted, or was without jurisdiction, or that the proceedings were fatally irregular, or that the charge or finding was insufficient in law,—the defect cannot be remedied by other testimony, and the plea, upon the principles heretofore considered, must be overruled.

**Proof of identity.** To establish, however, the averment of identity, either as to person or as to offence, evidence outside the record is admissible.[24] Whether indeed the offences are the same will in general be apparent from a comparison of the circumstances, names, places and dates, set forth in the specifications of the two charges. But where there is a material and substantial variance between them, some evidence, such as the testimony of the officer or officers who preferred or investigated the several charges, the judge advocate who conducted the original prosecution, or other individuals familiar with the facts, will be necessary to assimilate the offences.[25] As to the identity of the *person*,—evidence on this point will be especially called for where a considerable period has elapsed since the former trial, and the soldier then appeared under an *alias* or has since changed his name, and the second trial is ordered at a station remote from that of the first: in such cases some testimony such as that of a member or the judge advocate of the former court, or of a witness at the trial, or other person then present or otherwise recognizing the accused as the same individual, will be required to sustain the plea.

403 **WAIVER OF THE RIGHT TO PLEAD FORMER TRIAL.** It is now abundantly established by the adjudications in criminal cases that the constitutional right to be exempt from being twice put in jeopardy, or twice tried, for the same offence, being for the sole benefit of the accused party, may be, expressly or impliedly, *waived* by him.[26] The same principle has been recognized at military law. It was held by Attorney General Wirt, in 1818, that the provision of the Articles of war, that "no person shall be tried a second time for the same offence," did not apply to a case in which the accused, upon a conviction and sentence being disapproved by the reviewing authority, himself applied for a new trial; the right to take advantage of the provision of Art. 102 being

[23] Douglass *v.* Wickwise, 19 Conn., 489; Martha *v.* State, 26 Ala., 75.

[24] Wharton, C. P. & P. § 481; People *v.* McGowan, 17 Wend., 415; Do. *v.* Barrett, 1 Johns., 69; Dunn *v.* State, 70 Ind., 47.

[25] Compare 2 Gabbett, 330–1; Wilson *v.* State, 24 Conn., 63; Durham *v.* People, 4 Scam., 172; People *v.* McGowan, 17 Wend., 389. Where the two indictments clearly set forth distinct offences, there can be no question of variance, and no evidence to assimilate the offences will be admissible. Martha *v.* State, 26 Ala., 72.

[26] 1 Bishop, C. L. § 992, 995, 998, 1001, &c., Wharton, C. P. & P. § 518; U. S. *v.* Harding, 1 Wallace Jr., 127; State *v.* Gurney, 37 Maine, 156; Veatch *v.* State, 60 Ind., 291; Brennan *v.* People, 15 Ills., 511.

thus deemed to be waived.[27] An accused would, it is believed, also waive by implication this right, where he applied to the reviewing authority or President to have a conviction and sentence in his case disapproved or pronounced invalid on the ground of illegality, and this action was taken as requested.[28] An accused, who had in fact been previously tried for the same offence, would also waive this right by intelligently pleading guilty or not guilty without interposing the special plea under consideration.[29]

**PLEADING OVER.** The plea of former trial being overruled by the court, the accused will be required to plead over to the charge upon the merits, either guilty or not guilty, precisely as if no plea in bar had been interposed.[30]
404 This special plea and the plea of the general issue should be kept quite distinct in practice; the former being disposed of before proceeding to the other.[31] And the accused cannot properly be allowed to put the fact of the former acquittal or conviction in evidence under the general issue of not guilty, but should in all cases plead it specially.[32]

### Plea of Pardon.

A pardon is an act of grace and mercy presupposing only the commission of an offence;[33] and it is well settled that, under the plenary power conferred upon him in this respect by the Constitution, the President, while not often exercising the same before conviction,[34] may legally pardon an offender even in advance of trial.[35] Hence the legality and fitness of a *plea of pardon* in a case where, after such action, the party is sought to be prosecuted.

Leaving the subject of the nature and extent of the pardoning power in military cases to be more appropriately considered in treating of the function of the Reviewing Authority under the 112th Article of war,[36]—we will here

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[27] 1 Opins., 233. As to the few cases in which similar action has since been taken in the military practice, see Digest, 536. The new trial has generally been granted as a special indulgence to the accused in lieu of approving and executing his conviction and sentence.

In connection with the view of Mr. Wirt that the benefit of the provision of Art. 102 may be waived by the accused, may well be noted his view, expressed two years later in 1 Opins., 383, that the benefit of the provision of Art. 103 may *not* be waived. (See *ante*, Chapter VIII, p. 85 and note.) It would seem that if either Article was to be regarded as absolute or prohibitory, it would be the former rather than the latter.

[28] Compare 1 Bishop, C. L. § 998.

[29] See *post*—"Pleading over."

[30] Wharton, C. P. & P. § 486. Com. *v.* Goddard, 13 Mass., 460; Benét, 108.

[31] "They are distinct issues, and the jury must be separately charged with them." Until the issue under the special plea is disposed of, "there can be no trial in chief." Henry *v.* State, 33 Ala., 399, 400. And see Foster *v.* State, 39 Ala., 229; Dominick *v.* State, 40 Ala., 680.

[32] State *v.* Barnes, 32 Maine, 530; Com. *v.* Olds, 5 Litt., 140. The defence of former trial is thus distinguished from that based upon the statute of limitations; the latter may be taken advantage of upon the general issue. See *ante*.

[33] 1 Opins. At. Gen., 342; 6 Id., 21; *Ex parte* Wells, 18 Howard, 311.

[34] "A variety of considerations seem to me to render it inexpedient, generally, to interpose the pardoning power previous to trial." Atty. Gen. Berrien, 2 Opins., 275. And see 5 Id., 729; 6 Id., 21.

[35] 1 Opins. At. Gen., 342; 6 Id., 20–1, 405; 8 Id., 283–4; 11 Id., 227. "The power extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment." *Ex parte* Garland, 4 Wallace, 380.

[36] See Chapter XXI.

notice in brief:—I. The occasions and grounds for the plea of pardon in the military practice; II. The form and proof of the plea; III. The procedure upon the plea.

### I. Occasions and Grounds for the Plea.

This plea may be offered:—1, Where the accused has been specially
405 formally pardoned; 2, Where he is included in a general act of pardon or amnesty; 3, Where he has been pardoned constructively.

**1. SPECIAL PARDON.** Special formal pardons of military offenders by the President have not been frequent; prior to conviction they have been most rarely extended; and no instance is known of the specific pleading of one upon an arraignment before a court-martial. Such a pardon, duly pleaded, would of course constitute a complete bar of trial.

**2. GENERAL AMNESTY TO DESERTERS, &c.** An informal plea of pardon has in some cases been interposed in the military practice, where the accused has or claims to have been included in a general amnesty, offered by the President,[37] in the form of a Proclamation or General Order, to deserters or absentees.[38] Pardons, as it has repeatedly been remarked, may be conditional—based upon conditions precedent or subsequent;[39] and these amnesties have generally proceeded upon the condition precedent that the party shall return and surrender himself by a certain day, while some of them have contained the condition subsequent that he shall duly perform duty for the remainder of his term, make good the time lost by his desertion, &c. Where a pardon is granted upon a condition precedent, the pardon does not take
406 effect till the performance of the condition: where the condition is subsequent, the failure to perform it nullifies the grant.[40]

**3. CONSTRUCTIVE PARDON.** Where a deserter has been restored to duty without trial, under par. 128, Army Regulations, 'by the authority competent to order his trial,' this action is regarded as a constructive condonation of the offence, and may be pleaded in bar of a trial subsequently ordered.[41] So, a promotion or appointment to a new office, of an officer of the army, while under arrest and charges for the commission of a certain military offence, will operate as a constructive pardon of such offence, and constitute a valid bar to

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[37] That the pardoning power includes the power to extend amnesty, see Davies *v.* McKeefy, 5 Nev., 369; U. S. *v.* Klein, 13 Wallace, 128; Armstrong *v.* U. S., Id., 154.

[38] See Proclamations or Executive Orders of this character, (generally issued after a war,) published or referred to in the following Orders of the War Dept.: *viz.* G. O. of Nov. 5, 1811; Do. of June 17, 1814; Do. of July 8, 1815; Do. 35 of July 6, 1848: Do. 58 of March 10, 1863; Do. 35 of March 11, 1865; Do. 43 of July 3, 1866; Do. 102 of Oct. 10, 1873. [De Hart, (p. 144, note,) refers to a further proclamation of this character, as "made by the President, after the termination of the Black Hawk War in 1832, when many soldiers deserted from dread of the cholera."] The proclamations and orders of March 10, 1863, and March 11, 1865, were issued pursuant to directions of Acts of Congress. Several such proclamations were issued by Washington during the Revolutionary War. See 2 Jour. Cong., 294; G. O. Hdqrs. Army, Morristown, April 6, 1777; Do. Hdqrs., Newburg, May 12, 1782.

[39] 2 Hawk., c. 37, s. 45; 4 Black. Com., 401; *Ex parte* Wells, 18 Howard, 307; Com. *v.* Haggarty, 4 Brewst., 326; 6 Opins. At. Gen., 405; 11 Id., 229; DIGEST, 554.

[40] Flavell's Case, 8 W. & S., 197; 6 Opins., 405. And see U. S. *v.* Klein, 13 Wallace, 142. "If a condition subsequent is broken, the offender could be tried and punished for the original offence. The breach of the condition would make the pardon void." 11 Opins. At. Gen., 229.

[41] DIGEST, 341–2. And see G. O. 4, Dept. of the West, 1861, where the plea was sustained in cases of soldiers, not deserters, restored to duty while under charges, in the same manner as deserters, by the Department Commander, in a General Order.

a trial therefor.[42] But the mere restoring to command or duty, or ordering on duty, of an officer or soldier, when in arrest under charges, by his commanding officer, while regarded in the English law[43] as practically a pardon and pleadable as such in bar of trial, is not authorized in our law to be so treated, (except in the single case above mentioned as provided for in the Army Regulations,) and is not so treated in practice.[44] Nor can the mere fact that charges once preferred have been dropped by a commander be pleaded in bar as a constructive pardon of the same, upon their being subsequently revived and brought to trial in connection with charges for offences since committed.[45]

### II. Form and Proof of Plea.

**FORM.** The plea may be oral or in writing. Where the pardon is a
407 special one, *i. e.* a formal pardon of the individual, the plea should properly be in a written form, setting forth the date of the pardon, by whom granted, and its substance, with an averment to the effect that the offence pardoned is the same with that which is the subject of the charge. If the grant is made upon a condition precedent, a compliance with the same should be alleged; if upon a condition subsequent, it should be averred that the same had been accepted. Where a pardon is claimed under a General Order or proclamation of the President, it will be sufficient to refer to the same orally or in writing, stating its date and substance or effect, with an averment that the accused belonged to the class described therein, and that he has complied with the conditions imposed thereby; as, for example, in returning, as a deserter or absentee, by the time fixed, in since rendering due service as a soldier, &c. If a constructive pardon is relied upon, the fact or facts claimed to constitute a pardon in law must be set forth—as that the accused was, by a certain order, stating its date and source, restored to duty as a deserter under par. 128 of the Army Regulations; or that, since his arrest and the preferring of the present charges, he has been, by the President, promoted to higher rank or appointed to a higher office in the army, &c.

**PROOF.** In connection with a plea of special pardon, the original pardon should be produced in court, since the court cannot take judicial notice of a personal grant of this character.[46] As in a case of a deed, the acceptance of the pardon will be inferred from the fact of the making of the plea, without other proof. If the pardon be conditional, the accused should show that he has duly and fully performed the condition, or has performed it as far as practicable up to the date of the plea.[47] In pleading an amnesty offered to deserters, the accused,—if the fact does not appear from the averments of the specification

[42] 4 Opins. At. Gen., 8; 6 Id., 123; 8 Id., 237; Digest, 553.

[43] Simmons § 565–7; Clode, 1 M. F., 173, (citing opinions of the Duke of Wellington and Judge Advocate General Villiers, and cases of Lord Lucan, Col. Quentin, Capt. Achison, &c.) And see Prendergast, 244–5; Gorham, 28–9; Jones, 28; Twyford, 35; Digest, 553.

[44] Digest, 553; De Hart, 144; Benét, 119; Ives, 100.

[45] See case in G. C. M. O. 13 of 1871.

[46] See U. S. *v.* Wilson, 7 Peters, 161. It may be noted here that proof of a promise to pardon is not evidence of pardon: the promise being executory may be withdrawn. 11 Opins. At. Gen., 230. A variance in a pardon as to the name or description of the beneficiary may be explained by evidence. 2 Hawk., c. 37, s. 66; 2 Gabbett, 340.

[47] 6 Opins. At. Gen., 405; Simmons, § 564; Griffiths, 99; Macomb, 40; O'Brien, 249; De Hart, 144.

or is not admitted by the prosecution,—must show that his case is
408 embraced within the terms of the offer,[48] (not being included in any excepted class, if exceptions are made,[49]) and further,—if this also does not appear from the specification or is not conceded by the prosecution,—that he surrendered himself or returned voluntarily within the time limited, and has since duly performed service, &c.[50] A copy of the Order or proclamation as published will properly be added and entered of record with the plea; but of the existence and contents of such Order, &c., the court will take judicial notice without proof. A constructive pardon will be proved by the order, issued by competent authority, restoring the party to duty as a deserter under the Army Regulations, with evidence, if necessary, of the identity of the accused with the person described in such order; or by the executive appointment or other fact or facts relied upon as constituting a legal pardon. If the accused requires time, (as he well may where his station has been changed, or he has been transferred to a distant command, &c., since the date of the alleged condonation,) in order to make profert of a special pardon, to produce or prove an order restoring him to duty, to establish his identity, &c., a reasonable continuance will in general properly be granted him for the purpose.[51]

The prosecution may take issue on the plea;—may reply that the pardon has been obtained by fraud;[52] that the accused is not identical with the person claimed to be pardoned; that he has not complied with the conditions prescribed, &c.

### III. PROCEDURE UPON THE PLEA.

Upon the plea being interposed, (and the pardon, order, &c., being
409 produced, if any,) the proper proceeding is for the judge advocate, if he has no exceptions to take, to enter, (with the authority of the convening officer,) a *nolle prosequi* upon the charge or charges covered by the pardon. If he contests the plea, it will remain for the court, upon the evidence furnished and argument made, to deliberate and pass formally upon the issue. If the plea is overruled, the accused—as in the case of the overruling of a special plea of former trial—is, regularly, called upon by the court to plead to the merits, and the trial goes on. If the plea be sustained, the court does not proceed to *acquit* the accused, since the pardon was based upon the theory of his guilt, and his acceptance of it was substantially an admission of guilt in law.[53] The court therefore merely adjudges that the plea is allowed, and terminates its proceeding in the case; the record then going to the reviewing authority, who, if he approves the action taken, will order the discharge of the prisoner.

A pardon existing at the time of the arraignment should be *then* sought to be taken advantage of by this plea, since the benefit of it will be waived by

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[48] It must appear that he was a deserter at the date of the proclamation or Order; if deserting later he could not of course be held to be included in the amnesty. G. O. 5, Dept. of the East, 1866.

[49] Partridge's Case, Cro. Ellz., 125.

[50] Simmons § 564; Griffiths, 99; Macomb, 41, De Hart, 144. In a case published in G. O. 61, Dept. of the East, 1865, the accused was held "not entitled to the benefit of the President's proclamation to deserters, as he did not voluntarily deliver himself up, but, when brought before a magistrate on a complaint for grand larceny, he then, to escape prosecution, claimed to be a soldier." And note case referred to in DIGEST, 554, § 9.

[51] 2 Hawk., c. 37, s. 65. On the subject of Continuances, see Chapter XV.

[52] 2 Hawk., c. 37, s. 46; 4 Black. Com., 400; 11 Opins. At Gen., 229.

[53] 11 Opins. At. Gen., 228.

a plea of guilty or not guilty.[54] A pardon, however, may reach an accused after the trial has been commenced on the merits; in which case the judge advocate, (no occasion appearing for raising an issue,) will, (with the sanction of the reviewing authority,) properly enter a *nolle prosequi*.[55] Indeed, as it has been remarked by Atty. Gen. Cushing,[56] the President, without resorting to a grant in the ordinary form, may practically exert the pardoning power "by order of *nolle prosequi* pending a prosecution."

### IV. PROCEDURE ON SPECIAL PLEAS IN GENERAL—ORDER OF THE COMMANDER.

Where a special plea, interposed by the accused, is allowed by the court, the proceedings are, as already indicated, for the time at least terminated, and the court adjourns, the record of its action being forthwith transmitted to the reviewing authority. Such authority indeed, as remarked on the subject
410 of the Plea to the Jurisdiction,[57] may disapprove the action of the court and *order* it to proceed with the trial. A court-martial—a mere instrumentality for the maintenance of discipline in the army—is not vested by statute with power of final disposition of a case under these circumstances, and, in the absence of such power, it is subject, in regard to its procedure, to the orders of the commander by whose order it was created.

The action of a court-martial upon a special plea, motion,[58] or other interlocutory issue, where no such power is given it, cannot be allowed to be independent of the approval of the commander without authorizing insubordination or assumption in a body which would be wholly unwarranted in a separate member.

The court may thus legally be ordered by the proper superior to proceed with the trial, notwithstanding its allowance of the special plea. But before making such order the commander may well pursue the less positive course of returning the proceedings to the court for revision by it and correction of its action. Should it decline to make the proper correction, the commander should not hesitate to resort to a positive order, if due considerations of justice demand it.[59]

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[54] 2 Hawk., c. 37, s. 59, 67; 4 Black. Com., 402; 2 Gabbett, 340–1; U. S. *v.* Wilson, 7 Peters, 162; Hough, 905.

[55] As to this proceeding, see Chapter XV.

[56] 8 Opins., 283, 284.

[57] *Ante*, page 249.

[58] As to the procedure on Motion, see *ante*, p. 252.

[59] Such orders are believed to have been given more frequently at an earlier period than later. A precedent is found in G. O. of February 6th and 22d of 1822, where a court first directed "to reassemble for the purpose of reconsidering its proceedings," is subsequently ordered by the Secretary of War, to "proceed and try Bvt. Major Saml. Miller of the U. S. Marine Corps, upon the charges and specifications preferred by Lieut. Howle of said Corps, which charges and specifications were rejected by said court." The course held legal in the text was more recently substantially pursued in two cases in the Dept. of the Platte—that of Pvt. B. Watkins, (G. C. M. O. 62, Dept. of the Platte, 1891,) and that of Pvt. John Kitt. (Do. 58, Id., 1892.) In each case the court, having sustained a plea to the jurisdiction, its action was disapproved by the Dept. Commander and the proceedings returned for completion of the trial, which was thereupon completed accordingly, by the hearing of evidence, and, in the one case, by a formal acquittal, and, in the other, by a conviction. [These particulars are not set forth in the G. C. M. O., but appear in the records of trial.] In a naval case, published in G. C. M. O. 9, Navy Dept., 1893, the Secretary of the Navy declined to approve the exercise of a similar authority by a convening officer, on the ground of want of precedent and because he considered the power to be a "dangerous" one. There are, as we have seen, precedents in the army, and, in the opinion of author, there can be no material danger attending a resort to the power, where properly called for by the requirements of justice.

411 INADMISSIBLE SPECIAL PLEAS.

Besides the regular special pleas above considered, a few others, not properly admissible as separate pleas, have in some instances been offered in military cases—as follows:

**FORMER PUNISHMENT.** The plea of former punishment, *i. e.* that the accused has already been adequately punished for his offence by his commanding officer, though recognized in the English practice,[60] is not known to our military law,[61] and when made on our military trials has been properly overruled.[62] Where indeed an accused has, prior to trial, been subjected, on account of his offence, to any physical punishment, or to reduction to the ranks, or to a protracted arrest, or other unusual or unauthorized discipline, he may properly show the fact in evidence on the general issue, in mitigation of such sentence as the court, in the event of his conviction, may impose.[63] But, except in this form, he cannot avail himself of such circumstances, upon a trial.

**ILLEGAL ENLISTMENT.** The accused, upon arraignment, has sometimes pleaded that on account of some illegality in his enlistment, as that he was under age,[64] or that he was enlisted for three years when the law required that all enlistments should be for five,[65] &c., he was not amenable to trial. But no such form of special plea is recognized in our law. If the accused, by reason of an invalid enlistment, is not duly or legally in the army,
412 he should, regularly, offer the facts in evidence under a *plea to the jurisdiction*, or bring them out under the general issue.

**RELEASE FROM ARREST, &C.** Release from arrest upon the charges, and restoration to duty, before trial,—already noticed as not ground for a plea of pardon, (except in cases of deserters, under par. 218, Army Regulations,)—is, similarly, no ground for a special plea in bar of trial.[66]

**OTHER SUBJECTS.** Such objections, (which have been taken in some cases,) as that the accused at the time of the arraignment is undergoing a sentence of general court-martial;[67] or that owing to the long delay in bringing him to trial he is "unable to disprove the charge or defend himself;"[68] or that he has not been furnished with a copy, or a correct copy, of the charges;[69] or that his accuser is actuated by malice or is a person of bad character,[70]—are, it need hardly be said, not proper subjects for special pleas; however much they may constitute ground for continuance, or affect the question of the measure of punishment.

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[60] Simmons § 561-563; Army Act, 46, (7.)

[61] See De Hart, 145; Benét, 103. A plea of this nature, however, seems to have been recognized in the practice of our navy. See case of Lieut. Stanley in Captain Jones' Trial, p. 310; also case in G. O. 137, Navy Dept., 1869.

[62] G. O. 27, Army of the Potomac, 1861; Do. 73, Third Mil. Dist., 1868; Do. 12, Dept. of Cal., 1871; G. C. M. O. 71, Dept. of Dakota, 1882.

It has been held in a recent case in the Navy—G. C. M. O. 9, 50, Navy Dept., 1893—that a previous public reprimand of an officer by his commander was not a legal bar to his trial for the offence committed, or ground for a special plea.

[63] DIGEST, 398. And see the three last G. O. cited in the preceding note.

[64] G. O. 52, Dept. of the East, 1869.

[65] G. O. 82, Dept. of Dakota, 1869.

[66] G. O. 7, Dept. of the Mo., 1868; Do. 32, Fifth Mil. Dist., 1868.

[67] G. O. 30, Dept. of the Pacific, 1864.

[68] G. C. M. O. 85, Dept. of the Mo., 1869. And see G. O. 33, Dept. of Arizona, 1871; also G. C. M. O. 34, Dept. of the Platte, 1893, citing this treatise.

[69] See De Hart, 147.

[70] G. O. 33, Dept. of Arizona, 1871.

So, as to all such objections as are properly matters of *defence* under the general issue,—for example, that the accused committed the offence charged when insane or intoxicated, or in obedience to a military order, or under a mistake of fact or law, &c.;—these are not within the scope or purpose of special pleas in bar, nor can they properly be raised in any interlocutory form or otherwise than upon the trial and by the testimony, being, as they are, of the very substance of the defence.

## IV. PLEA OF GUILTY OR NOT GUILTY.

The accused, upon arraignment, having no special plea or pleas to offer, (or having presented a special plea or motion which has been overruled, or the sustaining of which by the court has been disapproved, and the court ordered to proceed, by the convening commander,) proceeds in regular
413 course to plead—orally—Guilty or Not Guilty, as the case may be, to the several charges and specifications in their order.

**FORM OF THE PLEA—QUALIFICATIONS AND EXCEPTIONS.** The general form of this plea has already been indicated. As to this form it is laid down by the authorities that it must be "express, simple and unqualified," no statement in exculpation or justification being admissible in connection with it.[71]

But though no such matter of evidence, or other matter of explanation or embellishment, can form part of this plea, it may yet, at military law, be qualified in so far that the accused may *except* from the application of his answer of guilty or not guilty to a specification certain words or allegations indicated by him. Thus he may plead guilty to a specification except as to some averment or averments of fact, or as to a word or words expressive of the intent charged, and to this or these, not guilty; or he may plead not guilty to a specification except as to some portion which is admitted, and to this portion guilty. Another form of qualification of this plea, is the pleading of not guilty of the charge as laid, but guilty of a *lesser offence* included and involved in it. Thus a soldier accused of desertion, but claiming that he is chargeable only with an unauthorized absence, may legally plead not guilty of the offence charged but guilty of absence-without-leave. And in so pleading he should, further, *except* from his plea of guilty such words in the specification as characterize the offence of desertion, substituting, if necessary, words describing the offence actually admitted.[72] This form of qualifying and excepting, though not essential, since the court may always find the lesser offence if the evidence warrants it, is not unfrequent in practice.

**Inadmissible forms.** An accused may plead guilty of the specification
414 but not guilty of the charge, since such plea raises a legal issue, *viz.* whether the facts alleged in the specification do constitute the offence charged.[73] But the converse plea of not guilty of the specification but guilty of the charge, is wholly illegitimate. It neither confesses anything nor con-

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[71] 4 Black. Com., 333; Adye, 158; Tytler, 239; Kennedy, 92; Simmons § 552; Maltby, 53; De Hart, 134, 135; G. O. 107 Dept. of the Mo., 1863.

[72] In such a case the plea would ordinarily be—To the Specification, Guilty, except as to the words "did desert," substituting the words *did absent himself without authority from;* to the Charge, Not Guilty, but Guilty of Absence-without-leave. Or the plea to the Specification might be—Guilty, except in so far as it alleges desertion; or Guilty, only so far as it alleges absence-without-leave.

[73] This plea may sometimes be made by a soldier through ignorance when he really does not mean to admit the substance of the specification. In such a case it was remarked by the reviewing authority, in G. C. M. O. 70 of 1875—"The court should have advised him to frame his plea more intelligently."

tests anything, but consists of two incompatible answers which nullify the issue, and cannot be admitted as pleas by the court.[74] So, the plea to a charge or specification of "*guilty but without criminality*," though sometimes admitted in practice, is irregular and contradictory and not to be sanctioned.[75] It is practically equivalent to "not guilty" and should properly be made in this form.

**EFFECT OF THE PLEA AS A WAIVER.** The effect of the plea of guilty or not guilty is to *waive* any defects of form in the charges and specifications, which might be taken advantage of by plea in abatement, or its substitute, a motion to strike out. By this plea, the accused admits his own identity with the person described in the charges as the offender, and foregoes objections to the same as inartificial, indefinite or redundant, &c., as well as to the allegations of particular matters of description, or of time and place, as being obscure or incomplete.[76] A substantial defect, however, going to the sufficiency of the charge as a statement of a military offence, is not waived.[77] Nor of course can any such radical defect as an illegality in the constitution of the court, or an absence of jurisdiction of the offence or the person, be done away with or lessened by this plea.[78]

415 **THE PLEA OF NOT GUILTY—ITS LEGAL EFFECT.** This plea, which is by far the most frequent in all criminal proceedings, whether civil or military, is also known as the *general issue*, because it denies and puts at issue and to trial all the material allegations in the indictment or charge. Where a contest on the merits is proposed, this plea is an essential element of the proceedings which cannot be dispensed with. It must be made by the accused and entered of record as a starting point: in its absence the court can not supply an issue.[79]

In law "not guilty" is not a denial by the accused of the doing of the specific acts or things set forth in the charge. He may have done none of them, while, on the other hand, he may have done all of them, and the plea be as proper in the latter case as the former. For what he denies is not the details but the commission of the legal offence which these details describe; in other words the particular offence which, it is alleged, the details constitute.[80] Thus the accused may well admit the *act* charged but not admit the *animus* ascribed to it; or he may admit the act and defend it on the ground that it was enjoined by superior authority, or compelled by an exigency of war or of the service, &c. The plea is thus a legal issue, not a moral disclaimer; it commits the party resorting to it to no falsehood or deception.[81] Even where every material averment in the charge is admitted to be true, and no defence to the same exists on the merits,

[74] G. O. 76, Dept. of the East, 1864.

[75] In a case in G. C. M. O. 52, Dept. of the Columbia, 1881, a plea of this kind offered by the accused was refused to be received by the court, which required him to plead anew. On his then standing mute, the court directed the plea of not guilty to be entered to both charge and specification.

[76] Wharton, C. P. & P. § 413; 3 Opins. At. Gen., 549; O'Brien, 250–1; G. O. 48, Dept. of the South, 1864; Do. 10, Dept. of the Cumberland, 1867; Do. 2, Dept. of the Platte, 1871; DIGEST, 591.

[77] Fletcher *v.* State, 7 Eng., 170; DIGEST, 591.

[78] DIGEST, 326, 591. In Gen. Hull's case, (Printed Trial, p. 118,) the court, referring to the charge of "treason" preferred against the accused, expresses the opinion that a court-martial "cannot acquire jurisdiction of the offence by the waiver or consent of the accused." That a plea of jurisdiction cannot confer jurisdiction where none exists in law, compare People *v.* Campbell, 4 Park., 386; Do. *v.* Rathbun, 21 Wend., 509; Shoemaker *v.* Nesbit, 2 Rawle, 201; Moore *v.* Houston, 3 S. & R., 190; Duffield *v.* Smith, Id., 599.

[79] Wharton, C. P. & P. § 409; 1 Bishop, C. P. § 801; Douglass *v.* State, 3 Wls., 821.

[80] See Kennedy, 93.

[81] Kennedy, 93; Com. *v.* Battis, 1 Mass., 94.

this plea is always justifiable, since it is in general only through this legal form that all the circumstances surrounding the offence, and which, taken together, may very considerably extenuate its criminality, can be brought out in evidence, and the proper measure of punishment be duly determined.

**THE PLEA OF GUILTY—ITS LEGAL EFFECT.** The effect in law of this plea is that of a confession of the offence or admission of the
416 act *as charged*. But it is to be noted that such plea does not necessarily confess that a particular legal offence has been committed, for it admits only what is charged. If the alleged offence indeed is duly set forth in the charge, such offence is confessed by this plea, and a formal conviction of the same must follow.[83] If not duly set forth,—if the facts stated in the specification fall short of constituting the particular offence,—there is no such confession by the plea of guilty and the accused cannot legally be convicted.[85] Nor can such plea confer jurisdiction where not given by law.[84]

**RECEPTION OF THIS PLEA—WITHDRAWAL.** This plea is one which military courts, in common with civil, should not too readily receive,[86] and which, (as has already been remarked,) a judge advocate should not attempt to induce to be made. Where there is reason to suppose that such plea is not both voluntary and intelligent, or that the accused does not appreciate its legal effect, or is misled as to its influence upon the judgment of the court, he should be advised by the court not to interpose it but to plead instead "not guilty." So, where, after it has been duly made and received, the accused asks to be allowed to withdraw it and substitute the general issue, he should ordinarily be permitted to do so:[86] indeed the *court* will properly advise or suggest such substitution if the same appears to be in the interests of justice.

417 **THIS PLEA IN CONNECTION WITH AN INCONSISTENT "STATEMENT."** For the action last indicated there is especial reason where the accused, upon his plea of guilty, proceeds, as has often been done by enlisted men ignorant of the legal effect of the course pursued, to make to the court a "statement" setting forth facts quite inconsistent with such plea. Thus, a soldier, after having pleaded guilty to a charge of desertion, will sometimes, in a final address to the court, state facts going to show that his unauthorized absence was unaccompanied by the *animus* peculiar to desertion; or, where the charge is larceny, that his unauthorized taking of the property was not characterized by an *animus furandi;* or, in any case, that he was drunk and ignorant of what he was doing. So, he may claim in his statement that he committed the act charged while temporarily insane.[87] In such cases, while

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[83] 1 Bishop, C. P. § 795. This is "the highest kind of conviction of which the case admits." 1 Chitty, C. L., 428–9.

[85] Wharton, C. P. & P. § 413; 1 Bishop, C. P. § 795; Fletcher *v.* State, 7 Eng., 170. Where the charge is defective in that the offence is laid under the wrong Article of war, "the plea of guilty cannot enlarge the power of the court." G. C. M. O. 32, Dept. of the Mo., 1871. In G. C. M. O. 79 (H. A.) of 1891, is an instance of a plea of—"*Not Guilty, by advice of counsel.*"

[84] As—in a civil case—neither silence nor consent of parties will supply a jurisdiction not given by the existing law. Indiana *v.* Tolleston Club, 53 Fed., 18.

[85] 4 Black. Com., 329; 2 Gabbett, 319; 1 Bishop, C. P. § 795; Tytler, 237; Kennedy, 86; De Hart, 136.

[86] 1 Bishop, C. P. § 798; Wharton, C. P. & P. § 414; 2 Gabbett, 319; Tytler, 237; Hough, (P.) 780; State *v.* Cotton, 4 Fost, 143; People *v.* McCrory, 41 Cal., 458; DIGEST, 590. So, the court may in its discretion permit the plea of not guilty to be withdrawn and that of guilty, or a special plea, to be substituted. 1 Chitty, C. L., 423; 1 Bishop, C. P. § 801.

[87] See case in G. C. M. O. 16, Dept. of the Columbia, 1892.

the representation made is often a mere pretence, the fair inference may not unfrequently be that it is the statement which is accurate and intelligent rather than the plea, and that the accused has really a good defence to the charge, or is guilty only of a minor offence included in it. In other cases, the statement, while not strictly inconsistent with the plea, will set forth matters of extenuation which, if established in evidence, will very materially palliate the offence admitted by the plea. In all such cases the court, if it has reason to believe that the statement is made in good faith, will in general properly advise the accused to withdraw his plea of guilty, substituting a plea of not guilty. Upon this being done, or if the plea remains as made, the court will properly call upon the judge advocate to introduce such evidence as may be readily available for investigating the facts stated by the accused, with a view to ascertaining the exact offence committed and the amount of criminality to be attached to it. Such was the opinion and advice of Judge Advocate General Holt in repeated cases of soldiers brought to trial during and since the late war,[88] and his view was adopted in Orders by the Secretary of War.[89] It
418 has also been cited and followed in numerous cases by commanders of military departments, &c., by whom the proceedings of courts-martial, by which such action was neglected to be taken, were frequently disapproved.[90]

**INTRODUCTION OF EVIDENCE WITH THE PLEA OF GUILTY IN GENERAL.** But, *in general also*, and where the plea is intelligently made, the same, though a confession of the offence as charged, is held by the weight of authority not to preclude the introduction of evidence to exhibit the full facts of the case. While it was no doubt the practice formerly, as it is now in the majority of cases in which this plea is interposed, not to take any evidence whatever, the fact that *some* evidence was necessary to a comprehension of a considerable proportion of such cases seems to have been appreciated at an early period. Thus in a General Order from Army Headquarters—No. 60 of 1829[91]—it was enjoined, by the General Commanding, upon courts-martial in

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[88] DIGEST, 588–9.

[89] In the cases of two soldiers published in G. C. M. O. 2, of 1872, in which the written statements submitted by the accused were contradictory of their pleas of guilty, it was remarked by the Secretary of War as follows: "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 teatimony. 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 offences, 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, 1876; also Do. 63, 1874; Do. 91 of 1881. A similar view has now been adopted into the English law. See Rules of Procedure, 36 (A.)

[90] See G. O. 34, Northern Dept., 1865; Do. 33, Dept. of the Ohio, 1866; Do. 46, Dept. of the South, 1868; Do. 7, Id., 1869; Do. 22, Id., 1871; Do. 22, 71, Id., 1873; Do. 28, Dept. of the Platte, 1869; Do. 39, Id., 1870; Do. 2, 24, 68, Id., 1871; Do. 88, Dept. of Texas, 1870; Do. 19, 33, 38, Id., 1873; Do. 11, 16, 18, Id., 1874; Do. 45, Id., 1875; G. C. M. O. 18, 23, Id., 1891; Do. 22, Id., 1893; Do. 98, Dept. of the East, 1872; Do. 14, 43, 68, Id., 1873; Do. 81, 83, 98, Dept. of Dakota,, 1873; Do. 8, Id., 1876; Do. 31, Dept. of Cal., 1872; Do. 55, Id., 1874, Do. 5, 74, Dept. of the Mo., 1875; Do. 61, Id., 1876; Do. 77, 80, Id., 1881; Do. 18, Id., 1893; Do. 29, Div. of the Atlantic, 1874; Do. 23, Id., 1875; Do. 68, Id., 1888; Do. 144, Div. of Pacific & Dept. of Cal., 1880; Do. 1, Dept. of Dakota, 1885; also Do. 69, Hdqrs. of Army, 1877, (remarks of Gen. Hancock.) The instances referred to in these Orders, while mostly cases of desertion, include also cases of larceny and of drunkenness on duty.

[91] This ruling was preceded by that of the court in the case of Capt. Barron of the Navy in 1822, where it was held that the plea of guilty of the accused should "not prevent the introduction of any teatimony which the court may deem it necessary to hear on the part of the prosecution."

capital cases, and especially cases of desertion, not to receive the plea
419 of guilty, but, entering for the prisoner the plea of not guilty, to "determine the grade of the offence and *quantum* of guilt by the character of the evidence produced to them." Next, in a General Order, No. 23 of 1830, it was declared by the same authority that:—"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." Later, in No. 21 of the Orders of 1833, the General Commanding, in remarking that the old rule, that no evidence should be received with the plea of guilty, had been abrogated by recent Orders, disapproves the action of a certain court-martial in disregarding the same and refusing to allow the judge advocate to show, notwithstanding such plea, the facts and circumstances of the case, which—it is declared—are essential both to the reviewing officer and to the President as the pardoning power. Still later, in G. O. 36 of 1835, another court-martial is pointedly censured for a similar disregard of Orders and of the opinion of the Attorney General. This was an opinion of Atty. Gen. Butler, in the case of Cadet Crittenden, addressed to the Secretary of War on April 11, 1834,[92] "in answer to questions proposed upon a statement prepared by Gen. Macomb." It is here held that—"it is the duty of a court-martial in all cases where the punishment of the offence charged is discretionary, * * * and the specifications do not show all the circumstances attending the offence, to receive such testimony as the judge advocate may offer for the purpose of illustrating the actual degree of the offence, notwithstanding the party accused may have pleaded guilty. * * * If there be any exception to this remark, it is where the specification is so full and precise as to disclose all the circumstances of mitigation or aggravation which accompanied the offence. Where that is the case, or where the punishment is fixed, and no discretion is allowed, explanatory testimony cannot be needed." This opinion was incorporated in par. 31 of Art. 35 of the issue of the Army Regulations of December, 1836. In the Regulations of 1841, the opinion, condensed to a few lines, and limited to "cases of enlisted soldiers," is
420 published as par. 228; and the same paragraph, (numbered 320,) is repeated in the issue of 1847. It does not appear in the Regulations of 1857 nor thereafter. Revived during the late war, attention was frequently called to this principle by the Judge Advocate General, who held that a court-martial was authorized, notwithstanding the plea of guilty, and even where the sentence was not discretionary,[93] to receive evidence on the merits, with a view to determining the actual criminality of the offender and the measure of punishment which should properly be executed, in any case in which such evidence was deemed to be essential to the due administration of military justice. And this even against the objection of the accused, who "could not properly be allowed, by pleading guilty, to shut out testimony where the interests of the public service required its introduction." Of course, where evidence was thus admitted, the accused was to be afforded the opportunity of offering rebutting evidence, the testimony on both sides being governed by the usual rules in

[92] Published in 2 Opins. At. Gen., 636; also in G. O. 32 of 1834.

[93] See G. C. M. O. 37, Dept. of the Mo., 1880, where it is observed by Gen. Pope:—"While the punishment may be fixed, yet teatimony is necessary and proper for the consideration of the Reviewing Officer, who may, under the powers conferred upon him by law, pardon or mitigate the punishment."

regard to relevancy, &c.[94] These views have been adopted and acted upon in repeated cases published in Department, &c., Orders,[95] and—especially as relating to cases of desertion to which they are peculiarly applicable—have been announced in a G. O. of the War Department.[96]

With the plea of Not Guilty or Guilty begins the Trial proper,[97] which we now proceed to consider.

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[94] DIGEST, 587.

[95] See G. O. 54, Army of the Potomac, 1861; Do. 91, Id., 1863; Do. 57, Dept. of Washington, 1863; Do. 20, Northern Dept., 1865; Do. 33, Dept. of the N. West, 1864; Do. 52, 58, 91, Dept. of Arkansas, 1864; Do. 24, Dept. of Va., 1865; Do. 81, 114, Dept. of the Mo., 1867; Do. 39, Dept. of the Platte, 1870; Do. 45, Third Mil. Dist., 1868; Do. 42, Fifth Id., 1867; G. C. M. O. 72, Dept. of the Platte, 1887; Do. 1, Dept. of Dakota, 1888. And see Simmons § 553, 1005; Tytler, 238; Macomb, 38–9; De Hart, 135. The contrary view, that, where the accused pleads guilty, no evidence can be introduced against his objection, is expressed by O'Brien, 250, 251. And see Benét, 95.

[96] G. C. M. O. 69 of 1877.

[97] The *trial* begins "when the jury is charged with the prisoner. Previous to this everything that is done is merely preliminary." McFadden *v.* Com., 23 Pa. St., 12.

# CHAPTER XVII.

## THE TRIAL.

421 SUPPOSING all preliminary objections, motions, and special pleas, if any, to have been disposed of, and the accused to have pleaded "not guilty" to at least a portion of the charges and specifications,—all is now prepared for the Trial on the merits; and this subject will be considered in the present Chapter under the following heads:—I. The hours of session of the court; II. The Opening of the prosecution or defence; III. The general course of proceeding; IV. The Defence; V. The concluding Statement; VI. Contempts. The important subject of EVIDENCE will be presented in a separate Chapter.

### I. THE HOURS OF SESSION OF THE COURT.

**THE LAW ON THE SUBJECT.** This subject is regulated by Art. 94 of the code, as follows:—"*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.*"

**PURPOSE OF THE ARTICLE.** The object of this statute, which dates in our law from the Articles of 1775, and is but a modified form of a similar provision in the first Mutiny Act, is, as explained by military writers,[1] to prevent the daily attendance upon the trial from being too protracted and onerous, to obviate hasty action on the part of the court, and to afford an opportunity to the judge advocate to write up the daily record. In an opinion of an Attorney General,[2] it is represented as a purpose of the Article, "to guard against
422 improper secrecy," *i. e.*, by precluding courts-martial from sitting during hours when their proceedings would not readily be subject to public scrutiny.

**ITS LEGAL EFFECT.** The provision of the Article, being confined to "proceedings of trials," is not to be extended to action taken by the court which is not properly a part of the trial. Thus it has been held that the fact that a court entertained a *motion to adjourn* after three o'clock p. m. did not constitute a violation on its part of the injunction of the statute.[3] As a rule of procedure on the *trial*, however, the injunction is invariable.[4] While a court is not *required* to sit during the entire period between the hours specified, and may, on any day of its sessions, open later than eight o'clock a. m., or close

[1] Hough, 377; Coppée, 50.

[2] 11 Opins., 141.

[3] DIGEST, 111.

[4] Hough, 377; DIGEST, 110. Hough, (p. 378,) observes: "All officers are supposed to regulate their watches by the time of headquarters, and by such should a court, I apprehend, be regulated in their proceedings." The uncompleted proceeding, whatever its nature, should be at once interrupted at the fixed hour. Thus Hough, (p. 192,) notes a case where—"three o'clock striking, the court adjourned in the midst of its deliberations," (on the *sentence.*)

earlier than three o'clock p. m., yet in the absence of the specific authority indicated in the last clause, it can not properly sit outside of the designated limits, and, if it does so, its proceedings, while not, in the opinion of the author, legally invalidated, the provision being regarded as directory only,[5] are necessarily irregular, and the members of the court are amenable to justice for a disregard of the statutory direction:[6] their proceedings and sentences also are liable to be formally disapproved by the reviewing officer, if the objec-
423 tion is deemed sufficiently material.[7] Strictly indeed, in the author's opinion, it is only those portions of the testimony or proceedings of trials which are had without the hours named that can be affected, and if such testimony or proceedings can afterwards be repeated and gone through with *de novo*, within the proper hours, the defect in the action of the court may be remedied.[8] It is also only where the record shows affirmatively that the legal hours were disregarded by the court that the proceedings are, so far forth, to be treated as irregular and liable to disapproval.[9] It is not *required* in the Article or elsewhere that the record shall specifically set forth the hours of assembling and adjournment, and where none are stated, it will properly be presumed, in favor of the official record, (in the absence of clear proof to the contrary,) that the injunction of the Article has been duly observed by the court.[10]

**EXCEPTED CASES.** The Article, in its last clause, in excepting from its general operation, "*cases which, in the opinion of the officer appointing the court, require immediate example,*" confers upon such officer a discretion similar to that vested in him by Arts. 75 and 79, for fixing the number and rank of the members.[11] The exception may be said to refer mainly to cases where, by reason of some such condition as the pressure of business upon the court or of other duties upon the members, the need of prompt discipline in the command, the gravity or peculiar circumstances of the offence or offences to be tried, or the exigencies of war or of the service, it is deemed desirable that the proceedings should be especially expedited. The term "*immediate example*" has been variously construed by convening officers—by some quite strictly and by others much more freely. As all cases of military offences, referred after due investigation to courts-martial for trial, may be said in a general sense to require immediate example, *i. e.* to call for as speedy justice as can reasonably be administered, a broad interpretation of the term employed and liberal use of the discretion reposed by the Article are believed by the author to be in general justified.
424 No case is known to have occurred in our service where the abuse, to the prejudice of the accused or of justice, of such discretion, has been made the occasion of a military charge.

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[5] It has indeed been ruled in Orders, (G. C. M. O. 66 of 1890,) in a case in which a general court martial, convened at West Point, "conducted its proceedings in part" after 3 p. m., without express authority, that its proceedings were rendered "null and void." With such ruling the author is unable to concur. It may be added that in this case it was recommended by the Acting Judge Advocate General that the error be corrected by reconvening the court and "continuing the trial from the point arrived at at 3 p. m." But this course was not taken.

[6] Hough, (p. 386,) cites a case of a convening and reviewing officer convicted upon charges of permitting a court-martial to carry on its proceedings after 3 p. m., and of approving and executing a sentence then adjudged; and sentenced to be reprimanded.

[7] See cases of such disapproval in G. O. 2, Dept. of the South, 1873; Do. 94, Dept. of the Gulf, 1864; S. O., 281; Dept. of Washington, 1861.

[8] Compare case cited by Hough, 378; Id., (P.) 31, 787; Hughes, 168.

[9] DIGEST, 110, 111.

[10] As to the presumption in favor of the regularity of judicial proceedings, see 1 Greenl. Ev. § 19.

[11] See De Hart, 42.

**FORM OF AUTHORIZING DISREGARD OF STATED HOURS.** As to the *form* for the exercise of the discretion, and for authorizing the court to commence or continue its daily proceedings independently of the general restriction of the Article—this, in our service, is almost invariably given in one particular mode, *viz.* by a direction added in the convening order, or in a subsequent order issued pending the trial,[12] (for the authority may be given at any stage at which an occasion for it may be deemed to have arisen,) that "the court will sit without regard to hours," or "is authorized to sit without regard to hours," or in words to such effect.[13]

**A PROVISION LIABLE TO OBJECTION.** Whether this Article has not proved rather embarrassing than advantageous in practice is a question which has been considerably discussed. In the report of the Committee on the Judiciary of the Senate, of February 18, 1885, heretofore cited, it is observed as follows:—"The committee also thinks that it will be expedient to amend Article 94 of the Articles of war, so as to provide that the court-martial shall have power to regulate the time and duration of its daily sittings." No amendment, however, has yet been made. In the opinion of the author, this antiquated provision interposes an artificial obstruction to the efficiency and convenience of military administration which it is time should be done away with. The more rational rule of the British military code authorizes courts-martial to sit between the hours of 6 a. m. and 6 p. m., and later than 6 p. m., if the court considers it necessary.[14]

## II. THE OPENING OF THE PROSECUTION OR DEFENCE.

425 This proceeding, by which the introduction of the testimony may be prefaced, is not common in our practice, and openings are even more rarely made by the accused than by the prosecution. An opening is indeed much less called for before a court-martial, where the proceedings are in general simple and summary, than before a civil jury. In complicated cases, however, as where there are numerous charges or specifications, or where accounts or money transactions are to be inquired into, it may be of considerable advantage, both to the parties and the court, for the judge advocate, prior to entering upon the evidence for the prosecution, to present, orally, or by reading from a writing, a brief statement of the testimony proposed to be offered to establish the several charges and of the principles of law deemed applicable to the case. In so doing, he may read from law books, published legal opinions, &c. He will properly be careful not to misrepresent the evidence—stating only what facts can be proved—and especially not to attempt to create in advance an unfair impression against the accused. Argument also is out of place here and should be postponed till the final address. Subject to these restrictions, a clear and compact statement of the facts and the law, on the part of the prosecution, by rendering the issues intelligible from the outset, may materially simplify and facilitate the investigation and contribute to the exclusion of collateral and irrelevant matter, and an opening of this character would be advised in all cases of difficulty and importance. And so of an opening on

[12] See the order issued toward the conclusion of Gen. F. J. Porter's trial, (in time of war, 1862–3,) for the purpose of expediting the proceedings. Printed Trial, p. 209.

[13] G. O. 9 of 1892 now directs in terms—"Whenever a court-martial is ordered to sit without regard to hours, the order must state that it is necessary for the sake of immediate example."

[14] Rules of Procedure, 63; Story, 24.

the part of the accused, where the defence promises to be an elaborate one, involving the examination of numerous witnesses or an extended discussion of points of law.[15]

## III. THE GENERAL COURSE OF PROCEEDING.

**SEPARATION AND EXCLUSION OF WITNESSES.** In order to guard against collusion between witnesses, as well as the unconscious coloring of his testimony to which a witness is liable in listening to the statements of previous witnesses as to the same part of the case, it is the usage upon military as upon civil trials to separate the witnesses by excluding from the court-
426 room at the outset of the trial all except the one about to testify, and subsequently permitting only those to be present who have fully given their evidence. The judge advocate, at the beginning, generally and properly, notifies the witnesses present to remain in an anteroom or outside the court-room, to await being called in, each in his turn. When this has not been done, the President, as the organ of the court, will ordinarily preface the hearing by a similar direction. Where the precaution has been omitted, either party may, at this or a later stage, bring the fact, that witnesses who have not yet been examined are present, to the attention of the court, which will thereupon properly order them to withdraw. The rule of exclusion should embrace *all* the witnesses, and not merely those of the party whose side of the case is about to be presented. It should be enforced by the court, (upon its own motion or at the instance of either party,) at all stages of the trial, so that any witness or witnesses yet to testify, who may be discovered to have come into the court-room, through ignorance or disregard of the preliminary direction, may be at once sent out.

In civil cases the witnesses are sometimes also cautioned by the court not to converse together or with other persons upon the subject of their testimony. By military courts a direction to this effect is rarely given, but in a case of importance, which had excited public interest and become matter of common talk, such a warning would not be out of place.

The rule of exclusion, it may be added, has been extended, in the civil practice, to cases where, at the trial, a discussion has arisen upon the testimony or proposed testimony of a witness under examination. Here, on motion of either party, a court-martial, like a civil court, will, ordinarily and properly, cause the witness to withdraw pending the argument.

It may also be noted that a witness who, having been examined, is proposed to be re-examined at a subsequent stage, or to be called as a witness by the other side, will properly be directed to remain out of the hearing of the other witnesses till again called in; the rule properly applying to all witnesses who have not been finally discharged as such.

If a witness, though notified to retire, has remained in court during the examination of a previous witness, while he may—if a military person—
427 be amenable to a charge under Art. 62, he is not disqualified from testifying; his credibility only, not his competency, being affected.

To the general rule of exclusion certain classes of witnesses have been recognized as exceptions. These are those summoned as *experts*, who must often necessarily hear the evidence which precedes their own as a basis for

[15] On the subject of the Opening, see 1 Bishop, C. P. § 967–972; U. S. *v.* Mingo, 2 Curtis, 1; Simmons § 570; O'Brien, 252; De Hart, 149. Openings for the defence appear more frequently in the early cases. See, for example, Trial of Lt. Col. Bache, p. 24. A later instance of an extended opening is to be found in the Trial of Capt. Hurtt, p. 158.

forming their opinions; those called to testify as to *character* only; and further any person intended to be used as a witness who may be present in the capacity of a *member of the court, judge advocate,* or *counsel.* The *prosecuting witness,* if any, is generally permitted to remain in court, but not till after he has himself fully testified.[16]

**INTRODUCTION AND HEARING OF THE TESTIMONY.** The judge advocate now proceeds to introduce and examine his witnesses, subject to cross-examination on the part of the accused, and also to offer such depositions and written evidence as he may have to exhibit, and having completed his showing he announces that the prosecution rests. The examination should be conducted in the form of separate questions separately responded to, and not, as has sometimes been done, by reading the specification to the witness and asking him what he knows in regard to its allegations.[17] The prosecution having closed its examination in chief, the accused then produces similarly the proofs on his side and similarly rests in conclusion. Evidence in rebuttal may follow on the part of the prosecution, and this, in the discretion of the court, may be succeeded on the part of the accused by evidence in reply to the same.

The hearing cannot legally be interrupted except by a *nolle prosequi* or a dissolution, ordered by the proper superior.

**Qualifying of witnesses.** The witnesses, standing with up-
428 lifted hand, qualify by taking in open court[18] the form of oath (or affirmation) prescribed in Art. 92. A witness, though he be recalled, or after testifying for one side be required to testify anew and in chief for the other, is never sworn but once, *viz.* when he first takes the stand. The Article fails to indicate by whom the oath shall be administered,[19] but, according to the established usage of our service, the witnesses are sworn by the judge advocate, who is now also specially authorized to perform this function by the Act of July 27, 1892. The judge advocate, when himself appearing as a witness, is sworn, according to usage, by the president of the court. In view of the mandatory injunction of the Article, the form of the oath may not be departed from; but the witness may accompany the form by such additional ceremony as is habitual with persons of his religious sect. Thus Roman Catholics are usually sworn on a copy of the Evangelists, with a cross impressed upon or affixed to it, which is kissed by the witness. Jews are sworn by the five books of Moses, and in being qualified wear their hats. Chinese are believed to be now more commonly sworn, not by the breaking of a saucer,[20] or

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[16] On the subject of this title see 1 Greenl. Ev. § 432; 1 Bishop, C. P. § 1188–1193; U. S. *v.* Cole, 5 McLean, 529; State *v.* Zellers, 2 Halst., 225; Com. *v.* Hersey, 2 Allen, 176, McLean *v.* State, 16 Ala., 672; Thomas *v.* State, 27 Ga., 288; Southey *v.* Nash, 7 C. & P., 632; Regina *v.* Murphy, 8 Id., 297; Gen. Whitelocke's Trial, vol. I, p. 2; Adml. Byng's Trial, p. 7; Simmons § 569, 942, 943; Tytler, 249; O'Brien, 203; De Hart, 148.

That a court was in error where it refused the request of the judge advocate, that the prosecuting witness should be allowed, after testifying, to remain in court, was properly held by Gen. Miles, in G. C. M. O. 20, Dept. of the East, 1894.

[17] See G. C. M. O. 38, Dept. of Dakota, 1892; O'Dowd, 10.

[18] See G. O. 1, Div. of the Pacific, 1866, where the swearing and examining of one of the witnesses out of court, and in the absence of the accused, is commented upon as an illegal proceeding.

[19] The similar form of oath prescribed by the first Mutiny Act was specifically authorized and directed to be administered by the "Judge Advocate or his Deputy." The Articles of 1776 provided that the oath be administered by the president; those of 1786 that it be administered "by the court." The present form of the statute dates from the Article of 1806 which was silent as to this particular.

[20] This was the form observed in the reported case of Regina *v.* Entrehman, 1 C. & M., 248.

burning of a joss-stick, but by the usual form of oath, administered through the medium of an interpreter who explains it to the witness; and Indian witnesses have been sworn in a similar manner. A deaf and dumb witness, (having sufficient intelligence to comprehend the obligation,) is sworn through an interpreter.[21]

**Order and sequence of testimony.** Subject to the distinction of the several stages of the Examination—the Direct, Cross, and Re-direct examinations—
which are properly to be kept clearly apart, the court will in general
429 leave it to the parties—judge advocate and accused—to introduce their witnesses, and written testimony, in such sequence as may be found by them most advantageous or convenient. Further, in its discretion and in the interests of truth and justice, the court may permit material evidence to be introduced by a party quite out of its regular order and place. Thus it may not only admit evidence at a later period of an examination which should regularly have been introduced at an earlier, allowing a witness to be recalled for direct or cross examination upon a question or questions inadvertently omitted;[22] but it may permit a case once closed on the part of the prosecution or defence, or on both sides, to be reopened for the introduction of testimony previously omitted or discovered since the closing.[23] Even where the party is chargeable with *laches* in not offering the testimony at the proper time, the court may still permit its subsequent introduction if of so material a character that its exclusion will leave the investigation incomplete. But where new testimony is thus admitted, it must be admitted subject to the right of the other party to cross-examine and rebut.[24]

**Examination by the court.** While it is no part of the province of the
430 court to conduct either the prosecution or the defence, it is open to any member to put questions to the witnesses for either side. But this, though it may be done at any stage of a protracted examination where some matter, which may be forgotten if not noticed at the moment, has not been made quite clear by the witness, is in general postponed until both the parties have concluded their examinations, and is then resorted to for the purpose only or mainly of the elucidation of some part of the testimony which has been left obscure.[25] A member may also suggest a question to be put by the judge advocate or accused where he has omitted to elicit some material particular. Further, while the court cannot legally "originate" evidence,[26] *i. e.* take

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[21] 1 Greenl. Ev. § 366.

[22] See 1 Bishop, C. P. § 966, and cases cited; People *v.* Keith, 50 Cal., 137; Simmons § 580; De Hart, 159; G. C. M. O. 47, Dept. of Texas, 1872. The court may induce the recalling of a witness for its own information. De Hart, 174.

[23] 1 Bishop, C. P. § 966; R. R. Co. *v.* Steinburg, 17 Mich., 99; Eberhart *v.* State, 47 Ga., 598; Lang *v.* Waters, 47 Ala., 625. Compare Lieut. Gen. Sir John Mordaunt's Case. Simmons, 383, note. In the leading case, at which the author officiated as judge advocate, of B. G. Harris, (see Printed Trial,) the defence was permitted to introduce new evidence after both sides had formally closed and the court had adjourned for two days to give the accused time to prepare his argument. In several military cases evidence has been admitted even after the reading of the final statement of the accused. See G. O. 31, Dept. of Fla., 1865; Do. 11, Dept. of La., 1869; Do. 149, Dept. of the Mo., 1870; G. C. M. O. 143, Div. Pacific & Dept. of Cal., 1880. On Lieut. Hyder's Trial, (p. 141,) evidence was held admissible, in the discretion of the court, after both addresses had been made. Evidence, however, which, though material, is merely *cumulative*, should not thus be admitted.

[24] See cases in G. O. 73 of 1829; Do. 31, Dept. of Fla., 1865; Do. 11, Dept. of La., 1869; Do. 149, Dept. of the Mo., 1870—where the action of the court in refusing this right to the accused is disapproved.

[25] Simmons § 577; O'Brien, 253; De Hart, 157; Lieut. Hyder's Trial, 143; Gen. Dyer's Court of Inquiry, Part I, 269; G. O. 21, Dept. of the Platte, 1866.

[26] De Hart, 85; G. O. 11, 17, Dept. of La., 1869.

the initiative in providing any part of the proofs, yet where, with a view to a more thorough investigation of the case, it desires to hear certain evidence not introduced by either party, it may properly call upon the judge advocate to procure the same if practicable, adjourning for a reasonable period to allow time for the purpose. New testimony thus elicited must of course be received subject to cross examination and rebuttal by the party to whom it is adverse.[27]

**The testimony to be in open court.** All testimony, whether oral or written, and whether upon the main or an interlocutory issue, is to be introduced in open court, and no testimony can be received by the court during a
431 period of deliberation after it has been cleared.[28] So, where a member of the court has knowledge of material facts in the case, he cannot properly communicate the same privately to the court when cleared for deliberation, or to the other members, but should cause himself to be sworn as a witness on the part of the prosecution or defence.

To the rule that the testimony shall be taken in open court, an exception has been recognized in a case where a material witness, commorant at the station at which the court is assembled, is unable, through sickness or other disability, to attend, and the exigencies or interests of the service do not justify waiting for his recovery. In such a case the court may temporarily adjourn to the quarters or hospital where the witness may be, and receive the testimony, taken in the usual manner.[29]

**The completing of the testimony not to be interfered with.** After the testimony has been entered upon, it cannot, if material, properly be allowed to be interrupted, except of course through action of the superior authority which created the court, in the form of an order dissolving it or suspending the proceedings, or through the authorized entry of a *nolle prosequi*.[30] The court itself cannot refuse to hear witnesses proposed to be offered by either party, provided they are competent and their testimony is material[31] and not unreasonably cumulative;[32] nor can a party, by any act or objection, shut off the exhibition by the other party of evidence pertinent to the proof of his case. Even an

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[27] See G. C. M. O. 48, Div. Pacific & Dept. of Cal., 1880.

It may be noted here that the "*confronting*" of witnesses, or the causing by the court of two witnesses who contradict each other to be brought into court together and subjected to further interrogatories with a view to reconcile their statements, has been referred to as allowable by some authorities. (See Simmons § 944; De Hart, 152; Coppée, 75.) It is however a measure of very doubtful expediency, now most rarely if ever resorted to. It was refused to be permitted by the court when proposed by the accused on Lieut. Col. Fremont's Trial—pp. 321–325.

Art. VI of the Amendments to the Constitution, which declares that "the accused shall enjoy the right * * * to be confronted with the witnesses against him," has reference only to criminal cases in the federal civil courts and thus no application to trials by courts-martial. See DIGEST—WITNESS § 10, p. 752. Compare note 38, page 165, *ante*.

[28] See 3 Opins. At. Gen., 546; also G. O. 1, Div. of the Pacific, 1866.

[29] In such a case the testimony must be taken by the court, *i. e.* as a whole; it cannot depute a member or members for the purpose. Adye, 205; Tytler, 306.

[30] See U. S. *v.* Corrie, 23 Law Rep., 145. As to the proceeding of *nolle prosequi*, or withdrawal of a charge, see Chapter XVI.

[31] See the leading case of Emerson Etheridge in G. O. 34, Div. of the Tenn., 1865; also G. O. 21 of 1872; Do. 31, Sixteenth Army Corps, 1863; Do. 20, Dept. of the South, 1871; also G. O. 59, Dept. of Dakota, 1871, where the court is censured for not waiting a reasonable time for material *documentary* evidence which had been sent for, but proceeding to judgment with unreasonable haste and thus prejudicing the interests of justice. And see G. C. M. O. 41, Div. of the Atlantic, 1886.

[32] As to the authority of the court to limit the extent of testimony as to *character*, see next Chapter.

accused, by escaping from legal custody, after pleading not guilty, and
432 thenceforth absenting himself from the court, does not put an end to the trial, but the same may proceed and the prosecution be completed without regard to his absence.[33]

**THE READING OF THE PROCEEDINGS.** A customary part of the routine of a trial is the reading, at the opening of each day's session, of the proceedings and testimony of the previous day, as recorded. At this reading the accused is entitled to be present, but he may waive the right:[34] with his concurrence also a reading may be dispensed with.

**OBJECTIONS—CLEARING THE COURT.** Objections, based upon grounds to be indicated in the next Chapter,[35] may be taken by either party to proposed oral testimony—questions or answers—in the course of the examination of the witnesses, as also to the admission of written evidence. Objections may also be raised by members of the court; but, as remarked in a General Order,[36] inasmuch as the members occupy the position of judges and not of counsel, and "it is no part of their business to try the case as counsel, the frequent interposition of objections by members is a vicious practice and should be discountenanced."

It has been sometimes asserted that a *party* could not properly object to a question put by a member; but if such a question is one not sanctioned by the law of evidence, no sufficient reason is perceived why an exception taken thereto in a respectful manner should not be entertained and allowed, as in a case of a similar question by an adverse party, and this is the view sustained by the weight of authority.[37]

433 All objections should be *specific;*[38] an objection expressed in general terms only, (as where the party simply says—"I object," without adding his ground,) should not be entertained by the court.

To determine whether an objection is or not valid,[39] the court usually *clears*, but objections of an unimportant character may be disposed of without this formality. The "clearing" of the court in our practice is the same in form whether the purpose be to deliberate upon a special plea or motion, upon an objection to evidence, or upon the finding and sentence. A clearing may also be resorted to at the instance of the president or on the motion or at the request of a member, when the ruling of the court is desired upon any question suggested in the course of the proceedings though not raised by a party to the trial. In all cases the clearing is effected by the president of the court directing all persons (including now the judge advocate) to withdraw from the court-room and remain excluded till the doors are again opened. Our procedure, by reason of the inconvenience and embarrassment caused to the accused, counsel, clerks and reporters, witnesses and the public, is subject to serious objection.

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[33] DIGEST, 318. See Chapter XIX.

[34] DIGEST, 335; G. O. 35 of 1867.

[35] The ground of the objection should be one recognized at law—as that the question is irrelevant or leading, or that the answer is not responsive, or is an expression of opinion, &c. An objection by a judge advocate to a question, that it was "unnecessary," was condemned in G. O. 42, Dept. of the Platte, 1871.

[36] G. C. M. O. 142, Dept. of Dakota, 1881, also cited in Chapter XII.

[37] A party may object to a question put by a member before "the collective opinion of the court" has been expressed upon it. Simmons § 575; DeHart, 156.

[38] Grounds for objection on the part of the prosecution or a member should be specified in court in the presence of the accused, not left to be stated after the court is cleared. G. C. M. O. 9, Dept. of the East, 1871.

[39] That this is for the court to decide for itself; that the question cannot at this stage properly be referred for the opinion of the Attorney General—as was actually proposed in the case of Cadet J. C. Whittaker, in 1881—see 17 Opins. At. Gen., 54.

In the French *conseils de guerre*, the members when desiring to deliberate,[40] themselves retire to a separate room, leaving the officials, counsel and audience in their seats to await the return of the court, and incommoding no one. Even in the English practice, as it is remarked by Capt. Hall,[41] "the court, instead of clearing the room, sometimes retires to an adjoining apartment to deliberate." In this country, in the case of the trial of Milligan *et al.*, by Military Commission in 1864, the commission, as it is recorded,[42] "retired to an adjoining room for deliberation, to avoid the inconvenience of dismissing the audience assembled to listen to the proceedings." In the absence of any provision of law on the
434 subject, it would be perfectly legal, and in general desirable upon extended and important trials, for our courts-martial to adopt, where practicable and convenient, the French form of clearing in lieu of that commonly practiced.

Where the court has been cleared for deliberation upon an objection, the approved course, after the point has been sufficiently discussed, is for the president to put to the vote of the members the question—"Shall the objection be sustained?" If a minority only vote in the affirmative, or the vote is a tie,[43] the objection is not sustained, and, on the court being re-opened, and this result announced, the question, or answer, objected to is put or given, and recorded. Otherwise, if the objection is sustained by a majority vote.

## IV. THE DEFENCE.

**IN GENERAL.** It is a principle to be scrupulously observed on a military trial that the accused, whatever his rank,[44] is not only to be deprived of no right but is to be accorded every proper privilege—is in no manner to be embarrassed or placed at a disadvantage, but in every reasonable degree facilitated, in making his defence. As heretofore indicated,[45] he is not to be shackled or otherwise restrained as to his person, unless it may be necessary to prevent escape or violence. If he be under the influence of liquor,[46] or ill, the proceedings should be suspended till he is sober, well, and master of his faculties. That he may be a prisoner, under a previous sentence, should not be allowed to prejudice his defence.[47] On the trial he should be deprived of no material testimony, reasonably obtainable either by subpœna, order or deposition, whether required to present his original defence,[48] to rebut or reply to the testimony of the prosecution,[49] to impeach its witnesses,[50] to exhibit matters of extenua-
435 tion,[51] or to establish his own character or record. Subject only to the objections to which all proofs or proceedings are liable, he should be permitted to conduct the examination and cross-examination of the witnesses, and generally to present his defence, in his own way, without restriction by

[40] Which, however, so far as perceived by the author, in attending personally their military trials, they rarely do except on the final judgment.

[41] "Suggestions for improving the military law," &c. London, 1864, p. 9.

[42] Printed Trial, p. 73–4.

[43] As to the effect of a *tie vote*, see Chapter XII.

[44] DIGEST, 335.

[45] In Chapter XII.

[46] See Taffe *v.* State, 23 Ark., 34.

[47] That it can constitute no objection to his being tried, see G. O. 30, Dept. of the Pacific, 1864.

[48] G. C. M. O. 43 of 1885; G. O. 40, Fourth Mil. Dist., 1869.

[49] G. O. 11, Dept. of La., 1869; G. C. M. O. 15, Dept. of Dakota, 1887.

[50] G. C. M. O. 21 of 1872.

[51] G. O. 45, Third Mil. Dist., 1868.

the court.[52] Subject to a reasonable limitation as to evidence of character and evidence purely cumulative, the court should hear his entire material testimony,[53] aiding him where necessary in bringing it fully out, and should protect him from testimony which is legally inadmissible.[54] He should be informed, if he is not aware of it, of his right to be sworn as a witness in his own behalf. The principle thus illustrated, that the accused shall be allowed and enabled to make a free and full defence, while of general application, is especially to be regarded in a case where he is an enlisted man without counsel.

**SPECIFIC DEFENCES—CLASSIFICATION.** The prosecution having established, by *prima facie* evidence, the offence, (or at least one of the offences,) charged, the accused is put upon his *defence*. Defences are of two sorts, consisting either—1, of proof that the offence charged was not committed by the accused; or—2, of proof that though the act alleged was committed by him, it did not constitute the offence charged.

1. A defence of the former class will consist in exhibiting some state of facts inconsistent with guilt,—as that the occurrences set forth in the specifition did not take place as alleged, or at all; or that the accused did not personally do, or take part in, the act charged; or that he was not present at the alleged place and time of its commission, but was elsewhere, (*alibi*,) and therefore could not have committed it; or that the offence was actually committed by another person, &c. Defences of this class vary with the provi-
436 sions of the Articles under which the charges are laid and with the circumstances of each case, and, except to notice briefly the defence of *alibi*, need not here be considered.[55]

**Alibi.** This defence, when satisfactorily established, is necessarily a conclusive answer to the charge. It is however easily fabricated, and, even when sustained by the testimony of *bona fide* witnesses, is subject to question by reason of possible and natural errors as to dates, hours of the day, identity of persons, &c.: it is therefore to be entertained with strictness and caution.[56] "A perfect *alibi* must cover the whole time when the presence of the prisoner was required" for the consummation of the offence.[57] Where, however, it fails to include the entire period, it is still to be taken into consideration, and if sufficient to justify a reasonable doubt as to the presence of the accused at the time and place of the act, will properly induce an acquittal by the court.[58] This defence is best tested by a searching cross-examination as to details; it may also be rebutted by any facts tending to disprove it and not already in evidence, as, for example, admissions or statements of the accused at variance with the claim of *alibi*.[59]

2. The defences of the *second* class are such as consist in proof of an absence of criminal *capacity* or *intent*, by reason mainly of Ignorance of fact or of law, Drunkenness, Insanity, Obedience to orders, Compulsion of the enemy, and Requirements of military discipline.

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[52] Kennedy, 104; Napier, 91; also case in G. C. M. O. 6, Dept. of Dakota, 1886. Here the court improperly interrupted a legitimate cross-examination by the accused, a private soldier, of his prosecutor, a sergeant, on the ground that the latter was "not on trial." Disapproved.

[53] G. O. 34, Div. of the Tenn., 1865; G. C. M. O. 17, Dept. of Cal., 1889; Do. 32, Id., 1890.

[54] G. C. M. O. 128, Dept. of Dakota, 1882; Do. 13, Dept. of Texas, 1886.

[55] As to this class of defences see Chapter XXV, on the Articles of War separately considered.

[56] Wharton, Cr. Ev. § 742; 1 Bishop, C. P. § 1064; Chappel *v.* State, 7 Cold., 92.

[57] 1 Bishop, C. P. § 1067; Baton *v.* State, 22 Fla., 51.

[58] State *v.* Waterman, 1 Nev., 544; State *v.* Howell, 100 Mo., 628.

[59] 1 Bishop, C. P. § 1068.

**IGNORANCE OF FACT.** It is generally laid down that ignorance of fact excuses crime.[60] But this must be an honest or innocent ignorance, and not an ignorance which is the result of carelessness or fault.[61] The theory
437 of course is that where a *bona fide* ignorance of fact exists there must be an absence of the requisite wrongful *intent*. The general rule applies equally to military cases; and the ignorance, to constitute a defence therein, must appear not to have proceeded from any want of vigilance, or from failure to make the inquiries or obtain the information reasonably called for by the obligations and usages of the service. Thus an officer who presents a fraudulent claim against the United States without knowing it to be fraudulent, or a soldier who neglects to report for guard or other duty because ignorant of the fact that he has been duly detailed therefor, is not guilty of a breech, in the one case of the 60th, or in the other of the 33d Article of war, unless his ignorance is the result of his own negligence or wrong-doing.

**IGNORANCE OF LAW.** On the other hand, it is also a general principle, founded originally "on the necessities of civil government,"[62] that an ignorance or mistake of *law* does not excuse crime, and it is a legal presumption that "every man is presumed to know the laws of the country in which he dwells."[63] In general therefore such ignorance or mistake can have no effect in doing away with the inference, or rebutting the proof, of criminal intent, and the fact of its existence is inadmissible in evidence as a defence.

438 This principle is equally applicable to military persons so far as regards their knowledge of and amenability to the general law of the land. Such persons also are generally to be presumed to have a knowledge of the special laws and regulations governing the army, as well as of the General Orders which have been officially promulgated and of which they are bound from their position or circumstances to take notice.[64] In the case of *officers* certainly this rule can scarcely admit of an exception; but the question may sometimes arise how far *enlisted men* are to be charged with a knowledge of the Articles of war.

Ignorance of the code on the part of soldiers. This question would be based primarily upon the fact that the 2d Article makes it one of the features of enlistments into the military service that the "*Articles of war shall be read to every enlisted man at the time of, or within six days after, his enlistment,*" and then proceeds to enjoin that he shall thereupon take an oath in which,

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[60] 3 Greenl. Ev. § 21; 1 Bishop, C. L. § 301.

[61] 1 Bishop, C. L. § 302, 313. Simmons, (§ 593,) in treating of this defence, says:—"Ignorance or mistake is a defect of will, when a man, intending to do a lawful act, does that which is unlawful. As if a soldier, intending to fire on the enemy, kills some of his own people; or firing by order of his officer at a target, kills a bystander." But this must be qualified as indicated in the text: the ignorance or mistake in such cases, to constitute a sufficient defence, must be such as could not have been guarded against by a reasonable prudence: if in an appreciable degree the result of heedlessness, the defence fails.

Akin to this defence is that sometimes distinguished as the defence of Accident—in regard to which it is observed by Blackstone, (4 Com., 26, 27,) as follows: "If any accidental mischief happens to follow from the performance of a *lawful* act, the party stands excused from all guilt. But if a man be doing anything *unlawful*, and a consequence ensues which he did not foresee or intend, as the death of a man or the like, his want of foresight shall be no excuse; for, being guilty of one offence in doing antecedently what is in itself unlawful, he is criminally guilty of whatever consequence may follow the first misbehaviour." And see *post*, Chapter XXV—Fifty-Eighth Article. The first of these statements however must be taken with the qualification above specified.

[62] And on a consideration of "the dangerous extent to which the excuse of ignorance might otherwise be carried." 3 Greenl. Ev. § 20, note.

[63] 3 Greenl. Ev. § 20; 1 Bishop, C. L. § 294.

[64] See De Hart, 164 Benét, 119.

among other things, he swears that he will observe and obey military orders "*according to the rules and articles of war.*"[65] While in the case of an old or re-enlisted soldier, or one who had been for a considerable period in the service and had had a sufficient opportunity to inform himself as to the provisions of the code, a failure to have complied with the injunction of this article could scarcely constitute a defence, such failure might perhaps have this effect, or at least operate as an extenuation, in the case of a recruit, especially one imperfectly acquainted with the English language. In such a case it would certainly be admissible for the accused to show the fact,[66] and if the offence charged were one of the criminality of which he could not, in his ignorance of military law, have been aware, or the gravity of which he could not have appreciated, the omission of the reading of the Articles upon his enlistment would properly be regarded by the court, if not as a defence, certainly as a palliation of his misconduct. In several cases published in General Orders, such
439 an omission has induced the court to impose a light sentence or the reviewing authority to mitigate the punishment adjudged.[67]

**DRUNKENNESS.** The common law, though it does not indict for mere drunkenness, views it as a wrongful act.[68] As observes Bishop,[69] "the law deems it wrong for a man to cloud his mind, or excite it to evil action, by the use of intoxicating drinks." Crime therefore, when committed by an individual who has previously placed himself under the influence of an intoxicant, is committed by one who is in the wrong *ab initio;* hence the established general principle of law that voluntary drunkenness furnishes *per se* no excuse or palliation for criminal acts committed during its continuance, and no immunity from the penal consequences of such acts.[70]

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[65] In this connection, note also Art. 128, (commented upon in Chapter XXV.,) which requires that the "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."

[66] G. C. M. O. 20, Dept. of the East, 1870.

[67] G. O. 23, Army of West Va., 1861; Do. 20, Dept. of the Mo., 1861; Do. 49, Dept. of the Susquehanna, 1864; G. C. M. O. 73, Dept. of the East, 1872; Do. 25, Dept. of Texas, 1874. And see Harcourt, 88.

[68] "It is a great offence in itself." Beverly's Case, 4 Coke, 123, b. And see G. O. 157, Dept. of Va. & No. Ca., 1864. Blackstone refers to it as a "crime." Thus he says, (4 Com., 26,) "The law of England, considering how easy it is to counterfeit this excuse, and how weak an excuse it is, (though real,) will not suffer any man thus to privilege one crime by another." Story J., in U. S. *v.* Cornell, 2 Mason, 11, more accurately expresses the principle as follows: "The vices of men cannot constitute an excuse for their crimes."

[69] 1 C. L. § 397.

[70] "A man who voluntarily puts himself in a condition to have no control of his actions must be held to intend the consequences. The safety of the community requires this rule. Intoxication is so easily counterfeited, and, when real, is so often resorted to as a means of nerving the person up to the commission of some desperate act, and is withal so inexcusable in itself, that the law has never recognized it as an excuse for crime." People *v.* Garbutt, 17 Mich., 19. And see Beverly's Case, 4 Coke, 123, b.; U. S. *v.* Cornell, 2 Mason, 111; U. S. *v.* Drew, 5 Id., 28; Com. *v.* Hawkins, 3 Gray, 466; Kenny *v.* People, 31 N. Y., 330; 1 Bishop, C. L. § 400, and cases cited; Harcourt, 54; G. O. 40, 53, Army of the Potomac, 1862; Do. 70, Dept. of the East, 1865.

In the majority of cases, indeed, drunkenness rather aggravates than extenuates crime, *viz.,* by adding at least a gross and offensive feature to the specific wrongful act. See G. O. 8, Dept. of the Gulf, 1872; G. C. M. O. 21, Dept. of the East, 1871. In U. S. *v.* Claypool, 14 Fed., 127, the Court say—"Drunkenness is no excuse for crime, and in the instances in which it is resorted to, to blunt moral responsibility, it heightens the culpability of the offender."

Where the intoxication is not voluntary—not induced by the party's own act—the principle of responsibility does not apply. Thus, "if a party be made drunk by stratagem, or the fraud of another, he is not responsible." Parsons' Case, 2 Lewin, 144. And see U. S. *v.* Roudenbush, Baldwin, 518. So, where drunkenness is caused by the want of skill or care of a physician. 1 Bishop, C. L. § 405; 3 Greenl. Ev. § 6; People *v.* Robinson, 2 Park., 236.

440 But the question whether or not the accused was drunk at the time of the commission of the criminal act may be material as going to indicate what *species* or *quality* of offence was actually committed. Thus there are crimes, or instances of crimes, which can be consummated only where a peculiar and distinctive intent, or a conscious deliberation or premeditation, has concurred with the act, which could not well be possessed or entertained by an intoxicated person. In such cases evidence of the drunken condition of the party at the time of his commission of the alleged crime is held admissible, not to excuse or extenuate the act as such, but to aid in determining whether, in view of the state of his mind, such act amounted to the specific crime charged, or which of two or more crimes, similar but distinguished in degree, it really was in law. Thus in cases of such offences as larceny, robbery, burglary, and passing counterfeit money, which require for their commission a certain specific intent, evidence of drunkenness is admissible as indicating whether the offender was capable of entertaining this intent, or whether his act was anything more than a mere battery, trespass, or mistake.[71] So, upon an indictment for murder, testimony as to the inebriation of the accused at the time of the killing may ordinarily properly be admitted as indicating a mental excitement, confusion, or unconsciousness, incompatible under the circumstances of the case with premeditation or a deliberate intent to take life, and as reducing the crime to the grade of manslaughter, or—where such an offence is created by the State statute—of murder in the second (or other) 441 degree.[72] On the other hand, where, to constitute the legal crime, there is required no peculiar intent—no wrongful intent other than that inferable from the act itself—as in cases of assault and battery, rape, or arson, evidence that the offender was intoxicated would, strictly, not be admissible in defence.[73]

In *military* cases, the fact of the drunkenness of the accused, as indicating his state of mind at the time of the alleged offence, whether it may be considered as properly affecting the issue to be tried or only the measure of punishment to be adjudged in the event of conviction, is in practice always admitted in evidence.[74] And where a deliberate purpose or peculiar intent is necessary to constitute the offence, as in cases of disobedience of orders in violation of Art. 21, desertion, mutiny, cowardice, or fraud in violation of Art. 60, the drunkenness, if clearly shown in evidence to have been such as to have incapacitated the party from entertaining such purpose or intent, will ordinarily properly

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[71] U. S. *v.* Roudenbush, Baldwin, 514; Rex *v.* Pitman, 2 C. & P., 423; Com. *v.* French, Thach., 163; Pigman *v.* State, 14 Ohio, 555; Nichols *v.* State, 8 Ohio St., 435; State *v.* Schingen, 20 Wis., 74; State *v.* Bell, 29 Iowa, 316; Mooney *v.* State, 33 Ala., 420; Keeton *v.* Com., 92 Ky., 522; People *v.* Harris, 29 Cal., 701; 1 Bishop, C. L. § 408–414; G. C. M. O. 21, Div. Atlantic, 1886.

[72] Hoyt *v.* People, 104 U. S., 931; U. S. *v.* King, 34 Fed., 303; U. S. *v.* Meagher, 37 Fed., 881; State *v.* Johnson, 40 Conn., 136, and 41 Id., 588; People *v.* Rogers, 18 N. Y. 9; People *v.* Hammill, 2 Park., 223; People *v.* Robinson, Id., 235; Friery *v.* People, 54 Barb., 319; State *v.* McCants, 1 Speers, 384; Kelley *v.* State, 3 Sm. & M., 518; Shannahan *v.* Com., 8 Bush, 463; Swan *v.* State, 4 Humph., 136; People *v.* Belencia, 21 Cal., 544; People *v.* Williams, 43 Id., 344; 3 Greenl. Ev. § 6, 148; 1 Bishop, C. L. § 401, 409.

To constitute, however, a defence, the mere fact that the party was *under the influence* of liquor is not sufficient. A person in some degree under such influence may nevertheless be capable of conceiving a specific design and of acting with premeditation. If so capable, he must be presumed, like a sober man, to have intended the natural and legitimate consequences of his act. Friery *v.* People; People *v.* Belencia, *ante*.

Where a person is too drunk to entertain the specific intent peculiar to a certain crime, his drunkenness will constitute equally a defence to the charge of an *attempt* to commit it. 1 Bishop, C. L. § 413.

[73] See People *v.* King, 27 Cal., 514; Ferrell *v.* State, 43 Texas, 503.

[74] DIGEST, 379.

be treated as constituting a legal defence to the specific act charged. In such cases, however, if the drunken act has involved a disorder or neglect of duty prejudicial to good order and military discipline—and such will almost invariably be the fact[75]—the accused may be convicted of an offence under Art. 62, thus incurring some adequate punishment.

442 It is to be noted that drunkenness, to be admitted in evidence, or to constitute a defence, need not be caused by indulgence in spirituous liquors, but may, with the same effect, result from the voluntary excessive use of an intoxicating drug.[76]

The effect, as a defence, of drunkenness when so extreme as to induce a condition of *insanity* will be noticed under the next head.

**INSANITY.** Insanity is a disease so perverting the reason or moral sense or both as to render a person not accountable for his acts. It is an exceptional and abnormal status, (to be established in general by the testimony of medical experts,[77]) and as the law presumes a man to be sane till he is proved to be the contrary, the burden of maintaining insanity as a defence in a criminal case rests of course upon the accused.[78] To constitute a defence on the ground of insanity it may be made to appear, on the one hand either that the accused, in committing the offence, did not, from mental derangement, comprehend the nature of what he was doing, or did not know that he was doing wrong;[79] or, on the other hand, that, though aware of the nature and consequence of his act, as well as of its wrongfulness or its illegality, he was prompted by such an uncontrollable impulse as not to be a free agent.[80]

443 Insanity may be general or partial It may consist of an entire or almost entire dispossession of the reason, or of some delusion or hallucination only,[81] or of a monomania.[82] A partial insanity is no defence where it relates to persons or things not connected with the crime charged.[83] In-

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[75] Some writers express themselves in general terms to the effect that "drunkenness is in itself a breach of military discipline." See Simmons § 591; Hough, (P.) 86; Harcourt, 56; Napier, 181; Hickman, 130. It certainly can rarely fail to be so when committed in camp or at a military post.

[76] DIGEST, 379. And see late case in G. C. M. O. 49 of 1883.

[77] Real *v.* People, 55 Barb., 551; G. O. 91, Army of the Potomac, 1863.

But "the opinion on the subject of a non-professional witness, based upon his own observations, is competent evidence, and is entitled to weight, according to the intelligence of the witness, his means of information, and the character of the derangement." Parkhurst *v.* Hosford, 21 Fed., 827.

[78] If enough, however is shown on the part of the accused, to induce—upon the whole evidence—a reasonable doubt of his sanity, he is entitled to an acquittal. Hopps *v.* People, 31 Ills., 385; Chase *v.* People 40 Id., 353. Otherwise if a mere doubt or possibility only is raised. Lynch *v.* Com., 77 Pa. St., 205.

[79] McNaghten's Case, 10 Clark & Fin., 210; Com. *v.* Rogers, 7 Met., 500; Com. *v.* Mosler, 4 Barr, 264; People *v.* Klein, Edmonds, 13; State *v.* Klinger, 43 Mo., 127. "The legal test of the accountability of a criminal for his acts is his mental ability, at the time of the commission of the crime, to discriminate between right and wrong, with respect to the offence charged in the indictment." U. S. *v.* Young, 25 Fed., 710.

[80] See Com. *v.* Rogers, *ante;* U. S. *v.* Guiteau, 1 Mackey, 498.

[81] "Where the delusion of the party is such that he has a real and firm belief of the existence of a fact which is wholly imaginary, and under that insane belief he does an act which would be justifiable if such fact existed, he is not responsible for such act." Com. *v.* Rogers, 7 Met., 500. "He must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real." McNaghten's Case, 10 Clark & Fin., 211.

[82] Such as *homicidal mania*—a morbid propensity to kill; *kleptomania*—a morbid propensity to steal; *pyromania*—a morbid incendiary propensity; *pseudomania*—a morbid propensity to falsify; and other manias now well recognized in medical jurisprudence. See Whart. & Stillé § 185.

[83] State *v.* Spencer, 1 Zabr., 196; Com. *v.* Mosler, 4 Barr, 266; Bovard *v.* State, 30 Miss., 600.

sanity may also be permanent, or intermittent, or temporary. If the party has lucid intervals when he is free from the disease, he will be responsible for criminal acts committed in such intervals.[84] If at the date of the crime he has quite recovered from a previous derangement, he will be held accountable as if such derangement had never occurred. But the recovery must be clearly shown, otherwise the presumption of law will govern—that insanity once existing has continued to exist.[85]

Insanity of whatever sort must, to constitute a defence, be absolute. No mere caprice or eccentricity, however arbitrary or extravagant, can be accepted as an excuse for crime.[86]

Insanity may be a defence though resulting solely from intoxication. But such an insanity, to relieve from criminal responsibility, must amount to a fixed mental derangement or delirium existing at the time of the act, and incapacitating the party either to appreciate its wrongfulness or to resist the impulse to commit it.[87]

444 In military cases, insanity is not a common *defence*, though the claim has been sometimes advanced by soldiers, in *extenuation* of an offence charged, that their brain has been affected by a previous wound or other injury. Where the defence is actually set up, it should be duly entertained and allowed to be supported by evidence, however improbable it may apparently be.[88] Where insanity or mental incapacity has been shown or indicated on the defence, the court has in some cases proceeded to sentence, accompanying such action with a recommendation that the sentence be remitted or that its execution be suspended till the question of sanity can be more fully investigated;[89] in other cases it has found the accused "guilty without criminality" on the expressed ground of his mental condition:[90] the preferable form is simply to *acquit* on this ground.[91]

If at the arraignment, or pending the trial, the accused, though not alleging it as a defence, manifests insanity or imbecility, the court should suspend pro-

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[84] "It is all one whether the phrenzy be fixed and permanent, or whether it were temporary by force of any disease, if the fact were committed while the party were under that distemper." 1 Hale, P. C. 36.

[85] State *v.* Spencer, 1 Zabr., 210. But it is only established permanent insanity which the law presumes to continue till the contrary is shown; not so with spasmodic or temporary mania. People *v.* Francis, 38 Cal., 183.

[86] 1 Russell, 13; Com. *v.* Haskell, 3 Brewst., 491.

[87] 3 Greenl. Ev. § 6; 1 Bishop, C. L. § 400, 406; Lanergan *v.* People, 50 Barb., 277; Com. *v.* Crozier, 1 Brewst., 349; Bailey *v.* State, 26 Ind., 422; Bradley *v.* State, 31 Ind., 492; Tyra *v.* Com., 2 Met. (Ky.) 1; People *v.* Ferriss, 55 Cal., 588; State *v.* Till, 1 Houston, 233, 511.

It may be remarked that a party cannot be held accountable for acts committed while in a condition of excessive intoxication or unnatural excitement brought on by no fault of his own. Thus Hale, (1 P. C., 32,) observes: "If a person, by the unskilfulness of his physician, or by the contrivance of his enemies, eat or drink such a thing as causeth such a temporary or permanent phrenzy as *aconitum* or *nux vomica*, this puts him into the same condition in reference to crimes as any other phrenzy and equally excuseth him."

[88] In a peculiar case in G. O. 29, Div. of the Atlantic, 1874, in which the court assumed to refuse to entertain this defence on the ground that the accused was personally known to a majority of the court, who considered themselves competent to judge of his sanity without evidence, Gen. Hancock disapproved of the proceedings as a method of disposing of a defence "unknown to the administration of justice," as well as at variance with the oath of the members to "determine according to *evidence*."

[89] G. O. 62, 73, First Mil. Dist., 1867, Do. 1, Div. of the Pacific, 1872.

[90] G. O. 13, Northern Dept., 1864. And see cases in G. O. 46 of 1824 and 36 of 1825, where the accused is convicted, but, on account of mental derangement or idiocy, is not sentenced but recommended to be discharged. See also Hickman, 215.

[91] See Simmons § 590; Kennedy, 195, O'Brien, 266.

ceedings and investigate his condition, reporting the result to the com-
445 mander;[92] or, preferably, simply report to him the apparent fact, for such investigation or other action as he may see fit to institute.

**OBEDIENCE TO ORDERS.** That the act charged as an offence was done in obedience to the order—verbal or written[93]—of a military superior, is, in general, a good defence at military law.[94]

The act, however, must have been *duly done*—must not have been either wanton or in excess of the authority or discretion conferred by the order. Thus an officer or soldier ordered to suppress a mutiny or disorder or to make an arrest, a guard ordered to keep in custody a prisoner, or a sentinel ordered to prevent persons from passing his post, will not be justified in taking life or in resorting to extreme violence, where the object of the order can be effectually accomplished by more moderate and customary means: otherwise where the forcible resistance of the party, his persistence in disregarding warnings, his sudden flight, &c., render it impracticable to seize or stop him without extreme violence or the use of a deadly weapon.[95]

Further the order, to constitute a defence, must be a *legal* one.[96] It must emanate from a proper officer—a superior authorized to give it—and it must command a thing not in itself unlawful or prohibited by law. In other words, it must be an order which the inferior is bound to obey. While obedience by inferiors is the fundamental principle of the military service, it is yet required to be rendered only to a lawful order.[97] It is "the lawful orders of the superiors appointed over them" that "all inferiors" are, by par. 1 of the Army
446 Regulations, "required to obey strictly and to execute promptly;" and it is the "lawful command of his superior officer" which by the 21st Article of war, "any officer or soldier" may be punished even with death for disobeying. But for the inferior to assume to determine the question of the lawfulness of an order given him by a superior would of itself, as a general rule, amount to insubordination, and such an assumption carried into practice would subvert military discipline.[98] Where the order is apparently regular and lawful on its face, he is not to go behind it to satisfy himself that his superior has proceeded with authority, but is to obey it according to its terms, the only exceptions recognized to the rule of obedience being cases of orders so mani-

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[92] G. O. 10, Dept. of the Gulf, 1866; G. C. M. O. 39, Dept. of the Mo., 1868. And compare People *v.* Ah Ying, 42 Cal., 19.

[93] See Pollard *v.* Baldwin, 22 Iowa, 328. So, no particular form of words is required if the order is so expressed as to be intelligible. State *v.* Small and State *v.* Hill, Smith's Reports of Decisions in Militia Cases, pp. 57, 83.

[94] Simmons § 594; Bombay R., 16; DeHart, 165; Benét, 119.

[95] See U. S. *v.* Clark, 31 Fed., 710; DIGEST, 486; and compare title "Requirements of military discipline," *post,* and authorities cited thereunder; also civil cases cited under PART III, *post.*

Where the exceeding of the order was only the result of an extreme zeal, the offence was held to be extenuated. G. O. 5, Dept. of Tenn., 1866.

[96] DIGEST, 27–8. See adjudged cases illustrating this principle cited under PART III, *post.*

[97] See Chapter XXV—TWENTY-FIRST ARTICLE.

[98] In 2 Opins., 713, the Attorney General, referring to a certain military order, held to be legal, says: "It is not for the subordinate officer who receives it to judge of the fitness or legality of such order; for the case must be an extreme one which would justify him in refusing obedience." In a leading case in the *navy,* Dinsman *v.* Wilkes, 7 Howard, 403, the Supreme Court observes: "There would be an end of all discipline if the seamen and marines on board a ship of war on a distant service were permitted to act upon their own opinion of their rights, and to throw off the authority of the commander whenever they supposed it to be unlawfully exercised."

It may be noted that the ruling in an adjudged *militia* case, State *v.* Woodman, Smith's Reports of Decisions, 25, that, to entitle a superior to the obedience of his inferior, "his command must be lawful *and reasonable,*" could scarcely be accepted as good law for the army.

festly beyond the legal power or discretion of the commander as to admit of no rational doubt of their unlawfulness.[99] Such would be a command to violate a specific law of the land or an established custom or written law of the military service, or an arbitrary command imposing an obligation not justified by law or usage,[100] or a command to do a thing wholly irregular and improper given by a superior when incapacitated by intoxication or otherwise to perform his duty.

447 Except in such instances of palpable illegality, which must be of rare occurrence, the inferior should presume that the order was lawful and authorized[1] and obey it accordingly, and in obeying it he can scarcely fail to be held justified by a military court.[2]

It may be added that an order which might not be regarded as legal in time of peace, may furnish to the inferior obeying it a complete defence in time of *war*, as being warranted by the laws and usages of war. This point, as also this Title in general, will be illustrated in treating of the *civil amenability* of military persons in PART III.

**COMPULSION OF THE ENEMY, &c.** This defence, as establishing an absence of criminal capacity, is recognized as valid in cases of persons charged with having joined the public enemy in war, or with having associated themselves with rebels, mutineers, and the like, and who claim to have done so through compulsion or inevitable necessity. But it is held in the adjudged cases on the subject that such defence can be sustained by nothing short of proof of an immediate danger of death threatened by the enemy or other compelling party; that neither a menace nor impending danger of bodily injury less than loss of life, nor a well-founded apprehension of pecuniary loss or injury to property, will amount to a justification in law.[3] Military courts indeed might feel warranted in relaxing this strict rule in special cases, as it was in fact relaxed in certain extreme cases of prisoners of war charged with desertion to the enemy in the late war.[4] It is to be added that even where the compulsion has originally so overpowered the will of the party as to constitute a legal justification, he may yet forfeit his right to have it allowed as a

448 defence, by voluntarily remaining and acting with the enemy, &c., notwithstanding opportunity of escape has been offered.[5]

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[99] A soldier is justified in law in obeying all orders of his commanding officer, "unless they are obviously, and in a manner patent to common sense, illegal." Forsyth, Const. Law, 216. And see DIGEST, 28; Tullock, 32; O'Brien, 83; De Hart, 166; Desty, Am. C. L., 20 *a*; Despan *v.* Olney, 1 Curtis, 306; Riggs *v.* State, 3 Cold., 85. And compare Chapter XXV—TWENTY-FIRST ARTICLE.

[100] Such as the order to a soldier to take his clothes to be washed by a particular laundress, held illegal in G. C. M. O. 87, Dept. of the East, 1871.

[1] See G. O. 34 of 1852, where the general rule is laid down by the Secretary of War, (Mr. Conrad,) that an inferior "should act upon the reasonable presumption that his superior was authorized to issue an order which he *might* be authorized to issue. If he acts otherwise, he does so at his peril, and subjects himself to the risk of being punished for disobedience of orders."

[2] In a case of an act done under an order admitting of question as to its legality or authority, the inferior who executed it will be more readily justified than the superior who originated the order. See G. O. 27, Dept. of Pa., 1865; McCall *v.* McDowell, Deady, 233.

[3] See McGrowther's Case, Foster, 14; Oldcastle's Case, 1 Hale, P. C., 50; Respublica *v.* McCarthy, 2 Dallas, 87; U. S. *v.* Vigol, Id., 347; U. S. *v.* Hodges, 2 Wheeler, Cr. Cas., 477; U. S. *v.* Greiner, 4 Philad., 396, 401; Simmons § 597.

[4] DIGEST, 614.

[5] "The force and fear must continue all the time the party remains with the rebels. It is incumbent on every man who makes force his defence to show an actual force, and that he quitted the service as soon as he could." McGrowther's Case, *ante*. "Those that supplied with victuals Sir John Oldcastle and his accomplices then in rebellion were acquitted by the judgment of the Court, because it was found to be done *pro timore mortis, et quod recesserunt quam cito potuerunt*." 1 Hale, P. C., 50. And see Respublica v. McCarthy, *ante;* DIGEST, 614–15.

**REQUIREMENTS OF MILITARY DISCIPLINE.** As an inferior may defend on the ground that his alleged offence was committed in due obedience to a legal order of a superior, so a *superior*, when charged with some extreme violence or severity toward an inferior, may claim in defence that his alleged act was justified by the requirements of military discipline. This defence, however, should not be accepted as sufficient by a court-martial except in cases where it clearly and satisfactorily appears that the insubordination, criminal attempt, or misconduct of the inferior, could not have been repressed or prevented without a resort to the extreme measure which is the subject of the charge. In practice the striking or otherwise assaulting of soldiers, as well as the infliction upon them of summary and unauthorized punishments, by officers, have repeatedly been made the occasion of trials by court-martial, and where not proved to be fully justified by the demands of discipline have induced severe sentences, or, if not thus visited by the courts, (which in some instances have shown themselves too indulgent to the accused,) have called forth severe reprobation from the reviewing commanders.[6] Personal violence employed by an officer against a soldier, by the use of the fist, the sword or otherwise, is always an extreme measure, and must constitute a serious military offence when resorted to in a case where an emphatic and dignified command, or an
449 immediate arrest ordered, would have put an end to the insubordination.[7]

And the principle governing such cases is of course to be applied with especial strictness to those in which, in the enforcement of discipline, life has been taken.[8] In all cases indeed of this general class it should be satisfactorily established that the act was imperatively called for by the necessities of discipline at the time; that to all appearance, or in all reasonable probability, the mutineer or rioter could not have been repressed, the escaping deserter or prisoner recaptured, the assailant subdued, the insubordinate inferior restrained or made subordinate, or the rescuer prevented, by any less extreme measure than that actually employed.[9] Otherwise the defence should not be accepted as sufficient. And in time of *peace* the superior should be held to a stricter responsibility than in war.[10] The law on this subject has been abundantly illustrated not only in military cases but in a series of civil prosecutions.[11]

[6] See G. O. 81 of 1822; Do. 28 of 1829; Do. 47 of 1830; Do. 64 of 1832; Do. 34, 53 of 1842; Do. 2, 4, 6, 17, 68 of 1843; Do. 2, 39 of 1844; G. C. M. O., 645 of 1865; Do. 80 of 1875, G. O. 53, Dept. of Va. & No. Ca., 1864; Do. 22, Dept. of the Platte, 1867; Do. 40; Dept. of the East, 1868; Do. 9, Div. of the Atlantic, 1869; Do. 5, Id., 1870; Do. 50, Dept. of the Mo., 1871; Do. 93, Dept. of the South, 1873; Do. 62, Div. Atlantic, 1888; Do. 29, Navy Dept., 1890; also Chapter X—"Disciplinary Punishments."

[7] See cases in the following Orders in which officers have been held to account for the unjustifiable striking, &c., of soldiers:—G. O. 64 of 1832; Do. 4, 6, 68 of 1843; Do. 2, 39 of 1844; Do. 53, Dept. of Va. & No. Ca., 1864; Do. 22, Dept. of the Platte, 1867; Do. 9, Div. of the Atlantic, 1869; Do. 5, Id., 1870; G. C. M. O. 29, Dept. of the Mo., 1893.

[8] See cases of officers dismissed, &c., for unjustifiably taking the lives of inferiors,—in G. C. M. O. 14 of 1871; Do. 28 of 1873; Do. 47 of 1877; Do. 112, Dept. of the East, 1870; G. O. 87, Northern Dept., 1864; Do. 39, 56, Dept. of the Susquehanna, 1864; Do. 44, Dept. of West Va., 1864; Do. 7, Dept. of Pa., 1865; Do. 17, Dept. of Ky., 1865; Do. 54, Dept. of So. Ca., 1865; Do. 25, Dept. of La., 1866; Do. 89, Second Mil. Dist., 1868. And compare Lieut. Gamage's Case, Hickman, 197–9; Cases of Maxwell and Porteous, Prendergast, 162–7.

[9] See DIGEST, 486. So, at maritime law, the master "may use a deadly weapon, when necessary to suppress a mutiny, but only when mutiny exists or is threatened." Thompson *v.* The Stacey Clarke, 54 Fed., 534.

[10] DIGEST, 486.

[11] U. S. *v.* Cornell, 2 Mason, 60; U. S. *v.* Travers, 2 Wheeler Cr. C., 490; U. S. *v.* Carr, 1 Woods, 484; U. S. *v.* Clark, 31 Fed., 710; U. S. *v.* King, 34 Fed., 302; U. S. *v.* Fullhart, 47 Fed., 802; Case of Sifford, 5 Am. Law Reg., 659; U. S. *v.* Linzee, Utah, (1894.) And compare *In re* Neagle, 39 Fed., 833. [The ruling in the recent case of Iams, (Com. *v.* Hawkins and Streator, Ct. of Com. Pleas, Pa., 1892,) remarked upon in Part III, *post*, is not regarded as sound law or sustained by the precedents.]

## V. THE CONCLUDING STATEMENT.

450 **OF WHAT IT CONSISTS.** The testimony on both sides being concluded, either party or both parties—the accused *first in order* and the judge advocate *after* him—may present a closing "statement" or address to the court, which may be oral but is commonly read from a writing. While, strictly, the closing of the argument, as of the proof, belongs to the party who has the affirmative of the issue,[12] the order indicated is that now invariably observed in the practice of our courts-martial, whatever be the nature of the defence, if any, which may have been made.[13] The statement, if in writing, is signed and attached to the record as an exhibit; if verbal, it is generally entered in the body of the record,[14] in the words, as nearly as they can be given, of the party. The statement may consist of a brief summary or version of the evidence, with such explanation, or allegation of motive, excuse, matter of extenuation, &c., as the party may desire to offer, or it may embrace, with the facts, a presentation also of the law of the case and an argument both upon the facts and the law.

**ITS PRIVILEGE.** A very considerable freedom is allowable here within certain limits.[15] The accused, for example, in his statement may sharply criticize the testimony as given by the adverse witnesses, and their apparent or supposed *animus* in giving it, as well as the conduct, motives, &c., of the persons through whose acts or at whose instance he has been brought to trial, and especially those of the actual prosecutor or responsible accuser. And evidence of malice on the part of the latter will justify an increased asperity of comment. But between animadversion of this character and defamatory personalities a line should be drawn, and the latter should not be permitted. Further, a proper consideration for the discipline and established military relations of the service should exclude from the statement gratuitously disrespectful language toward superiors or the court, as well as any form of insubordination and defiance of authority.[16] But within these limitations the court will rarely be
451 called upon to check the accused, who, under the critical circumstances in which he is placed, should certainly be allowed the largest latitude of expression consistent with the observance of the conditions mentioned, the non-observance of which indeed could give no additional force to the address.[17]

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[12] Millerd *v.* Thorn, 56 N. Y., 402.

[13] DIGEST, 711. Either party, or both parties, may waive the right to make a statement. Id., 458.

[14] G. O. 4, Dept. of N. Mex., 1864.

[15] See Tytler, 302; Simmons § 587; Pipon & Col., 55; Macomb, 45, 46; O'Brien, 258, 262, De Hart, 160; Benét, 116; Coppée, 82; DIGEST, 711; G. O. 16 of 1851; Do. 31, Div. of the Atlantic, 1873.

[16] It is well remarked by the Secretary of War in G. O. 25 of 1859 that the statement cannot be allowed to "serve as a cover for language amounting to a breach of military discipline." The use in the statement of unseemly and unmilitary language has been severely commented upon by courts in connection with their findings, (see G. O. of May 10, 1816; Lieut. Hyder's Trial, p. 156,) and still more frequently by reviewing officers. G. O. 3 of 1826; Do. 64 of 1827; Do. 16 of 1851; Do. 2 of 1856; Do. 3, Army of the Potomac, 1861; Do. 6, Dept. of La., 1869; also Do. 36, Middle Dept., 1864; Do. 52, Dept. of the Cumberland, 1868, in which—as in some other cases, see *post*—the court is declared to have erred in receiving the paper, or allowing it to be read. See the comment of Gen. Otis upon the disrespectful criticism, by counsel in a concluding argument, of the rulings of the court in the case tried—as closely approaching contempt. G. C. M. O. 24, Dept. of the Columbia, 1894.

[17] As remarked in Bombay R., 16, an indulgence in personalities not only weakens a defence, but has the effect of disposing the pardoning power against lenity toward the accused.

Where the statement manifestly exceeds a reasonable freedom, and offends in either of the particulars above indicated, the court may properly warn the accused that he is transcending the proprieties, and if he persists or does not withdraw the objectionable portion, may refuse to allow him to proceed or to admit the statement into the record.[18] In an extreme case the court may properly report the facts to the reviewing authority for the preferring of charges or other action.[19] The use of "menacing words," in the sense
452 of Art. 86, may expose the party to be proceeded against as for a contempt. It may be added that mere discursiveness or irrelevancy in the statement will not justify the court in restricting it unless it be thus so protracted as to delay unconscionably the proceedings.

As to the statement or argument on the part of the *prosecution*, it is comparatively rare that this becomes subject to criticism on account of gross improprieties of language. Where, however, it exceeds a proper license, the same procedure is to be observed as in a case of a similar address on the part of the accused.[20]

**PROCEDURE AS TO READING, &C., OF STATEMENT.** The statement of the accused, if written, may be read by the accused himself, by his counsel, by a friend, or by the judge advocate. The latter however would with less propriety act herein for the accused, where he proposed himself to present a closing address. In some important cases, in lieu of a written statement, counsel have addressed to the court oral arguments, or arguments part oral and part written, the oral portion being taken down by a stenographer.

**THE STATEMENT AS EVIDENCE.** While all due consideration is to be given to a statement properly presented, the statement is *not evidence* but a personal declaration or defence, and cannot legally be acted upon as evidence either by the court or reviewing authority.[21] Nor can it be a vehicle of evidence, or properly embrace documents or other writings, or even averments of material facts,[22] which, if duly introduced, would be evidence; and if such are embraced in it, they are no more evidence than any other part.

In some instances the statement has been *sworn* to under the impression that it will thus answer as a form of the exercise by the accused of the privilege,

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[18] Simmons § 588; McNaghten, 210; Macomb, 46; O'Brien, 258; De Hart, 161; DIGEST, 711. In G. O. 3, Army of the Potomac, 1861, where the statement is reflected upon as of an improper character, it is added:—"The court would have been entirely justified in excluding it." And see case in G. O. 23, Dept. of the Columbia, 1876. In a case in G. O. 157, Navy Dept., 1870, where the accused officer presented a statement "so disrespectful that the court would not receive it" and thereupon declined to offer any other, his action was censured by the Secretary of the Navy.

It is for the *court*, of course, if the occasion justifies it, to rule out the statement. The *judge advocate* has no authority to reject or suppress it, however objectionable, G. O. 31, Div. of the Atlantic, 1873.

[19] In some cases officers have been brought to trial for disrespectful language, &c., contained in their addresses, and in general convicted and sometimes dismissed. G. O. 2 of 1856; Do. 25 of 1859; McNaghten, 209. And see case of summary dismissal cited from James, *post*.

[20] In a case in James, (p. 461, 463,) in which the court, in connection with its judgment, reflects upon the address of the *prosecutor*, (which contained false and malicious charges against a superior officer,) the reviewing authority, concurring, proceeds to pronounce his dismissal from the service.

[21] G. O. 21, Middle Dept., 1865; Do. 28, Dept. of W. Va., 1865; Do. 231, Fifth Mil. Dist., 1869; Do. 23, Dept. of the South, 1870; G. C. M. O. 30, Dept. of the East, 1886; DIGEST, 710.

[22] See Benét, 116.

(accorded by the Act of March 16, 1878,) of testifying in his own behalf,
453 and so become evidence. Such an impression is erroneous;[23] it is irregular and improper to permit the statement to be sworn to, and that it is an affidavit adds nothing to its legal effect.[24] The statement and the testifying are distinct and independent proceedings, and the accused may, and often does, make a statement although he may previously have taken the stand as a witness.[25]

While the statement proper cannot be regarded as evidence, yet where,—as it is expressed in the Digest[26]—the accused "clearly and unequivocally admits therein *facts* material to the prosecution, such may properly be viewed by the court and reviewing officer as practically *in the case.*" Such facts must of course not be inconsistent with the plea. But admissions of this sort can scarcely in any event constitute a sufficient basis for a conviction unless supported by material testimony on the trial.

## VI. CONTEMPTS.

**SOURCE OF THE AUTHORITY OF COURTS-MARTIAL TO PUNISH FOR CONTEMPT.** A general power to punish for contempt—necessary as it is to protect the dignity of judicial tribunals and ensure a proper administration of public justice[27]—is inherent in all superior courts of record, independently of legislation.[28] But it "does not arise from the mere exercise of judicial functions,"[29] and so is not commonly possessed by inferior courts unless the same are courts of record, or are specially empowered to exercise this authority
454 by express statute.[30] Courts-martial, not being courts of record,[31] nor indeed, strictly, courts at all in the sense of being a part of the judicial department of the government, but only instrumentalities in aid of the executive arm, of temporary and limited powers, without the capacity to issue process or the means of enforcing their judgments,[32] have no general inherent authority to punish for contempt, and are only authorized so to punish as they are thereto expressly empowered by the 86th Article of war.[33]

**ART. 86—ITS GENERAL EFFECT.** This Article is as follows:—"*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.*" Its proper original may be said to be Art. 54 of the Code of James II, (itself derived from provisions of the Arts. of 1639, 1642 and 1666,) which made punishable the use of "braving or menacing words, signs, or gestures," as also the "drawing of a sword," in the presence of the court. Its effect in our law is to authorize the punishment only of some "*direct*" contempts, or contempts committed in the presence or immediate prox-

[23] DIGEST, 750.
[24] G. C. M. O. 2, Dept. of the Mo., 1880; Do. 9, Id., 1886; Do. 42, Dept. of Texas, 1880; Do. 6, 13, Id., 1882.
[25] G. C. M. O. 2, Dept. of the Mo., 1880; Do. 19, Id., 1881; DIGEST, 710.
[26] Page 710.
[27] *Ex parte* Robinson, 19 Wallace, 510; *In re* Cooper, 32 Vt., 257; State *v.* Goff, Wright, 79; *Ex parte* Smith, 28 Ind., 47; Samuel, 630; O'Brien, 151–2; De Hart, 102.
[28] 2 Hawkins, c. 1, s. 15; 4 Black. Com. 286; Samuel, 633; U. S. *v.* Hudson, 7 Cranch, 34; Anderson *v.* Dunn, 6 Wheaton, 227; *Ex parte* Robinson, 19 Wallace, 505; *In re* Kerrigan, 33 N. J., 344, 347; *In re* Cooper, 32 Vt., 254.
[29] *In re* Kerrigan, *ante.*
[30] See *In re* Cooper, *ante;* Morrison *v.* McDonald, 21 Me., 556.
[31] See Chapter V, p. 48.
[32] *Ante*, p. 48.
[33] See 18 Opins At. Gen., 278.

imity of the court when in session, as distinguished from "*constructive*" contempts, *i. e.* acts committed at a distance from the court, or beyond its "precinct," but which operate to prevent and obstruct the due administration of justice.[34] Thus, such acts as a refusal or neglect by a *witness* to appear[35] when duly summoned; or a publication in a newspaper reflecting improperly upon the action of the court or its officers in a pending case, &c.,—acts which would be constructive contempts in the civil procedure,—would not be punishable by a court-martial under Art. 86.[36]

455 Further, the Article contemplating *direct* contempts, its effect is to authorize the punishment of the acts which it enumerates only in such manner as direct contempts are properly punished,[37] *viz. summarily.*

**CONSTRUCTION OF THE ARTICLE**—"A court-martial." This general description includes *inferior* equally with the superior courts-martial. Some of the authorities indeed, repeating the view of Simmons,[38] have expressed the opinion that a regimental or garrison court was not empowered to proceed for a contempt against an officer, although it could do so against an enlisted man.[39] This opinion is founded upon the provision of the code, that such a court shall not *try* a commissioned officer. But here the distinction is lost sight of between a trial and a proceeding for contempt, the latter not being a trial, but a summary assertion and enforcement of executive authority. Thus an officer who by his conduct before an inferior court, as a witness or otherwise, is guilty of a contempt, may be as legally subjected to the punishment provided by the Article as may a soldier, and as properly as he may be before a general court.

The term under consideration, "a court-martial," cannot be held to include a *court of inquiry.*[40] There is not indeed the same reason for investing a court of inquiry with authority to punish for contempt as exists in the case of a court-martial, the former not administering justice or being in fact a court, but only a board or commission of investigation. Moreover the Article, as conferring a summary and in a measure arbitrary power, is to be strictly construed, and, as it does not give this power to courts of inquiry in express terms, cannot properly be held to convey the same by implication.[41]

456 It may be observed in this connection that, in order to empower a *court-martial* to proceed as for a contempt, under Art. 86, it is not essential that it should be *sworn* for the trial for which it has assembled. It cannot indeed

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[34] The two kinds of contempts at common law are sometimes also designated as *criminal* and *constructive.* The direct and constructive contempts which may be taken cognizance of by the U. S. courts are specified in Sec. 725, Rev. Sts. And see *Ex parte* Robinson, 19 Wallace, 511.

[35] That a failure so to appear by a military witness is not punishable as a contempt under Art. 86, but is a "neglect" cognizable under Art. 62, was noticed by Maj. Gen. Thomas, in G. O. 58, Dept. of the Cumberland, 1868.

[36] A larger power is given to *naval* courts-martial by Art. 42 of the Articles for the Government of the Navy.

[37] Johnston *v.* Com., 1 Bibb, 598; Crow *v.* State, 24 Texas, 13; State *v.* Sauvinet, 24 La. An., 121. And see Samuel, 631–633; Simmons § 434; Harcourt, 158; O'Brien, 311; De Hart, 103.

[38] § 435.

[39] Griffiths, 30; Harcourt, 157; De Hart, 105; Benét, 31.

[40] A contrary view expressed by De Hart, (p. 279,) is repeated by Benét, (p. 182.) It may be noted that the power in question is also not given to courts of inquiry by the Articles specifically relating to the same—Arts. 115–121.

In the *navy* the power to punish for contempts is expressly given to courts of inquiry, by the naval Article 57.

[41] "The power to punish for an alleged contempt is in its nature arbitrary, and its exercise is not to be upheld except under the circumstances and in the manner prescribed by law," Batchelder *v.* Moore, 42 Cal., 414.

proceed to *trial* without the additional qualification of an oath, but, as already remarked, the proceeding for a contempt is not a trial. Thus, before the oath is taken by which the organization for the trial is completed, the court is as fully empowered to pass upon and punish a contempt as it is subsequently. Such was in fact the ruling of the Judge Advocate of the Army in an early case in 1844,[42] and such was the action taken by the court in a more recent case, promulgated in General Orders,[43] in which the proceedings were approved by the President.

"**May punish at discretion.**" These words, it is to be remarked, are not mandatory, the court being *authorized*, not *required* to punish. Thus it is always open to the court to *waive* the right of proceeding under the Article, and, instead, to prefer charges against the offender, through its president or judge advocate, or to report the facts to the proper commander for his action.[44] In the majority of the cases in our service this course has in fact been pursued.[45] Except,
457 however, where the offence committed is of a peculiarly grave character, demanding a severe punishment, and one not appropriate to the action under consideration, it will be the preferable course,[46] and indeed in general the duty of the court,[47] to proceed summarily under the Article.

**PUNISHMENT.** As to the punishment authorized, the "discretion of the court, in the absence of any statutory provision, or defined custom of the service, on the subject, will properly be guided in the first instance by a reference to the common law, and the civil statutes and practice. From these sources it is ascertained that the appropriate and customary punishment for contempt is fine or imprisonment, or fine *with* imprisonment. Such was the usual punishment at common law,[48] and such—*i. e.* fine *or* imprisonment—is the only penalty authorized by the Revised Statutes to be imposed by the courts of the United States.[49] In the civil practice generally the punishment for direct contempts is

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[42] Private Shalon's case, referred to in note *post*, under "*Punishment.*"

[43] G. C. M. O. 36 of 1870.

[44] Simmons, (§ 434,) referring to this alternative mode of proceeding, says:—"At other times charges have been preferred by the court, or by direction of the confirming or other superior authority, whose notice had been drawn to the offence either by a special report or by the circumstances appearing in the record of the proceedings." And see Samuel, 634; Griffitha, 30; Harcourt, 158; O'Brien, 152; G. O. 3 of 1853.

There is a similar *civil* procedure. Thus the court say in Williamson's Case, 26 Pa. St., 19:—"It (contempt) is punished sometimes by indictment, and sometimes in a summary proceeding." And to a similar effect see U. S. *v.* Jacobi, 1 Flippin, 108, and *In re* Mullee, 7 Blatchford, 24—where it is held that a contempt offered to a U. S. court is a crime against the United States.

[45] See instances in G. O. 14 of 1855; Do. 1 of 1858; G. C. M. O. 37 of 1873; G. O. 63, Dept. of the Tenn., 1863; Do. 126, Sixteenth Army Corps, 1863; G. C. M. O. 9, Fourth Mil. Dist., 1867; G. O. 58, Dept. of the Cumberland, 1868; Do. 17, Dept. of the Columbia, 1871; Do. 79, Dept. of the South, 1874; Do. 39, Div. of the Atlantic, 1876; G. C. M. O. 7, Dept. of the Platte, 1874. And compare cases reported by Hough, 97; Id., (P.) 675. The charge should be laid under Art. 62, or, in an aggravated case of an officer, under Art. 61. The trial should, obviously, be had before a new court, *i. e.*, a court composed of officers other than those who were members of the court before which the contempt was committed. See Hough, (P.) 676; Harcourt, 158.

[46] Samuel, 638; Harcourt, 158; O'Brien, 152; De Hart, 106.

[47] See *In re* Cooper, 32 Vt., 257, where it is said of the power to punish for contempt:—"Its exercise is not merely personal to the court and its dignity: it is due to the authority of law and the administration of justice."

[48] Anciently, upon the theory that the King was present in his courts of justice, and a contempt was a personal affront to his majesty, some contempts were punishable with death. 4 Black. Com., 124. By the Articles of War of the Earls of Northumberland and Essex, in the reign of Chas. I., contempts before military courts were made similarly punishable. Samuel, 630; 1 Clode, (M. F.,) 444.

[49] Rev. Sts., Sec. 125. And see *Ex parte* Robinson, 19 Wallace, 512. The statute is merely declaratory of the common law principle. Anderson *v.* Dunn, 6 Wheaton, 227.

commonly either a small fine which can be satisfied at the moment or presently, or a brief commitment intended for the temporary restraint of the per-
458 son;[50] it being evidently deemed to be of the essence of such punishment that it should be simple, light and provisional, in the same manner as the summary proceeding of which it is the result is secondary and incidental in its character.

So, in *military* cases, the appropriate punishment under the Article would in general be either a fine, in the form of a forfeiture of pay moderate in amount and proportioned to the rank and monthly pay of the offender, or a confinement for a certain number of hours or days either in the guard-house or in quarters.[51] The court, however, would not be precluded from substituting, or adding, some other military punishment, not inappropriate to the
459 occasion nor excessive in quality or quantity.[52] The extent and character of the penalty will depend mainly upon the particular *circumstances* which exhibit the offence as aggravated or the reverse,[53] and upon the *intent* of the party.[54] In imposing the punishment some regard may well be had to the relation which the offender bears to the trial or investigation. Thus if he be the accused, his punishment should, if practicable, not be such as to interfere

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[50] A review of the leading cases shows that the fine adjudged (for a first offence) has generally been not less than five dollars nor more than one hundred dollars. In some cases the judgment has been that the party stand committed to jail till the fine is paid. When imprisonment has been imposed, it has very rarely exceeded thirty days and sometimes has been limited to a few hours. In Hill *v.* Crandall, 52 Ills., 70, the offender, an attorney, for contemptuous and defiant language addressed to the court, was required to pay a fine of five dollars and be imprisoned in the county jail until it was paid. In People *v.* Boughton, 1 Edmonds, 143–6, where the Attorney General of the State and a counsel in the case engaged in an altercation and exchanged blows, the court committed them both to the common jail for twenty-four hours. The same imprisonment, with a fine of $100 and costs, was imposed for an assault committed by an attorney on the judge, in State *v.* Garland, 25 La. An., 532. In the case of *In re* Kerrigan, 33 N. J., 344, the punishment for insulting language addressed to the court by a party present, was imprisonment in the county jail for fifteen days. In Middlebrook *v.* State, 43 Conn., 257, the punishment adjudged, for a violent assault committed in the court-room by the plaintiff in a suit, upon the counsel for the defendant, was thirty days in the common jail, with $100 fine and costs. The imprisonment should not be for an indefinite period but for a time practically certain. King *v.* James, 5 B. & Ald., 894; Yates *v.* People, 6 Johns, 339; Yates *v.* Lansing, 9 Johns., 419. In the larger number of cases the penalty has been *fine* only.

[51] In adjudging confinement, the distinction indicated in the Army Regulations between the kinds of restraint appropriate for officers and soldiers, respectively, may ordinarily well be observed. See Samuel, 634. Where, however, an officer is already in close arrest, *i. e.* confined to his quarters, the court is not precluded from imposing, for a contempt, a stricter restraint. Thus in a case of this kind in G. C. M. O. 36 of 1870, the punishment adjudged was—"To be confined in charge of the officer of the guard in the post guard-house, during the pending trial, or during the pleasure of the court, and denied all communication with any one except his counsel."

[52] In a case of a soldier published in G. C. M. O. 1, Dept. of Texas, 1875, there was added to a confinement the penalty of walking for a certain period with a loaded knapsack, weighing 25 pounds.

To the penalties of fine and imprisonment, Samuel, (p. 634,) subjoins—for cases of officers—"reprimand." If the court resort to this punishment, it may adjudge the reprimand to be administered at once by the president of the court, or by the reviewing authority in passing upon the whole case.

[53] The offence will be aggravated where it is *repeated*, (see, for example, The King *v.* Davidson, 4 B. & Ald., 333, where the prisoner, who conducted his own defence, was, for repeated improper language used in his argument, fined successively £20, £40, and again £40;) or where it is a *second* offence though of a different nature, (see State *v.* Garland, 25 La. An., 532;) or where it is committed after a warning or admonition from the court, (as in both these cases;) or where it is justified by the party on the hearing, (as in State *v.* Garland.) See *post*—"Purging the Contempt."

[54] See Sturoc's case, 48 N. H., 432. As to the effect of disavowals of improper intent, and of expressions of regret, in excusing or purging the contempt, see *post*.

either with the regular course of the trial or with the presentation of his defence to the same.[55]

It is quite clear that the imposition of dismissal, suspension, dishonorable discharge, prolonged forfeiture, or protracted or very severe imprisonment—penalties which have been resorted to in some cases[56]—would be quite
460 foreign to the purpose and province of a proceeding for contempt, and should properly be regarded as beyond the scope of the authority of a court-martial under the 86th Article. Punishments of this kind might indeed be appropriate where the party, instead of being proceeded against as for a contempt, was brought to trial upon a charge laid under Art. 61 or 62, for some grave military offence involved in his conduct.

**Execution of the punishment.** The punishment, if a fine or forfeiture to pay, may be executed through the orders of the reviewing officer, in passing upon the proceedings, in the same manner as a sentence.[57] If the punishment consists in imprisonment or other bodily restraint, it may be executed through the order of the convening authority, upon a reference and report of the facts to him by the court, or, if the offender is a member of the command of the post commander, the court, which is incapable of executing its own mandate,[58] may apply to such commander, who, if he has the means for the purpose, will execute the judgment with the same propriety and legality as he executes the arrest of the accused under the charges, furnishes the court with a guard, or performs any other ministerial function in aid of its proceedings.[59]

"Any person."[A] This designation includes certainly any *military* person
461 who may be before the court, whether in an official capacity or otherwise. It thus embraces the judge advocate[60] or the accused, a military wit-

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[55] See The King *v.* Davison, 4 B. & Ald., 340.

[56] The following were instances of summary punishment for contempt, excessive in kind or degree: Case of Lt. Col. Backenstos, adjudged "to be cashiered," published in G. O. 14 of 1850; A case, cited by Hough, (C. M., 455,) of a surgeon, punished by "suspension from rank, pay and allowances for six months;" A case of a soldier mentioned by Simmons, (§ 435, note,) and also Hough, (P., 676,) condemned to "transportation for life;" Case of Private Shalon, 7th U. S. Infy., (1844,) adjudged "to be confined for six months in a dark prison—every other month on bread and water, and chained to the floor—and to forfeit all pay for the same period;" A case published in G. C. M. O. 37, Fourth Mil. Dist., 1868, of a civilian witness at a trial before a military commission, adjudged "to be confined at hard labor for one year, and to pay a fine of five hundred dollars, and to be further confined until such fine be paid." In the first and third of these cases the punishment was formally disapproved by the reviewing authority. In Shalon's case it was materially mitigated. In the last case, the party having been in confinement for two months, the punishment was remitted by the District Commander, who remarked that confinement *at hard labor*, for contempt of court, was "unusual and improper." It is believed, however, that such a penalty would not necessarily be improper if restricted to a brief term. In a case in G. O. 79, Dept. of the South, 1874, where a soldier, for a contempt not aggravated, was adjudged to be confined at hard labor for six months, (with a forfeiture of $5 per month,) the punishment was declared by Gen. McDowell to be "excessive" and was mitigated to "confinement at hard labor for one month."

[57] That an accused may have been *acquitted* of a charge for which he was on trial cannot affect the authority to execute a punishment adjudged him, pending the trial, for a contempt committed. See Hough, (Practice,) 250, note 41.

[58] It would appear that *English* courts-martial have sometimes placed officers in arrest for contempt. See Samuel, 635; Hough, 455. Whether or not such an authority would now be conceded to them, it is clear that none such can be exercised by courts-martial in this country. See Chapter IX.

[59] Where courts-martial are attended by provost-marshals, these officials might be sufficient for the execution of some minor punishments under Art. 86.

[60] The case of the judge advocate, however, is so assimilated to that of a member, (see text *post*,) that although the courts would be fully empowered to punish him summarily for a contempt, it would probably, in a case of any aggravation, prefer to adjourn, and, reporting the facts to the convening authority, (with formal charges, if thought proper,) apply at the same time for the detail of a new judge advocate.

ness, prosecutor, counsel, clerk, or guard, or any officer or soldier who may be present as a spectator. The rank of the person is immaterial.[61] Though the party chargeable with the contempt may be senior in rank to all the members of the court, he is yet equally subject to be proceeded against under the Article as if he were the youngest officer in date in the service. To this effect was the ruling in the leading case of Major John Browne of the British army, in 1786, as reported by Samuel and other subsequent writers.[62]

**Inclusion of civilians.** Whether the term "any person" includes also *civilians*, is a question upon which the authorities have differed.[63] In the opinion of the author, a court-martial, while empowered of course to cause a disorderly civilian to be ejected from the court-room, is also empowered, under the comprehensive terms of Art. 86, to punish, for a direct contempt, by fine or imprisonment, any such civil person, whether witness, clerk, reporter, counsel, or a mere spectator at the trial, with the same legality as it may an officer or soldier of the army.[64] The enforcing of the Article in the instance of a
462 civil person is not an exercise of military *jurisdiction* over him. He is not subjected to trial and punishment for a military offence, but to the legal penalties of a defiance of the authority of the United States offered to its legally-constituted representative. Any less power in the court than one of summary punishment would be imperfect and insufficient under the circumstances. "The mere power," says Aldis J., in a case in Vermont,[65] to remove disorderly persons from the court-room would be wholly inadequate to secure either the proper transaction and dispatch of business or the respect and obedience due to the court and necessary for the administration of justice." In view, however, of the embarrassments likely to attend the execution through military machinery of a punishment adjudged a civilian for a contempt under the Article, it would in general be advised that a court-martial, in a case of such contempt, should confine itself to causing the party to be removed as a disorderly person, and, in an aggravated instance, where practicable, procuring a complaint to be lodged against him for a breach of the public peace. Where, however, the civilian is a person employed by the military authorities in connection with the army as a post-trader, quartermaster's employee, &c., the preferable course will generally be to punish him by a confinement in the post guard-house, for a brief period or till he shall purge his contempt.

**Members of the court not included.** Though it is not a necessary implication from the terms of the Article, it is yet a natural inference from its context, that it could not have been intended in the designation "*any person*," comprehensive though it be, to include a member of the court itself. And so it has been held in this country; a direct ruling on the point by the Secretary of War having been made in 1850, in the case of Lt. Col. Backenstos. This officer, as senior member and president of a general court-martial, was summarily pro-

[61] See O'Brien, 152–3; also McNaghten, 165–168, where is aptly cited the case of the commitment, for an aggravated contempt, of the Prince of Wales, afterwards Henry V, by Sir Wm. Gascoigne as Chief Justice of the King's Bench.

[62] See especially Samuel, 636.

[63] Samuel, (p. 638–9; and see Harcourt, 158; Clode, 138,) held the negative; McNaghten, (p. 168–9,) and Hough, (p. 440,) the affirmative. De Hart, (p. 106–8,) while treating the question as one involved in doubt, seems to be of opinion that a court-martial may not punish a civilian for a contempt under the Article. Benét, (p. 32,) expresses a contrary view.

[64] The Attorney General, (18 Opins., 280,) similarly construes the term "all persons," in Art. 6, Sec. XIV, of the Articles of 1776, which relates also to contempts. "The terms of this Article," he says, "are broad enough to include civilian witnesses, and it was doubtless meant to apply to them."

[65] *In re* Cooper, 32 Vt., 258.

ceeded against by the court as for a contempt, (consisting in certain arbitrary and disorderly conduct,) and was sentenced "to be expelled from the court and to be cashiered," Upon this action the following decision was announced in General Orders:[66]—"The proceedings of this court having been sub-
463 mitted to the President of the United States are not approved, as the 76th" (the present 86th) "Article of war does not confer on a court-martial the power to punish its own members." In a case of this character, therefore, the proper course, in view of this rule, would in general be for the court to adjourn and at once report the facts to the convening authority, (with a formal charge preferred, if deemed desirable,) with a view to having the offending member brought to trial for conduct prejudicial to good order and military discipline.[67]

"Who uses any menacing words, signs, or gestures, in its presence." This phraseology is unsatisfactory; the employment of the single descriptive term "menacing" having the effect of excluding from the cognizance of the court, under the Article, the use, in its presence, of improper words, &c., which yet do not express or involve a threat or defiance.[68] Thus language, however disrespectful, if it be not of a minacious character, cannot, unless actually amounting to or creating a *disorder*, in the sense of the further provision of the Article,[69] be made the occasion of summary proceedings and punishment as for a contempt—a defect certainly in the statute.

Menacing or threatening words or acts aimed at the *court* or its individual *members* are no doubt especially contemplated by the Article;[70] and words of this nature may either be spoken, or presented in a writing, as, for
464 instance, in the closing address or argument.[71] Menaces, however, if directed at the accused or a witness, or at the judge advocate, or any other person in a *quasi* official position before the court or under its legal protection, would also, it is conceived, properly fall within the designation of the Article, such conduct being equally a contempt of the court itself.[72] As to the case of a witness, while the ordinary bullying practised sometimes toward persons on the stand would scarcely come under the description of "menacing words, gestures," &c., an attempt to intimidate a witness, by alarming him with the prospect of some specific danger in case he should make or not make a certain disclosure or statement, might readily be deemed to fall within the category.

The term "*in its presence*" is taken to mean before the court in the court-room, or in its sight or hearing, and also while it is in session. Menacing

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[66] G. O. 14 of 1850.

[67] See Army Regulations, par. 1006, based on the case of Backenstos.

[68] "As to *menacing* words, they imply a threat." Hough, (C. M.,) 442. The manner, tone, emphasis, &c., of the speaker, with the surrounding circumstances, are to be taken into consideration in determining whether his language imports a menace. See *Ex parte* Robinson, 19 Wallace, 511; *In re* Cooper, 32 Vt., 256; Hough, 455.

[69] Such were the character and circumstances of the language employed in the case of contempt published in G. O. 17, Dept. of the Columbia, 1871, where the accused, when asked by the judge advocate if he had any statement to make to the court, replied—"I'll be God damned if I have any statement to make," and left the court-room abruptly and without proper authority. And see cases in G. C. M. O. 1, Dept. of Texas, 1875; G. O. 79, Dept. of the South, 1874; G. O. 126, Sixteenth Army Corps, 1863—where disrespectful and insolent language was, apparently as constituting a *disorder*, treated as a contempt.

[70] See the instance given in James, 504, and Hough, 454, of an officer, who, as prosecutor, repeatedly menaced the court "with the vengeance of a superior tribunal, accompanying his expressions by the most defying attitudes."

[71] See case cited in Hough, 455; also The King *v.* Davison, cited in note *ante*.

[72] See 4 Black. Com., 126; Hough, 443.

language, &c., however, used toward the court or a member, during a recess,—the day's session of the court not having been adjourned,—might perhaps be regarded as within the terms of the Article.[73]

"Or who disturbs its proceedings by any riot or disorder." The word "riot" is regarded as here employed not in its strictly legal sense, but rather in the sense in which it is commonly used, as meaning—to cite the definition of Webster—"wanton or unrestrained behaviour; uproar; tumult." The term "disorder" is still more general, and, in a broad sense, (analogous to that in which it is employed in Art. 62,) would mean, literally, any conduct in breach of the *order* of the proceedings. But, in the connection in which it here occurs, it is construed as implying more than a mere irregularity, and as importing disorder so rude and pronounced as to amount to a positive intrusion upon and interruption of the proceedings of the court. The more familiar examples of such a disorder and disturbance as are held to be contemplated by the
465 Article are—assaults committed upon members,[74] or upon persons connected with the court or properly before it;[75] altercations between counsel[76] or spectators;[77] drunken[78] or indecent[79] conduct; loud and continued conversation;[80] any noise or confusion which prevents the court from
466 hearing the testimony, &c.;[81] any shouting, cheering, or other expression of applause or disapprobation, especially if repeated after being

[73] Compare State *v.* Garland, 25 La. An., 532, where an assault committed upon the judge, during a recess of the court, but while it remained unadjourned, was held a direct contempt, and punished as stated in note *ante*.

[74] See cases reported in Hough, 97; Id., (P.,) 675; also in note *ante*, under "Punishment."

[75] "Likewise all such as are guilty of any injurious treatment to those who are immediately under the protection of a court of justice, are punishable by fine and imprisonment." 4 Black. Com., 126. And see Hough, 442. The leading instance in our service is that published in G. O. 63, Dept. of the Tenn., 1863, where a witness assaulted and killed, by shooting with a pistol, in the court-room, the accused, for attempting to impeach his testimony. He was not proceeded against under Art. 86, but tried for murder.

[76] See case of People *v.* Boughton, cited in note under "Punishment," *ante*. But hasty expressions of counsel, under excitement, will ordinarily be overlooked where no contempt is intended. St. Croix *v.* Piatt, Wright, 532.

[77] See U. S. *v.* Emerson, 4 Cranch C., 188; State *v.* Woodfin, 5 Ire., 200. The latter case was one of a breach of the peace *in facie curiæ*, consisting in a fight between two individuals just outside of the court-room.

[78] In G. C. M. O. 59, Dept. of the Platte, 1872, a case is referred to of a soldier ordered by the court to be confined for contempt in using profane language, in his testimony as a witness, while apparently intoxicated. In general, however, contempts by way of drunken conduct, on the part not only of members, but also of parties or witnesses, have been made the occasion of formal charges, under Art. 62, (formerly Art. 99,) and regular trials before new courts. See cases of this kind in G. O. 14 of 1855; Do. 1 of 1858; G. C. M. O. 52, Dept. of Va., 1865; Do. 9, Fourth Mil. Dist., 1867; Do. 7, Dept. of the Platte, 1874; G. O. 39, Div. of the Atlantic, 1876. In G. C. M. O. 39, Hdqrs. of Army, 1877, is a case of an officer charged and convicted under both Art. 61 and Art. 62, for appearing in uniform drunk before the court by which he was being tried. In the case in G. O. 1 of 1858, the offender, a member, became disorderly *upon being challenged*.

[79] In G. C. M. O. 1, Dept. of Texas, 1875, it was properly held *not* to constitute a contempt under Art. 86 for a soldier to come before the court by which he was to be tried with his clothing in disorder.

[80] In the case of Acton tried for murder, 17 Howell's State Trials, 463, (1729,) the judge said—"Crier, make proclamation to keep silence under pain of imprisonment. This is a trial for life and death, and I shall commit any one that don't hold their peace."

[81] See Whittem *v.* State, 36 Ind., 212; State *v.* Goff, Wright, 78; State *v.* Coulter, Id., 421; Hough, 444. "It is sufficient that the noise or hindrance be such, however small, so that the court cannot distinctly hear what is addressed to it, by its members, &c., or those before the court as witnesses." Id., 452.

checked;[83] contumelious or otherwise disrespectful language, addressed to the court or a member or the judge advocate, of so intemperate a character as to derange the proceedings, especially if persisted in after a warning from the court.[83]

**ACTS NOT DISORDERS—CONTUMACY OF WITNESS.** But acts not of a violent or disturbing character, though they might constitute contempts at common law and before the civil courts, would not be *disorders* in the sense of the present Article. Thus a quiet refusal by a witness to be sworn, or to answer a proper question on his examination, or a standing mute or simple refusal to testify at all, would not be punishable as a disorder and contempt before a court-martial. In a case indeed of a military witness, whose duty it clearly was to furnish evidence of material facts of which he was cognizant, a refusal to testify would properly subject him to a charge and trial under Art. 62. But a *civilian* witness declining thus to testify would, under our 467 existing law, do so with entire impunity.[84] The British code, (Army Act, sec. 126,) adequately provides for such a case by authorizing the President of the court-martial to certify the offence of such a person to a *court of law*, which may then proceed duly to punish the witness for his contempt as in civil cases. It is a serious defect in our system, which may, in an important case, entail a serious failure of justice, that our courts-martial (and civil courts) are wholly without power to take action in such an instance.

**UNINTENTIONAL CONTEMPT—PRESENCE OF THE COURT.** It is not essential that a disturbance of the court or interruption of its business should have been *purposed* by the party; that he disclaims any such purpose

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[82] In the report of the case of Colledge, in 8 How. S. T., 714, (1681,) after the statement of the verdict of guilty, the following occurs:—"At which there was a great shout given, at which the Court being offended, one person who was observed by the Crier to be particularly concerned in the shout, was committed to gaol for that night, but the next morning, having received a public reproof, was discharged." In the report of the trial of the Dean of St. Asaph, 21 How. S. T., 865, (1783,) during the recital of some remarks of Erskine as counsel for the defence, this note is made:—"Here some of the audience clapped, and the Court fined a gentleman £20." In Stone's case, 6 Term, 530, (also reported in 25 How. S. T., 1438,) it is narrated that:—"On this, (the rendering of the verdict of not guilty,) there was considerable shout in the hall; and a man of the name of Thompson, jumping up in the middle of the court, waving his hat and halloing, was taken into custody and find £20." But see the note to the case of the Earl of Shaftesbury, 8 Term, 821, (1681,) where, when the grand jury "returned the bill '*Ignoramus*,' the people fell a hollowing and shouting," but no one was punished for contempt.

[83] See case in G. C. M. O. 1, Dept. of Texas, 1875; also Hill *v.* Crandall, cited in note *ante*, under *"Punishment."*

[84] A ruling to this effect by the Judge Advocate General, (Digest, 99,) was followed by a similar opinion of the Attorney General, (18 Opins., 278,) in case of a civilian witness who, on being duly summoned and appearing before a court-martial, stood mute. The Atty. Gen., in holding that such a witness could not be compelled to testify or punished for not testifying, notices that the power to punish in such a case was once conferred upon courts-martial of the army by Art. 6 of Sec. XIV of the Code of 1776, as also upon *militia* courts by the Act of April 18, 1814, c. 82, s. 4. Referring to Art. 86, he says—"By this article Congress has given a court-martial power to punish for contempts; but the power is in terms restricted to cases of acts of menace in its presence or of disorder by which its proceedings are disturbed. In thus limiting the grant of power to certain cases designated in the statute, by a familiar rule of interpretation it is to be implied that all others were meant to be excluded therefrom." The view thus expressed was approved by the Secretary of War in a communication to the Comdg. Gen., Dept. of Texas, Oct. 27, 1885, stating it as his decision that "courts-martial are powerless to punish civilians for failure to testify."

But though a civilian witness cannot be compelled to testify against his will, his *attendance* will entitle him to his witness fees, (Circ. No. 1, H. A., 1886,)—a peculiar anomaly in our military law.

will not affect the offence.[85] "The question whether a contempt has or has not been committed does not depend on the intention of the party but upon the act he has done. It is a conclusion of law from the act."[86] Where, however, the court is satisfied that the contempt was quite unintentional, it will certainly impose a less penalty,[87] or it may, in its discretion, refrain from proceeding to punish at all.[88]

The words "in its presence" not being connected in the context with the clause of the Article under consideration, the same may be held to include disorders which, though disturbing the proceedings, are not committed in the court-room itself. Under Sec. 725, Rev. Sts., which authorizes the infliction
468 by U. S. courts of summary punishment for contempts when committed "in the presence of the court or so near thereto as to obstruct the administration of justice," it has been held that disorderly conduct at or near the entrance of the court-room, or outside but in the sight or hearing of the court, and so loud or conspicuous as to interrupt and embarrass the proceedings, was a contempt;[89] and a similar rule might properly be applied to like disturbances of military trials.[90]

**FORM OF PROCEDURE UNDER THE ARTICLE.** As to the manner and form of the exercise by the court of the summary power conferred by the Article, it is first to be remarked that a timely warning, call to order, or command to silence, by the president as the organ of the court, at the first symptom of any disorderly manifestation, may often have the effect of preventing the occurrence of an act of the class which the Article is designed to correct.[91]

As to the procedure when the court finds itself called upon to avail itself of the discretion to punish, *i. e.* to award punishment—it is clear, as has already been indicated, that no form of trial or investigation is required. The act having transpired in the presence, (or in the sight or hearing,) of the court, no evidence is in general necessary to inform it of the circumstances, nor is any introduced in practice.[92] Opportunity is properly given the offender to present anything he may have to offer in excuse or explanation of his lan-
469 guage or behaviour,[93] but beyond this no formality whatever is called for.

The proceeding not being a trial, it is wholly unnecessary to swear the court for the purpose, and it is also quite unnecessary, (though this has some-

[85] Watson *v.* Savings Bk., 5 So. Ca., 159. And see State *v.* Garland, 25 La. An., 533.
[86] Wartman *v.* Wartman, Taney, 370.
[87] See Sturoc's Case, 48 N. H., 432.
[88] See *post*, under "*Purging the contempt.*"
[89] U. S. *v.* Emerson, 4 Cranch C., 188; U. S. *v.* Carter, 3 Id., 423. And see, to a similar effect, in the State courts, State *v.* Woodfin, 5 Ire., 200; State *v.* Goff, Wright, 78; State *v.* Coulter, Id., 421.
[90] "Any noise close to, or so near the court as to disturb their proceeding is a contempt of court. * * * Sentries should be stationed, if required, to prevent such a disturbance." Hough, 444. And see 4 Black. Com., 125; Whittem *v.* State, 36 Ind., 212.
[91] See Hough, 444; Acton's case, cited in note *ante;* State *v.* Goff, Wright, 78.
[92] The punishment "may be adjudged without the previous form of trial; the offence being committed under the eye of the court, and incapable of being more clearly or satisfactorily proved." Samuel, 634.
[93] The court proceeds to punish after such hearing as may be deemed "just and necessary." A. & K. R. R. Co. *v.* A. R. R. Co., 49 Maine, 400. And see Fanshawe *v.* Tracy, 4 Bissell, 497; Wartman *v.* Wartman, Taney, 370; Samuel, 634–5; Simmons §434; O'Brien, 152; De Hart, 103; Benét, 31. In a case published in G. C. M. O. 37, Fourth Mil. Dist., 1868, where the court denied the application of the party to have a statement of his defence to the charge of contempt put on record, the reviewing authority, (Gen. Gillem,) observes:—"He should not only have been permitted to make his statement, if pertinent to the question, but should have been allowed a full opportunity to be heard himself, or by counsel, to show cause, if he could, why he should not be punished for contempt."

times been done,) to have a charge and specification preferred or prepared.[94] As there is no formal accusation, so there is no arraignment, plea, prosecution, or defence. As aptly observed by the court in a case already cited,[95]—"Where the contempt is committed in the presence of the court, and the court acts upon view, * * * and inflicts the punishment, there will be no charge, no plea, no issue, no trial."

All therefore that is required is, that the court should temporarily discontinue the investigation or other business upon which it is engaged, and proceed at once, or as soon as may be convenient, to pass upon the matter of the contempt, as an interlocutory question. The question is in general initiated by the motion of a member or the judge advocate, and the court sometimes clears to consider whether it will take action. The proceeding will consist mainly in the court announcing to the party, through its president, that he is held to have committed a contempt within the description of the Article, and that it is proposed to punish him for the same unless explained away, and calling upon him to make any explanation or statement he may have to offer. This action will preferably be taken in open court, as in civil cases. Proper opportunity for a hearing being afforded, and the party's statement, if any, being made, deliberation is then had, and a punishment—a contempt being found—is adjudged. If required to be immediately or presently enforced, the punishment as declared is without delay reported to the convening authority, or to the commander of the post or station if competent to execute it. A full record of the proceeding is at once made by the judge advocate,[96] not
470 separate from but in and as a part of the regular record of the trial, showing the occasion and circumstances of the contempt, the words or acts which constituted it, the excuse or statement, if any, of the party, the action taken by the court, its judgment, the disposition of the offender, &c.

**PURGING THE CONTEMPT—REMISSION OF THE PUNISHMENT.** At the hearing, or before the court-martial has proceeded to judgment upon the contempt, it may, in its discretion, receive an apology for his conduct from the offender, and, if the same is deemed sufficient and satisfactory, may consider him to have "purged" himself of the contempt, and so discontinue the special proceeding.[97] But, as is observed by the court in a late case,[98] "an expression of regret for the contempt committed is always held to be essential to purge the contempt;" a mere "disavowal of an improper motive" not being sufficient. Much less, where the disavowal is accompanied by a justification by the party

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[94] The view, as expressed by O'Brien, (p. 152,) that "the court must be sworn and a distinct charge made out," and repeated by Benét, (p. 31,) is clearly founded upon a misapprehension of the legal character of the proceeding.

[95] Whittem *v.* State, 36 Ind., 211.

[96] That an immediate record should be made, see 2 Hawkins, c. 22, s. 1; State *v.* Matthews, 37 N. H., 453.

[97] See Simmons § 434. In Capt. Burke's case, (Samuel, 635,) the officer "apologize for his conduct," and, "after a slight admonition and reprimand, was discharged of the contempt." In State *v.* Coulter, Wright, 427, the court, in accepting the apology of the defendants, (officers of a militia company, marched and exercised with loud martial music in the immediate neighborhood of the court-house,) as purging the contempt, say:—"They disclaim on oath any intention of interrupting the business of the court, or design to contemn its authority. They assert the most perfect respect for the court and their want of knowledge that it was holding its session as they approached and passed the court-house. Singular as this state of fact appears, the character of these gentlemen forbids all suspicion that they have not uttered the truth." And see G. O. 79, Dept. of the South, 1874.

[98] Watson *v.* Savings Bk., 5 So. Ca., 159.

of his conduct; for this, as held in another case,[99] is an *aggravation* of the contempt.

Where, however, the offence is one of a grave character, an expression of regret, or disclaimer of ill intent, on the part of the offender, though, when offered in good faith, it may, as has been seen, go to reduce the punishment, will not in general be accepted as purging the contempt, or properly relieving the party from the penalty which public policy requires should be enforced.[100]

471 But after a court-martial has passed finally upon a matter of contempt, and imposed a specific punishment therefor, it is not, in the opinion of the author, empowered to remit, in whole or in part, the penalty awarded.[101] The contempt, like any other military offence, is a crime against the United States;[102] a fine imposed by way of punishment accrues to the United States;[103] and, as to an imprisonment or other punishment, the same, when once duly adjudged according to Art. 86, is, as to the matter of its execution, equally with a sentence imposed by the authority of any other article, beyond the control of the court. The power of remission, therefore, can be exercised only by the military commander authorized thereto by Art. 112,[104] or by the President.[105]

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[99] State *v.* Garland, 25 La. An., 532.

[100] In Sturoc's case, 48 N. H., 428, Perley C. J., says:—"The defendant," (the publisher of a newspaper which had commented improperly upon the case,) "cannot discharge himself by alleging that he meant no harm and did not suppose he was doing anything illegal." In People *v.* Boughton, (where the contempt consisted in a personal altercation and exchange of blows between the counsel in open court,) the judge, notwithstanding the regrets expressed by both the offending parties, declined to abate the punishment—twenty-four hours in jail—and adjourned the court in order that it might be fully executed.

[101] In a case, already cited, published in G. C. M. O. 36 of 1870, the court, after imposing the punishment of confinement, accepted an apology from the offender and remitted the punishment. Here indeed the confinement adjudged was "during the pleasure of the court." But this form of punishment, besides being objectionable as indefinite, is regarded as unauthorized, since the term of a confinement adjudged for a military offence cannot be made to depend upon the will of the court.

[102] U. S. *v.* Jacobi, Flippin, 108; *In re* Mullee, cited in note *post*.

[103] Fanshawe *v.* Tracy, 4 Bissell, 498. And see Matter of Rhodes, 65 No. Ca., 518; Morris *v.* Whitehead, Id., 637; also Opins. of At. Gen. cited in second succeeding note.

[104] Art. 112 authorizes, in general terms, officers ordering courts-martial to "pardon or mitigate any punishment adjudged" by them, (certain special penalties only being excepted, which are reserved for the action of the President.)

[105] It is held in *In re* Mullee, 7 Blatchford, 24, that a contempt of a U. S. court, being an offence against the United States, the *court* cannot relieve or discharge the offender from the punishment imposed, but the President, as the pardoning power, can alone do so. And see 3 Opins. At. Gen., 622; 4 Id., 458, where it is held that the pardoning power of the President extends to the remission of fines imposed for contempts by U. S. Courts. And see State *v.* Sauvinet, 24 La. An., 119, as to the similar authority of a State executive to pardon in cases of contempts of the State courts.

The court, however, (or rather the members,) may *recommend* the remission of the punishment by the proper authority; as was done in a case in G. C. M. O. 52, Dept. of Va., 1865, where a witness, who had been punished with confinement for drunkenness in court, appeared the next day and apologized.

# CHAPTER XVIII.

## EVIDENCE.

472 COURTS-MARTIAL, which are bound in general to observe the fundamental rules of law and principles of justice observed and expounded by the civil judicature,[1] are also in general to be governed, upon trials, by the *rules of evidence* of the common law as recognized and followed by the criminal courts of the country.[2] Thus, indeed, it is laid down and repeated by the
473 authorities on the subject; and inasmuch as the rules of evidence are in the main the result of the best wisdom and experience of the past, approved and ratified by modern intelligence, it is clear that military tribunals cannot in general safely assume to reject or ignore them. But the essence of all military proceedings is summary and vigorous action, and moreover, courts-martial are no part of the Judiciary of the United States, are not even courts in the full sense of the term, but are, in peace as well as in war, simply bodies of military men ordered to investigate accusations, arrive at facts, and—where just—recommend a punishment. In the absence, therefore, of statutory direction, they can scarcely be held bound to the same strict adherence to common-law rules as are the true courts of the United States;[3] and, upon trials, they may properly be allowed to pursue a more liberal course in regard to the admission of testimony and the examination of witnesses than do, habitually, the civil

[1] Tytler, 352; Kennedy, xiii; Prendergast, 208; Maltby, 1; Macomb, 80.

[2] "Courts-martial, having cognizance only of criminal offences, are bound, in general, by the rules of evidence administered in criminal cases in the courts of common law; the only exceptions being those which are of necessity created by the nature of the service, and by the constitution of the court, and its course of proceeding." 3 Greenl. Ev. § 469, 476. "As no rules of evidence are specially prescribed by Congress for the observance of courts-martial, it must be deemed that such courts are contemplated to be governed, in general, by the same rules of evidence which govern the ordinary courts of criminal jurisdiction. These rules are supplied by the common law, excepting of course where otherwise provided by statute, in which case the latter prevail." Opinion of At. Gen. Brewster, in Whittaker's Case, March 17, 1882. 17 Opins., 311. "The rules of evidence, as established by a long line of decisions, are the only safe guides for the ascertainment of truth, and cannot safely be purposely disregarded by military courts." G. C. M. O. 6, Div. Atlantic, 1891. And to a similar effect, see Grant *v.* Gould, 2 H. Black., 69, 87; Lebanon *v.* Heath, 47 N. H., 359; People *v.* Van Allen, 55 N. Y., 39; 2 Opins. At. Gen., 344; 1 McArthur, 47; Warren, 8, 15; Harcourt, 76; Simmons § 811, 1006; Pipon & Col., 138; Hickman, 35; Kennedy, xiii–xvii, 120; Griffiths, 65; Prendergast, 206; Maltby, 2; O'Brien, 109; De Hart, 334, 405; Benét, 224; G. O. 51, Middle Dept., 1865; Do. 36, Fifth Mil. Dist., 1868; G. C. M. O. 60, Dept. of Texas, 1879; Do. 3, 52, Dept. of the East, 1880; DIGEST, 393.

That the rules of evidence are substantially the same in the criminal as in the civil procedure, see 1 Greenl. Ev. § 65; Wills, 73; U. S. *v.* Winchester, 2 McLean, 135; Brown *v.* Schock, 77 Pa. St., 471; G. O. 4, of 1843.

[3] As the Court of Claims, for example, which, being *a court of the United States*, is held to be bound, in the absence of statutory provision on the subject, by the common-law rules of evidence. Moore *v.* U. S., 91 U. S., 270.

tribunals.[4] Their purpose is to do justice; and if the effect of a technical rule is found to be to exclude material facts or otherwise obstruct a full investigation, the rule may and should be departed from. Proper occasions, however, for such departures will be exceptional and unfrequent.

The subject of this Chapter will be presented under the separate heads of:—I. Proof in general; II. Admissibility of Evidence; III. Oral Testimony; IV. Written Testimony.

## I. PROOF IN GENERAL.

Under this head will be noticed:—I. What is to be proved; II. How much is to be proved; III. What is to be presumed; IV. What is to be judicially taken notice of.

### I. What is to be Proved.

474 **THE THREE FACTS TO BE ESTABLISHED.** Upon every criminal trial—military as well as civil—the burden is on the prosecution to establish guilt, not on the accused to establish his innocence. In the establishing of guilt, there are to be demonstrated three principal facts, viz.—That the act charged as an offence was really committed; That the accused committed it; That he committed it with the requisite criminal intent.

**Proof of the Commission.** The *corpus delicti*[5] so called, or the fact that the alleged criminal act was committed—by some one,[6] is, as a separate fact to be proved, especially illustrated in cases of homicide and larceny, and—at military law—in cases of offences under Arts. 5, 8, 13, 14, 17, 22, 26, 45, 46, 58 and 60. Here the fact that a person has been unlawfully killed, that property has been unlawfully appropriated, that a false return or muster has been made, that arms, clothing, &c., have been sold or through neglect lost, &c., that a mutiny has occurred, that a challenge has been sent, that the enemy has been relieved, that a fraudulent claim has been advanced, &c., is a distinct fact to be established independently of the fact of the agency of the accused.

**Proof of the agency and identity of the accused.** This, as an independent fact, is especially material to be clearly shown where the offence was committed secretly or in the night time, or where the accused was a stranger to the witnesses, or was one of a number of persons associated together, or, (by reason of their similar dress or otherwise,) not readily distinguished from each other.[7] In the cases of some of the military offences, as desertion,
475 cowardice, drunkenness on duty, sleeping on post, &c., the agency of the accused is so connected with the act done that proof of the latter is also proof of the former.

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[4] Grant *v.* Gould, 2 H. Black., 104; Kennedy, 120; Tullock, 13; Bombay R., 19; Pratt, 198; Lieut. Col. Fremont's Trial, 239–40, 256. "Courts-martial had much better err on the side of liberality towards a prisoner than, by endeavoring to solve nice and technical refinements of the laws of evidence, assume the risk of injuriously denying him a proper latitude for defence." G. C. M. O. 32 of 1872. And, to a similar effect, see G. O. 104, Dept. of Dakota, 1871; Do. 23, Dept. of Texas, 1873; Do. 49, 60, Dept. of Cal., 1873; G. C. M. O. 60, Dept. of the Mo., 1874.

[5] Proof of this first essential is not done away with by the fact that the accused has confessed the offence. In other words proof of a confession does not prove the *corpus delicti*, but the latter must be independently proved before evidence of the confession can be admitted. 1 Greenl. Ev. § 217; G. O. 234, Fifth Mil. Dist., 1869; Do. 5, 48, Dept. of the Platte, 1871.

[6] U. S. *v.* Searcy, 26 Fed., 435. The term *corpus delicti* is sometimes referred to as including not only the criminal act but also the agency of the accused therein. See Wharton, Cr. Ev. § 325, 633. The definition of the text, (and see 3 Greenl. Ev. § 30,) is, however, preferred.

[7] See case in G. O. 1, Dept. of the Platte, 1871, in which the proceedings were disapproved because the proof did not sufficiently connect the accused with the offence.

**Proof of the intent.** Crime, at common law, is made up of intent and act; the wrongfulness of the intent constituting the criminality of the act. To complete the legal crime, an intent to effect the wrong and an act performed in pursuance of such intent must concur, and without this combination there can be no crime.[8] And if the wrongful intent is present, the wrongful act committed is a complete crime, though it may not be the precise act had in view.[9] Where the intent is shared in by several persons, as in conspiracy, mutiny, &c., every one who has contributed to the intent, and at the same time engaged in the act, is criminal.[10]

In respect to the element of *intent*, crimes are distinguished as follows:—those in which a distinct and specific intent, independent of the mere act, is essential to constitute the offence; and those in which the act is the principal feature, the existence of the wrongful intent being simply inferable therefrom. Of the former are murder, larceny, burglary, desertion and mutiny; of the latter arson, rape, perjury, disobedience of orders, drunkenness on duty, neglect of duty.[11] In cases of the fomer class the characteristic intent must be established affirmatively as a separate fact; in the latter class of cases it is only necessary to prove the unlawful act, for every man is presumed in law to have intended to do what he actually does, and the burden of proof is upon him to show the contrary.[12] "When"—as observed by a U. S. Court[13]—"the proof shows that an unlawful act was done, the law presumes the intent, and proof of the act being a violation of law is proof of the intent."

476 **Facts negativing intent.** Under the head of the DEFENCE in Chapter XVII, we have already considered certain facts and conditions, the effect of the proof of which is to negative the existence of the element of wrongful intent in alleged crime, or to show an incapacity to entertain such intent. These are such as Ignorance or mistake of fact, Ignorance of law, Drunkenness, Insanity, Compulsion by military orders or by hostile force, and Necessity of executing military discipline.

The subject of the *intent* will be further illustrated in considering the specific offences which form the subjects of the different Articles of war.

### II. How Much is to be Proved.

**REASONABLE DOUBT.** In a civil action the plaintiff needs in general but to make out a *prima facie* case, or to offer evidence materially preponderating over that of the defendant, to give him the verdict or judgment. But the quantity of the proof required (on the part of the prosecution) is considerably greater upon criminal trials, where there exists always in favor of the accused the presumption of innocence—a presumption from which results the familiar rule of criminal evidence that, to authorize a conviction, the guilt of the accused must be established *beyond a reasonable doubt*. By "reasonable doubt" is intended not fanciful or ingenious doubt or conjecture, but substantial, honest, conscientious doubt, suggested by the material evidence in the case. "It is," as expressed by the court in a recent case,[14] "an honest, substantial misgiving, generated by insufficiency of proof. It is not a captious doubt, not a doubt suggested by the ingenuity of counsel or jury, and unwarranted by the testimony; nor is it a doubt born of a merciful inclination to permit the defendant

[8] 3 Greenl. Ev. § 13; 1 Bishop, C. L. § 285–287; U. S. *v.* Houghton, 14 Fed., 544.
[9] 1 Bishop, C. L. § 327–329.
[10] 1 Bishop, C. L. § 630, 636.
[11] "Neglect in the discharge of a duty, or indifference to consequences, is in many cases equivalent to a specific criminal intention." U. S. *v.* Thompson, 8 Sawyer, 122.
[12] 3 Greenl. Ev. § 13, 14.
[13] U. S. *v.* Baldridge, 11 Fed., 552.
[14] Woolson, J., in U. S. *v.* Newton, 52 Fed., 290.

to escape conviction, nor prompted by sympathy for him or those connected with him." The meaning of the rule is that the proof must be such as to exclude, not every hypothesis or possibility of innocence, but any fair and rational hypothesis except that of guilt; what is required being not an absolute or mathematical but a "moral certainty."[15] A court-martial which
477 acquits because, upon the evidence, the accused may *possibly* be innocent falls as far short of appreciating the proper *quantum* of proof required in a criminal trial, as does a court which convicts because the accused is *probably* guilty. However convincing the testimony, it is nearly always possible that the accused may be innocent: on the other hand, though the probabilities may favor his guilt, a material and sensible doubt of the same may exist, of which he is entitled to the benefit.

It is to be observed that the general rule indicated applies alike to each of the three main facts required to be made out upon a trial, in order to establish guilt, *viz.*—the *corpus delicti*, the identity of the accused with the real offender, and the requisite criminal *animus*. Each must be proved beyond a reasonable doubt.[16] The rule is equally applicable to military as to civil prosecutions.[17]

## III. What is to be Presumed.

**Presumption in General — Kinds of Presumption.** It
478 is observed by Bishop[18] that the whole law of evidence rests upon presumptions, and it has been said, by a distinguished English judge,[19] of *proof* itself that it is "nothing more than a presumption of the highest order."

Presumptions are most simply divided into *presumptions of law and presumptions of fact.*[20]

**Presumptions of law.** These are general propositions established by the law, which are accepted without evidence by the courts as being either "absolutely" or *prima facie* true, and have thus been distinguished as "conclusive" and "disputable."[21] *Conclusive* presumptions are inferences of the law in

[15] 3 Greenl. Ev. § 29; 1 Bishop, C. P. § 1093, 1094; Wharton, Cr. Ev. § 1; Wills, Cir. Ev., 157; U. S. *v.* Douglass, 2 Blatchford, 212; U. S. *v.* Gleason, Woolworth, 128; U. S. *v.* Carr, 1 Woods, 486; U. S. *v.* Babcock, 3 Dillon, 621; U. S. *v.* King, 34 Fed., 302; U. S. *v.* Hughes, Id., 734; U. S. *v.* Meagher, 37 Fed., 881; U. S. *v.* Means, 42 Fed., 559; Com. *v.* Webster, 5 Cush., 320; Com. *v.* Costley, 118 Mass., 21; Com. *v.* Drum, 58 Pa. St., 22; Meyer *v.* Com., 83 Id., 131; Com. *v.* Carey, 2 Brewst., 304; G. O. 27, Army of the Potomac, 1864; Do. 46, Dept. of the Mo., 1864; G. C. M. O. 67, Dept. of Cal., 1883; Manual, 71 § 42. And compare Coffin *v.* U. S. 156 U. S., 432; Cochran *v.* U. S., Id., 287.

In U. S. *v.* Babcock, (p. 621–2,) Dillon, J., well observes:—"The defendant, by the policy of our law, can neither be compelled nor permitted to testify. As a substitute for this deprivation, the law clothes the defendant with a presumption of innocence which attends and protects him until it is overcome by testimony which proves his guilt beyond a reasonable doubt." This was said in 1876. But the fact that the accused may now be permitted to testify cannot, it is believed, impair the initial legal presumption.

[16] "It is incumbent on the Government to prove beyond reasonable doubt the truth of every fact in the indictment necessary in point of law to constitute the offence." Curtis, J., in U. S. *v.* McGlue, 1 Curtis, 2. And see U. S. *v.* Wright, 16 Fed., 112; U. S. *v.* Newton, 52 Fed., 275.

[17] Courts-martial, being, as criminal courts, bound by the rules of criminal evidence, "ought not to convict the prisoner until all reasonable doubt of his guilt is removed; allowing the presumption of innocence, in all cases, to operate in his favor" 3 Greenl. Ev. § 469; G. C. M. O. 39, of 1889; Do. 18, 47, Div. Atlantic, 1886.

[18] 1 C. P. § 1096.

[19] "Lord Erskine, in the Banbury Peerage Case." Wills, Circumstantial Evidence, 34.

[20] See, on this distinction, U. S. *v.* Searcy, 26 Fed., 437.

[21] 1 Greenl. Ev., 14. Some later writers do not approve this distinction, on the ground that few if any presumptions can be said to be absolutely conclusive. See the subject discussed in Wharton, Cr. Ev., Ch. XIV; also 1 Bishop, C. P. § 1099, 1100.

regard to which, as it is expressed by Greenleaf,[22] "all corroborating evidence is dispensed with and all opposing evidence is forbidden." Of these one of the most familiar is, that every sane person, who is a free agent, is "conclusively presumed to contemplate the natural and probable consequences of his own acts."[23] So, according to the earlier authorities, an infant under seven years is "conclusively presumed incapable" of committng a felony.[24] There is also the conclusive presumption, in favor of judicial proceedings, that the records of courts of justice have been correctly made up.[25] Among *disputable* presumptions, (where the inference, though more or less strong, is not absolute but may be overcome by counter evidence,[26]) are—the presumption in favor of the
479 innocence of every person accused of crime;[27] the presumption in favor of the sanity of persons in general, and, on the other hand, the presumption that unsoundness of mind, (not accidental or temporary, as upon disease or drunkenness,) proved to have existed at a previous date, has continued;[28] the presumption of ownership arising from the open possession of property;[29] the presumptions as to public officers, that they are legally in office, and that they properly perform their official duties[30]—presumptions especially applicable to the military service.[31]

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[22] 1 Greenl. Ev. § 15.

[23] 1 Greenl. Ev. § 18; 3 Id. § 14. "The law makes a man answerable for even the unexpected consequences of his crimes; and for this purpose imputes the intention to produce the consequence as well as the original act." State *v.* Cooper, 1 Green, 361. But see 1 Bishop, C. P. § 1100.

[24] 1 Greenl. Ev. § 28; 3 Id. § 4.

[25] 1 Greenl. Ev. § 19.

[26] "All presumptions as to matters of *fact*, capable of ocular or tangible proof, * * * are in their nature disputable. No conclusive character attaches to them. Presumptions are indulged to supply place of facts. When these appear, presumptions disappear." Field, J., in Lincoln *v.* French, 13 Fed., 48.

[27] Warren, (p. 19,) says of this presumption: "It alone can guard against first impressions, prepossessions and prejudices." A further presumption may here be noted, that in favor of the character of a *witness* till impeached. Johnson *v.* State, 21 Ind., 329.

[28] Greenleaf, (1 Ev. § 42,) cites these two presumptions as illustrations of the more general one, that—"The opinions of individuals, once entertained and expressed, and the state of mind once proved to exist, are presumed to remain unchanged until the contrary appears." In Sleeper *v.* Van Middlesworth, 4 Denio, 431, the court designate this presumption as one "against any sudden change in the moral, as well as the mental and social, condition of man."

[29] 1 Greenl. Ev. § 34. "It is true that a presumption of ownership or title does arise from the possession of personalty; but it is the lowest form of presumption, and is subject to be rebutted by proof and the circumstances attending and surrounding the possession." Myers *v.* U. S., 24 Ct. Cl., 456.

[30] Griffith *v.* U. S., 22 Ct. Cl., 183. It is "a presumption that one who publicly performs official functions holds the office in fact; and no record or other like proof of his appointment is, in the first instance, required. * * * Official persons are presumed to have done their duty." 1 Bishop, C. P. § 1130, 1131. And see 1 Greenl. Ev. § 40, 83, 92, 195, 207.

There are also the presumptions, founded upon the course of official public business, that certain results will follow if certain conditions are complied with. Thus if a letter is shown to have been deposited prepaid and properly addressed in the post office, it may be presumed, in the absence of rebutting evidence, that it reached its destination and was received. In U. S. *v.* Babcock, 3 Dillon, 571, the court applied the same rule to telegraphic dispatches.

[31] Thus, on the trial of an officer or soldier, it is not necessary to produce the commission, or prove the official character or rank of the officer; or to produce the enlistment paper, or prove the formal enlistment of the soldier. It is sufficient to show that the officer has publicly acted and been recognized as such, and that the soldier has received pay or performed service as such. 3 Greenl. Ev. § 483; Lebanon *v.* Heath, 47 N. H., 359; O'Brien, 171. The rule of presumption of due appointment arising from the exercise of the office "would appear to apply with even more force to military than to civil officers." Jones *v.* Johnson, 24 Ark., 256, 260.

480 **Presumptions of fact.** These are simply inferences as to the existence of a fact derived from some other fact or facts, inferences not deduced by the law, but by the human reason. Varying with the circumstances of every case, they are not peculiar to judicial investigations, but illustrate the ordinary operations of the intellect in arriving at conclusions in general. Applied to criminal cases, they are inferences as to the fact of the guilt or innocence of the accused, deduced from minor facts and circumstances, physical and moral. They do not constitute or exemplify fixed legal principles, but "are in truth but mere arguments of which the major premise is not a rule of law."[32]

**Inculpatory and exculpatory presumptions.** Of this class are the "*inculpatory*" presumptions, derived from collateral circumstances and declarations indicating a motive for crime, from preparations for the commission of crime, from failure to account satisfactorily for suspicious appearances, from acts apparently exhibiting a criminal consciousness, (as concealment, disguise, or flight,) from the suppression, destruction, simulation, or fabrication of evidence from attempts to prevent a fair trial, (as by endeavors to suborn or bribe witnesses, &c.,[33]) as well as from the numerous *physical* circumstances—such as impressions of foot-marks, blood on garments, possession of weapons or instruments likely to have been used in the commission of the crime, possession of property recently in the possession of the subject of the larceny, violence, &c.—which go to identify an accused as the guilty party. Of this class also are various presumptions similarly deduced but of an "*exculpatory*" character. Such are—the absence of apparent motive to commit the crime, the presence of a strong motive not to commit it, the fact of previous exemplary character, or of conduct and deportment not apparently reconcilable with guilt, the appearance of malice or falsehood on the part of the prosecuting witness, &c.[34]

481. **Presumptions and "circumstantial" evidence.** The above are some of the presumptions of fact, which, in nearly every criminal case not established by direct testimony, combine, (for they rarely arise separately,) to induce the conclusion either of guilt or the reverse. And it is the various grounds of these presumptions, such as have been specified, which mainly constitute the material of *Circumstantial* as opposed to *Direct* evidence; the latter being the evidence, (comparatively rarely attainable in criminal trials,) of witnesses who testify from personal knowledge derived from the senses, as from seeing or hearing; the former the evidence furnished by the great variety of minor facts, circumstances and indications connected with or relating to the principal fact of the crime committed, and affording *presumptions*, more or less strong or weak, of the guilt or innocence of the accused.[35]

## IV. What is to be Judicially Taken Notice of.

We find further, in entering upon the subject of evidence, many facts of a conspicuous, general, or public character, which so authenticate themselves in law that the courts take judicial notice of their existence as matters of course, and which are not required either to be charged or proved. These, which have already been referred to in Chapter X on the Charge, are such as—The laws

[32] 1 Greenl. Ev. § 44. And see Id. § 48.

[33] An unsuccessful attempt to establish an *alibi* has sometimes been cited as affording an inculpatory presumption against an accused; but in general probably such a failure should no more give rise to an unfavorable presumption than a failure to make out any other defence. See Miller *v.* People, 39 Ills., 457.

[34] See Wills, Cir. Ev., Ch. III, IV and V.

[35] See 1 Greenl. Ev. § 13; Wills, Cir. Ev., 15, 16; U. S. *v.* Searcy, 26 Fed., 437.

of nations and of war, the provisions of the Constitution, public statutes and executive proclamations, the system and framework of the Government, the powers of the President and of the heads of the executive departments, matters of public history, the existence of a pending war,[36] the geographical features of the country;[37] and so of the ordinary meaning of words in our
482 language,[38] &c. Military courts will also take notice of the existence and situation of military departments, reservations and posts, and will accept as authentic, without proof of their authority, the published "general" orders, circulars, and usually "special" orders, emanating from the War Department or Headquarters of the Army, or from the headquarters of the different military divisions and departments of the army.[39] So, inferior courts will properly take judicial notice of the formal published orders of the commander of the regiment or post. Facts within the common observation and knowledge of mankind will also be judicially taken notice of without proof by military equally as by civil tribunals.[40]

## II. ADMISSIBILITY OF EVIDENCE.

This subject will be considered under the following heads:—I. General rules governing the admission of testimony; II. Hearsay; III. Confessions; IV. Evidence excluded from considerations of public policy.

### I. General Rules Governing the Admission of Testimony.

**THE THREE PRINCIPAL RULES.** These, (which are the more directly illustrated by the testimony on the part of the *prosecution*,) may be stated as follows: 1. The evidence must be relevant; 2. The burden of proof of guilt is always on the government; 3. The best evidence must be produced of which the case is susceptible.

**1. The evidence must be relevant.** The testimony offered by the *prosecution*, whether oral or written, must be relevant, that is to say, must be apposite to the material averments of the indictment or charge and be such as to establish or tend to establish the commission of the offence alleged; otherwise, it may be objected to as "irrelevant" or "immaterial," and, upon such
483 objection, will, in general, properly not be admitted by the court.[41] The testimony, to be admissible, need not indeed *directly* or *immediately*

[36] In Cuyler *v.* Terrill, 1 Abb., (U. S.,) 169, it was held that the U. S. courts would take judicial notice of the existence of the civil war of 1861–1865 and "also of particular acts which led to it, or happened during its continuance, whenever it becomes essential to the ends of justice to do so."

[37] 1 Greenl. Ev. § 5, 6; Wharton, Cr. Ev. § 308; La Vengeance, 3 Dall., 297; Furman *v.* Nichol, 8 Wallace, 44; Armstrong *v.* U. S., 13 Id., 154; Prize Cases, 2 Black, 635; Turner *v.* U. S., 21 Ct. Cl., 24.

[38] Nix *v.* Hedden, 149 U. S., 304.

[39] See G. O. 121, Second Mil. Dist., 1867. A *civil* court, however, will not take judicial notice, without proof, of the orders issued by a military department commander. Burke *v.* Miltenberger, 19 Wallace, 519.

[40] It is not necessary to prove facts which the jury may be presumed to know as well as any witness, or which are "within the ordinary observation of all men." Kraus *v.* R. R. Co., 55 Iowa, 338–9.

[41] It need hardly be remarked that the exclusive authority to decide upon the relevancy of testimony, whether objected to by a party or by a member, rests with the Court. A witness, of whatever rank, on a military trial, has no authority to pass upon the relevancy or competency of his own evidence. In G. O. 1, Dept. of the South, 1869, Gen. Meade, in disapproving certain proceedings of a court-martial, comments as follows:—"The court, on the application of the defence, directed a witness" (an officer) "for the prosecution to produce a copy of a certain paper, which he refused to do on the ground that it was the business of the defence to produce the original. The witness thus assumed the functions of the court in deciding upon the relevancy of the evidence, and his refusal was disrespectful and a grave breach of discipline."

sustain the charge, provided it merely "constitutes a link in the chain of proof;"[43] and evidence offered which is seemingly irrelevant and is objected to as such may yet be admitted by the court, if persuaded by the representations of the party offering it that it will be rendered relevant by other testimony to be subsequently introduced.[43]

To be relevant, the evidence must be confined to the *issue* in the case; evidence as to the commission or attempted commission by the accused, at another time, of an offence quite independent of and distinct from that charged, though of the same sort, is in general irrelevant and inadmissible.[44] Where, however, two or more criminal acts or attempts have been committed by the accused at the same time, or as parts of the same transaction or system, evidence in regard to the one may be relevant as illustrating the commission of the other.[45]

484 So, evidence of collateral facts—as declarations or acts of the accused, or an accomplice, made or done before, or even after, the commission of the offence charged—may sometimes be relevant and admissible as tending to prove *intent* or *guilty knowledge*.[46]

But though evidence, to be admissible, must tend to prove the issue, yet, except as to matters of essential description, it is relevant and sufficient if it supports only *substantially* the allegations of the charge.[47] Mere surplusage in the charge need not be noticed in the proof, and averments which are formal merely or immaterial need not be proved as laid. Thus the formal averment in an indictment for homicide, that the killing was done with a particular weapon, need not be verified by the evidence, but it will be enough to show that any other deadly weapon was employed.[48] So of the allegations of time, place, quantity, quality, and value—the rule as to relevancy does not require strict proof;[49] and this especially in military cases, in view of the authority of courts-martial to except and substitute in their findings. As to time and place in military specifications, while these may sometimes require to be more precisely distinguished—as where a series of distinct offences of the same class are alleged to have been committed on separate days—it is in general sufficient if the time be shown to have been within the legal period of limitation,[50] and the place within the jurisdiction of the court, that is to say, within the United States.

The rule as to relevancy applies also to the *defence*. Whether testimony on the part of the accused is or not relevant must be determined by the nature of the defence in each case. In a military case, not only is such testimony relevant as goes to the gist of the particular defence, but also such as may establish good character or avail to extenuate the punishment in case of conviction.

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[43] 1 Greenl. Ev. § 51 *a*; Thompson *v.* Bowie, 4 Wallace, 471.

[43] 1 Greenl. Ev. § 51 *a*; U. S. *v.* Flowery, 1 Sprague, 109; G. O. 41, Dept. of the Platte, 1870. Such evidence is sometimes admitted, "subject to the proof to be given hereafter;" that is to say, subject to be accepted and retained, or rejected, in the end, according as subsequent testimony may or may not show it to be relevant. See Kelly *v.* Crawford, 5 Wallace, 790.

[44] The purpose of such testimony, as generally offered, *viz.* to raise an *inference* that the accused committed the similar act charged in the indictment, cannot be recognized as legitimate. See People *v.* Jones, 31 Cal., 565.

[45] 1 Greenl. Ev. § 52, 53; Wharton, Cr. Ev. § 32, 38, 49; Wills, Cir. Ev., 44; Manual, 65 § 21. The collateral offence must form "a link in the chain of circumstances or proof relied upon for conviction." Swan *v.* Com., 104 Pa. St., 218.

[46] Manual, 66 § 22–25.

[47] 1 Greenl. Ev. § 56, 63.

[48] 1 Greenl. Ev. § 59.

[49] 1 Greenl. Ev. § 61.

[50] As to the rule in civil prosecutions, see McBryde *v.* State, 34 Ga., 203.

Where irrelevant or immaterial testimony has been admitted in a case, but such testimony was manifestly such as could not have affected the find-
485 ing or impaired the rights of the accused, the same should not be regarded as sufficient to induce a disapproval of finding or sentence.[51]

**2. The burden of proof of guilt is always on the prosecution.** It is a general rule of evidence that "the obligation of proving any fact lies upon the party who substantially asserts the affirmative of the issue."[52] And upon a criminal trial, where there stands at the threshold the presumption of the innocence of the accused, and the affirmative of the issue is thus necessarily asserted by the Government, the burden is imposed upon the prosecution of proving the existence of every material fact required to establish the offence charged. The *onus probandi* is not always confined to the proof of a proposition affirmative in form. The gist of the offence may be a criminal neglect,[53] and here the prosecution is called upon to prove a negative. This more frequently occurs in military than in civil cases, several of the Articles of war making punishable in terms the not doing of some duty incidental to the military status, or the doing of some act without the authority of the proper superior. One or the other of these negative elements may be perceived in offences designated in Arts. 7, 15, 16, 17, 23, 31, 32, 33, 34, 35, 40, 60, 67, 69; but it is the general charge laid under Art. 62, of "neglect of duty, to the prejudice of good order and military discipline," that most conspicuously illustrates the frequency of the obligation to prove a negative which is imposed upon the government in military cases. Yet the negative here is often but an affirmative in another form; the issue requiring the proving affirmatively of the commission of a specific act the doing of which is alleged to constitute the offence.

The burden of proof of guilt never shifts from the side of the prosecution. The accused may indeed admit the commission by him of the act charged, claiming that it did not constitute an offence on his part because of the existence of a certain fact which he sets up as a defence. Asserting this defence, the burden is upon him to maintain it. But the onus of proving *guilt* remains with the State, and if the accused so far makes out his defence as to
486 involve the main issue in a reasonable doubt, the prosecution must dispel this doubt by further evidence, in order to obtain a conviction.[54]

**3. The best evidence must be produced of which the case is susceptible.** The rule that proof is to be made by the highest existing evidence is one of *quality*, not of *quantity*.[55] It does not require that the greatest amount of evidence should be accumulated for the proof of any fact, but only that every allegation should be established by the best, that is to say most authoritative and legally satisfactory, evidence of which the case is capable. But again the rule does not mean that indirect or circumstantial evidence, or evidence of less strength, is to be rejected where direct evidence or evidence of greater strength exists and may be produced; for indirect, weak, or imperfect evidence is equally admissible in law with direct, strong, or full evidence, provided only it be relevant. What is meant is that, where the evidence actually offered indicates of itself the existence of higher evidence for which it is clearly only

[51] See U. S. *v.* Jones, 32 Fed., 570.
[52] 1 Greenl. Ev. § 74.
[53] 1 Greenl. Ev. § 80.
[54] See, in this connection, 1 Bishop, C. P. § 1050, 1051.
[55] See Manual, 71 § 41; Id., 78 § 44.

a substitute, the substitutional evidence is incompetent and not to be admitted if objected to.[56]

The familiar application of the principle is to cases in which record evidence or other *written* evidence exists of a material fact which is attempted, in the course of the trial, to be established by *oral* testimony. Where such testimony, as offered, discloses the fact of the existence of the written proof which the law regards as of higher quality, (or where such fact has been disclosed by the pleadings or by previous testimony,) the secondary evi-
487 dence may be objected to and, upon objection, will properly be excluded.[57]

Thus, in proving a charge of perjury or false swearing, committed at a military trial, the record of the trial is clearly the best evidence of the testimony given by the accused, and parol evidence of the same, unless introduced by consent, will be inadmissible.[58] The rule excluding the oral testimony in such cases is adopted not only because the writing must necessarily afford the most satisfactory evidence of the facts which it sets forth, but also, as Greenleaf observes, "for the prevention of fraud;" since, as he adds, "whenever it is apparent that better evidence is withheld, it is fair to presume that the party has some sinister motive for not producing it, and that, if offered, his design will be frustrated. The rule thus becomes essential to the pure administration of justice."[59]

But it may happen that oral testimony may be the original and best evidence as to a fact or facts when a statement of the same exists in writing. Thus where certain facts within the knowledge of the writer, and material to the issue in a case on trial, have been *recited* in an official endorsement, certificate, communication, or other writing, the primary and best evidence of such facts will be not the writing but the personal declaration of the same, under oath and subject to cross-examination, by the writer, and if he can be obtained as a witness, the written statement should not be received.[60]

**Exceptions.** To the general rule, however, there are certain exceptions,
488 growing out of considerations of public policy and convenience, or out of the necessities or peculiar circumstances of the case. Thus public records and documents may be proved by *copy*, as will be hereafter indicated; though copies of writings which are not public records will be secondary

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[56] "The rule of law is that the best evidence must be given of which the nature of the thing is capable; that is, that no evidence shall be received which presupposes greater evidence behind, in the party's possession or power." Marshall, C. J., in Tayloe *v.* Riggs, 1 Peters, 596. And see Ang.-Am., &c., Co. *v.* Cannon, 31 Fed., 313; 1 Greenl. Ev. § 82, 84; Manual, 68 § 30. The two sorts of evidence thus related are sometimes termed "primary" and "secondary." Even when secondary evidence is obliged to be furnished, it must be the best the party has it in his power to produce under the circumstances. Cornett *v.* Williams, 20 Wallace, 226. In a case of desertion, in G. C. M. O. 25, Dept. of the Mo., 1887, the proceedings and sentence were disapproved because the best evidence to prove the offence, though accessible to the prosecution, was not introduced.

[57] That written *post orders* are not properly provable by parol, if it is practicable to produce them, see G. O. 60, Third Mil. Dist., 1867; Do. 11, Dept. of the South, 1869.

[58] See recent cases in G. C. M. O. 93, Dept. of the East, 1884, and in Do. 2 Dept. of the Mo., 1888, where the above paragraph is cited by Gen. Merritt.

[59] 1 Evidence § 82. And see U. S. *v.* Reyburn, 6 Peters, 367; Manual, 68 § 30. "The withholding of the better evidence raises a presumption that, if produced, it might not operate in his favor." Tayloe *v.* Riggs, *ante*.

It is the duty of the court to see that the *best evidence* is procured if practicable, and where a witness, having important and material papers in his possession, refuses to appear and produce them, the court will properly call upon the judge advocate to *attach* him if necessary. See G. C. M. O. 32, Dept. of the Columbia, 1882.

[60] See G. O. 28, Dept. of the South, 1864; Do. 39, Dept. of the Susquehanna, 1864; Do. 45, Dept. of the East, 1872.

and inadmissible.[61] A further exception has been admitted where the charge is to be proved out of voluminious or complicated accounts or similar documents, the introduction and inspection of which in court must be attended with great inconvenience, or entail unreasonable delay. Here an accountant or other competent person who has made the proper examination may be introduced to testify to the contents of the writings,[62] and schedules prepared and verified by him may also be admitted.[63]

**Lost or destroyed writing.** An occasion for the substitution of secondary evidence is also presented where a material writing has been *lost* or *destroyed*.[64] A party proposing to prove by secondary evidence a writing which has been *lost*, must properly first offer some evidence that a paper of the character has existed, and that a "*bona fide* and diligent search has been unsuc-
489 cessfully made for it in the place where it was most likely to be found, if the nature of the case admits of such proof."[65] Where the paper was lost out of the party's own custody, his affidavit as to the fact and circumstances of the loss may be offered,[66] or he may be allowed to be sworn to the fact in court.[67] Where the paper has been *destroyed*, the fact of its previous existence and of the circumstances of its destruction must be shown,—(and the affidavit, or statement on oath before the court, of the party, is admissible, if the facts rest in his knowledge alone,)—before secondary evidence of its contents can become competent.[68]

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[61] Ang.-Am., &c., Co. *v.* Cannon, 31 Fed., 313.

[62] 1 Greenl. Ev. § 93.

[63] R. R. Co. *v.* Dana, 1 Gray, 83. Greenleaf, (vol. 1 § 94,) adds:—"Under this head may be mentioned the case of inscriptions, on walls and fixed tables, mural monuments, gravestones, surveyors' marks on boundary trees, &c., which, as they cannot conveniently be produced in court, may be proved by secondary evidence." Otherwise, where things of this nature can be conveniently brought into court; as a *printed notice*, not affixed to the freehold but merely hung up in an office. Jones *v.* Tarlton, 1 Dow, P. C. (N. S.) 625.

[64] "Secondary evidence of the contents of written instruments is admissible wherever it appears that the original is destroyed or lost, by accident, without any fault of the party offering the evidence." Remer *v.* Bk. of Columbia, 8 Wheaton, 581. And see U. S. *v.* Reyburn, 6 Peters, 365; U. S. *v.* Laub, 12 Peters, 1; Williams *v.* U. S., 1 Howard, 290. In U. S. *v.* Lyon, 2 Cranch C., 309, the court refused to receive parol evidence of the contents of a written *challenge*, in the absence of evidence that the same had been lost or destroyed.

In the recent case of Magie *v.* Herman, 50 Min., 424, it has been held that a person, in transmitting a communication by telegraph, "makes the Telegraph Company his agent, and the transcribed message actually delivered is *primary evidence;* and if lost or destroyed its contents may be proved by parol." That the written message delivered to the receiver is the original, see Brewing Asstn. *v.* Hutmacher, 127 Ills., 652.

[65] 1 Greenl. Ev. § 558. Slight evidence of the previous *existence* of the paper is sufficient. Id. § 349, 558. "It seems that in general the party is expected to show that he has in good faith exhausted, in a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest and which were accessible to him." Id. § 558. And see Kelsey *v.* Hanmer, 18 Com., 311; Foster *v.* McKay, 7 Met., 531.

[66] 1 Greenl. Ev., 349, 558; Foster *v.* McKay, *ante;* Allen *v.* Blunt, 2 Wood. & Minot, 121; Maye *v.* Carberry, 2 Cranch C., 336.

[67] Fitch *v.* Bogue, 19 Conn., 285; Vedder *v.* Wilkins, 5 Denio, 64. The statement of the accused, when thus presented, is not in the nature of the testimony of a witness to the merits of the case, but formal and preliminary merely and addressed to the discretion of the court,—as in the instance of the swearing by a party to his having given notice to produce papers, (see *post,*) or to an affidavit for a continuance to procure testimony.

[68] See authorities cited in the two preceding notes; also Pillow's Case, (Court of Inquiry,) p. 30–31. Upon the waiver of the opposite party, the simple statement of a party as to the fact of loss or destruction, (unaccompanied by his oath,) may be accepted by the court, in its discretion, as sufficient.

**Paper in adverse possession—Notice to produce.** A further instance in which secondary testimony as to a writing may be introduced in lieu of the writing itself is presented where the paper or document desired to be put in evidence is *in the possession or under the control of the adverse party.*[69] For the admission of such testimony a foundation must be laid, by the party proposing to avail himself of the evidence, by a showing on his part that he has done all that the law requires of him to induce the production of the original. What the law requires is, that he shall first give a notice to the adverse party, (or his attorney,) to produce the original in court, to be admitted and
490 used in evidence.[70] The notice should generally be in writing, and should clearly describe the paper or document called for, so that it cannot be mistaken.[71] It should ordinarily be served, if practicable, before the trial, so that there may be ample opportunity for complying with it:[72] if the occasion, however, for using the evidence does not arise till during the progress of the trial, the notice may be served at that time, and, unless required by the adverse party to be in writing, may be given verbally in the presence of the court.[73]

The proper time for calling for the *production* of writings, to produce which notice has been given, is held to be—"not until the party who requires them has entered upon his case."[74]

It has been held by a United States Court that books and papers produced under notice must be allowed to be used by the other side *unconditionally;* else parol evidence of their contents may be given.[75]

## II. Hearsay.

491 **RULE OF EXCLUSION.** Intimately connected with the rule last considered, requiring the production of the "best evidence," is that which excludes the species of secondary evidence known as *hearsay.* "The term 'hearsay,'" says Greenleaf,[76] "is used with reference to that which is written

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[69] "If papers are in the possession of the opposite party, due notice for their production should be given; after which, if not produced, secondary evidence may be given of their contents." Simmons § 1035.

[70] 1 Greenl. Ev. § 560, 562; U. S. *v.* Winchester, 2 McLean, 136; Allen *v.* Blunt, 2 Wood & Minot, 121; Maye *v.* Carberry, 2 Cranch C., 336; Underwood *v.* Huddlestone, Id., 76. The party must not only give notice to produce, but must prove the existence of the original, and must show that the instrument is in the hands or power of the opposite party. That it is so, "very slight evidence will raise a sufficient presumption," where the instrument belongs to him, or has been or should regularly be in his possession, or in that of his agent or other person in privity with him. 1 Greenl. Ev. § 560, note.

The fact that the adverse party or his attorney actually has the paper in court does not dispense with the usual notice. See 1 Greenl. Ev. § 561, note.

[71] 1 Greenl. Ev. § 562; Rogers *v.* Custance, 2 M. & Rob., 179; Jacob *v.* Lee, Id., 33.

[72] See 1 Greenl. Ev. § 562; Choteau *v.* Raitt, 20 Ohio, 132; Emerson *v.* Fiak, 6 Greenl., 200.

[73] See Smith *v.* Young, 1 Campb., 440. A voluntary offer by the adverse party to produce the paper is a waiver of notice. Dwinell *v.* Larrabee, 38 Maine, 464.

If it becomes necessary to *prove* the fact that notice was given, this may be done by the affidavit, or statement in court under oath, of the party, or of his counsel or other person through whom it was communicated or served.

[74] "Until which time the other party may refuse to produce them, and no cross-examination as to their contents is usually permitted." 1 Greenl. Ev. § 563. It may be noted here that it is held that, after notice and refusal to produce a paper, and secondary evidence thereupon given of its contents, the adverse party cannot be permitted to produce it in evidence as part of his own case. Doe *v.* Hodgson, 12 Ad. & El., 135.

[75] Carr *v.* Gale, 3 Wood. & Minot, 38.

[76] 1 Evidence § 99. And see Manual, 73 § 46, 77 § 59.

as well as to that which is spoken; and, in its legal sense, it denotes that kind of evidence which does not derive its value solely from the credit to be given to the witness himself, but rests also, in part, on the veracity and competency of some other person." Such evidence, in the words of Chief Justice Marshall,[77] "is incompetent to establish any specific fact which is in its nature susceptible of being proved by witnesses who speak from their own knowledge." This kind of testimony is uniformly held inadmissible, not only on account of its intrinsic uncertainty growing out of the fact that it consists of matter repeated at second hand at least, as well as because it presumes the existence of better testimony and because it may serve as a cover to fraud and perjury, but especially because it introduces into the case statements not made under oath, and the truth of which cannot be tested by the criterion of cross-examination.[78]

**HEARSAY DISTINGUISHED FROM ORIGINAL TESTIMONY.** It is to be noticed that the statements of a third person are not always hearsay,
492 but may constitute original facts, as properly admissible as any other original testimony. Thus where a question at issue in the case is whether certain words were actually spoken (or written) by a person other than the witness, or whether a certain confession or admission was made by such person, a recital by the witness of the words or terms employed is original testimony, and an objection to its admission should be overruled. So, in a military case, where the question is whether a certain order of a superior which the accused is charged with disobeying was actually given, a witness other than such superior may be admitted to testify as to the facts and terms of the order.[79]

**RES GESTÆ.** Other declarations of third persons which are admitted in evidence as being not hearsay, but original testimony, are those which fall within the class of the "*res gestæ*," as the legal phrase is. By the *res gestæ* is meant the circumstances and occurrences attending and contemporaneous with the principal fact at issue, or so nearly contemporaneous with it as to constitute a part of the same general transaction, which explain and elucidate such fact by indicating its nature, motive, purpose, &c.[80] Such are threats of declarations of the accused in connection with his commission of the crime charged and indicating his intent or knowledge; declarations or exclamations of the party injured, relating to the violence committed, going to indicate its nature, by whom committed, &c.; language of accomplices; cries of bystanders in

[77] Queen *v.* Hepburn, 7 Cranch, 295, reaffirmed in Hopt *v.* Utah, 110 U. S., 574.

[78] In Merritt *v.* Mayor, 5 Cold., 95, it was remarked by the court that—"the declarations and conversations of *military officers* are not exempted from the common rules of evidence, but are mere hearsay and excluded as those of ordinary citizens." Otherwise, of course, where they are a part of the *res gestæ*. See *post*. The introduction of mere hearsay evidence by courts-martial has been repeatedly disapproved by reviewing officers. See instances in G. O. 118, Dept. of the East, 1870; Do. 34, Dept. of Dakota, 1874. In a recent case in G. C. M. O. 14, Dept. of the East, 1894, the proceedings are disapproved "in so far as they show remarks made by the judge advocate to the court as to the statements of witnesses who had been examined by him before the trial and who were not called to testify. Remarks of such a character," it is added, "are inadmissible. When information is desired from persons not before the court, they should be regularly called and duly sworn to set forth facts within their knowledge."

[79] So, where the question is, whether the party acted prudently, wisely, or in good faith, the *information* on which he acted, whether true or false, is original evidence. 1 Greenl. Ev. § 101. The rule, it may be noted here, "does not exclude evidence as to statements made in the presence of the prisoner." Manual, 74 § 48.

[80] Beaver *v.* Taylor, 1 Wallace, 642; U. S. *v.* Roudenbush, Baldwin, 514; State *v.* Keene, 50 Mo., 357; Blount *v.* State, 49 Ala., 381; Head *v.* State, 44 Miss., 731; Wharton, Cr. Ev. § 263. Declarations offered in evidence as *res gestæ* must be shown to be voluntary and spontaneous, and made so near in time to the principal transaction as to preclude the idea of deliberate design. People *v.* Vernon, 35 Cal., 49.

concert with the accused or party assailed by him; declarations of *agents* in regard to pending transactions, &c.:—all such may be established by the testimony of persons present who heard the utterances, &c. Other circumstances admissible in evidence as of the nature of *res gestæ* would be the words and acts of third persons—seconds for example—which go to indicate whether a certain communication is a challenge to fight a duel,
493 or an acceptance of a challenge, in violation of the 26th Article of war.

**EXCEPTION TO RULE EXCLUDING HEARSAY**—Dying declarations in cases of homicide. Under indictments for murder and manslaughter, the law recognizes an exception to the rule rejecting hearsay, by allowing the dying declarations of the victim of the crime, in regard to the circumstances which have induced his present condition, and especially as to the person by whom the violence was committed, to be detailed in evidence by one who has heard them.[82] It is necessary, however, to the competency of testimony of this character—and it must be proved as preliminary to the proof of the declaration[83]—that the person whose words are repeated by the witness should have been *in extremis* and under a sense of impending death, *i. e.* in the belief that he is about or soon to die;[84] though it is not necessary that he should himself *state* that he speaks under this impression, provided the fact is otherwise shown.[85] And if this belief on his part sufficiently appears, it is not essential to the admissibility of his words that death should have immediately followed upon them.[86] On the other hand if, in uttering the words, he was under the impression that he should recover, the same would be inadmissible even if in fact he presently died.[87] But it is no objection to their admissibility that they were brought out in answer to leading questions,[88] or upon urgent solicita-
494 tions addressed to him by any person or persons;[89] and if, instead of speaking, he answered the questions by intelligible signs, these signs may equally be testified to.[90] But it is held that only such declarations are admissible as would be admitted if the party were himself a witness; so that where the language employed is irrelevant or consists in a statement of *opinion* instead of fact, it cannot be received.[91] Nor can it be received unless complete in itself; as where the declaration is left incomplete and uncertain because interrupted by death.[92] If it was put in writing at the time, the

[82] "As the testimony of an accomplice is admissible against his fellows, the dying declarations of a *particeps criminis* in an act which resulted in his own death are admissible against one indicted for the same murder." 1 Greenl. Ev. § 157. "So the dying declarations of a third person, mortally wounded by the same shot that killed the deceased, are admissible in evidence against the person charged with the homicide of the latter." State *v.* Wilson, 23 La. An., 558.

[83] Kelly *v.* U. S., 27 Fed., 616.

[84] "The persons whose declarations are thus admitted are considered as standing in the same situation as if they were sworn; the danger of impending death being equivalent to the sanction of an oath." 1 Greenl. Ev. § 157.

[85] 1 Greenl. Ev. § 158; People *v.* Sanchez, 24 Cal., 17; Wills *v.* State, 74 Ala., 21.

[86] See Rakes *v.* People, 2 Neb., 157.

[87] See 1 Greenl. Ev. § 158.

[88] The statement, as to its admissibility, is to be governed by the same rules as other testimony, except only that it may be elicited by leading questions. People *v.* Sanchez, 24 Cal., 17.

[89] 1 Greenl. Ev. § 161 *a*; Vass Case, 3 Leigh, 852.

[90] 1 Greenl. Ev. § 161 *b*; Com. *v.* Casey, 11 Cush., 417.

[91] Binns *v.* State, 46 Ind., 311; State *v.* Quick, 15 Rich., 342; U. S. *v.* Veitch, 1 Cranch C., 115; 1 Greenl. Ev. § 159.

[92] 1 Greenl. Ev. § 161 *a*; Vass Case, 3 Leigh, 786.

writing should be produced.[93] Dying declarations are admissible as well in favor of the accused as against him.[94]

It is to be remarked that evidence of dying declarations, made as such usually are under circumstances of mental and physical depreciation, and without being subjected to the ordinary legal tests, is generally to be received with great caution.[95]

### III. Confessions.[96]

**DIFFERENT KINDS OF CONFESSION.** Confessions are said to be *judicial* or *extra-judicial*. The former are those made in court, as by the plea of guilty; the latter are all those which are made elsewhere than in court. They are also *express*, as when made by the accused in specific terms either orally or in writing; or *implied*, as where they are deduced from his silent acquiescence in statements in regard to his alleged offence, made in his presence by others, when there is nothing to prevent his contradicting, qualifying, or otherwise replying to, such statements.[97] But of course the evidence of such acquiescence must be very clear and positive to assign to it the efficacy of a confession.[98]

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**ADMISSIBILITY OF CONFESSIONS.** As to the requisites to the admission in evidence of *extra-judicial* confessions—it has been seen, in the first place, that a confession can not be admitted in evidence till the *corpus delicti*—the fact that the alleged criminal act was in fact committed, by somebody—is proved.[99]

In the seond place, it is held that a confession, to be admitted, must be offered in its *entirety*, so that the whole may be taken together, and the complete purport may fully appear. If a material part is withheld the part offered should not be admitted.[100] A judge advocate upon a military trial may desire to keep out of sight a portion of a confession because it implicates parties other than the accused; but this is a reason not recognized as sufficient at law, since a confession is not evidence against any person (not an accomplice) other than the one who makes it.[1] So, the judge advocate may prefer not to discover

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[93] As being the "best evidence." State *v.* Cameron, 2 Chand., 172.

[94] Mattox *v.* U. S., 146 U. S., 140.

[95] 1 Greenl. Ev. § 162; Manual, 74 § 49. In Murphy *v.* State, 37 Ill., 447, the dying person was under the influence of morphine and had to be aroused to get his statement out. In People *v.* Knapp, Edmonds, 177, it is noticed that the evidence is especially unsatisfactory where it appears that the deceased was a person of bad character who might, in his declaration, have charged the accused with the crime through motives of hostility and revenge.

[96] The subject of Admissions, as distinguished from that of Confessions, pertains rather to civil suits than to criminal proceedings. It is enough to note here that all facts admitted by either party, or obviously assumed on the trial, are to be regarded as being as much in the case as if they had been expressly proved. See Kennedy, 172; Paige *v.* Fazackerly, 36 Barb., 392.

[97] See 1 Greenl. Ev. § 215; Wharton, Cr. Ev. § 680; Kelley *v.* People, 55 N. Y., 565; G. O. 48, Dept. of the Platte, 1871.

[98] The mere fact, for example, that the accused remains silent *when questioned* as to the offence committed, is not to be regarded as equivalent to a confession in law. See Campbell *v.* State, 55 Ala., 80; Digest, 258. In Marvin *v.* Dutcher, 26 Min., 391, it is held that where it is not the *duty* of a person to speak as to the existence of an alleged fact, his silence cannot be taken as an admission against him.

[99] See *ante*—"What is to be proved;" also G. C. M. O. 8, Dept. of Arizona, 1892.

[100] 1 Greenl. Ev. § 217; U. S. *v.* Wilson, Baldwin, 78. G. O. 48, Dept. of the Platte, 1871. "If a confession is given in evidence, the whole of it must be given, and not merely the parts disadvantageous to the accused person." Manual, 81 § 80.

[1] The mere fact that two persons are charged and tried *jointly* does not render a confession made by one admissible in evidence against the other. State *v.* Weesel, 30. La. An., 919.

a certain portion of the confession, on the ground that it is erroneous and unsatisfactory; but this also is not a sufficient reason, since he is at liberty to contradict such portion by other evidence.[2] He must, therefore,
496 (unless objection is waived,) introduce the entire confession or wholly withhold it.

But the most familiar requisite to the admissibility of a confession is that it must have been *voluntary;*[3] and the *onus* to show that it was such is upon the prosecution in offering it.[4] A confession is, in a legal sense, "voluntary" when it is not induced or materially influenced by hope of release or other benefit, or fear of punishment or injury, inspired by one in authority; or, more specifically, where it is not induced or influenced by words or acts,—such as promises, assurances, threats, harsh treatment, or the like,—on the part of an official or other person competent to effectuate what is promised, threatened, &c., or at least believed to be thus competent by the party confessing.[5] And the reason of the rule is that where the confession is *not* thus voluntary,
497 there is always ground to believe that it may not be *true.*[6] Though confessions are in the majority of cases made to officials holding the party in confinement or arrest, the mere fact that he is in custody at the time of making the confession does not stamp it as involuntary.[7]

But the confession, though it must have been voluntary, need not have been *spontaneous.* It will be admissible though induced by the exhortations of a spiritual adviser, by appeals to the accused founded upon the claims of justice, the rights of other persons whose safety or interests are involved in his declaring the truth, &c., or by any other influence "collateral to the proceedings"

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[2] U. S. *v.* Long, 30 Fed., 678.

[3] U. S. *v.* Pumphreys, 1 Cranch C. C., 74; U. S. *v.* Hunter, Id., 317; U. S. *v.* Charles, 2 Id., 76; U. S. *v.* Pocklington, Id., 292; U. S. *v.* Nott, 1 McLean, 499; Hopt *v.* Utah, 110 U. S., 575; Com. *v.* Myers, 160 Mass., 530; Lefevre *v.* State, 50 Ohio, 584; State *v.* Drake, 113 No. Ca., 624; Gallagher *v.* State, 24 S. W., 288; Collins *v.* Com., 25 S. W., 743; May *v.* State, 38 Neb., 211; Goodwin *v.* State, 15 So., 571; Regina *v.* Thompson, 2 Q. B., 12, (1893.)

[4] Nicholson *v.* State, 38 Md., 140, and cases referred to in last note. See also the principle illustrated in military cases published in the following Orders: G. C. M. O. 3 of 1876; G. O. 31. Dept. of Florida, 1865; Do. 54, Dept. of Dakota, 1867; Do. 5, Fifth Mil. Dist., 1868; Do. 48, Dept. of the Platte, 1871, G. C. M. O. 16, Div. of the Pacific & Dept. of Cal., 1881. "The course of practice is to inquire of the witness whether the prisoner had been told that it would be better for him to confess, or worse if he did not; or words to that effect." G. O. 48, Dept. of the Platte, 1871.

[5] "Of course such inducement must be held out by some one who has, or who is supposed by the accused to have, some power or authority to assure him the promised good, or cause or influence the threatened injury." Shaw C. J., in Com. *v.* Morey, 1 Gray, 461. And see Com. *v.* Taylor, 5 Cush., 610; U. S. *v.* Pocklington, 2 Cranch C., 293; Cady *v.* State, 44 Miss., 332; Joy on Confessions, 5, 23; 1 Greenl. Ev. § 222; Wharton, Cr. Ev. § 650, 651; Manual, 80, 81; G. C. M. O. 16, Div. of the Pacific & Dept. of Cal., 1881.

It is held that though influences may have been used that *per se* would render a confession incompetent, the same may be admitted in evidence if it is shown that the effect of such influences was in fact entirely dispelled before the confession was actually made. See 1 Greenl. Ev. § 221; State *v.* Guild, 5 Halst., 180; People *v.* Jim Ti, 32 Cal., 60; Manual, 81 § 77.

[6] 1 Greenl. Ev. § 231; People *v.* Ah Ki, 20 Cal., 177. But where a confession induced by a promise, &c., is shown not to have been false by the fact that property confessed to have been stolen is surrendered, or its place of concealment truly disclosed, the confession, or rather the fact which accompanied it or was discovered in consequence of it, is admissible in evidence against the accused. U. S. *v.* Hunter, 1 Cranch C., 317; U. S. *v.* Richard, 2 Id., 439; Frederick *v.* State, 3 West Va., 695; People *v.* Ah Ki, *ante.* "Facts discovered in consequence of a confession improperly obtained, and so much of the confession as distinctly relates to those facts, may be proved." Manual, 81.

[7] Wharton, Cr. Ev. § 672; Wiley *v.* State, 3 Cold., 362; Com. *v.* Hanlon, 3 Brewst., 461; Hopt *v.* Utah, 110, 575.

and not such as to induce a substantial hope of favor or fear of punishment.[8] So it will be admissible though elicited by questions addressed directly to the accused by a person in authority and assuming his guilt, or by means of making him partially intoxicated,[9] or by practicing upon him some deception by which he is entrapped into confessing.[10]

In *military* cases, in view of the authority and influence of superior rank, confessions made by inferiors, especially when ignorant or inexperienced and held in confinement or close arrest, should be regarded as incompetent unless very clearly shown not to have been unduly influenced. Statements, by way of confession, made by an inferior under charges to a commanding officer,
498 judge advocate, or other superior whom the accused could reasonably believe capable of making good his words, upon even a slight assurance of relief or benefit by such superior, should not in general be admitted. Thus in a case where a confession was made to his captain by a soldier upon being told by the former that "matters would be easier for him," or "as easy as possible," if he confessed, such confession was held not to have been voluntary and therefore improperly admitted.[11] And it has been similarly ruled in cases of confessions made by soldiers, upon assurances held out, or intimidation resorted to, by non-commissioned officers.[12]

These principles are equally applicable to a *written* as to a verbal confession. But it is to be remarked that where, (as is often the case when it has been drawn up by another person,) a written confession specifies that the statement is freely made, without hope of favor or advantage, or fear of injurious consequence, (or in words to that effect,) the inquiry as to whether it was *in fact* voluntary is in no manner precluded.[13] But a confession, written or verbal, may always be *confirmed* by evidence going to establish its truth and to prove that it has not been fabricated.[14]

**CONFESSIONS OF ACCOMPLICES.** Applying here the general principle attaching to conspiracies and concerted crimes, it may be remarked that, a conspiracy or combination having once been proved, a confession by one conspirator or accomplice, provided it relate to the matter of the intended or pending criminal transaction, and be made before the purpose of the association has been accomplished, is admissible in evidence against any other conspirator or accomplice.[15]

499 **CONFESSIONS TO BE RECEIVED WITH CAUTION.** In view of the peculiar conditions of mind and body under which accused persons

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[8] 1 Greenl. Ev. § 229; Manual, 80 § 76; Frank v. State, 39 Miss., 705.

[9] 1 Greenl. Ev. § 229; Wharton, Cr. Ev. § 676; Manual, 81 § 79; People *v.* Ramirez, 56 Cal., 533. But the confession of a person who is too much intoxicated to be responsible for his statements is not competent evidence. See G. O. 234, Fifth Mil. Dist., 1869.

[10] "Provided there is no reason to suppose that the inducement held out was calculated to produce any untrue confession, which is the main point to be considered." 1 Greenl. Ev. § 229. And see Manual, 81 § 79; also, as very full on this general branch of the subject of justifiable inducements, &c., Wharton, Cr. Ev. § 647, 648, 654, 655, 657, 659, 660, 663, 670, 675, 676.

[11] G. C. M. O. 16, Div. of the Pacific & Dept. of Cal., 1881.

[12] G. C. M. O. 3 of 1876; G. O. 54, Dept. of Dakota, 1867. And see instance reported in DIGEST, 397–8.

[13] In a case in G. O. 11, Army of the Potomac, 1864, the proceedings were disapproved because the court would not allow the accused to show that he had signed a written confession without knowing its contents and upon false representations made to him as to the same.

[14] See 1 Greenl. Ev. § 231. So a confession may be contradicted, as to any part of it, by evidence offered by the prosecution. G. O. 48, Dept. of the Platte, 1871.

[15] See 1 Greenl. Ev. § 233; U. S. *v.* White, 5 Cranch C., 39; Logan *v.* U. S., 144 U. S., 263. But note also citation from State *v.* Weesel, 30 La. An., 919, *ante*.

are often placed when making confessions, of the liability to mistake on the part of the witnesses who repeat them when oral, and of the tendency of these latter to exaggerate through a zeal for conviction,—evidence of confessions, unless corroborated by other reliable evidence, is in general to be received with caution. Where, however, a confession is explicit and deliberate as well as voluntary, and, if oral, is proved by a witness or witnesses by whom it has not been misunderstood and is not misrepresented, it is indeed one of the strongest forms of proof known to the law.[16]

### IV. Evidence Excluded from Considerations of Public Policy.

**STATE PAPERS, PUBLIC DOCUMENTS, &C.** Under this head is to be noted—first—confidential archives and "secrets of state," pertaining to the administration of the government, the disclosure of which would be prejudicial to the public interest.[17] Of this kind of evidence would be the papers and documents belonging to the archives of the Executive Departments at Washington, containing the correspondence of public officials and agents with the Government, reports of investigations and other official communications made, in the line of duty, by officers of the army or navy to their military or naval superiors,[18] and records of advisory boards and courts of inquiry.[19] Such papers are
500 esteemed of so *privileged* a character that heads of departments or others in whose legal custody they are,[20] cannot in general be required to furnish the same, (or copies,) to be produced in court, if it be determined by them not to be for the public interest that their contents should be disclosed; nor, if furnished, will the courts in general admit them if objected to.[21] The courts appear to have recognized an exception to this rule only in a case of an official communication proved to have been made *maliciously and without due cause.*[22]

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[16] 1 Greenl. Ev. § 214, 215; U. S. *v.* Nott, 1 McLean, 499; State *v.* Long, 1 Hayw., 524; Lehman *v.* McQueen, 65 Ala., 570; Whiteside *v.* State, 4 Cold., 175; G. C. M. O. 3 of 1876; G. O. 48, Dept. of the Platte, 1871; Do. 46, Div. of the Atlantic, 1874.

[17] 1 Greenl. Ev. § 250; Digest, 543–544.

[18] In the matter of Mason, U. S. Circ. Ct., No. Dist. N. Y., October, 1882; Hopper *v.* Field, U. S. Circ. Ct., E. Dist. Pa., October, 1886.

[19] In Home *v.* Bentinck, 2 Brod. & Bing., in holding that the record of a certain military court of inquiry had been properly rejected as evidence upon objection raised at the trial, the court say, (p. 163,)—"On the broad rule of public policy and convenience, these matters, secret in their natures, and involving delicate enquiry and the names of persons, stand protected." In our law, "the proceedings of a court of inquiry may be admitted as evidence by a court-martial," in cases and under the circumstances specified in the 121st Article of war. As to the admission in evidence of records of courts-martial, see *post*, under "Written Testimony."

[20] As to the routine official papers of the War Department, not in general claimed to be privileged, of which copies for use in evidence are ordinarily furnished, see Digest, 543–4.

[21] Home *v.* Ld. Bentinck, 2 Brod. & Bing., 130; Beatson *v.* Skene, 5 Hurl. & Nor., 837; Dawkins *v.* Ld. Paulet, 5 Q. B., 94; Dawkins *v.* Rokeby, 8 Id., 255; Dickson *v.* Earl of Wilton, 1 Fost. & Fin., 419; Gardner *v.* Anderson, 22 Int. Rev. Rec. 41; Maurice *v.* Worden, 54 Md., 233; 11 Opins. At. Gen., 142; 15 Id., 378, 415; Wharton, Cr. Ev. § 513; 1 Greenl. Ev. § 251; Manual, 84, § 94. Where the custodian declines to produce the paper on grounds of public policy, *secondary* evidence of its contents will not in general be received by the court. Maurice *v.* Worden, 54 Md., 233.

[22] See Maurice *v.* Worden, 54 Md., 233. This was an action for libel based upon an official endorsement made by the defendant as Superintendent of the Naval Academy, in forwarding the resignation of the plaintiff, as an assistant professor, to the Secretary of the Navy. A copy of the endorsement, furnished to the plaintiff by the Navy Department, being offered in evidence, was objected to by the defendant on the ground that the writing was a privileged communication. The Court held it "to be privileged to the extent that the occasion of making it rebuts the presumption of malice, and throws upon the plaintiff the *onus* of proving that it was not made from duty, but from actual malice and without reasonable and probable cause."

**NAMES, &c., OF PERSONS EMPLOYED IN CRIMINAL INVESTIGATIONS.** A like consideration—that it is important to the interests of the community in connection with the due administration of penal justice, as well as to the protection of the persons themselves, that public agents or others employed in the investigation of crime should not be known—excludes testimony which would make public the names of such persons, or their operations or the information on which they have proceeded, except in so far as strict justice to the accused may render necessary.[23]

501 Thus a military officer, directed by an authorized superior to investigate a case of supposed dereliction and make report, cannot properly be required, as a witness before a court-martial, to disclose either the conclusions of his report, or the names of the persons from whom information was obtained by him or their statements.

**PROFESSIONAL COMMUNICATIONS.** Under the present head is also properly considered evidence of professional communications, that is to say declarations and statements, verbal or written, made to a legal adviser. These are protected from disclosure on grounds of public policy, and cannot be admitted in evidence if excepted to by the accused party by whom they were made.[24] Thus if an accused, in the course of his communications to his counsel, shall have disclosed the commission of, or participation in, by him, of the criminal offence with which he is charged, the counsel cannot be interrogated or required to testify as to the same against the objection of the accused. So, a counsel, against such objection, cannot be obliged to produce or disclose the contents of papers committed to him in his official capacity by the accused.[25]

It is to be remarked that the privilege of objecting to the disclosure in evidence by counsel of communications made to him professionally is *personal to the client* and for his benefit, and that the objection may be *waived* by him.[26]

502 The rule under consideration is laid down by the authorities with reference of course to *civilian* legal advisers. But, in principle, it is equally applicable to the relations between the accused and *military* persons acting as their counsel on military trials, where professional counsel is often not attainable and resort is frequently had to the assistance of officers or soldiers in the conduct of the defence.

It may be added that the privilege accorded to communications addressed to professional advisers extends only to those made by or on behalf of the client, and therefore not to such as may be made by a person other than the client or his agent.[27] Further, it has not been attached by the common law to

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[23] 1 Greenl. Ev. § 250; Rex *v.* Hardy, 24 How., S. T., 753; Rex *v.* Watson, 2 Stark, 119; U. S. *v.* Moses, 4 Wash., C., 726; Manual, 85 § 97.

[24] In the absence of such protection, "the course of justice must stop. No man will dare to consult a professional adviser with a view to his defence or to the enforcement of his rights." * * * Without such privilege, "no person can safely come into a court either to obtain redress or to defend himself." Lord Ch. Brougham, in Bolton *v.* Corp. of Liverpool, 1 My. & K., 94, 95. And see Bk. of Utica *v.* Mersereau, 3 Barb. Ch., 528; Cheirsc *v.* Reinicker, 11 Wheaton, 280; Aiken *v.* Kilburne, 27 Maine, 252; 4 Opins. At. Gen., 383; 1 Greenl. Ev. § 237–246. "But this protection does not extend to any such communications if made in furtherance of any *criminal* purpose." Manual, 85 § 99.

[25] But he may be examined as to the fact of the existence of such papers, in order to let in secondary evidence as to their contents. So he may be called upon to prove the identity of his client, or his handwriting. 1 Greenl. Ev. § 245; 4 Opins. At. Gen., 384.

[26] It is an implied waiver of the privilege for the party to examine his own attorney, as a witness, in regard to communications professionally made to him by the party, and where he does so, the witness is bound to answer generally, on cross-examination. Crittenden *v.* Strother, 2 Cranch C., 464.

That the counsel may be willing to be examined does not affect the privilege of the client to object. Aiken *v.* Kilburne, 27 Maine, 252.

[27] Randolph *v.* Quidnick Co., 23 Fed., 278.

communications made either to *clergymen* or *physicians*.[28] Such, indeed, especially those made to spiritual advisers, are, in many of the States, protected from disclosure in evidence by express statutes. But there is no statute of the United States on the subject, and those of the States cannot of course affect the practice of courts-martial in this particular.

## III. ORAL TESTIMONY.

Evidence, upon judicial investigations, is communicated either orally or in writing. Oral testimony is that of Witnesses testifying *viva voce* in court, or by Deposition out of court.

The subject of Oral Testimony will be considered under the titles of: I. The Attendance of Witnesses; II. The Competency of Witnesses; III. The Examination of Witnesses; IV. Testimony by Deposition; V. The Credibility and Weight of Oral Testimony.

### I. The Attendance of Witnesses.

As has been seen in Chapter V, a Court-Martial is not authorized, either by inherent judicial power or by express statute, to issue *writs*, and cannot therefore issue a writ, either of subpœna or attachment, to compel the
503 attendance of witnesses. The authority for this purpose has been vested by law in the Judge Advocate, as follows: (1) The Army Regulations, par. 1008, provide that—"The judge advocate shall summon the necessary witnesses for the trial." (2) Sec. 1202 of the Revised Statutes enacts—"*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.*" The whole matter, therefore, of the summoning of witnesses before courts-martial, including the service and return of the summons, as also of the issuing, service and return of process of attachment, belongs properly to the subject of the authority and province of the Judge Advocate, and has accordingly been considered in Chapter XIII, relating to the duties and powers of that official.

### II. The Competency of Witnesses.

**A RARE ISSUE AT MILITARY LAW.** The question of the competency of a witness, or his legal capacity to be sworn and to testify, is one rarely raised in the military practice. There is no statute law which in terms makes parties incompetent for any cause to testify as witnesses before courts-martial. The only public statute by which a person is made incompetent as a witness before courts of the United States—Sec. 5392, Rev. Sts., rendering thus incompetent a party convicted of perjury under its provisions—has no application to military tribunals. In many of the States, facts which, under the old common law, were grounds of incompetency, are now allowed to go only to the question of *credibility*.[29] In case, however, of an objection to a witness as incompetent being preferred to a court-martial, the common-law rules are, in the absence of statute on the subject, to be recurred to, to see if they are

[28] 1 Greenl. Ev. § 247, 248; Manual, 85 § 100.

[29] That "mere *interest*" no longer affects the competency of a witness, see Reagan *v.* U. S., 157 U. S., 306.

applicable to the case. The principal of these rules will therefore be noticed here.

**INSENSIBILITY TO THE OBLIGATION OF AN OATH.** This is one of the common-law grounds of incompetency,[30] but in recent times a much more liberal view has been taken than formerly as to the quality of the insensibility, or want of religious belief, which should be deemed to render a witness
504 incompetent to be sworn in the usual manner. To render a witness competent, "it is enough," says Greenleaf,[31] "if he has the religious sense of accountability to the Omniscient Being who is invoked by an oath." The form of oath for witnesses prescribed by Art. 92 of our military code, concludes with the usual appeal to the Diety; and a witness who takes this oath, though he may have no positive faith, should at least have some such sense of accountability to qualify him for taking it. But that a person is not competent to take a judicial oath is never to be *presumed*,[32] and, in view of the multiplicity of religious creeds and the freedom of religious belief recognized in this country and impliedly sanctioned by the Constitution, the objection to a mature person offered as a witness, that he was insensible to the obligation of an oath, would have to be most clearly established to be accepted as excluding him from the stand on a military trial.[33] If indeed he "objects to take an oath, or is objected to as incompetent to take an oath,"[34] he may always be *affirmed*, and the objection be thus wholly avoided. In the case of a very young child, the question as to its sense of religious obligation is a more serious one, though here the proper objection would be that of deficiency of intelligence rather than of religious sensibility. Where indeed a young child, who is to be a material witness, is quite ignorant of the obligations of an oath, it should be instructed beforehand, by some competent person—as a clergyman, as to the nature of the oath and the moral consequences of false swearing. A
505 momentary instruction at the time of the trial is not sufficient.[35] The court, in a case of doubt, will, by questioning the child, satisfy itself whether he or she has the requisite appreciation of the significance of an oath to make proper its administration. Where there is an apparent lack of knowledge, and no opportunity for instruction has been had, the court may grant a continuance to enable such instruction to be given. These considerations are especially important on a trial for the rape of a young female child.

It is to be noted that the exception under consideration, where it exists in

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[30] See 1 Starkie, Ev., 22; 1 Greenl. Ev. § 306.

[31] 1 Ev. § 372.

[32] "The law, on grounds of policy, presumes that all witnesses tendered in a court of justice are not only competent but credible." Wharton, Cr. Ev. § 358.

[33] The weight of authority seems to be in favor of the view that the objection must be sustained by the testimony of persons other than the witness—persons who have heard his declarations, &c.; and that the witness himself cannot be personally questioned as to his religious opinions. 1 Greenl. Ev. § 370 and note; Wharton, Cr. Ev. § 358, 362.

On Gen. Swaim's Trial, a witness, objected to as incompetent for want of religious belief, stated that he neither believed nor disbelieved in the existence of a Supreme Being—was an "Agnostic." No other testimony was offered. The Court sustained the objection.

In a case in G. O. 10, Dept. of the Columbia, 1871, in which an Indian witness was rejected as incompetent because insensible to the sanctity of an oath, the proceeding was disapproved for the reason that no *proof* of such insensibility appeared to have been offered.

[34] Manual, 93–4.

[35] G. C. M. O. 10 of 1886.

any degree to a witness, may in general be avoided by his making *an affirmation in lieu of an oath*[36]—as all witnesses are authorized to do by our law.[37]

**INFAMY.** At the common law, "infamy," or the status of having been convicted of an "infamous" crime, renders a person incompetent as a witness. The term infamous crime comprehended "treason, felony, and the *crimen falsi;*" the latter term having reference to such offences as perjury, forgery and conspiracy and to certain frauds. An objection on the ground of infamy can be sustained only by the production of the record of conviction and judgment; proof merely that the party has been subjected to the *punishment* is not sufficient.[38] It is apparently held by the weight of authority that a record of a "*foreign*" judgment—as a judgment of a court of a different State—will not sustain this objection.[39] Whether, therefore, a conviction of a felony by any civil court—or any such court other than a court of the United States—could be accepted as establishing such objection before a court-martial is certainly doubtful. At military law, in the absence of any statute attaching such a disability, the fact that an officer or soldier has been convicted of desertion or other military offence can affect in no manner his competency as a witness before a court-martial.[40] A military case to which the common-law rule would appear most aptly to apply would be one of an officer or soldier convicted by a court-martial, in time of war, of one of the higher crimes specified in Art. 58.

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**DEFICIENCY OF UNDERSTANDING.** The persons held incompetent for this cause are chiefly idiots, insane persons, persons in a state of intoxication and very young children. In the words of the Manual[41]—"A witness is incompetent if, in the opinion of the court, he is prevented by extreme youth, disease affecting his mind, or any other cause of the same kind, from recollecting the matter on which he is to testify, from understanding the questions put to him, from giving rational answers to those questions, or from knowing that he ought to speak the truth." That a person is *deaf and dumb* does not render him incompetent, provided he has average intelligence and can communicate what he knows either in writing or by signs through an interpreter.

Unless there is something in the appearance of the witness when he comes to the stand clearly indicating that he has not at the time the requisite intelligence, the *onus* of showing that he is incompetent from want of understanding will be upon the party objecting. The court also, especially in the case of children, may itself properly interrogate the witness, with a view to more fully satisfying itself as to his competency.[42]

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[36] Wharton, Cr. Ev. § 361.

[37] "A requirement of an 'oath' shall be deemed complied with by making affirmation in judicial form." Rev. Sts., Sec. 1. And see Article 92.

"Persons who entertain conscientious scruples against the form of a judicial oath are allowed, when summoned as witnesses, to use the form—'I solemnly and truly declare and affirm,' or words to like effect, but without importing any relaxation of the punishment of perjury if they give false testimony." Abbott's Law Dictionary—Affirm.

In an affirmation, the invocation—"*So help me God!*" is of course omitted.

[38] 1 Greenl. Ev. § 372, 375.

[39] 1 Greenl. Ev. § 376; Wharton, Cr. Ev. § 363, note.

[40] G. O. 48, Dept. of the Platte, 1867; Do. 2, Dept. of Dakota, 1875; G. C. M. O. 103, Dept. of the East, 1870; Do. 44, Dept. of the Columbia, 1881; Do. 45, Dept. of Cal., 1883.

A person is not rendered incompetent to testify as a witness before a military court by the fact that he is an enemy in arms. See DIGEST, 397. Officers of the Confederate army were admitted to testify upon the trials, by military commission, of the Assassins of President Lincoln, and of Capt. Henry Wirz, in 1865, while the *status belli* was still pending.

[41] Page 83 § 86.

[42] See 1 Greenl. Ev. § 367.

The law has fixed no age at which a *child* may be presumed to have the requisite understanding to qualify it to be a witness: the competency of children depends more upon intelligence than age.

507 As to *insane* persons, the fact that they are subject to fits of derangement does not affect their competency, provided they are sane at the time of being called upon to testify.[43] So a person insane upon some particular subject or subjects will not be incompetent as a witness if his delusions do not materially impair his general intelligence.[44]

*Intoxication* should in general render a person only temporarily incompetent as a witness. "Witnesses put aside when drunk may be examined when sober."[45]

**WIVES OF ACCUSED PERSONS.** The familiar general rule of the law of evidence, founded on public policy, that neither the husband nor the wife is competent as a witness either for or against the other, though departed from in some of the States, is strictly held in the criminal courts of the United States and in courts-martial.[46] The rule excludes all communications, whether oral or in writing.[47] And the application of the principle extends "to all cases in which the interests of the other party are involved."[48] Thus the testimony of the wife of an accused will not be admissible for 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.[49]

The general rule, however, is subject to exception in cases "where the trial is for bodily injury or violence inflicted by the husband on the wife or *vice versa*."[50]

Thus, in a military case, a wife would in general properly be held com-
508 petent to testify against her husband when charged with a violation of the 61st or 62d Article of war in maltreating her under circumstances rendering his act a military offence.[51]

**ACCUSED PERSONS THEMSELVES.** By the Act of Congress of March 16, 1878, c. 37, it is provided that upon criminal trials and proceedings before not only "United States courts" and "Territorial courts," but also "courts-martial and courts of inquiry," the accused "*shall, at his own request, but not otherwise,*[52] *be a competent witness. And*"—it is added—"*his failure to make such request shall not create any presumption against him.*" An accused person thus may, at his option, take the stand as a witness, but in so doing he occupies no exceptional status,[53] and becomes subject to cross-examination like

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[43] Evans *v.* Hettich, 7 Wheaton, 470; 1 Greenl. Ev. § 365; Simmons § 921.

[44] Regina *v.* Hill, 5 Eng. L. & E., 547.

[45] Simmons § 921.

[46] G. O. 6, Div. Pacific, 1887; G. C. M. O. 84, Dept. of the Platte, 1890. See the reasons for this rule as set forth by McLean, J., in Stein *v.* Bowman, 13 Peters, 223; also in 1 Greenl. Ev. § 254, 334, 337. And see the more recent case of U. S. *v.* Jones, 32 Fed., 569. The statute of 1878 authorizing accused persons to testify, (see *post*,) does not affect the application of the rule. See DIGEST, 750.

[47] State *v.* Mathers, 64 Vt., 101.

[48] 1 Greenl. Ev. § 335.

[49] 1 Greenl. Ev. § 335, 407; Simmons § 925; Territory *v.* Paul, 2 Mont., 314.

[50] Manual, 82 § 85.

[51] See cases in G. C. M. O. 17 of 1871; G. O. 1, Dept. of Miss., 1866.

[52] These words—"at his own request but not otherwise," indicate the distinction between our law and that of Europe, where, at courts-martial, the inquisitorial form of examination is pursued as to the accused. In G. C. M. O. 11, Navy Dept., 1895, the Secretary of the Navy, in citing this Work, observes—"the accused should not be obliged to testify in his own behalf, and should not be made a witness except at his own request."

[53] McKeone *v.* People, 6 Col., 346; G. C. M. O. 179, Dept. of Dakota, 1882.

any other witness.[54] As a witness, he cannot be permitted to state only circumstances favorable to himself and maintain silence as to the other facts in the case;[55] nor, as it has been repeatedly held,[56] can he read or put in an *ex parte* "statement," sworn to, as his testimony. The same rules as to the admissibility of evidence, privilege of the witness, impeaching of his credit, &c., will apply to him as to any other witness, and the only noticeable difference between his attitude and that of other witnesses will be that he will in general
509 naturally and properly enough be exposed to a more searching cross-examination.[57]

Inasmuch as the Act of 1878 provides that the "failure" of an accused to make the request to be a witness "shall not create any presumption against him," it has been held by the U. S. Supreme Court that it was not allowable to make "comment, especially hostile comment, upon such failure" to the jury. "The minds of the jurors," it was said, "can only remain unaffected from this circumstance by excluding all reference to it."[58]

**CO-ACCUSED AND ACCOMPLICES.** Except when testifying at his own instance under the Act of 1878, above cited, a defendant in a criminal case is not regularly competent as a witness for or against a *co-defendant* unless he has been discharged from the record,—as by the entry of a *nolle prosequi*,—or unless, having beeen accorded a separate trial, (a proceeding of rare occurrence in the military practice,) he has been duly acquitted or convicted. In military cases where the prosecution proposes to call upon a co-accused as a witness, the entry of a *nolle prosequi*, though the more usual course, is not invariable: where this course is not pursued, and the witness has testified in good faith on the trial, it is in general announced in the Order in which the proceedings in the case are passed upon that he is released from arrest, and further proceedings against him are discontinued.[59]

But the mere fact that a person was an *accomplice* of the accused does not so identify him with the latter as to render him incompetent to testify for or against him. Nor is his competency affected by the fact that he has himself been charged—separately—with the same offence. The objection is not to his competency but to his *credibility*—as will be noticed under another head.[60]

510 **OTHER PERSONS.** Neither a member of a court-martial, the judge advocate, nor the officer who is to review and pass upon the proceedings, is incompetent to testify before the court.[61] It is not desirable, however, that any of these officials should appear as witnesses, except perhaps to give evidence as to the military character or record of the accused. As has been remarked in

[54] Wheelden *v.* Wilson, 44 Maine, 11; Marx *v.* People, 63 Barb., 618; Fralich *v* People, 65 Id., 48; Clark *v.* State, 50 Ind., 514; People *v.* McGungill, 41 Cal., 429; Rea *v.* Missouri, 17 Wallace, 542; G. O. 8, 16, Dept. of the Platte, 1879; Do. 6, Id., 1880; G. C. M. O. 34, Dept. of Texas, 1879; Do. 13, Id., 1882; Do. 179, Dept. of Dakota, 1882.

[55] G. C. M. O. 18, 32, Dept. of the East, 1886.

[56] G. C. M. O. 30, Dept. of the East, 1886; Do. 9, Dept. of the Mo., 1886; Do. 49, Dept. of California, 1886; Do. 3, Dept. of Dakota, 1886; Do. 76, Id., 1892; Do. 5, Id., 1893; Do. 3, Dept. of Texas, 1886; Do. 5, Id., 1890; Do. 39, Id., 1893; Do. 6, Dept. of Arizona, 1887; Do. 21, 25, Id., 1888; Do. 4, Dept. of the Columbia, 1888.

[57] See Rea *v.* Missouri, 17 Wallace, 542. But the cross-examination should not be extended beyond the limit observed for other witnesses. Thus where the accused took the stand to testify, and did testify, only as to the *date* of his confinement in arrest, it was held that it would be inquisitorial and illegitimate to cross-examine him as to other facts of the merits of the case. G. C. M. O. 29, Dept. of Dakota, 1893.

[58] Wilson *v.* U. S., 149 U. S., 60, 65. And see U. S. *v.* Pendergast, 32 Fed., 198.

[59] See instances in G. O. 13, Dept. of the South, 1866; Do. 30, Dept. of Cal., 1865.

[60] See "The Credibility and Weight of Oral Testimony," *post*.

[61] DIGEST, 750–1.

a previous Chapter,[62] a resort to a *member* as a witness on the merits is especially to be avoided.[63]

### III. The Examination of Witnesses.

This subject will be considered under the heads of:—1. Direct Examination; 2. Cross-Examination, 3. Re-examination, &c.; 4. Rebuttal; 5. The privilege of the witness as to not answering criminating, &c., questions; 6. Impeaching testimony; 7. Testimony as to good character.

#### I. DIRECT EXAMINATION.

This, which is also called the "Examination-in-chief," is the original examination, by the party producing them, of the witnesses by whose testimony he seeks to maintain his side of the case. It refers mainly to that examination by which, (subject to cross-examination by the adverse party,) the prosecution or defence is opened and displayed. It embraces also, however, the examination of witnesses offered *in rebuttal* of direct testimony from the other side,—as where witnesses are introduced to meet new matter brought out in the defence, or to show that impeaching testimony is itself unworthy of credit.

Premising that the direct examination of every witness properly begins in general with asking his name, and, in military cases, his office, rank, corps, regiment, &c., and whether he knows or identifies the accused,—we proceed to notice certain general principles which, though *in part* applicable to all stages of the examination of a witness, are best illustrated as governing the Examination-in-chief—as follows:

511 **THE EXAMINATION SHOULD CONSIST OF QUESTIONS RELEVANT TO THE ISSUE.** This rule, the application of which is one of the features which distinguish the direct from the cross examination, has been specifically considered under an earlier title.[64]

**ALL THE TESTIMONY IS TO BE VIVA VOCE, AND TO CONSIST OF FACTS DERIVED FROM THE PERSONAL KNOWLEDGE AND MEMORY OF THE WITNESS.** This principle is indeed one of general application, but is here noticed because of two apparent qualifications which affect its operation in the course especially of the direct examination.

**Memorandum to refresh memory.** Thus, the general rule is compatible with allowing a witness to "refresh and assist" his memory by a reference to some *writing*, which may be either an official document or other written instrument, (original or copy,) a formal entry in a book, or any mere note or memorandum, written or in print. Where the writing consists of a memorandum or paper made by the witness himself, it should appear, from his testimony, to have been made at the time of the fact or transaction to which it refers, or so soon after as to afford the presumption that the memory of the witness as to such fact, &c., was fresh in making it. Where the paper is not one made by the witness, it must appear that, on inspecting it, he can speak to the facts from his own recollection; otherwise he cannot be permitted to make use of it. Nor indeed can he use it in any case, or by whomever made, unless

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[62] Chapter XII.

[63] It may be noted here that persons of allen races, including *Indians*, are competent as witnesses, equally with white persons, natives, or citizens, in the courts of the United States. See G. C. M. O. 54, Div. of the Pacific & Dept. of Cal., 1879; Sec. 1977 Rev. Sts.

[64] See "Admissibility of Evidence," *ante*.

it enables or assists him to testify as of his own memory or knowledge. If, instead of serving as a refresher of memory, it is relied upon to supply facts not otherwise known to the witness, it is of course not a legitimate means

512 of reference.[65] It is usual and desirable, (though not essential,) that the writing be brought into court and produced by (or exhibited to) the witness upon the stand, since thus its nature and effect can be fully made to appear on the direct or cross examination.[66]

**Statement of opinion or belief.** The general rule, in requiring the witness to state facts within his personal knowledge, does not require that he should speak with entire certainty, but only to the best of his recollection. If his testimony, though not of an assured character, be based upon *some* memory of the facts, it will be admissible for what it is worth. But the rule, (*except* as presently to be noted,) *does* exclude all matters resting in the individual *opinion* of the witness. His opinion upon the merits of the issue, or as to the motives, intention, or conduct of the accused or others, or the effect of their acts or as to what would have been his own conduct in a particular case, or upon any general question of moral or legal obligation, is wholly inadmissible and should be ruled out on objection made.[67]

513 For a witness, however, to declare the existence or occurrence of a fact which is a matter of *common observation*, and in general palpable and scarcely mistakable—as the fact of *drunkenness*, or that the accused or other person *was drunk* on a certain occasion—is not properly a statement of

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[65] U. S. *v.* Wood, 3 Washington, 440; Patriotic Bk. *v.* Frye, 2 Cranch C., 684; State *v.* Rawls, 2 Nott & McC., 331; Elston *v.* Kennicott, 46 Ills., 187; Hill *v.* State, 17 Wisc., 675; 1 Greenl. Ev. § 436–438; Manual, 86. It is not sufficient for the witness to swear that he made a memorandum which he believes to be true, and that he relies upon it without any present recollection of the facts. Lawrence *v.* Baker, 5 Wend., 305. The privilege of using a paper as a memorandum to refresh the memory, does not authorize the witness to read his evidence from notes previously prepared. Malthy, 44–5. It has been held that a witness may make use, as a refresher, of a *copy* of an original memorandum, provided it satisfactorily appears that the copy is a true one. Chicago, &c., R. R. Co. *v.* Adler, 56 Ills., 344. In a case in G. C. M. O. 22, Dept. of the East, 1882, it was held that a guard book, containing an entry of a charge of absence-without-leave against a soldier, not being evidence of the commission of the offence, could be used as a memorandum to refresh the memory of a witness as to the occurrence.

[66] 1 Greenl. Ev. § 437, and notes.

[67] See 1 Greenl. Ev. § 441; Manual, 86; O'Dowd, 7; Witnesses are not to testify as to their *opinion* or what they *think*, but what they *know* or have *seen*. G. C. M. O. 64, Dept. of the East, 1872. Opinions of witnesses, who are not experts, are not admissible. G. O. 4 of 1843; Do. 32, Dept. of the East, 1869; G. C. M. O. 121, Id., 1871; G. O. 42, Dept. of the Platte, 1871; G. C. M. O. 17, Dept. of Texas, 1873. Opinions of officers on points upon which the *court* is the proper judge are inadmissible. G. C. M. O. 41, Dept. of the East, 1872; Com. Wilkes' Trial, pp. 39, 85, 94. A witness cannot be asked his opinion of the prisoner's guilt. G. C. M. O. 21, Dept. of the East, 1871. Nor whether he thinks that the accused intended to desert, this being a question for the court. G. C. M. O. 75, Dept. of the East, 1871; Do. 5, Id., 1891; Do. 11, Id., 1893.

In G. C. M. O. 42, (H. A.,) 1890, it was held that the court improperly admitted, against the objection of the judge advocate, certain indorsements of commander's expressing the opinion that the accused was not guilty of negligence justifying his trial. In G. C. M. O. 1, Dept. of Arizona, 1892, the reading, by counsel for the accused, by permission of the court, of "indorsements upon the charges referred to the court for trial, for the purpose of showing the opinion of the commanding officer of the post as to the gravity of the offence"—was held to be "irregular," but was really wholly incompetent.

an *opinion*, but of a fact so far within the personal knowledge of the witness as to render it admissible in evidence.[68]

**Exceptions—Facts at issue resting on belief.** There are to be noticed two excepted classes of cases, however, in which witnesses are allowed to declare their opinion or belief. The *first* is where a certain matter of fact resting wholly on belief is directly in issue, as the fact, for example, of the *identity* of a person. So of the fact that a writing is or not in the *handwriting* of a party: here a witness familiar with the handwriting may be asked and may state his belief as to the fact in issue, without being an expert.[69]

**Opinions of experts.** The second class is the familiar one of cases
514 involving questions of science or questions requiring for their solution a peculiar skill or knowledge of a specialty, in which is admitted the testimony of *experts*.[70] Thus, military officers may give evidence as experts upon issues requiring, for their proper solution, technical military knowledge;[71]

[68] People *v.* Eastwood, 14 N. Y., 562; Stacy *v.* Portland Pub. Co., 68 Maine, 279; Sydleman *v.* Beckwith, 43 Conn., 12; State *v.* Huxford, 47 Iowa, 16; DIGEST, 395; G. O. 42, Dept. of the Platte, 1871; G. C. M. O. 2, Dept. of Texas, 1890. Witnesses, however, who testify that the accused was drunk should in general be "required to state in detail the specific facts upon which their judgement of his condition was based." G. C. M. O. 59, Div. Atlantic, 1888. As to drunkenness, the views of officers and non-commissioned officers are in general more reliable than those of private soldiers. G. O. 27, Dept. of the Arkansas, 1866. But the witness could not properly be asked whether the accused was so drunk as to be incapable of forming a criminal intent. Armor *v.* State, 63 Ala., 173.

"Opinions of witnesses derived from observation are admissible when, from the nature of the subject under investigation, no better evidence can be obtained." Brown *v.* Com., 14 Bush., 405. And see Hardy *v.* Morrill, 56 N. H., 232. In Ins. Co. *v.* Lathrop, 111 U. S., 612, it is held that a non-expert may give his opinion as to the *sanity* of another person, in connection with a statement of the facts and circumstances within his knowledge upon which such opinion is based.

[69] As to proof of Handwriting by experts, &c., see "Private Writings," *post*. In Smith *v.* U. S., 24 Ct. Cl., 209, it was held that the Secretary of War was empowered to employ (and authorize a paymaster to pay) special experts to elucidate a question of handwriting at issue before a court-martial.

As to the payment of extra fees to expert witnesses, see Circ. No. 13, (H. A.,) 1891.

[70] See 1 Greenl. Ev. § 440. The qualifications of the expert to give evidence, as such, may be tested not only by interrogating the witness himself as to his experience, but also, (though this means is not often resorted to,) by the testimony of other witnesses. Tullis *v.* Kidd, 12 Ala., 648. And not only should the character of experts, as such, be "satisfactorily established," but their testimony, to be reliable, "must be free from suspicion of interest, bias, or prejudice." Schultz *v.* U. S., 2 Ct. of Cl., 380. In Johnson *v.* Root, 1 Fisher, 361, Sprague J. charges the jury to consider, in weighing the testimony of an expert, "his ability, his knowledge of the art or profession in which he is engaged, the fairness with which he expresses an opinion, the impartiality of that opinion, and all those considerations which go to create a confidence or a distrust of the opinion which is given. You will," he adds, "take into consideration also the reasons that may be assigned by the experts for their opinions." In Tullis *v.* Kidd, it was held, in regard to a medical expert, that it was not necessary that he should be in the practice of his profession, if it appeared that he had studied it as a science, and "felt confident to express a medical opinion upon a particular disease;" the fact that he was not at the time a practicing physician going to his credibility only. But of course the weight and value of the testimony will depend mainly upon the amount of the practical experience of the witness. See Allen *v.* Hunter, 6 McLean, 303.

[71] They cannot, however, be resorted to as *experts in general* upon military trials—as, for example, as experts upon questions of military law. See G. C. M. O. 41, Dept. of the East, 1872. In Do. 113, Id., 1871, the action of a court-martial in calling upon the Judge Advocate of the Department to testify as an expert upon a question of law raised in the case—whether a member absent at the organization could subsequently come in, qualify and act—was properly disapproved by the Dept. Commander.

and in the military practice, as in the civil, medical men, whether or not officers of the Army, are frequently and properly called to testify as to the cause of death or disease, the effects of wounds or injuries, or the question of the sanity of an accused person, witness, &c. Such experts, in expressing their opinions, need not found them upon any personal observation;[72] it is sufficient if they are based upon the facts of the case as narrated by other witnesses whose testimony they have listened to, or, where they have not heard the facts detailed in
515 evidence, upon a statement of similar facts presented hypothetically by the examining party or counsel.[73] But the expert cannot state his opinion "as to the general merits of the cause," but only his opinion "upon the facts proved;" nor can he state it as to any *other* question in the case not involving expert knowledge for its solution.[74]

**A PARTY MAY NOT IMPEACH THE CREDIBILITY OF HIS OWN WITNESS.** This is also a general rule peculiar to the direct examination. A party, in offering a witness, is presumed to be acquainted with his character and is viewed as representing him as entitled to credit. He is therefore in general bound by the statements of the witness, and if such statements prove contrary to what he expected, he will not be permitted to impugn the credibility of the witness, either directly by attacking his general reputation for veracity, or indirectly by "general evidence tending to show him unworthy of
516 belief."[75] The party is not indeed precluded from putting in *other* testimony, as to a particular fact, which is directly contradictory to the testimony of such witness;[76] but such other testimony cannot properly be introduced in the form of a personal reflection upon the witness. Where, however, a party has been *innocently misled* by the witness whose statement on the stand turns out to be materially different from the one previously made, and which induced the party to introduce him, "the weight of authority," says Greenleaf, "seems in favor of admitting the party to show, that the evidence has taken him by *surprise*, and is contrary to the examination of the witness prepara-

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[72] See 3 Greenl. Ev. § 5.

[73] The following appear to be approved forms of interrogating the expert in this class of cases: 1. *Where the expert has heard all the testimony in regard to the actions, indications, &c., of the accused, (or witness,) alleged to have been insane.* Here he may properly be asked—"Supposing the testimony which you have heard to be true, is it your opinion thereon that such person is, (or was, at the time of the offence,) insane?" It may be also asked—"What state of mind do such symptoms, &c., indicate?"—or "What would, in the belief of the witness, be the conduct of such a person in certain supposed circumstances." (See Com. *v.* Rogers, 7 Met., 506.) 2. *Where the expert has not heard the testimony or has heard it only in part.* Here it is the practice for the examining party or counsel to atate to the witness the substance of the testimony, and then to ask, whether, *supposing such testimony to be true,* the person in question was, (or is,) not, in the opinion of the witness, insane, &c., as above. The hypothetical question must be based upon previous evidence in the case tending to prove the matters atated in the question. Bomgardner *v.* Andrews, 55 Iowa, 638.

[74] See 1 Greenl. Ev. § 440; U. S. *v.* McGlue, 1 Curtis, 1. "Even where the medical or other professional witnesses have attended the whole trial and heard the testimony of the other witnesses as to the facts and circumstances of the case, they are not to judge of the credit of such witnesses or of the truth of the facts testified by them." Com. *v.* Rogers, 7 Met., 505.

[75] Greenl. Ev. § 442; Lawrence *v.* Baker, 5 Wend., 305; Cooker *v.* The Tolacca, 7 Philad., 199. In G. O. 4 of 1843, where the accused was allowed by the court to call a witness to contradict a previous witness introduced by him, and show that the latter had made a different statement from that given in his testimony, the proceedings were in this respect disapproved by the Secretary of War. And see G. C. M. O. 71, Dept. of the Platte, 1890.

[76] 1 Greenl. Ev. § 443; U. S. *v.* Watkins, 3 Cranch C., 442; Lawrence *v.* Baker, 5 Wend., 305; Clapp *v.* Peck, 55 Iowa, 270.

tory to the trial, or to what the party had reason to believe he would testify; or, that the witness has recently been brought under the influence of the other party, and has deceived the party calling him.[77]

**LEADING QUESTIONS ARE NOT TO BE ASKED.** It is a further general rule governing the *direct* as distinguished from the *cross* examination,[78] that a "leading" form of questioning a witness may not be pursued in regard to the material facts at issue in the case on trial.[79] The 90th Article of war recognizes this rule in making it the duty of the judge advocate to "object to any leading questions to any of the witnesses," as a measure of protection to the accused. Leading questions may be said to consist mainly of three sorts, closely connected however in their nature, as follows:—1. Those "which
517 suggest to the witness the answer desired;" 2. Those "which, embodying a material fact, admit of an answer by a simple negative or affirmative;" 3. Those which, in their form, "assume facts to have been proved which have not been proved," or assume "that particular answers have been given which have not been given."[80] The proper and legitimate province of direct examination is to elicit the precise matters of fact within the knowledge or recollection of the witness and no more, and to induce him to communicate them naturally and in his own language, without either prompting or restraint. Any direction, therefore, given to his thoughts, on the part of the interrogator; any suggestion as to the form or substance of his answer; any repression of a full statement of what he has to say that is material; any deceit or disingenuousness concealed in the question that may tend to shape the reply of the witness, divert it from its intended form, or, in short, prevent or embarrass a true and honest response,—these and all similar influences and expedients are, as a general rule, irregular and unauthorized.[81]

**Exceptions.** There are recognized, however, certain excepted cases in which leading questions may not only be proper but necessary for the eliciting of the truth. 1st. As where the witness is manifestly *hostile* to the party by whom he has been called, or is in the *interest* of the opposite party, or exhibits, for some cause, a decided *unwillingness or reluctance* to testify, or a disposition to prevaricate, or is stupid, or is very young.[82] 2d. A further exception

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[77] 1 Greenl. Ev. § 444. That a party may discredit his witness where he has been entrapped, see McDaniel *v.* State, 53 Ga., 253.

[78] "To allow leading questions is to give direct the character of a cross-examination." People *v.* Mather, 4 Wend., 247. As to the use of leading questions on the cross-examination, see *post.*

[79] "Such a question cannot be put on main examination even to contradict another witness." U. S. *v.* Angell, 11 Fed., 34. But the rule does not apply to questions put in regard to *preliminary* matter, not tending to prove or disprove the issue. Gannon *v.* Stevens, 13 Kans., 447; 1 Greenl. Ev. § 434. "It would be mere waste of time to enforce the rule where the questions asked are simply *introductory,* and form no part of the real substance of the inquiry, or where they relate to matters which though material, are not disputed. But where a question relates to a contested point, which is either directly conclusive of the matter in issue, or directly and proximately connected with it, the rule should nearly always be strictly enforced." Manual, 87 § 106.

[80] 1 Greenl. Ev. § 434; Manual, 87 § 106. "It is a mistake to suppose that such only is a leading question to which *yes* or *no* would be a conclusive answer. A question is also leading which puts into a witness' mouth the words that are to be echoed back, or plainly suggests the answer which the party wishes to get from him." Marcy, J., in People *v.* Mather, 4 Wend., 247.

[81] "If it were not for this rule, a favorable and dishonest witness might be made to give any evidence that is desired." Manual, 87 § 106.

[82] 1 Greenl. Ev. § 435; People *v.* Mather, *ante;* Moody *v.* Rowell, 17 Pick., 498; Coon *v.* People, 99 Ills., 368; G. C. M. O. 18 of 1874—remarks of Gen. Terry; Do. 14 of 1864; G. O. 36, Dept. of La., 1869; Manual, 88–9.

is where the testimony of the witness is defective in that he cannot recollect or specify a certain material fact: here it may be permitted to men-
518 tion or suggest the particular matter in regard to which an answer is desired.[83] But in such a case the most approved course is first to exhaust the recollection of the witness in asking him what was said or done, &c., in general, at the time in question. If, when he has made his statement in answer, some material circumstance is omitted, the best practice is to ask him if he has stated all that he remembers, and, upon his replying that he has, to then call his attention, by specifying it, to the particular fact, thing, or language, and inquire if it existed, was done, said, &c. Among the more familiar occasions for pursuing this course are those where a name, a date, or an item such as an article of property—perhaps one out of many—has been forgotten; or where disrespectful or other material words spoken, the phraseology of a verbal order, &c., cannot be recalled or accurately testified to without being so specified.

**Discretion of the court as to the admission of leading questions—Military cases.** Whether, in any civil case, the circumstances presented constitute so far an *exception* to the general rule as properly to allow leading questions to be put on the direct examination of a witness, is a matter which rests entirely in the *discretion* of the court, and not one which can be "assigned for error."[84] So, in a *military* case, the improper admission of a leading question or questions would not affect the legal validity of the proceedings, though, in an extreme instance, it might well induce a disapproval of the same.[85]

A special form of leading interrogation, sometimes pursued in military cases but irregular and improper, may here be noticed. This consists in reading the charge and specification, or stating their substance to the witness, and
519 then asking him what he knows on the subject. This form is objectionable in that it leads the witness as to the details of the offence as charged, and suggests them to him as a given basis for his testimony, instead of leaving the same to rest solely on his personal knowledge and recollection. It has been repeatedly condemned by the authorities and in Orders.[86]

### 2. CROSS-EXAMINATION.

**ITS SCOPE IN GENERAL.** The direct examination of a witness being concluded, the opposite party, though he may waive it, proceeds ordinarily to avail himself of the right of cross-examination. So essential is cross-examination, or the opportunity to cross-examine, to the acceptance of facts as legal

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[83] 1 Greenl. Ev. § 435; Manual, 88; People *v.* Mather, *ante;* Moody *v.* Rowell, *ante.*

[84] 1 Greenl. Ev. § 435; Moody *v.* Rowell, *ante;* Donnell *v.* Jones, 13 Ala., 490; Shuffin *v.* People, 4 Hun., 16; King *v.* Mittalberger, 50 Mo., 182.

[85] In G. O. 36, Fifth Mil. Dist., 1868, it is remarked by the reviewing officer, (Gen. Neill,) in regard to the action of the court in admitting questions of this character, as follows:—"There appears to have been no limit to the number of leading questions improperly allowed. Thus arbitrarily to set aside the rules of evidence is unprecedented and illegal. A Court possesses no power to authorize the examination of a witness to be conducted in any other manner than that sanctioned by the well-established rules of law. The proceedings are disapproved." And see G. O. 71, Dept. of Dakota, 1870.

[86] See McNaghten, 185; Bombay R., 28; Gilchrist, 20; G. O. 12, Dept. of the Mo., 1862; Do. 36, Id., 1863; Do. 77, Dept. of the East, 1870; Do. 29, Dept. of Cal., 1865; G. C. M. O. 54, 120, Div. of the Pacific & Dept. of Cal., 1880; DIGEST, 394. A still more objectionable form is to recite the charge in terms or substance, and ask the witness directly whether the accused actually committed the specific act alleged. As—"Did he desert?" "Did he sell or through neglect lose his clothing, &c.?" See G. O. 67, Dept. of the South, 1874; DIGEST, 394–5.

testimony, that all *ex parte* statements whatever, whether or not sworn to, are radically incompetent as evidence on the merits, and should be absolutely excluded by the court, even though the party entitled to object may be willing to consent to their introduction. An *ex parte* statement or declaration, whether or not in the form of an affidavit, is essentially illegitimate material upon which to base, wholly or in part, a finding by a court or an approval by a reviewing officer.[87]

The exercise of the right of cross-examination, as a test of the perception, observation, recollection and veracity of the witness,—always important to the due investigation of truth and administration of justice,—has become even more so than formerly; certain classes of persons who once were excluded from the stand—including the accused himself[88]—being now admitted, and facts which once went to the competency now going to the credibility of the witness. In view of its purpose and significance, a much greater latitude is properly
520 allowed in the cross-examination than in the direct;[89] leading questions, for example, being freely permitted;[90] and matters otherwise irrelevant and collateral being allowed to be gone into to a reasonable extent, (and subject to the limitations yet to be noticed,) where properly apposite to the testing of the knowledge, memory, or *animus* of the witness, or to discrediting him in general.[91]

Upon the liberty, however, of cross-examination there are certain restrictions, as follows:—

1. To be confined to the matter of the direct examination. The rule is established in the U. S. courts,[92] and commonly observed in the military
521 practice,[93] of restricting in general the cross-examination to the subject and scope of the direct examination. Such rule tends to simplify and

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[87] See G. C. M. O. 5, Dept. of Texas, 1890; Do. 5, 11, Dept. of Dakota, 1893; Do. 50, Navy Department, 1893.

[88] See *"Accused Persons Themselves,"* and notes, *ante.*

[89] It is however always within the discretion of the court to confine a cross-examination within reasonable limits—to stop it when unreasonably protracted. Reed *v.* Clark, 47 Cal., 194. Under the license of cross-examination a party cannot be permitted to bully or insult a witness, particularly when the latter is an official superior to whom he owes deference and respect. See remarks of Gen. Terry in G. C. M. O. 134, Dept. of Dakota, 1884.

[90] The right to employ leading questions on the cross-examination is subject to a possible limitation, in the discretion of the court, "where the witness shows a strong interest or bias in favor of the cross-examining party, and needs only an intimation to say whatever is most favorable to that party." Moody *v.* Rowell, 17 Pick., 498. And see G. C. M. O. 18 of 1874—remarks of Gen. Terry.

[91] "Everything which goes to affect the credit of a witness as to the particular facts to which he is called to testify is material and admissible." Com. *v.* Hunt, 4 Gray, 423. See the point, that questions as to the motives or *animus* of the witness are permissible on the cross-examination, recognized in G. C. M. O. 7 of 1873; Do. 8, Fourth Mil. Dist., 1867; Do. 23, Dept. of Texas, 1873; G. O. 11, Dept. of Cal., 1865; Do. 8, Div. of the Atlantic, 1875. That the question, whether the witness has not previously expressed *hostility* toward the accused, is not an irrelevant one on cross-examination, see *post.* In G. C. M. O. 24 of 1872, it was held that a witness, who had testified that the accused was drunk, might be asked, to test his powers of perception at the time, whether he was then himself sober. And see a similar case in G. O. 48, Dept. of the South, 1869, cited *post.* In G. C. M. O. Div. Atlantic, 1889, it was held admissible for the accused, on cross-examination, to interrogate a witness as to his sobriety at the time of the offence charged, the question directly affecting his credibility.

[92] R. R. Co. *v.* Stimpson, 14 Peters, 461; Houghton *v.* Jones, 1 Wallace, 702; Rea *v.* Missouri, 17 Id., 542.

[93] Simmons § 604; G. O. 85, Dept. of the Cumberland, 1867; G. C. M. O. 18, Dept. of the Columbia, 1880. But a party has the same right to cross-examine a witness as to matter brought out, on the direct examination, by questions addressed *by the court,* as he has in regard to matter brought out by the opposite party. G. C. M. O. 48, Div. of the Pacific & Dept. of Cal., 1880.

confine within reasonable limits the investigation of a criminal trial, and is peculiarly adapted to the purposes of a court-martial as an instrument of prompt and efficient justice. In consequence of this rule, if the adverse party wishes to examine the witness as to matters not embraced within the scope of the direct examination, he should, as observed by Judge Story, "do so by making the witness his own, and calling him as such, in the subsequent progress of the cause."[94] This rule indeed may be allowed to be departed from in the discretion of the court;[95] and it is to be understood that it has reference mainly to facts pertaining to the issue and material to the prosecution or defence, and does not apply to questions outside of the main subject at issue and asked for the purpose of testing the motives, prejudice, or credit of the witness.

**2. Not to be extended to collateral matters with a view to contradict the witness—Previous statements and expressions.** It is an established rule of the law of evidence, repeatedly recognized in military cases,[96] that a party cannot be permitted to cross-examine a witness as to any "collateral, independent fact, irrelevant to the main issue," for the purpose of laying a foundation for subsequently contradicting him by other evidence and thus discrediting him; but that the answers of the witness to all such collateral interrogation are to be taken as conclusive against the cross-examining party.

522 But a question whether the witness has not at some previous time told a *different story*, or given a *different account* of the matter testified to on his direct examination, is not collateral or irrelevant; nor is a question whether the witness has not previously expressed *hostility* toward the accused.[97] And questions of either kind, being relevant, may be asked the witness on cross-examination, with a view of contradicting him by other evidence, in the event of his returning a negative answer.[98] The form of the cross-examination in such cases will be further referred to under the head of "Impeaching Testimony."

### 3. RE-EXAMINATION, &c.

**ITS SCOPE.** Where the witness, in the course of the cross-examination to which he has been subjected, has made statements not in harmony with those made upon the examination in chief, or statements of a doubtful or equivocal

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[94] R. R. Co. *v.* Stimpson, *ante*. Matters of defence are not in general properly proved by cross-examination. Dennis *v.* Van Voy, 2 Vroom, 38. A party who has not yet opened his own case cannot in general properly do so by a cross-examination of his adversary's witnesses. Thornton *v.* Hook, 36 Cal., 223.

[95] See Rea *v.* Missouri, 17 Wallace, 542.

[96] Simmons § 975; Lieut. Hyder's Trial, 157; Lieut. Col. Fremont's Trial, 256. And see the case of 1st Sgt. Clerc, in G. C. M. O. 45, Dept. of Cal., 1883, in which it is remarked by the reviewing authority, (Gen. Schofield,) as follows:—"The defence was permitted to ask a witness for the prosecution, on cross-examination, collateral and irrelevant questions, viz.: whether he had ever been tried or sentenced for desertion, with a view to contradicting him, (on his answering in the negative,) by subsequent testimony in chief, which also was allowed to be introduced against the objection of the judge advocate. In permitting this to be done, the Court disregarded one of the fundamental rules of the law of evidence, and its action is disapproved."

[97] 1 Greenl. Ev. § 449, 450. That these questions may be asked notwithstanding the rank of the witness, see G. C. M. O. 66, (H. A.,) 1879; G. O. 11, Dept. of Cal., 1865; G. C. M. O. 31, Dept. of Dakota, 1869; Do. 8, Fourth Mil. Dist., 1867. In Do. 18, Div. Atlantic, 1886, the court was held to have been in error in refusing to the defence an opportunity of showing that a certain witness had expressed feelings of hostility against the accused, after such witness, on cross examination, had denied it.

[98] See the principle recognized in military cases, as to the expressing of hostility by the witness, in G. C. M. O. 8, Fourth Mil. Dist., 1867; G. O. 11, Dept. of Cal., 1865; Do. 8, Div. of the Atlantic, 1875;—as to the making of different statements by the witness, in G. C. M. O. 40, of 1880; Do. 8, Fourth Mil. Dist., 1867; Do. 23, Dept. of Texas, 1873; G. O. 31, Dept. of Dakota, 1869.

character, an occasion is presented for his *re-examination*, (or as it is sometimes called, "examination in reply,") by the party who originally called him, for the purpose of eliciting from him an *explanation* of such statements, as also (if desired) of his *motives* in making the same. But this is, strictly, the full scope of a re-examination, which cannot in general extend to the bringing out of new matter,[99] and hence the desirableness of exhausting a witness as far as possible on the original examination.[100]

523 Where, however, upon the cross-examination, the opposite party has been allowed to go into matters not testified to upon the direct examination, the other party will become entitled to re-examine as to the subjects of the testimony thus introduced.

#### 4. REBUTTAL.

New evidence introduced on the defence, or otherwise, may always be rebutted by the opposite party. Rebutting evidence is direct evidence, and the same rules apply to it as to the direct examination. It should be noted that mere *cumulative* evidence, or evidence repeating facts already introduced at a previous stage, is not, in general, properly admitted by way of rebuttal.

**Exceptions to course of examination.** As to the authority of the court, in its discretion, to allow a party to recall a witness, once dismissed, for further examination as to a material point inadvertently omitted to be inquired into, or a point since brought to the attention of the party, or for further cross-examination where the regular cross-examination has been closed; or to allow a witness to be further examined, or new witnesses to be introduced by a party, after he has rested his side of the case, or both sides of the case have been closed,—remark has been made in Chapter XVII, in considering the course of proceeding on the trial.[1]

**Examination by the court.** In the same chapter is also noticed the subject of the extent of the authority of the *court* to examine the witnesses, and of the practice as to the form and occasion of such examination.[2]

#### 5. THE PRIVILEGE OF THE WITNESS AS TO NOT ANSWERING CRIMINATING, &C., QUESTIONS.

With the subject of cross-examination is connected that of the privilege
524 of the witness to decline to answer certain classes of questions which more usually come to be asked at that stage of the examination.

**QUESTIONS THE ANSWER TO WHICH MAY CRIMINATE.** It is an established principle of the common law, recognized indeed and affirmed in the U. S. Constitution,[3] that a witness—whether the accused on the stand, or other witness—may refuse and cannot be required to answer a question the

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[99] See 1 Greenl. Ev. § 467. "On the re-examination no questions can be put which do not relate to matters inquired into on the cross-examination." Dutton *v.* Woodman, 9 Cush., 255.

[100] "On the examination in chief, the party calling a witness is bound at his peril to interrogate him as to all material matters in the first instance; and if any material question is omitted it cannot be put upon the examination in reply." Sartorious *v.* State, 24 Miss., 609. But while this is the strict rule, the court may, in its discretion, make exceptions in the interests of justice.

[1] See *ante*, pp. 285–286.

[2] Pages 286–287.

[3] "No person shall be compelled in any criminal case to be a witness against himself." Art. V of the Amendments.

answer to which may tend to criminate him; or, as it is expressed by Greenleaf,[4] "have a tendency to expose him to a penal liability, or to any kind of punishment, or to a criminal charge;" or even, in the language of Chief Justice Marshall,[5] form a link in the "chain of testimony which is necessary to convict an individual of a crime." The privilege is held to be one personal to the witness, which he may avail himself of or not as he sees fit,[6] and
525 it is further held that it is the duty of the court, if the witness declines or hesitates to answer, to determine whether the question has the supposed drift and instruct him as to the exercise of the privilege.[7] Where indeed he positively refuses to answer, such refusal is conclusive and the question cannot be put. In Burr's Trial[8] it is observed by the court—"If in such case he say upon his oath that his answer would criminate himself, the court can demand no other testimony of the fact." Where, however, in a military case, the answer will clearly not be criminating, the court will properly so advise the witness, and he will then properly answer, though he cannot be *required* to do so.[9]

In the exercise of this privilege the law protects the witness from unfavorable presumptions; for if it be exercised, no legal inference as to the truth of the matter which was the subject of the inquiry is permitted to be drawn.[10]

The privilege cannot, of course, be claimed where the criminal liability has ceased;—as where the witness has been finally tried for the offence referred to in the question;[11] or prosecution for the same has been barred by the statute of limitations.[12] Nor can it be claimed on the cross examination where the

[4] 1 Evidence § 451. And see Manual, 84; also Counselman *v.* Hitchcock, 142 U. S., 597, where it is held that Sec. 860, R. S., (applicable indeed only to civil, not to military, courts of the United States,) does not abridge this privilege.

[5] 1 Burr's Trial, 244.

[6] In a case in G. O. 48, Dept. of the South, 1869, where the question—"Were you under the influence of liquor at this time?" addressed to a witness, was objected to by a member on the ground that the answer might criminate, and ruled out by the court, the Reviewing Officer, (Gen. Terry,) in disapproving this action, remarks:—"The question was one of undoubted propriety and competency, as tending to show the weight or degree of credibility to be attached to the testimony of the witness. It in no wise tended to implicate him in the commission of any offence, military or civil, nor could the answer in any manner, direct or indirect, tend to degrade his character. Moreover, questions of the character indicated, are not subject to objection by a member of the court, the judge advocate, or by the accused. The right to answer or not as he pleases, *is the privilege of the witness*, and concerns neither the court nor any of its members. This privilege may be waived or asserted in the witness' discretion; and the duty of the court is fulfilled when it informs him of his right and leaves him free to exercise his discretion in the premises." In a later case it was ruled—"The privilege belongs exclusively to the witness, who may take advantage of it or not at his pleasure;" * * * he "may waive it and testify in spite of any objection coming from" a party to the proceeding. * * * "If ordered to testify in a case where he is privileged, it is a matter exclusively between the court and the witness. The latter may stand out and be committed for contempt, or he may submit; but a *party* has no right to interfere or complain of the error." So *held* that the fact that a court-martial erroneously required a witness, who claimed the privilege, to answer, did not prejudice the legal rights of the accused, or call for a disapproval of the proceedings as invalid. Opinion of Attorney General, of Oct. 27, 1883, in case of Cadet Hackett. (17 Opins., 616.)

[7] 1 Greenl. Ev. § 451; Com. *v.* Shaw, 4 Cush., 594.

[8] Vol. 1, p. 244.

[9] See Hackett's Case, 17 Opins. At. Gen., 616, *ante*. It need hardly be remarked that a court-martial would not be empowered to commit or punish for contempt a witness refusing to answer under these circumstances. See Chapter XVII—"Contempts."

[10] 1 Greenl. Ev. § 451, and cases cited in note.

[11] See G. O. 29, Army of the Potomac, 1864.

[12] Roberts *v.* Allatt, 1 Mood. & Malk., 192; U. S. *v.* Smith, 4 Day, 123; People *v.* Mather, 4 Wend., 255.

witness has voluntarily testified without objection as to the subject of the question on the examination-in-chief.[13]

526 In military cases the principle has, properly, been recognized where the answer to the question might subject the witness either to a *military or a civil* prosecution.[14]

**OTHER QUESTIONS.** The privilege under consideration cannot be asserted where the question is such that the answer will merely subject the witness to a civil action or a pecuniary liability;[15] nor can it be asserted though the answer, (while not criminating,) will tend directly to degrade or disgrace the witness,[16] unless indeed the question relate to some matter wholly collateral and irrelevant to the issue.[17] If indeed the question, (having the tendency to disgrace the witness,) refer to a fact which can properly be proved only by documentary evidence,—as the fact of a criminal conviction, or of an imprisonment or other ignominious punishment as the result of a conviction,—it is not competent, for the *special* reason that such fact can legally be established only by the record.[18] There is also another important limitation to the asking of questions that may disgrace the witness—viz. that they must be questions which, relating to comparatively recent transactions, go to his present credit as a veracious and reliable person: if they do not directly affect his credit *as a witness*, they are not properly admissible.[19]

### 6. IMPEACHING TESTIMONY.

The credit of a witness who has been examined in chief is subject to be impeached, not only by counter evidence from the other side as well as by facts brought out in his cross-examination, but also by testimony bearing directly upon his *personal veracity*. This, which is that commonly intended by the term "impeaching testimony," is either particular or general, being

527 (1) testimony that the witness has made specific statements, (oral or written,) out of court contrary to what he has testified on the stand; or (2) testimony attacking his general reputation as a truthful person.

**TESTIMONY AS TO CONTRADICTORY STATEMENTS OF THE WITNESS.** Such testimony is competent only in respect to matters which are relevant and material to the charge. To properly prepare the way for such testimony, the established procedure is, first to ask the witness, on the cross-examination, not in general terms whether he has not made a different statement, or different statements, but whether he did not on a certain occasion make a certain diverse statement, (specifying it,) to a certain person named: this, in order that he may better remember what he has said on the subject out

[13] People *v.* Freshour, 55 Cal., 375. Nor does the protection extend to the case of an *accomplice* voluntarily testifying for the prosecution. That the *accused*, when on the stand as a witness, cannot claim the privilege *as to the offence for which he is on trial*—see Wharton, Cr. Ev. § 432.

[14] Lieut. Kennon's Trial, p. 29, 41, 43; G. O. 48, Dept. of the South, 1869. See also Capt. Barron's Trial, p. 84, 98, where the rule was applied to a case of a witness who was actually under charges growing out of the same transaction, (as that which had given rise to the charge against the accused,) and was soon to be tried.

[15] 1 Greenl. Ev. § 452; Manual, 95; Story, 71.

[16] 1 Greenl. Ev. § 454.

[17] 1 Greenl. Ev. § 455; U. S. *v.* White, 5 Cranch C., 73.

[18] 1 Greenl. Ev. § 457.

[19] 1 Greenl. Ev. § 458, 459; U. S. *v.* Van Sickle, 2 McLean, 219; Davis *v.* Forrest, 2 Cranch C., 23; U. S. *v.* Masters, 4 Id., 479.

of court, and be afforded an opportunity to correct or explain his testimony as given—a practice clearly in the interest of truth and justice.[20] This rule has been recognized in military cases.[21] Where the previous statement of the
528 witness was in *writing*, and contained in a letter or other paper, it is not considered competent to ask him whether he has written a certain thing, stating its substance or character; the proper practice is to put the paper into his hands, or at least to exhibit to him the material portion of it, and to then ask him whether or not he wrote it.[22]

That the party calling the witness cannot *confirm* his original statement, (after it has been impeached by evidence of his having made a different one,) by showing that he has at other times made statements to the *same* effect as that originally given under oath—appears to be established by the weight of authority.[23]

**TESTIMONY IMPEACHING THE GENERAL REPUTATION FOR TRUTH OF THE WITNESS.** This is the most familiar form of attacking the credit of witnesses; a party being always permitted to impeach the testimony of a witness to the merits, introduced by the adverse party, by evidence impugning his character for veracity.[24] But this evidence must be *general*—must relate to the *general reputation* of the witness as a truthful person, at the time of his testifying;[25] for, as it is well settled, evidence of particular deceits, falsehoods, false conduct, &c., of the witness is wholly inad-

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[20] This "is an elementary principle of the law of evidence. * * * In no other way can a foundation be laid for putting in the impeaching testimony." R. R. Co. *v.* Artery, 137 U. S., 519. And see Marks *v.* Fox, 18 Fed., 713; The Queen's Case, 2 Brod. & Bing., 313; 1 Greenl. Ev. § 462. In Conrad *v.* Griffey, 16 Howard, 46, McLean, J., says:—"This rule is founded upon common sense, and is essential to protect the character of a witness. His memory is refreshed by the necessary inquiries, which enable him to explain the statements referred to, and show they were made under a mistake, or that there was no discrepancy between them and his testimony." And see McKinney *v.* Neil, 1 McLean, 540; U. S. Dickinson, 2 Id., 325. In the latter case it was held that it is not proper to call, in the first instance, *another* witness, and ask *him* if the witness intended to be impeached has not made a contradictory statement. The latter must first be asked on the cross-examination, whether he has not made such previous statement, and if he replies in the negative, the impeaching witness may subsequently be called and interrogated as to the fact. And see G. C. M. O. 8, Dept. of Cal., 1891. It is to be noticed that the species of evidence under consideration is admitted for purposes of impeachment purely, not for proof of the previous statements. Thus in The Elvira, Gilpin, 60, the Court hold that—"A previous and contradictory statement of a witness may be given in evidence to impeach his credit, but not as proof of the facts formerly stated." Or, in other words, (p. 61,)—"You cannot substitute the other account in place of that which you have discredited, making it thus the evidence of the cause."

[21] See G. O. 31, Dept. of Dakota, 1869; G. C. M. O. 18, Div. Atlantic, 1886; Do. 8, Dept. of Cal., 1891; Do. 1, Dept. of Texas, 1891.

[22] See 1 Greenl. Ev. § 463, 465; Murphy *v.* May, 9 Buah, 33. In G. C. M. O. 40, of 1880, the credibility of a witness was held properly impeached by the production of the record of a court of inquiry containing a different statement made by him as a witness under oath.

[23] See Ellicott *v.* Pearl, 10 Peters, 439, remarks of Story J.; Ware *v.* Ware, 8 Greenl., 42; Hurd *v.* State, 44 Miss., 731; People *v.* Doyell, 48 Cal., 85. *Contra*, see U. S. *v.* Neverson, 1 Mackey, 153.

[24] An accused party taking the stand as a witness may be impeached like any other witness. Wharton, Cr. Ev. § 433.

[25] People *v.* Haynes, 38 How. Pr., 369. The object of the testimony is to ascertain the reputation for veracity of the witness *at the time of the trial*, but it may extend over a reasonable time previous, and to different places when the domicil of the witness has been changed. Hamilton *v.* People, 29 Mich., 173.

529 missible.[26] The impeaching witnesses are not called to communicate their personal knowledge in regard to his speaking or not speaking the truth,[27] or their own estimate or opinion of him as a veracious person or the reverse,[28] or knowledge of his general personal character, but his reputation or character *for truth* among his acquaintance or those conversant with him.[29] And this—what his reputation is—they must know of their own knowledge;[30] it is not sufficient for them to state what they have heard others say as to such reputation.[31] And ordinarily the impeaching witnesses should properly themselves come from the neighborhood, place of residence, military station, &c., of the witness, though it is not necessary that they should have a personal acquaintance with him.[32]

530 **Procedure.** The most approved *form* of the direct examination of an impeaching witness is simply to ask him if he knows the general reputation of the adverse witness for veracity,[33] and, if he answers in the affirmative, to ask him further to state what that reputation is.[34] In the English and in some of the American courts the practice has been to allow the further question, whether, knowing such reputation, he would believe the adverse witness under oath. But this question, though sometimes permitted to be asked upon military trials, is one which seems not to be encouraged by the weight of authority in

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[26] "The examination must be confined to his general reputation, and not be permitted as to particular facts; for every man is supposed to be capable of supporting the one, but it is not likely that he should be prepared to answer the other without notice." 1 Greenl. Ev. § 461. And see Teese *v.* Huntingdon, 23 Howard, 2; Wike *v.* Lightner, 11 Sergt. & Rawle, 198; Wilson *v.* State, 16 Ind., 392; Taylor *v.* Com., 3 Bush., 508; Lieut. Hyder's Trial; 157; G. C. M. O. 25, Dept. of the Colorado, 1894.

Nor—according to the weight of authority in this country—is it admissible to inquire, either as to the moral character of the witness generally, or as to particular immoral or criminal acts on his part. Teese *v.* Huntingdon, *ante;* U. S. *v.* Vansickle, 2 McLean, 219. Thus it has been held that it cannot be asked, for the purpose of impeaching a female witness, whether she was not a prostitute. Spears *v.* Forrest, 15 Vt., 435; Com. *v.* Churchill, 11 Met., 538; U. S. *v.* Dickinson, 2 McLean, 329. So, evidence that he was a deserter from the army has been held not to be admissible to impeach the character for veracity of a witness in a criminal court. Foley *v.* People, 22 Mich., 227. That "proof of a conviction or sentence for desertion, or other military crime," does not "affect the credibility of a witness by impeaching his veracity"—see G. C. M. O. 45, Dept. of Cal., 1883.

[27] People *v.* Methvin, 53 Cal., 68.

[28] Kimmel *v.* Kimmel, 3 Sergt. & Rawle, 336. "The court erred in admitting" impeaching testimony "based upon the individual opinion of the witness derived from specific acts of the accused, and not upon his general reputation for truth and veracity." Gen. McCook, G. C. M. O. 28, Dept. of Arizona, 1892.

[29] Douglass *v.* Tousey, 2 Wend., 354; Teese *v.* Huntingdon, *ante;* Kimmel *v.* Kimmel, *ante;* Wike *v.* Lightner, *ante;* G. C. M. O. 128, Dept. of Dakota, 1882.

[30] "That knowledge of character which is gained from report cannot be considered as *secondary*, for report constitutes character." Gibson J. in Kimmel *v.* Kimmel, *ante.* And see G. C. M. O. 44, Dept. of the Platte, 1892.

[31] Kimmel *v.* Kimmel, *ante;* Vernon *v.* Tucker, 30 Md., 456. Such evidence would be mere *hearsay.* Douglass *v.* Tousey, *ante.*

[32] Kimmel *v.* Kimmel, *ante.* "There is danger from the proneness so often observable in witnesses to substitute their own opinion for that of the public, whose judgment cannot be so readily warped by prejudice or feeling as that of an individual; and hence the policy of not requiring any intimate degree of knowledge respecting the person himself, or of bringing the witness too close to the scene." Id. (Gibson J.)

[33] "General reputation *for veracity,*" (or "*truth,*" or "*truth and veracity;*") not "general reputation"—without qualification. Wilson *v.* Young, 31 Wisc., 574. "Reputation" is a better word than "character." Knode *v.* Williamson, 17 Wallace, 586.

[34] Or the two questions may be consolidated—"Do you know his general reputation for veracity, and if so what is it?"

this country,[35] inasmuch as it calls for the individual estimate of the witness—a thing to be avoided in this proceeding—and invites an answer liable to be influenced by personal hostility or prejudice.[36]

The impeaching witness having given unfavorable testimony, remains subject to be *cross-examined* by the other party as to the means and sources of his knowledge. He is generally called upon to specify the particular individuals whom he has heard speak unfavorably of the truthfulness of the witness attempted to be impeached, and may be interrogated as to the grounds upon which they based their opinions.[37] The adverse party may in turn impeach the impeaching witnesses, or—as is oftener done—he may support the general character for veracity of his own original witness by testimony showing it to be good.[38]

531 7. TESTIMONY AS TO GOOD CHARACTER.

**ADMISSIBILITY OF IN DEFENCE, ON CRIMINAL PROSECUTIONS.** It may be regarded as settled law that evidence of good general character, as possessed *prior to* the commission of the alleged offence,[39] may be introduced by the accused as part of his defence, provided the character shown is of such a nature that it may properly weight with the jury in determining the issue involved in the case. Whether the evidence be deemed admissible as pertinent to the question of criminal intent,[40] or as sustaining the original presumption of innocence,[41] or as a fact going to show that it is unlikely that the accused could have committed the crime and thus contributing to a reasonable doubt upon the whole case,[42]—it is in general admitted if it be in any degree apposite to the species of criminality charged. Thus while a general reputation as a moral well-conducted person and law-abiding citizen would be admissible in evidence upon criminal trials in general, a character for peaceableness would not be apposite to the defence in a case of larceny, though it might be entirely apposite under an indictment for violent homicide.[43]

Evidence as to character is sometimes referred to as especially significant in *doubtful* cases;[44] but, where otherwise admissible, neither the nature of the

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[35] See 1 Greenl. Ev. § 461; Teese *v.* Huntingdon, *ante;* Phillips *v.* Kingsfield, 19 Maine, 375; People *v.* Methvin, 53 Cal., 68; People *v.* Ramirez, 56 Cal., 533.

[36] See Phillips *v.* Kingsfield, *ante.*

[37] "On the cross-examination, the inquiry may extend to the witness' opportunity for knowing the character of the other witness, for how long a time and how generally the unfavorable reports have prevailed and from what persons he has heard them." Phillips *v.* Kingsfield, *ante.* The impeaching witness may be asked, on cross-examination, not only the *names* of the persons whose statements have made up the general reputation to which he has testified, but *what they said.* Annis *v.* People, 13 Mich., 11. And see Bates *v.* Barber, 4 Cush., 107; 1 Greenl. Ev. § 461.

[38] See 1 Greenl. Ev. § 461; Manual, 90. In Bunnell *v.* Butler, 23 Conn., 65, it is held that the court "may, in its discretion, limit the number of impeaching witnesses," and that "the proper exercise of such discretion is no ground of error." And in this case the number was limited to *six* on each side. In People *v.* Murray, 41 Cal., 66, it was held not error to have limited the impeaching witnesses to *eight.*

[39] Evidence of good character sustained *after* the commission of the offence is of course not admissible. Graham *v.* State, 29 Texas, Ap. 31.

[40] 1 Greenl. Ev. § 54, note; 3 Id. § 26.

[41] 1 Bishop, C. P. § 1112; Manual, 64.

[42] See Wharton, Cr. Ev. § 57. It is deemed to have more force where the proof is circumstantial than where it is direct and positive. U. S. *v.* Babcock, 3 Dillon, 620.

[43] See 2 Russell, 784; 1 Greenl. Ev. § 55; 3 Id. § 25; Wharton, Cr. Ev. § 60; 1 Bishop, C. P. § 1113; Cathcart *v.* Com., 37 Pa. St., 108. In People *v.* Garbutt, 17 Mich., 9, a case of homicide, evidence that the accused, when in the army, was reputed a good and brave soldier was held inadmissible.

[44] See U. S. *v.* Means, 42 Fed., 599.

offence nor of the proof on the merits can properly affect its compe-
532 tency.[45] It will possess little or no weight, however, when the guilt of the accused is plainly shown by the testimony.[46] Where offered, it must be evidence of *general* character or reputation:[47] particular acts of good conduct are not admissible.[48]

This testimony is admitted, subject, like any other, to cross-examination.[49] It may also be rebutted by evidence of bad character; but such evidence cannot include particular acts or conduct, but must be as general as that to which it replies.[50]

It is settled law, however, that the general character of the accused cannot be attacked until he has himself first introduced evidence to sustain it, or—in the language of Wharton[51]—"unless the defendant puts his character in issue, the prosecution cannot call witnesses to impeach it."

It is also well settled that the fact that the accused offers, in his defence, no evidence in support of his general character, can furnish in law no unfavorable influence or impression against him—can afford no presumption, however weak, either "that he is guilty of the offence charged, or that his character is bad."[52]

533 **In military cases.** At military law, evidence of character, which is always admissible,[53] is comparatively seldom offered strictly or exclusively *in defence;* but, when introduced, is usually intended partly or principally, *as in mitigation of the punishment* which may follow upon conviction. With this view it is presented not only in connection with a plea of "guilty," but as a precautionary measure where the plea is "not guilty," and both where the sentence is discretionary and where it is mandatory. Thus offered, it is not subject to the rules which restrain the scope and quality of such testimony when defensive merely. It need have no reference to the nature of the charge, but may exhibit the reputation or record of the accused in the service, for efficiency, fidelity, subordination, temperance, courage, or any of the traits or habits that go to make the good officer or soldier. It also need not be limited to *general* character, but may include particular acts of good conduct, bravery, &c. It

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[45] Wharton, Cr. Ev. § 66; 1 Bishop, C. P. § 1115.

[46] U. S. *v.* Jackson, 29 Fed., 503; U. S. *v.* Jones, 31 Fed., 718.

[47] "In view of the fact that 'the best character is generally that which is the least talked about,' the courts have found it necessary to permit witnesses to give *negative* evidence on the subject, and to state that they 'never heard anything *against*' the character of the person on whose behalf they have been called." Wharton, Cr. Ev. § 58.

[48] Wharton, Cr. Ev. § 60; 1 Bishop, C. P. § 1117.

[49] In a case in G. C. M. O. 66 of 1875, a witness for the defence, having testified that the character of the accused was good, was asked, on cross-examination, by the judge advocate—"Whom have you heard give the accused a good character?" To this question an objection was made, and was sustained by the court. *Held* by the Secretary of War that the objection "should have been overruled."

[50] "Particular good or bad acts * * * * cannot be shown in proof or rebuttal of good character." 1 Bishop, C. P. § 1117.

[51] Cr. Ev. § 64. And see this principle recognized in G. O. 112, Dept. of the Mo., 1863; Do. 11, Dept. of the Susquehanna, 1864; Do. 65, Div. of the Atlantic, 1864; Do. 29, 1st Mil. Dist., 1867; Do. 40, Dept. of the South, 1870; Do. 52, Dept. of the Platte, 1871; G. C. M. O. 58, Dept. of Texas, 1872; Do. 10, Id., 1882; Do. 20, Dept. of the Mo., 1890.

[52] Wharton, Cr. Ev. § 62. And see 1 Bishop, C. P. § 1119; People *v.* Bodine, 1 Denio, 282.

[53] While in the American and the British military practice evidence of character and record is introduced by the accused, in the French the Government puts in the military history, (*état des services,*) of the accused at the beginning of every trial. See, for example, Le Procés Bazaine, Moniteur edition, Paris, 1873, page 3.

may also be either oral or written; consisting, if the latter, of testimonials from superior officers, recommendations for promotion, honorable mention in orders, awards of medals of honor, certificates of merit, warrants as non-commissioned officers, honorable discharges, &c., of which the originals or copies should be appended to the record of trial. Such evidence, in the event of conviction, may avail to lessen the measure of punishment if the same be discretionary with the court; if mandatory it may form the basis of a recommendation by the members and a mitigation or pardon by the reviewing officer. So much a matter of course is the admissibility of evidence of good character on a military trial, that, where the same exists, the accused should be allowed all reasonable facilities for obtaining it: where it can not be procured without too considerable a delay or other embarrassment to the service, the fact of its existence and its substance will in general properly be formally admitted of record, by the prosecution.

Rebutting evidence of bad character, in military cases, may be of similar form and nature to the evidence introduced of good character.[54]

534 IV. TESTIMONY BY DEPOSITION.

**ARTICLE 91.** The written military law in regard to Depositions is comprised in the present 91st Article of war—originally s. 27, c. 75, Act of March 3, 1863—as follows: "*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 effect of this statute is deemed to be, not merely to indicate when depositions shall be admissible as evidence, but to *entitle* parties, in cases within the Article, to have depositions "read in evidence." If, therefore, the deposition be in proper form, and material as testimony, the court cannot refuse to receive and consider it.

In all cases except where a question of identity is at issue, depositions of *distant* witnesses may in general well be substituted for personal testimony.

**CONSTRUCTION OF THE ARTICLE.**—"**The depositions of witnesses.**" In the earlier provision on this subject—Art. 74 of the code of 1806—the term "witnesses" was qualified by the words, "not in the line or staff of the army," and practically included civilians only.[55] The present Article, containing no such qualification, is held to authorize the admission in evidence of depositions of military as well as civil persons, and such has been its construction in practice. When officers or soldiers are stationed at remote points where their services cannot well be dispensed with, their evidence is commonly obtained by deposition; and this course is also in general pursued where the testimony of officials at Washington, (as chiefs of the staff corps,) is required at distant trials.

535 "**Residing beyond the limits of the State,**" &c. The Article, in providing for the admission of depositions taken under certain specified

[54] See G. C. M. O. 88, (H. A.,) 1886.

[55] It is remarked on Gen. Pillow's Court of Inquiry, p. 375, that the provision of 1806 was restricted to *civil* persons because such could not (then) legally be required, (as now by Sec. 1202, Rev. Sts.,) to attend as witnesses before courts-martial.

It may be noted that in the earliest provision on this subject—the original of the present Article in our law, *viz.*, a Resolution of Congress of Nov. 16, 1779, there is no such restriction, the statute providing in general terms—"That in cases not capital in trials by court-martial, depositions may be given in evidence," &c. 3 Jour. Cong., 392.

conditions, must be regarded as excluding them where these conditions do not exist.[56] Thus depositions of persons residing *within* the limits indicated are not admissible,[57] and cannot be read in evidence, *though the parties may consent.*[58] On the other hand, the Article authorizes the admission of a deposition of a witness residing in a *foreign* country. The term "residing," as applied to *military* persons on the active list, is ordinarily to be construed as equivalent to *stationed* or *on duty.*

"If taken on reasonable notice to the opposite party." What shall be "reasonable notice" is not indicated by law or regulation,[59] nor has the practice established any general rule on the subject. The period should depend mainly on the nature and importance of the case, the extent and materiality of the testimony sought, the situation of the opposite party, the existing status whether of peace, war or other emergency, &c. In general, all that the notice is really needed for is to afford the party sufficient time within which, (in consultation with his counsel, if he has any,) to examine the interrogatories, note objections, (if desired,) and prepare cross-interrogatories. For this a few days will ordinarily be a "reasonable" period.

The notice may be given, under the Article, at any time after the issuing of the order convening the court at a certain place named; for till the order is made it cannot be determined whether any particular witness whose deposition is proposed to be taken is a person "residing beyond the limits of
536 the State, &c., in which the court is ordered to sit," and therefore one whose deposition can legally be "read in evidence" in the case. The notice may thus be given, (and the deposition, if there is time, be taken,) prior to the assembling and organization of the court. In practice, the taking of depositions is not unfrequently initiated before the arraignment; and it is sometimes resorted to at a much later stage. Where, pending the trial, a deposition is desired to be obtained, the court will, if necessary, properly grant a continuance to await the arrival of the testimony.

A deposition taken without notice, or without reasonable notice, should, if objected to, be ruled out as inadmissible.[60] A deposition taken without notice is indeed no more than an *ex parte* affidavit; and affidavits, or statements of

[56] See 2 Opins. At. Gen., 344; Gilchrist, 24.

[57] G. O. 32, Dept. of Cal., 1866; G. C. M. O. 102, Dept. of the East, 1871; Do. 1, Div. of the South, 1875; Do. 10, 22, Dept. of the Mo., 1891.

[58] The fact that a civilian residing at the post where the court was convened has temporarily gone beyond the limits of the State, so that his personal attendance cannot be secured, will not make his deposition admissible. G. C. M. O. 44, Dept. of the Mo., 1887.

[59] The only statute in which a period of notice has been prescribed was the Resolution of Dec. 24, 1779, (3 Journals, 415,) where it was made to depend on the distance between the residence of the witness and that of the opposite party, with a view to enable him to be present, or represented, at the examination. In the present practice it is comparatively rare that either party is thus present or represented. See *post*—"Procedure."

[60] In a peculiar case published in G. C. M. O. 9 of 1879, it was held by the Judge Advocate General that a certain deposition was inadmissible as taken without notice, the witness being a person who, without the concurrence of the opposite party, had been substituted for the original intended deponent. See DIGEST, 105. In a case in G. C. M. O. 45, Div. of the Pacific & Dept. of Cal., in which a deposition was objected to as taken without notice, it was remarked by the reviewing authority that a statement, added by the judge advocate at the end of the Interrogatories, that the prisoner had no cross-interrogatories to ask, was no proof of notice, being merely an *ex parte* declaration.

persons not subjected to cross-examination, are of course, as already observed, entirely incompetent as evidence before courts-martial.[61]

537 The objection, however, to a notice as *not reasonable* would properly come from the adverse party rather than from the court.[62] Such party may, if he see fit, (the requirement as to notice being for his benefit,) *waive* any objection that he might make on the ground of insufficient notice, and upon such waiver the deposition, (if otherwise in conformity with the Article,) will be admissible in evidence.

**"And duly authenticated."** The earlier statutes—from the Resolution of December 24, 1779, to Art. 74 of 1806—provided that the deposition should be taken "before some justice of the peace." The present Article not designating any person as proper to act as commissioner, it is clear that any official who, by the laws of the United States,[63] or of the State, &c., is authorized to administer oaths, may qualify the witness and authenticate, by his official signature, and seal if he has one, the deposition.[64] And now, under the recent Act of July 27, 1892, the witness may be sworn, and the deposition "authenticated" by the judge advocate of a department or of a court-martial, or by the trial officer of a summary court. If a deposition be not duly authenticated, it is wholly inadmissible in evidence.[65]

Where the business of procuring a deposition to be taken is committed to a particular officer of the army, he will properly, by an official *certificate* to that effect, further authenticate the deposition as having been duly taken.[66]

**"May be read in evidence."** This does not mean that the entire deposition as taken shall necessarily be admitted in evidence, but that it shall be admitted subject to such objections for immateriality, irrelevancy, &c., as may have been noted or may be raised upon its being read, to the questions or answers. In other words, it is to be read and received subject to the

538 same exceptions as would be the oral testimony for which it is a substitute.

A deposition, in a case within the Article, should not be rejected for a mere *informality*. If complete—if it contains the entire testimony, under oath or affirmation, of the witness, in response to all the material interrogatories, and is duly authenticated—it should be admitted.[67]

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[61] It has been repeatedly so held in Orders. See G. C. M. O. 33 of 1873; Do. 133, Dept. of the Mo., 1871; G. O. 21, Id., 1863; Do. 17, Dept. of Ark., 1866; Do. 19, Third Mil. Dist., 1867; Do. 49, Dept. of Dakota, 1871; Do. 165, Id., 1882. In a case in G. C. M. O. 37, Dept. of the East, 1870, where the court admitted in evidence the affidavit of a witness sick at the post, instead of adjourning to his quarters to take his testimony, its action was disapproved by the reviewing authority. In G. C. M. O. 19, Dept. of Texas, 1873, a letter from a post adjutant, introduced in evidence, was held improperly admitted, being, though official, a mere *ex parte* statement. In G. C. M. O. 84, Dept. of the Mo., 1882, certain *ex parte* statements, contained in a record of a board of survey, were held improperly admitted in evidence upon a trial by court-martial.

Affidavits, however, have sometimes been admitted by the court in the absence of objection by a party. On Maj. Gen. Arnold's trial, (1779,)—the most marked instance met with by the author—they were admitted freely on both sides. See pp. 20, 37, 55, 63, 77. But, notwithstanding the consent of the parties, a court-martial could rarely, if ever, with safety receive evidence of this character, which must in general be too incomplete to serve as a reliable basis either for its own judgment or the action of the reviewing officer.

[62] If, indeed, he is ignorant, the court, on perceiving no indication in the deposition papers, that due notice was given, may and should advise him as to his right to object.

[63] See Sec. 863, Rev. Sts.

[64] Lieut. Kennon's Trial, (Navy,) p. 16. Notarial fees, &c., are payable by the Quartermaster Department. Circ. No. 9, (H. A.,) 1886.

[65] G. O. 37 of 1889; Circ., July 22, 1889; G. C. M. O. 33, Dept. of Dakota, 1891.

[66] See *post*—"Procedure;" and form in Appendix.

[67] Fuller *v.* Rice, 4 Gray, 343. And see Gartside Coal Co. *v.* Maxwell, 20 Fed., 187.

The party by whom the deposition was initiated may omit to offer it, but has no right absolutely to withhold it merely because the testimony given is not favorable or such as was expected. Nor can he introduce only such parts as are favorable or useful to him, omitting the rest. He must offer it as a whole or not at all. And if *he* does not offer it, the other party may do so if he chooses: if neither offers it, it is not read and forms no part of the proceedings,[68] unless possibly the court may require the same for its information or the elucidation of the case.[69]

"In cases not capital." Defining "capital" as *punishable capitally*,[70] it results from this limitation that depositions cannot be read in evidence in cases of spies, of deserters (or of officers or soldiers advising or persuading desertion) in time of *war*, or of persons charged with any of the offences specified in Articles 21, 22, 23, 39, 41, 42, 43, 44, 45, 46, 56, and 57, or in Art. 58 when made capital by the local law. This limitation is regarded as absolute, and it is held that a deposition cannot legally be introduced in evidence in a capital case by either party, even if the other party waives objection to its admission.[71]

**PROCEDURE.** In the absence in the military law of any provisions, (such as those in the statutes of the United States[72] and of the several States,) 539 regulating the taking and using of depositions, the military procedure in this respect has not been uniform, and the depositions themselves have often been inartificially made up.

A deposition may be taken—as sometimes in civil cases—by both parties appearing, personally or by counsel, before the designated commissioner or officer, and propounding questions to the witness. This course, however, is rarely pursued in military cases.

In general, in such cases, the taking of a deposition is initiated substantially in one of the two following forms:

1. The party desiring the testimony of a certain distant witness, whose personal attendance cannot, as it has been ascertained, well be secured, serves upon the opposite party a notice in writing, to the effect that the deposition of the witness will be taken at a certain time and place and by a certain officer or person named,[73] or—as it is more commonly expressed—by such officer or person and at such time and place as shall be designated by the proper superior authority, upon the Interrogatories annexed to the notice and such Cross-Interrogatories as the party notified may present; and desiring him to serve a copy of the latter upon the party giving the notice within a reasonable time. The party notified transmits in due time to the other party a draft of his Cross-Interrogatories, if he wishes to propose any, (with his objections, if he desires to note any at this stage, to the Interrogatories,) and the original party, similarly, if he sees fit, may note his objections to the Cross-Interrogatories. The judge advocate thereupon duly forwards the whole to the person who is to take the deposition, or, if no such person has been designated, to the proper military authority, (Department Commander, General Commanding the Army, or, through the Adjutant General, to the Secretary of War,) for such

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[68] See Pelamourges *v.* Clark, 9 Iowa, 2; Wheeler *v.* Smith, 13 Id., 564; Nash *v.* State, 2 Greene, 287; DIGEST, 104, 105.

[69] See G. C. M. O. 92, Div. Atlantic, 1889.

[70] See Imperial Dictionary—"Capital." This is the sense uniformly ascribed, in this treatise, to the word as used in the Articles generally, and this is the sense attributed to it in the practice of the service.

[71] 2 Opins. At Gen., 344.

[72] See Rev. Sts., Secs. 863–870.

[73] An officer of the army is in general to be preferred, since, if a *civil* commissioner is employed, an indebtedness for *fees* will ordinarily be incurred.

designation or orders. Objections need not be thus noted on the sets of Interrogatories, but may, and generally are, left to be raised at the trial. The original party, before forwarding, may add *re-direct* Interrogatories, (serving a copy on the opposite party,) if he thinks it desirable.

2. Or, as is by far the preferable mode where practicable to adopt it,
540 the parties—the accused and judge advocate—enter into and subscribe a written STIPULATION,[74] by which it is agreed that the deposition of the witness shall be made and forwarded by him directly, or shall be taken by a particular officer mentioned or an officer to be designated for the purpose by the proper superior,—upon certain annexed Interrogatories agreed upon by the parties jointly, (or Interrogatories and Cross-Interrogatories contributed by them respectively where they cannot thus agree,) subject to such objections either to questions or answers as either party may properly raise before the court.

The Stipulation is itself evidence of "reasonable notice" given, and is a waiver of any irregularities that may have attended the proceeding. It may well include an agreement that the deposition when returned shall first be opened by the president of the court in the presence of the court and of the parties.[75] The stipulation, with the appended Interrogatories, should be forwarded by the judge advocate, either to the witness directly, or to the officer named, or to the Commander for his action—according to the agreement of the parties.

In forwarding the Interrogatories, the judge advocate should include a proper subpœna or subpœnas for the witness or witnesses, according to the regulation on the subject prescribed in General Orders.[76]

Where the Interrogatories have been forwarded to the witness directly, he will proceed to make in writing under oath[77] his answers thereto, and will thereupon return the whole to the president of the court, or other officer or person as stipulated or requested. Where the witness is *an officer of the army*, the forwarding of the Interrogatories thus directly, with a view to his making up and returning the deposition similarly directly, may often be the preferable course of proceeding. The usual practice, however, is both to forward and return through the proper military headquarters.

541 Where the Interrogatories have been forwarded directly, or through military channels, to an officer or other person, as a commissioner or agent to take or cause to be made the deposition, such officer will proceed to meet or communicate with the witness as soon as practicable, and to take or procure in writing his sworn answers *seriatim* to the interrogatories as propounded by the parties or party. These, being signed and duly certified as sworn to, are, with such documents or other writings as may have been called for from the witness or referred to in his answers, appended to the Interrogatories, and the Deposition thus made up, being authenticated by the certificate of the officer, &c., as duly taken, is, together with the order or orders, if any, exhibiting the authority of the officer, forwarded by mail or otherwise to the headquarters of the proper commander for transmission to the court, or directly to the president of the same, as may have been stipulated or directed.

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[74] See form in Appendix.

[75] See *post*.

[76] Circ. No. 3, (H. A.,) 1888.

[77] Witnesses, in making their depositions, have sometimes sworn to the same at the end, *i. e.* after all the answers have been given. The regular course is to be sworn at the beginning, as other witnesses are sworn under Art. 92.

The deposition, it may be remarked, whether returned directly or through military channels, is properly transmitted or delivered to the president of the court rather than to the judge advocate, the latter being commonly a *party* to the proceeding. The deposition, to whomever forwarded, should properly be *first opened in court and in the presence of both parties.*[78] When opened it should be delivered to the party at whose instance it was taken—accused or judge advocate—to be "read in evidence."

It is directed in Circular, No. 9, (H. A.,) of 1888, that—"*When the deposition has been returned to the court, together with the subpœna, then the judge advocate should prepare and sign the usual certificates of attendance and transmit them to the witness, with duplicate copies of the order convening the court. The fact of the attendance and the length of the same is to be ascertained from the deposition.*" The subpoena, copy of the convening order, and judge advocate's certificate, constitute the evidence upon which the witness will be enabled to receive his fees, &c., from the Pay department of the Army, which will pay the same out of the annual appropriation "for compensation of witnesses attending upon courts-martial." A civilian witness who attends to give his deposition is entitled to the same "fees and expenses," 542 (authorized by the Army Regulations, Art. LXXVI,) as if he had attended personally before the court.[79]

### V. The Credibility and Weight of Oral Testimony.

In addition to what has been remarked on this subject under the foregoing Titles, there may further be noted certain legal rulings and practical considerations, as of value to the court in estimating the abstract importance and relative force of testimony in connection with its Finding.

**THE TESTIMONY OF ACCOMPLICES.** While the testimony of an accomplice, if believed, may be sufficient, though unsupported, to warrant a conviction, it is agreed by the authorities that, as a general rule, such testimony cannot safely be accepted as adequate for such purpose unless corroborated by reliable evidence.[80] It need not indeed be confirmed as to all its parts: if sustained as to some material and important points, it may in general be credited as to others.[81] It is held, however, that the corroboration must certainly extend to the *identity*, (where that is in question,) of the person of the accused.[82]

**TESTIMONY AS AFFECTED BY IMPERFECT VERACITY OR BY DISCREPANCY.** Even where the character for veracity of a witness is shown to be bad, his testimony is not necessarily to be altogether disregarded, but is to be considered in connection with the rest of the evidence, and such credit given to it as it may be found justly entitled to.[83]

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[78] It has been held a fatal objection to a deposition that it was opened out of court. Beale *v.* Thompson, 8 Cranch, 70. Such objection, however, may be waived by the interested party, and the deposition admitted in evidence in the discretion of the court.

[79] Circ. No. 9, (H. A.,) 1883.

[80] 1 Greenl. Ev. § 380; Wharton, Cr. Ev. § 441; 1 Bishop, C. P. § 1169; U. S. *v.* Kessler, Baldwin, 22; U. S. *v.* Lancaster, 2 McLean, 431; U. S. *v.* Troax, 3 Id., 224: Steinham *v.* U. S., 2 Paine, 168; U. S. *v.* Harries and Smith, 2 Bond, 311, 323; U. S. *v.* Babcock, 3 Dillon, 619; G. O. 14, Dept. of Dakota, 1868. That the rule in regard to accomplices does not apply to *informers*, see 1 Greenl. Ev. § 382; U. S. *v.* Patterson, 3 McLean, 53, 299.

[81] U. S. *v.* Kessler, *ante;* U. S. *v.* Reeves, 38 Fed., 404; U. S. *v.* Lancaster, 44 Fed., 896; U. S. *v.* Ybanez, 53 Fed., 536.

[82] See Wharton, Cr. Ev. § 442.

[83] State *v.* Miller, 53 Iowa, 209.

So where a witness is shown to have testified falsely to a certain particular, the maxim *falsus in uno falsus in omnibus* is not necessarily to be ap-
543 plied, nor is all his testimony necessarily to be disregarded. The presumption against his general veracity will indeed be strong where the false statement relates to some matter as to which he can scarcely be liable to mistake; still, though the falsity may be such as to discredit him in general, it does not follow that some portions of his testimony may not be true.[84]

Falsehood and disingenuousness in witnesses are, as has been remarked, in practice not unfrequently indicated by their avoidance of particularization in their testimony. "Fabricators," writes Wharton,[85] "deal usually with generalities, avoiding circumstantial references which may be likely to bring their statements into collision with other evidence; and hence it is properly held that a studied avoidance of details, by witnesses, throws suspicion on their statements. This, however," it is added, "depends upon the object to be recalled;" it being not to "events of remote date," but to "matters which the witness, under ordinary circumstances, would remember," that the test most "fairly applies."

The testimony of a witness should not be regarded as impeached by the fact that his statement differs from those of other witnesses as to the secondary details of an occurrence, nor by the fact that others who were present did not hear or see what he states to have been said or done.[86] Discrepancies as to minor matters rather tend to sustain the credit of witnesses, as indicating the absence of concert.[87] And the perceptive powers, as well as the capacities and opportunities for observation, of witnesses, are so diverse that it is quite possible and natural that acts or words sworn to by one witness should have escaped the notice of another present at the same time and place.[88] So, the positive testimony of a witness as to a particular fact in a case, which was certainly within his knowledge, should not be regarded as necessarily dis-
544 credited by his failure to recall other facts in the case or by his contradictory or confused statements in regard to the same.[89]

**AFFIRMATIVE AND NEGATIVE TESTIMONY.** As remarked by the U. S. Supreme Court in an adjudged case:[90]—"It is a rule of evidence that, ordinarily, a witness who testifies to an affirmative is entitled to credit in preference to one who testifies to a negative, because the latter may have forgotten what actually occurred, whereas it is impossible to remember what never existed." Again the negative witness may not have "forgotten," but may simply have failed to perceive what has really occurred in his presence or near him. Of two equally honest witnesses, the one, from a superior faculty of discernment, or a superior opportunity for informing himself, or both, may have become cognizant of facts to which he can testify affirmatively, while the other, when interrogated as to the same matter, can only reply that

[84] Wharton, Cr. Ev. § 380; The Santissima Trinidad, 7 Wheaton, 339; Hall *v.* Renfro, 3 Met. (Ky.,) 51; State *v.* Brantley, 63 No. Ca., 518; Shellabarger *v.* Nafus, 15 Kans., 547.

[85] Cr. Ev. § 389. On the other hand, an over-minute specification of details, especially as to remote events or unimportant matters, does not add to the credit of a witness, but rather the reverse. Id.; O Brien, 219.

[86] Bogle *v.* Hammons, 2 Tenn., 137.

[87] See Simmons § 986; O'Brien, 221.

[88] Note the excellent observations of McCormick, J., on the credibility of testimony, in U. S. *v.* Hughes, 34 Fed., 734–5.

[89] McClaskey *v.* Barr, 54 Fed., 781.

[90] Stitt *v.* Huidekopers, 17 Wallace, 384. And see Au *v.* R. R. Co., 29 Fed., 72; Wharton, Cr. Ev. § 382. "The testimony of a series of witnesses, for instance, that they never saw a party drunk, does not outweigh the testimony of others to the fact of his drunkenness on particular occasions, unless those speaking to the negative cover the same point of time as those speaking to the affirmative." Wharton, Cr. Ev. § 382, citing Murphy *v.* People, 90 Ills., 59.

he did not see or hear, or does not know, &c.; yet each will be a truthful witness. A witness may also have been mentally preoccupied at the time of the occurrence in question; or, for fear of involving himself or otherwise, he may have been unwilling to take notice of what was passing: in such cases also his testimony may be true, though of a negative character and of inferior relative weight.

**TESTIMONY OF THE ACCUSED.** In a case of importance in which the accused takes the stand as a witness in his own behalf, it may be embarrassing to determine exactly how far he is to be believed. His credibility will be subject to question oftener perhaps for the reason that it is not natural to expect an uncolored statement from a person charged with crime, than for the reason that he is to be supposed to have wilfully stated what is false. His *interest* in the case is "greater than that of any other witness" and therefore "may seriously affect the credence that shall be given to his testimony."[91] Such testimony will always be fair material for a rigid cross-examination, and,
545 as it has been observed by the U. S. Supreme Court, "a greater latitude is undoubtedly allowable in the cross-examination of a party who places himself on the stand than in that of other witnesses."[92] How successfully he may endure this test is a circumstance which will be most material in measuring his credibility;[93] but probably the safest general rule to apply to his evidence as a whole—at least where a *prima facie* case has already been made out against him by the prosecution—will be that entire credit should not be given to his statements except in so far as he is corroborated by unprejudiced witnesses or reliable written testimony.[94]

**NUMBER OF WITNESSES.** The relative number of the witnesses for the prosecution and the defence, though a material factor where the number on one side very considerably exceeds that on the other, is by no means decisive in general. The relative weight of testimony depends much less upon the number of the witnesses than upon the quality of their statements. Evidence is valuable according as it is the expression of such concomitants as superior intelligence, capacity of appreciation, habit of observation, and opportunity for acquiring knowledge, and a single witness in whose case these incidents concur will properly outweigh several less well qualified and informed witnesses.[95]

**MANNER OF THE WITNESS.** That the manner of the witness
546 on the stand—his appearance, demeanor, style of expressing himself, &c.—is proper to be considered in connection with his testimony as

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[91] Reagan *v.* U. S., 157 U. S., 301, 310.

[92] Rea *v.* Missouri, 17 Wallace, 542.

[93] Some inference may perhaps also be drawn from the manner in which his *direct* examination is conducted. Thus where a party "was examined as a witness in his own behalf, yet his counsel forbore to interrogate him" as to certain conduct charged against him and especially material in the case, it was held that "the natural and irresistible inference from this omission was that the party was conscious of the truth of the charge and was too honest to deny it if he had been examined concerning it." McCall *v.* McDowell, Deady, 243.

[94] See Reagan *v.* U. S., *ante*.

[95] See Sibley *v.* Ins. Co., 9 Bissell, 31; Taylor *v.* Harwood, Taney's Dec., 437; Randolph *v.* Lane, 57 Ind., 115; McCrum *v.* Corby, 15 Kans., 117; G. C. M. O. 3, Dept. of the Mo., 1884. "Witnesses cannot be treated as units, to be divested of their own distinctive claims to credit. It may well happen that one intelligent and honest witness may outweigh several who are ignorant or unreliable. Nor should it be forgotten that one witness, corroborated by facts or documents, may outweigh a multitude whose testimony may have been the result of imperfect observation or have been influenced by prejudice." So it may happen that the evidence of a witness who is entirely unsupported may be such as properly to outweigh that of another whose statements are corroborated. Canada *v.* Curry, 73 Ind., 246.

adding to or detracting from his credibility and relative weight, is a point frequently noticed by the authorities.[96] Where for example, the bearing of a witness is such as to indicate that he is simply making a statement of the facts within his knowledge and observation, uninfluenced by interest or personal feeling, his testimony will carry very considerably more weight than where it is apparently colored by resentment or prejudice, or where, unconsciously perhaps to himself, he speaks as a partisan of the side on which he is called. So a reluctant and overcautious witness, or a "willing" or "fast" one, is in general less to be credited than one whose evidence is neither calculated nor impulsive, who is frank without being florid or diffuse. So too a clear and self-possessed witness will ordinarily make a better impression than an agitated or confused one. At the same time it is unquestionable that a perfectly reliable and truthful witness will not unfrequently fail to do himself justice from natural embarrassment or a lack of fluency, and that diffidence and hesitation on the stand are as often characteristics of an honest as of a dishonest witness.[97]

A court-martial, by reason of the superior education and intelligence of its members, is a species of jury which should be peculiarly qualified for the discriminations and comparisons necessary to be made in estimating the relative weight and credibility of oral testimonies.[98]

547 IV. WRITTEN TESTIMONY.

This subject will be considered under the Titles of —I. Public Writings; II. Private Writings.

I. PUBLIC WRITINGS.

These may be divided into—1. Judicial Records; 2. Other Public Documents.

1. **JUDICIAL RECORDS—Records of civil tribunals.** Records of courts of the United States or of the States will rarely be required to be offered in evidence on military trials. Occasion, however, may occur for such evidence;—as where a soldier, to disprove a charge of desertion, has to show that he has been detained in arrest by the civil authorities for some crime or disorder, or sentenced therefor by a civil court to a term of imprisonment; or the prosecution in a case of desertion has to prove such a sentence and confinement, as evidence of the existence of a "manifest impediment" excepting the case from the operation of the 103d Article of war;[99] or where an officer or soldier charged before a court-martial, in time of war, with one of the offences specified in Art. 58, has to offer in support of a plea of former trial, (under Art. 102,) the record

[96] U. S. *v.* Cole, 5 McLean, 514; Johnson *v.* U. S., 157 U. S., 675; Dickenson *v.* Gore, Newberry, 415; Callanan *v.* Shaw, 24 Iowa, 441; Stokes *v.* Mowatt, 1 U. S. Law Jour., 325; Tytler, 262; Simmons §. 573; Kennedy, 173–5; Napier, 103; De Hart, 150; 18 Opins. At. Gen., 119.

[97] "Equally truthful men often speak in very different ways about the same transaction, one with perfect confidence and the other with doubt and hesitation. One will say—'It was,' and the other—'I think it was.' A jury is bound by neither statement, but may credit either. * * * * It does not follow that a jury must credit the former in preference to the latter." Muscott *v.* Stubbs, 24 Kansas, 520, 522.

[98] Upon the subject of the credibility of witnesses Dillon J., in U. S. *v.* Babcock, 3 Dillon, 619–620, expresses himself as follows:—"The degree of credit due to a witness should be determined by his character and conduct; by his manner upon the stand; his relation to the controversy and to the parties; his hopes and fears; his bias or impartiality; the reasonableness or otherwise of the statements he makes; the strength or weakness of his recollection viewed in the light of all the other testimony, facts and circumstances in the case." And see Huchberger *v.* Ins. Co., 4 Bissell, 265.

[99] See *In re* Davison, 4 Fed. Rep., 507.

of his acquittal or conviction by a civil tribunal having concurrent jurisdiction of the crime;[100] or where it may be material, (as in rare cases it has been,) to put in evidence a judgment of divorce, or a decree of a probate court granting letters of administration.

When thus required, the records of judgments, &c., of courts of the United States, (in the absence of the originals, which will rarely be attainable,) may be proved by copies under the seal of the court attested by the clerk. Judgments and judicial proceedings of State courts of general jurisdiction are proved by copies attested by the clerk and certified by the judge, as prescribed in
548 Sec. 905, Rev. Sts.[1] Judgments, &c., of municipal courts, or courts of limited judicial authority such as those of justices of the peace, of whose proceedings a formal record is required by law to be kept, may be proved by copies authenticated, so far as may be practicable, in the manner prescribed by the same statute. In the absence of a formal record, such judgments, &c., are proved by the book containing the minutes, produced and verified by the justice or other proper custodian as a witness, or by a copy of the minutes authenticated according to the local law or usage, or, if there has been no minute or written entry made of the proceedings, by the testimony of the justice or other "competent person."[2]

These forms of proof, adopted in civil proceedings, should also be observed in military cases, unless the parties, by *stipulating* to admit the existence and substance of the record desired to be shown, may dispense with the usual formalities.

**Records of military tribunals.** These, not being possessed or held in the office of any court or by any *judicial* authority, but being simply preserved in the War Department, or at the headquarters of military commands, are, as respects the form of proving the same by authenticated copies, not judicial records but executive documents. They will therefore be included under the following head.

**2. OTHER PUBLIC DOCUMENTS.** This second species of public writings consists, mainly, of the acts of the legislative and executive departments of government in their collective capacities, and of the official acts of the separate public functionaries, as contained in official books and papers form-
549 ing the records of public transactions. These may therefore be divided into: (1) Legislative acts and acts of State; such as Acts and Resolutions of Congress, and Congressional debates and proceedings; Executive proclamations, orders, communications to Congress, &c.; and Treaties; (2) Official books and papers.

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[100] See Chapter XVI—"Plea of Former Trial."

[1] As to judgments of courts of *foreign* countries, these, says Marshall, C. J., in Church *v.* Hubbart, 2 Cranch, 238, are to be authenticated—"1. By an exemplification under the great seal; 2. By a copy proved to be a true copy," (by a witness who has compared it with the original. 1 Greenl. Ev. § 514;) "3. By the certificate of an officer authorized by law, which certificate must itself be properly authenticated. These," he adds, "are the usual, and appear to be the most proper, if not the only, modes of verifying foreign judgments. If they be all beyond the reach of the party, other testimony inferior in its nature might be received." And see 1 Greenl. Ev. § 514; Butterick *v.* Allen, 8 Mass., 273; Lincoln *v.* Battelle, 6 Wend., 475. If a foreign judgment were proposed to be offered in evidence before a military court, it would be desirable to procure to be appended to the record a certificate of the American consul, attesting the genuineness of the signature of the certifying judge or clerk, and stating that the authentication was in the usual form adopted for copies of records of the particular court. The copy might then properly be admitted without further evidence. See Packard *v.* Hill, 7 Cow., 434.

[2] 1 Greenl. Ev. § 513.

1. **Legislative acts and acts of State.** The public Statutes—Acts and Resolutions[3]—of Congress are proved as follows: If enacted prior to December 1, 1873, they are proved by the Revised Statutes, which comprise a single Act of Congress of June 22, 1874, (originally published in one volume in 1875, and of which a Second Edition, that now in use, was published in 1878,) and constitute a revision and consolidation of all the existing public laws, (as contained in the previous seventeen volumes of "Statutes at Large,") in force on said December 1, 1873,[4] with a very few designated exceptions.[5] If enacted since December 1, 1873, public statutes are proved, either by the single volume designated as the "Supplement to the Revised Statutes,"[6] made, by the Joint Resolution of June 7, 1880, "*prima facie* evidence of the laws therein contained;" or by the separate publications or volumes issued from year to year under the direction of the Secretary of State,[7] according
550 to the provisions of the Act of June 20, 1874, and made by said Act "legal evidence of the laws and treaties therein contained."

**Private statutes** are proved by the printed copies of the Private Acts and Resolutions as first collected in Vol. 6 of the Statutes at Large, and further contained in each volume of those Statutes from the 9th to the volume last published.

**The public treaties** are proved from the Volume containing treaties in force, required to be compiled and published by sec. 3 of the Act of June 20, 1874; and, as to those of later date, by the printed copies of the same published at the end of the volumes of Statutes at Large from Vol. 18 to the last volume.

**Publications of statutes in Orders.** As already indicated, military courts may properly take judicial notice, without further evidence, (in the absence of proof that they are incorrectly printed,) of the Acts and Resolutions of Congress relating chiefly to the Army, which are published for its information in printed General Orders issued from the War Department or Headquarters of the Army.

**A statute of Congress, not yet published,** can only be proved by a copy from the State Department, (where the original is deposited,) authenticated under the seal of the department.

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[3] "Resolutions" are no less statutes than "Acts." Originally—in the Continental Congress—all enactments were designated as Resolutions. Under the Constitution, Resolutions were first resorted to mainly for the requesting, authorizing, or directing of things to be done by executive officials of the government, the regulation of minor details of public expenditure, &c. Later, they have not unfrequently contained legislation on subjects of general importance capable of being briefly disposed of. They are now designated in their titles as "Joint Resolutions," and in their publication are classed as "Public" and "Private" Resolutions; the latter, with the "Private Acts," comprising the legislation for the relief or benefit of individuals.

[4] The authority for the original revision of the statutes, and for the publication of the same, as also for the preparation and publication of a new edition, is contained in the Acts of June 27, 1866, June 20, 1874, and March 2, 1877. See Appendix to Revised Statutes, pp. 1089–1092. Compare Wright *v.* U. S., 15 Ct. Cl., 80.

[5] These exceptions—*i. e.* the enactments *not repealed* by the Revised Statutes—are specified in Sec. 5596, R. S.

[6] The "Supplement" (Second Edition) embraces statutes enacted between 1874 and 1891 inclusive.

[7] They are published in "pamphlet" volumes after each session of Congress, and subsequently in bound volumes of Statutes at Large. These volumes, as succeeding the seventeen vols. published up to the date of the Revised Statutes, commence with Vol. 18. The last thus far, (1895,) is Vol. 28.

**State or Territorial statutes** are proved by the authorized publications of the same, or by copies authenticated under the seal of the State, &c., as prescribed in Sec. 905, Rev. Sts.[8]

**The proceedings and debates of Congress** are proved from the publication of the same, as printed by the Public Printer, (or other person with whom
551 a contract for such printing may be authorized by Congress to be made,) according to the provisions of Sec. 78, Rev. Sts., and of the Act of January 22, 1874.[9] Similar proceedings of the Legislatures of the States or Territories are to be proved from the official journals or other authentic publications.

**Executive Proclamations, and Orders of the nature of proclamations,**[10] proceeding from the President, are usually published at the end of the volumes of the Statutes at Large, and may be proved therefrom, or from authenticated copies in the custody of the Secretary of State.[11] Executive messages and communications to Congress, (including those from Heads of Departments,) as well as other State papers ordered by it to be printed, are proved from the Journals and Public Documents published by the authority of Congress.[12]

**Other Executive acts.** *Pardons*, where the original charter cannot be produced, are shown by authenticated copies from the State Department. *Appointments*, in the absence of the original letter or commission, are proved by duly authenticated copy from the proper Department, or certificate of the fact as there recorded. The General Orders, however, issued from the War Department or through the Headquarters of the Army, are properly received by military courts as competent evidence of all proclamations or orders of the Executive, or other executive acts, which may be published therein.

**Acts of the Executives of the States or Territories** are to be proved from authorized publications, or by copies certified by the proper official, or, if matter of public record, in the form prescribed by Sec. 906, Rev. Sts.

**2. Official Books and Papers of the U. S. Executive Departments.**
552 These, where material in evidence, are provable either by the *original*, produced and sworn to by the proper official custodian as a witness on the stand;[13] or, where—as is usually the case—the original is not accessible, by *copy*, as provided in Sec. 882, Rev. Sts., as follows:—"*Copies of any books, records, papers, or documents in any of the Executive Departments, authenti-*

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[8] See an instance of a State law, published in a pamphlet, held inadmissible in evidence because not properly authenticated—in Craig *v.* Brown, Peters, C. C., 352.

*Foreign written laws* are authenticated similarly to foreign judgments. (See note *ante.*) But foreign *unwritten* laws, customs and usages may be proved by parol evidence, *viz.*, by the testimony of competent persons instructed in or acquainted with the same. See 1 Greenl. Ev. § 488; Church *v.* Hubbart, 2 Cranch, 237.

[9] The proceedings and debates of Congress are at present published in the "Congressional Record," an official publication printed by the Public Printer and issued daily during each session.

[10] See such "Executive Orders" in 13 Stats. at Large, 775–778.

[11] Lapeyre *v.* U. S., 17 Wallace, 198–199; Street *v.* U. S., 24 Ct. Cl., 249–250.

[12] See Watkins *v.* Holman, 16 Peters, 26; Bryan *v.* Forsyth, 19 Howard, 334: Gregg *v.* Forsyth, 24 Id., 179.

[13] In Evanston *v.* Gunn, 99 U. S., 660, it was held that the original record made by a member of the U. S. 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 public duty.

*cated under the seals of such Departments, respectively, shall be admitted in evidence equally with the originals thereof."* [14]

As to the *form* of the authentication prescribed by the statute—this, as it is held by the authorities, must be "strictly pursued." [15] It has however been ruled by the Supreme Court that the *signature* of the Head of the Department is not necessary to complete the authentication, the presence of the *seal* alone being required to make the transcript evidence.[16] In the practice indeed of the War Department, the certificate of authentication has in general been attested by the signature of the Secretary of War. This certificate has commonly also been preceded by one signed by the chief of bureau, or other subordinate, who may have the immediate custody of the original, to the effect that the
553 paper, &c., is a true copy of such original in his charge. Such preliminary certificate, however, though convenient as assuring the Secretary that the copy has been correctly made out, is quite immaterial to the legal proof required.

**Copy not evidence where original necessary and producible.** It may here be noted, that where the actual execution of a paper by the signature of an officer or soldier is required to be shown, an authenticated copy will not be sufficient if the original exists and is attainable. As where, for example, the accused is charged with having signed a false certificate on a pay roll or other voucher; here the original, if not lost or destroyed and if producible, must be exhibited with proof of handwriting.[17] The procedure where such an original is in the possession of the adverse party has already been indicated in this Chapter.[18]

An original paper on file in an executive department or office is proved by the person in whose custody it is, appearing as a witness on the stand and producing and swearing to the paper as the original.

**Publications authorized by statute.** Where a document of one of the Departments has been printed and published by the authority of statute, each printed copy is an original and proves itself.[19] Such a document is the Army Register, and it has been held by the Supreme Court [20] that this compilation is evidence of such facts "as the names of officers, date of commissions, promotions, resignations, and regimental rank, brevet and other rank, or the department of the army to which officers belong." But it was further held that the Register could not be received as evidence of the pay or emoluments of officers, the organization of the army, or any other matter which was the subject of an

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[14] See G. C. M. O. 20, Dept. of Arizona, 1893. It may be noticed here as applicable generally under the present head, that, independently of statute and "on general principles of law, a copy given by a public officer, whose duty it is to keep the original, ought to be read in evidence." Marshall C. J., in U. S. *v.* Percheman, 7 Peters, 85.

It may also be remarked that where an official document (or public record) is *lost or destroyed*, its contents, after proof of the loss or destruction, may be proved by secondary evidence. See 1 Greenl. Ev. § 509.

[15] Smith *v.* U. S., 5 Peters, 302; U. S. *v.* Harrill, McAllister, 243; Pendleton *v.* U. S., 2 Brock., 75. In the last case, a copy of a letter from the War Department to an army contractor was held inadmissible in evidence because not authenticated as prescribed by statute. On the trial of Capt. John Shaw of the navy, a copy of a letter from the Secretary of the Navy to the prosecutor in the case was ruled out on the same ground. Printed Trial, p. 34. So, copies of files of the War Department not duly authenticated were held inadmissible on Gen. Dyer's Court of Inquiry, part I, p. 7.

[16] Smith *v.* U. S., 5 Peters, 300.

[17] G. C. M. O. 25 of 1875; G. O. 3, Dept. of the N. West, 1863; Do. 28, Dept. of the South, 1864. See "Lost or Destroyed Writing," *ante*, p. 323.

[18] See—"Paper in adverse possession—Notice to produce," *ante*, p. 324.

[19] 1 Greenl. Ev. § 90.

[20] Wetmore *v.* U. S., 10 Peters, 652.

express *statute* fixing and defining it. For, as it was declared, the statute itself is the best evidence of its provisions, and where these are material
554 to the issue, the court itself must judicially expound them and not accept the construction of executive officials.[21]

**General Orders, &c.** The printed official copies of "General Orders" and "General Court-Martial Orders," and the "Circulars," published from the War Department or Headquarters of the Army, though not authorized by statute, carry upon their face such evidence of authenticity that they are always admitted as evidence before courts-martial, in lieu of formally authenticated written copies of the originals. In many cases indeed there are no preserved written originals; and in all cases military courts, as has heretofore been remarked, will take judicial notice of the printed forms as genuine and correct. As to the Special Orders emanating from the same sources, while these have a much more restricted scope as publications, they are equally formal and official, and the printed copies, in the absence of any indication that they are not genuine, may safely and properly be admitted in evidence by military courts in the same manner as General Orders.[22]

The printed General and Special Orders, issued from the Headquarters of Military Divisions and Departments, may properly be regarded as similarly proving themselves and admissible.

A printed General or Special Order, to be admitted as competent evidence, should, strictly, bear the written signature of the Adjutant General, or Assistant Adjutant General, or other staff officer, below the printed word "Official" at the end of the form. This however may be dispensed with in the absence of evidence that it is *not* an official copy.

**Proceedings of military courts.** As heretofore noticed, such proceedings are not judicial records but executive documents, and, as to the form and manner of their authentication and proof, are to be classed with the other official papers on file in the Departments. The 114th Article of war, entitling persons tried by general court-martial to be furnished with copies of the
555 "proceedings and sentence of such court," does not do away with any of the forms required to render copies of official papers admissible in evidence; nor does Art. 121, in authorizing the proceedings of courts of inquiry to be used as evidence on trials before courts-martial, affect the matter of the form of authentication of copies as prescribed by Sec. 882, Rev. Sts. On military trials, however, the parties may stipulate to dispense with the full legal form. Thus, where the original cannot be produced, the copy furnished from the Bureau of Military Justice, with no other authentication than the endorsed attestation of the Judge Advocate General to the effect that the same is a "*true copy*," may be agreed to be admitted without further formality. So the parties may consent to admit any separate portion of the proceedings or testimony set forth in such copy that may be material. Where indeed the proceedings have been promulgated in a General Order, and some fact, fully appearing in such Order,—as the finding, acquittal, sentence, or action of the reviewing authority,—is alone desired to be proved, the parties may well stipulate to admit in evidence a copy of the printed Order, of the authenticity indeed of which the court will properly take judicial notice.

**Official papers of military commands.** Such are the records of inferior courts,[23] books, official reports, communications and papers, kept on file at the

[21] Wetmore *v.* U. S., *ante*.

[22] If a General or Special Order, required or material to be put in evidence on a military trial, has not been printed or published, and exists only in a written form, it is to be proved like any other official paper,—unless admitted by consent without proof.

[23] Now required, by Act of March 3, 1877, to be retained and filed in the Judge Advocate's Office at Department Headquarters.

Headquarters of military Divisions and Departments, as also the various Regimental, Company, Post and Hospital books, &c., recognized by army regulations or military usage. These are not public records in the sense of Sec. 882, Rev. Sts., and the special provision of that section in regard to proof by authenticated copy can hardly be regarded as extending to them. Proof of the same therefore will, strictly, be made by the *original*, produced and identified by the proper custodian appearing on the stand as a witness. On military trials, however, *copies* of such papers, &c., or of the material entries in such books, attested by the proper commander or staff officer, will in general properly be admitted, by the consent of the parties and acquiescence of the court, as competent evidence of their contents, and as such evidence be annexed to or incorporated in the record of the trial.

556 Where however a paper or book of this class, or indeed *any* official paper, sets forth acts done, &c., by an officer or soldier signing the same or referred to therein, and such acts, &c., are material evidence, and can be proved by the officer or soldier himself in person as a witness, his testimony, as being the "best evidence" of the facts, should be resorted to instead of the writing.[24] So, where it is proposed to put in evidence on a trial certain facts already deposed to by witnesses before a court-martial, board of survey, &c., the witnesses themselves must, if practicable, be introduced to testify anew before the court; the record of the original court, board, &c., being secondary evidence and not admissible if the personal testimony can be obtained.[25]

**Official documents and papers of State and Territorial governments.** These, if matter of public record, may be proved by copy authenticated as specified in Sec. 906, Rev. Sts.; if not, in such manner and form as may be prescribed by the law, or sanctioned by the judicial usage, of the State or Territory.

**Legal effect, as evidence, of Public Writings.** Judicial records, or copies of the same when duly authenticated, are said to import "absolute verity," so that a presumption as nearly as possible conclusive is recognized as arising in favor of their correctness. Acts of State, when authoritatively promulgated, may be said to prove themselves with a conclusiveness parallel to that of judicial acts. Not much less cogent is the presumption which is recognized in favor of public books and records, other than judicial, required by statute to be officially kept. As to other official papers, these furnish not conclusive but *prima facie* evidence only of the facts therein stated,[26]—evidence which is

557 more or less strong in proportion to the formality, public consequence, and legal sanction attaching to the writing, but is always subject to be rebutted.

But such papers, whether originals or authenticated copies, are evidence only as to matter of their contents; however formal and authoritative *per se*, they prove or import nothing beyond themselves. Thus it has been held that the mere production in evidence of a formal written order or notice from the War Department, addressed to an officer, did not afford any legal inference

[24] See this point noticed in G. O. 28, Dept. of the South, 1864; Do. 51, Middle Dept., 1865; Do. 32, Dept. of the East, 1869.

[25] G. O. 39, Dept. of the Susquehanna, 1864. By an express provision, however, of Art. 121, the proceedings of a *court of inquiry* may be admitted in evidence upon a trial by court-martial in certain cases. So, the rule as stated in the text may be departed from by consent of parties, with the acquiescence of the court; indeed the testimony of a witness, (who has been subjected to cross-examination,) on a previous trial and investigation, may sometimes constitute not only the most convenient but the most desirable form of presenting the facts in evidence.

[26] Parish *v.* U. S., 2 Ct. Cl., 341; Hart *v.* U. S., 15 Id., 414; Chapman Township *v.* Herrold, 58 Pa. St., 106.

that it was received by him or even mailed to his proper station.[27] The point is illustrated by the entries of *charges* against soldiers in the report books, muster-rolls, &c., of companies: though these entries are formal acts, they import only that the *charges* have been made, furnishing no evidence whatever as to the commission of the *offences*.[28]

So, an official certificate is evidence only of facts therein stated which the officer was *authorized* to certify.[29] And of all official statements, as well as of public records, it is to be remarked *generally* that if they contain matter not within the province or official cognizance of the subscribing officer, they are, as to such matter, *extra-official* and not admissible as evidence.[30]

**Restriction on the use in evidence of official documents and papers.** As has already been noticed, the documents and papers of the Executive departments and officers of the Government are not in general public records open to inspection by any citizen, but confidential archives in the legal custody of the Head of the Department. And it has uniformly been held that this official may decline to allow copies of such papers to be made or authenticated for use in evidence before the courts, when, in his opinion, considera-
558 tions of public policy or justice render it inexpedient that their contents should be made public.[31] This course, (subject to the provisions of Arts. 114 and 121,) may be pursued with military charges, or records of military investigations, equally as with other official communications and documents.[32] So, as to official reports and communications addressed to him, or other confidential papers on file at his Headquarters, a Commander of a military Division or Department is properly to be regarded as invested with an authority analogous to that of the Head of the Executive Department whom he represents.[33] The corresponding officials of a State or Territory possess a discretion in this respect similar to that ascribed to the superior federal officers indicated.

### II. Private Writings.

**AS TESTIMONY IN MILITARY CASES.** The term "Private Writings," as employed in the works on Evidence, has especial reference to contracts, deeds, and other personal written instruments and obligations. In the military practice, writings of this character are not often required to be put in evidence on trials. It may sometimes indeed be necessary or material to introduce such writings as contracts of enlistment, contracts between officers representing the government and civil contractors, or official bonds of disbursing officers; but these in general will have become part of the official papers of the War or other

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[27] G. C. M. O. 25 of 1875.

[28] G. O. 33, Dept. of the Mo., 1875; G. C. M. O. 14, Dept. of Texas, 1876; Do. 22, Dept. of the East, 1882. So, in Hanson *v.* S. Scituate, 115 Mass., 336, an authenticated copy of an extract from a muster-roll on file in the War Department, in which it was stated that a soldier had deserted, was held not to constitute legal evidence of such desertion, such statement being in fact a *charge* only.

[29] Levy *v.* Burley, 2 Sumner, 358, (Story, J.) And see Owings *v.* Hull, 9 Peters, 624–6; U. S. *v.* Wiggins, 14 Id., 346; U. S. *v.* Delespine, 15 Id., 226; White *v.* Burnley, 20 Howard, 235.

[30] See 1 Greenl. Ev. § 491; U. S. *v.* Jones, 8 Peters, 375, 388; Wetmore *v.* U. S., 10 Id., 652.

[31] 1 Greenl. Ev. § 250, 251, 476; Wharton, Cr. Ev. § 513; Clode, M. L., 147–8; and authorities cited in note under the head of "Evidence excluded from considerations of public policy," p. 330, *ante*.

[32] See Home *v.* Ld. Bentinck, 5 Brod. & Bing., 130; Dawkins *v.* Ld. Paulet, 5 Q. B., 94; Dawkins *v.* Ld. Rokeby, 8 Id., 255; Dickson *v.* Earl of Wilton, 1 Fost. & Fin., 419. But see 11 Opins. At. Gen., 137.

[33] See G. O. 25, Dept. of the Mo., 1867.

Executive Department, and so provable by the original or a copy procured therefrom in the manner and form already indicated under the foregoing Title. Upon a charge also of unbecoming conduct in the dishonorable non-payment of a debt, it may be found material to prove the execution of a promissory note, check, or bill of exchange. More commonly, however, the class of private writings which come to be the basis of military charges or are required to be put in evidence on military trials are communications or statements written or caused to be written by the authors, (or published in newspapers or pamphlets,) containing false charges or disrespectful language, or which are otherwise unauthorized or improper and prejudicial to military discipline. With these may be enumerated, as special instances, written challenges sent or accepted in violation of Art. 26, communications made to an enemy in violation of Art. 46, letters or telegrams sent by offenders or interested persons and illustrating their *intent*, &c.

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The general rules already set forth as to the introduction and admission of evidence apply to writings of this class in common with other proofs; and it will be necessary to consider here but two points, as follows:—

**PROOF OF GENUINENESS AND IDENTITY.** The writing proposed to be proved must be produced in court and identified by the proper witness or witnesses as having been actually sent,[34] received, written, published, &c.[35] If it is a writing specifically referred to in the charges, the paper produced must appear to correspond in terms or substance with that thus set forth or described.[36] If it be indefinite, obscure, or incomplete *per se*, it may be explained, elucidated, or completed by other testimony. So, where expressed in a foreign language; it may be translated by a competent witness. But where it consists of a deliberate formal instrument, as an express contract, it cannot be varied or contradicted by parol evidence.[37]

If the writing produced is a *copy*, it must be shown to be a true transcript by one who has compared it with the original, and the original must be shown to have been genuine and to be lost or destroyed.[38] Where the fact to be proved is the mere receipt of a *telegram*, the copy identified as that actually received may ordinarily be admitted in evidence on a military trial; but if necessary that the original should be proved in order to show that a certain form of words was actually sent, or that the message as sent was different from the copy received, or was signed by or in the handwriting of the accused or other person, the operator or other proper official must be summoned and required to produce such original, (which is not a privileged communication,) and the same must be clearly identified by his or other testimony.[39]

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**PROOF OF HANDWRITING.** Where it is necessary to prove that a writing proposed to be put in evidence was written or signed by the accused or other person, and this cannot be shown by the party who wrote or signed it, (as where he was the accused himself,) or by a subscribing witness, (the paper not

[34] A postmark on a letter is presumptive evidence that it has been mailed. U. S. *v.* Noelke, 17 Blatchford, 555.

[35] See Stroud *v.* Springfield, 28 Texas, 649; Renn *v.* Sands, 33 Texas, 760.

[36] G. C. M. O. 64, Dept. of the Mo., 1881.

[37] 1 Greenl. Ev. § 275; Hunt *v.* Rousmanier, 8 Wheaton, 211; Emerson *v.* Slater, 22 Howard, 41; Findley *v.* Bk. of U. S., 2 McLean, 57; Kemble *v.* Lull, 3 Id., 272.

[38] McGinnis *v.* Sawyer, 63 Pa. St., 259; Krise *v.* Neason, 66 Id., 253; Sternburg *v.* Callanan, 14 Iowa, 251. A copy of a copy is not admissible. Maurice *v.* Worden, 54 Md., 233.

[39] See Wharton, Law of Ev. § 76, 1128; Id., Cr. Ev. § 645; Woods *v.* Miller, 55 Iowa, 168.

having been formally witnessed, or the witness being dead or not attainable,[40] the same is properly established either—(1) by the testimony of witnesses having personal knowledge of the handwriting;[41] or (2) by a comparison of writings, made—in a military case—by the court.

**1 By witnesses having knowledge.**[42] Such knowledge, it is held, must have been acquired in one of two ways. The witness must (1) either have
561 seen the individual write,[43]—and it is not essential that he should be familiar with his writing, for his evidence is admissible, for what it is worth, if he has seen the party write but once and then only his name;[44] or (2) he must have seen letters or other writings purporting to be in his handwriting and have been in some manner satisfied that they were written by him,—as by having corresponded with him on the basis of them, or having taken action upon them which he has acquiesced in, or by the fact, known to the witness, of the person himself having otherwise adopted and acted upon such writings in business or official transactions, &c., as his own.[45]

This, as has already been noticed, is one of the few exceptional cases in which a witness may be permitted to declare his opinion or belief. And in arriving at the opinion that the writing or signature in question is or not that of the accused, or other alleged person, "the test of genuineness," as is observed by

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[40] If there is a subscribing witness to the paper, he must be called if he can be reached and is legally competent. Kinney *v.* Flynn, 2 R. I., 319; 1 Greenl. Ev. § 569.

[41] "In regard to the term 'handwriting,' we think that it should include, generally, whatever the party has written with his hand, and not merely his common and usual style of chirography." Shaw, C. J., in Com. *v.* Webster, 5 Cush., 301.

[42] In Goodhue *v.* Bartlett, 5 McLean, 186, it was held, (following Moody *v.* Rowell, 17 Pick., 490,) that it was sufficient for the witness to swear affirmatively as to the handwriting, without stating how he knew it to be that of the party, leaving it to the other side, on cross-examination, to question as to the sources of his knowledge. In practice, however, the witness is generally called upon to state the grounds of his knowledge on the direct examination.

[43] Hopkins *v.* Simmons, 1 Cranch, C., 250; U. S. *v.* Larned, 4 Id., 312; Hopkins *v.* Megguire, 35 Maine, 78; Lyon *v.* Lyman, 9 Conn., 55; Keith *v.* Lothrop, 10 Cush., 453; Bingham *v.* Peters, 1 Gray, 145; People *v.* Spooner, 1 Denio, 343; State *v.* Allen, 1 Hawks, 8. "To identify handwriting, the oath of the writer, or his admission if produced against him, is the best evidence; then the testimony of persons who saw the writing actually written, or of persons who, from a knowledge of the writer, and from having seen him write, are acquainted with his handwriting." Simmons § 1041. But where the knowledge of the handwriting had been obtained by the witness from seeing the party write his name, "for the purpose of showing to the witness his true manner of writing it," and after the commencement of the suit, the evidence was held inadmissible. Stranger *v.* Searle, 1 Esp., 15. In George *v.* Surrey, 1 M. & Malk., 516, it was held that the genuineness of a person's *mark* might be testified to by a witness who had seen him make it on several occasions.

[44] 1 Greenl. Ev. § 577; 2 Bishop, C. P. § 432 *a;* Bowman *v.* Sanborn, 5 Foster, 110; Fulton *v.* Hood, 34 Penn., 371; Cross *v.* People, 47 Ills., 153; Simmons § 1041.

[45] Doe *v.* Suckermore, 5 Ad. & El., 705; Hammond's Case, 2 Greenl. R., 35; Page *v.* Homans, 2 Shep., 478; Withee *v.* Rowe, 45 Maine, 580; Bowman *v.* Sanborn, 5 Foster, 110; Moody *v.* Rowell, 17 Pick., 494; Com. *v.* Webster, 5 Cush., 295; Brigham *v.* Peters, 1 Gray, 145; Kinney *v.* Flynn, 2 R. I., 319; Lyon *v.* Lyman, 9 Conn., 59; Titford *v.* Knott, 2 Johns. Cas., 211; Johnson *v.* Daverne, 19 Johns., 134; People *v.* Spooner, 1 Denio, 344; Travis *v.* Brown, 43 Pa. St., 9; Pope *v.* Askew, 1 Ire., 20; McKonkey *v.* Gaylord, 1 Jones L., 96; State *v.* Allen, Hawks, 8; So. Ex. Co. *v.* Thornton, 41 Miss., 216; 1 Greenl. Ev. § 577; 2 Bishop, C. P. § 432 *a;* Wharton, Cr. Ev. § 552. It is not essential that the witness should have ever seen the party write or have corresponded with him. Rogers *v.* Ritter, 12 Wallace, 317. "The value to be given to the opinion of a witness as to the authorship of handwriting is to be determined by the opportunity and circumstances under which he has acquired his knowledge." U. S. *v.* Gleason, 37 Fed., 331.

the court in an English case,[46] "ought to be the resemblance, not to the formation of the letters in some other specimen or specimens, but the general
562 character of writing which is impressed on it as the involuntary and unconscious result of constitution, habit, or other permanent cause, and is therefore itself permanent."

2. By comparison—with other writings in evidence. The evidence last indicated is, indeed, "in its nature, comparison," the belief of the witness being derived from "comparing the writing in question with its exemplar in his mind derived from some previous knowledge."[47] The *comparison* now to be considered, however, is that which is technically known as such, *viz.* comparison by written "standards." By the weight of authority in this country, and until recently in England, proof of handwriting by such comparison has not been sanctioned *except* where there were already in the case, as evidence for some other purpose, other writings, proved or admitted to be genuine, of the individual whose handwriting is in question. In such a case the genuineness of the particular writing or signature in dispute has been allowed to be determined or tested by a comparison of the same with such other writings as standards.[48] Such comparison, made by the jury in civil cases, would in military cases of course be made by the court. To assist in the comparison, and in the determining of the question of genuineness, the evidence of experts, *pro* and *contra*, may—it is held—be introduced by the parties.[49] The ex-
563 pert,—who need have had no previous knowledge of the person's handwriting,[50]—may express his opinion upon such points as whether the signature is genuine or simulated,[51] whether the writing of the paper is in a real or feigned hand,[52] whether the signature and the body of the paper were

[46] Coleridge, J., in Doe *v.* Suckermore, *ante*.

[47] 1 Greenl. Ev. § 577; Travis *v.* Brown, 43 Pa. St., 9; Stokes *v.* U. S., 157 U. S., 191, 194, and cases cited.

[48] Moore *v.* U. S., 91 U. S., 270; U. S. *v.* Chamberlain, 12 Blatchford, 390; Medway *v.* U. S., 6 Ct. Cl., 421; also 1 Greenl. Ev. § 578; Wharton, Cr. Ev. § 556; 2 Bishop, C. P. § 432 *b*, and cases cited.

[49] 1 Greenl. Ev. § 578; Wharton, Cr. Ev. § 559, 560; 2 Bishop, C. P. § 432 *c*, and cases cited. The experts usually resorted to appear to have been cashiers, tellers, or clerks of banks; (see Moody *v.* Rowell, 17 Pick., 490; Lyon *v.* Lyman, 9 Conn., 59;) or persons employed by banks or public offices to detect forgeries; (see Goodtitle *v.* Braham, 4 Term, 497; Cooper *v.* Bockett, 4 Moore P. C., Cas., 433; Doe *v.* Suckermore, 5 Ad. & El., 703; People *v.* Spooner, 1 Denio, 344; Lodge *v.* Phipher, 11 Sergt. & Rawle, 336.) In Goodtitle *v.* Braham, and King *v.* Cator, 4 Esp., 117, the expert was an inspector or clerk of the Post Office accustomed to inspect franks for the detection of forgeries. In Cooper *v.* Bockett, the expert had "been in the habit of examining and comparing writings, and so employed by the Bank of England for eleven years and upwards." In Moody *v.* Rowell the expert had been a writing teacher "for more than forty years." Doe *v.* Suckermore, a "writing-engraver" was used as an expert. In the case of Cadet Whittaker, *post*, most of the witnesses introduced (on both sides) to assist in the comparison were so-called "professional experts in handwriting."

[50] King *v.* Cator, 4 Esp., 144; Nelson *v.* Johnson, 18 Ind., 329.

[51] See King *v.* Cator, *ante;* Withee v. Rowe, 45 Maine, 519; People *v.* Spooner, 1 Denio, 343.

[52] Lyon *v.* Lyman, 9 Conn., 55. In Kelth *v.* Lothrop, 10 Cush., 455, the expert, on comparing the writing in dispute with "acknowledged or proved specimens" of the handwriting of the party, gave it as his opinion, that the handwriting of the former was not genuine but artificial—"that it was a simulated, stiff, and imitative hand, and not a free and natural one." And see Moody *v.* Rowell, 17 Pick., 495. In Com. *v.* Webster, 5 Cush., 295, it was decided that—"On a criminal trial an expert in handwriting may testify whether, in his opinion, anonymous letters written in a disguised hand, and calculated to divert suspicion from the defendant, are in the defendant's handwriting."

written by the same person, whether the whole of the paper was written by the same individual and at the same time,[63] whether a date or amount has been altered by the substitution of one figure for another,[64] &c.; and he may state in full his reasons for his conclusions.[65]

It appears, however, to be the sentiment of the authorities that the testimony of experts as to handwriting is not in general of a very satisfactory character. "No great reliance," says Bishop, "should be placed on their evidence."[66] It is after all only *opinion*, and as such to be received
564 with caution.[67] Such as it is, however, it is allowed to go to the jury, (or, in military cases, to be considered by the court,) for whatever it may be worth.

**With any genuine writings.** The above exception to the common-law rule as to proof of handwriting by comparison has recently been extended in England by a statute of 1865,[68] by which the comparison is now allowed to be made with any other writings whatever, although not in the case and in fact quite irrelevant and inadmissible in evidence therein for any other purpose, *provided* they are first admitted, or shown to the satisfaction of the court, to be *genuine* writings or signatures of the person whose handwriting is in question.[69] Similar statutes have been enacted in a considerable number of our States; as in New York,[60] Rhode Island,[61] Maryland,[62] Kentucky,[63] Tennessee,[64] Georgia,[65] Iowa,[66] California,[67] Oregon,[68] Nebraska,[69] Montana.[70] And the law—in the absence of any statutory provision—has been similarly held by

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[63] Fulton *v.* Hood, 34 Pa. St., 370. And see Goodtitle *v.* Braham, 4 Term, 497; U. S. *v.* Darnaud, 3 Wallace Jr., 183; Wharton, Cr. Ev. § 559. In Cooper *v.* Bockett, 4 Moore P. C. Cas., 433, it was ruled that where one writing crossed another, an expert might testify which, in his opinion, was the first written.

[64] Nelson *v.* Johnson, 18 Ind., 329.

[65] Keith *v.* Lothrop, 10 Cush., 455; Com. *v.* Webster, 5 Id., 295; 2 Bishop, C. P. § 432 *c*.

[66] 2 C. P. § 432 *c*. And see Wharton, Cr. Ev. § 9, 420; Doe *v.* Suckermore, 5 Ad. & El., 751; The Tracy Peerage, 10 Cl. & Fin., 154; People *v.* Spooner, 1 Denio, 343; Borland *v.* Walrath, 33 Iowa, 130; Cowan *v.* Beall, 1 McArthur, 274. On the trial of Cadet Whittaker, (*post*,) much of the elaborate *expert* testimony, though illustrated by magnified representations and photographic impressions, was fanciful, unsubstantial, and of slight value. As to the unsatisfactory character of such testimony, compare Borland *v.* Walrath, 33 Iowa, 130; Whitaker *v.* Parker, 42 Id., 585.

[67] U. S. *v.* Pendergast, 32 Fed., 198. And see U. S. *v.* Molloy, 31 Fed., 19.

[68] "Lord Denman's Act"—28 Vict., c. 18, s. 8. In the Manual of Military Law, p. 88, the rule established by this statute is applied to the procedure of courts-martial, and stated as follows—"With respect to handwriting it has been specially provided by statute that comparison of a disputed handwriting with any writing proved to the satisfaction of the court to be genuine, is permitted to be made by witnesses. * * * The comparison may be made either by a person acquainted with the handwriting, or by an expert in handwriting, or by the court itself."

[69] See Cobbett *v.* Kilminster, 4 Fost. & Fin., 490; Taylor on Ev., 1587; Wharton, Cr. Ev. § 555, note; 2 Bishop, C. P. § 432 *b*.

[60] Laws, 1880, c. 36.

[61] Pub. Stats., p. 588 § 42.

[62] Pub. Gen. Laws, vol. 1, p. 689.

[63] Gen. Stats., p. 548.

[64] Act, Feb. 26, 1889, c. 22.

[65] Code § 3840.

[66] Code § 4905.

[67] Code, Civil Procedure § 1944.

[68] Hill's Annotated Laws § 765.

[69] Compiled Stats., p. 783.

[70] Code, Civil Procedure § 2072.

the courts in sundry of the other States;—as in Massachusetts,[72] Maine,[73]
565 New Hampshire,[74] Vermont,[75] Connecticut,[76] Ohio,[77] Pennsylvania,[78] Indiana,[79] South Carolina,[80] Mississippi,[81] Minnesota,[82] Kansas,[83] and in Utah.[84]

The common-law rule, however, denies the admission of such writings, and this rule has been recognized in the decisions of the U. S. Supreme Court,[85] and favored in other of the federal courts.[86] In the leading military case of Cadet Whittaker,[87] tried by general court-martial at West Point, New York, in 1881, the court, against the objection of the accused, admitted writings of his, not previously in the case but testified to be genuine, as standards of comparison with a disputed writing which was the basis of one of the charges. In an opinion of March 17, 1882,[87] this ruling was held by Atty. Gen. Brewster to be erroneous, as being opposed to the common-law doctrine, and the sentence advised to be "set aside."[88] This opinion having been concurred in by the President,[89] the proceedings and sentence were disapproved accordingly, on the ground of this objection alone, and one of the most extended and laborious in-
566 vestigations by court-martial ever held in this country thus came to naught. There were, however, special circumstances in this case which doubtless availed to induce the authorities to give to the accused, (a colored person,) the full benefit of any question as to the application of the law to his defence.

In the opinion of the author the common-law rule on this subject is not a satisfactory one. The main objections which have been urged to using, as standards of comparison, writings not already in the case as evidence are, that there is danger that the same may be deliberately selected from the mass of the correspondence, &c., of the party as the specimens most favorable for the purpose, and may not therefore fairly represent his average handwriting; and further that their introduction may open the door to collateral issues. The modern tendency, however, is—as has been seen—to reject the earlier rule as rigid and opposed to sound reason, and to admit any "standards" clearly proved to be genuine writings of the party. Otherwise, it would appear, there must sometimes be danger of a failure of justice.

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[72] Moody *v.* Rowell, 17 Pick., 490.

[73] Chandler *v.* Le Barron, 45 Maine, 534.

[74] State *v.* Hastings, 53 N. H., 452.

[75] Adams *v.* Field, 21 Vt., 256; State *v.* Ward, 39 Id., 226; Rowell *v.* Fuller, 59 Id., 688.

[76] Lyon *v.* Lyman, 9 Conn., 55.

[77] Calkins *v.* State, 14 Ohio St., 222; Bragg *v.* Colwell, 19 Id., 407; Bell *v.* Brewster, 44 Id., 690.

[78] Travis *v.* Brown, 43 Pa. St., 9.

[79] Chance *v.* R. R. Co., 32 Ind., 472.

[80] Robertson *v.* Millar, 1 McMull, 120.

[81] Wilson *v.* Beauchamp, 50 Miss., 24.

[82] Morrison *v.* Potter, 35 Minn., 425.

[83] Macomber *v.* Scott, 10 Kans., 335; State *v.* Zimmerman, 47 Id., 247.

[84] Tucker *v.* Kellogg, 28 P., 870.

And see further, in this connection, 2 Bishop, C. P. § 432 *b;* Wharton, Cr. Ev. § 557.

[85] Moore *v.* U. S., 91 U. S., 270; Williams *v.* Conger, 125 U. S., 397.

[86] See U. S. *v.* Craig, 4 Wash., 729; U. S. *v.* Chamberlain, 12 Blatch., 390; U. S. *v.* Jones, 10 Fed., 469; Medway *v.* U. S., 6 Ct. Cl., 429. In U. S. *v.* Craig, however, the court, though recognizing the common-law rule, adds that it "never was well satisfied with the reason" of the same.

[87] The proceedings are published in G. C. M. O. 18, (H. A.,) of March 12, 1882. And see Do. 31, Dept. of Texas, 1892; Do. 37, Dept. of the Platte, 1892.

[87] 17 Opins. At. Gen., 300.

[88] An incorrect term as applied to action in a military case. *Disapproved* would have been the proper one, and is that used in the Order.

[89] See G. C. M. O. 18 of 1882, above noted.

A court-martial composed of educated and intelligent officers of the army, representing the functions of both jury and judge, may, it is believed, safely be trusted, *where other sufficient means are wanting*, to depart from the strict common-law rule and avail itself, in its discretion, of the method authorized by the modern and enlightened English statute and sanctioned by the laws and rulings in not a few of our States. In view of the diversity of authority on the subject, such a court, in allowing itself to be so assisted, cannot—it is submitted—properly be viewed as taking "illegal"[90] action, when the course pursued will apparently work no injustice while conducing to a more complete investigation of the truth.[91]

567 **Conclusion.** In concluding, (as in beginning,) this Chapter, it may be stated, as the view of the author, that while a military court should, in general, as the wisest, safest and fairest proceeding, observe the well-established rules of evidence, yet where the rule pertaining to a particular subject is unsettled, or where it is so technical or antiquated as to restrict or embarrass a thorough investigation, the court may and should, in its discretion, adopt such course in regard to the reception and employment of testimony as justice—justice to the United States as well as to the accused—may appear to dictate.

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[90] The Attorney General, in his opinion, refers to the conviction in Whittaker's Case as "illegally obtained." The term is not a correct one, since the error of the Court, if it *was* an error, while it might properly have induced a *disapproval* of the proceedings and sentence, was not such as to have affected their *legal validity*.

[91] The view of the author, in regard to the proof of handwriting by comparison, is concurred in by Gen. Merritt in a recent General Order—G. C. M. O. 30, Dept. of Dakota, 1894.

# CHAPTER XIX.

## THE FINDING.

568 THE Trial having been completed, and the arguments or statements, if any are made, being concluded, the court proceeds—in general without any adjournment if the legal hours of session have not elapsed—at once to its Judgment, which consists of the Finding and Sentence.[1] If indeed the case is one in which considerable evidence has been taken and the judge advocate has not been enabled to bring up his record, the court may in its discretion adjourn to afford him time for the purpose. So in any case of importance, it may properly take an adjournment before entering upon the responsible duty of the Finding.

The subject of the Finding will be considered under the heads of—I. Mode and Rules of Procedure; II. Forms of Findings; III. Additions to the Finding.

### I. MODE AND RULES OF PROCEDURE.

**CLEARING.** The presiding officer forthwith announces that the court will be cleared for deliberation upon its findings; whereupon accused, counsel, clerks, reporters, guards, witnesses, spectators, &c., and now also the judge advocate, (as required by the Act of July 27, 1892,) withdraw; and the doors are then closed.

**DELIBERATION.** Before voting, the court, if deemed desirable, may have the entire evidence read over to it by a member from the record. Com-
569 monly, however, it is found sufficient to refer to the different portions of the testimony from time to time, as the members may desire to refresh their recollection as to particular facts.

Prior to the voting, discussion as to the merits of the case is sometimes engaged in by the members; but as such discussion, at this point, may perhaps exert an undesirable influence upon the views of the junior members, it is in general the preferable course, in order that all opinions may be as independent as possible, to reserve debate till the taking of a *vote* shall disclose differences necessary to be harmonized before a legal finding can be arrived at.[2]

When discussion is had, it may be informal, but should be free, frank and open.[3] Here, as in all other deliberations of the court, the principle of the perfect equality of the members should be observed, and a junior officer in rank or age be conceded the same right to declare his views as a senior.[4] So, what-

[1] If, after the evidence, or the evidence of the prosecution, is all in, the accused escapes from military custody and absconds, the court may proceed to judgment in the usual manner notwithstanding. See Trial by Military Commission of H. H. Dodd, Indiana, 1864; and compare Fight *v.* State, 7 Ohio, 180; McCorkle *v.* State, 14 Ind., 39; State *v.* Wamire, 16 Id., 357.

[2] See McNaghten, 115, and *post* under "Provision of Art. 95."

[3] See Tytler, 311; Kennedy, 182; Macomb, 58; De Hart, 174.

[4] "In all deliberations the law secures the equality of members." Par. 1005, A. R.

ever opinions or views are expressed should be expressed to all—laid before the court. As is remarked by Bishop[5] with regard to jurors—"If they do not spontaneously agree, they should confer together, each speaking in the hearing of all, not in clusters of two or three privately. Each should give due weight to the opinions of the others, but not concur in that to which he cannot bring his own judgment to consent."

**ADJOURNMENT PENDING DELIBERATION.** In case of a pointed difference of opinion—as where, there being an even number of members, the vote upon a charge or specification is found to be a tie—a more extended deliberation may be considered desirable, and in such a case the court may adjourn and separate, to allow an interval for rest and reflection, or to enable the judge advocate or members to consult legal authorities or military precedents. Upon such an adjournment the members should not of course allow themselves to converse with or receive communications from other officers or persons in reference to the case under investigation. Making a personal communi-
570 cation to a *juryman* "is an indictable offence when such communication touches the subject matter of the trial, or it may be treated as a contempt of court."[6] So, "it is a misdemeanor in a juryman knowingly to permit such communications."[7]

**RECALLING WITNESSES.** It is held by Simmons[8] that the court, during its final deliberation, may, to assist its conclusions, "recall a witness for the purpose of putting any particular question deemed essential." He adds—"The parties must necessarily be present, and cannot be refused permission to cross-examine or re-examine the witness to the extent of the question proposed by the court. The prisoner moreover must have the fullest opportunity of meeting the evidence." This view is repeated by some subsequent writers.[9] Such course, however, has been most rarely pursued, and is now quite unknown, in our practice, and would, if resorted to, be regarded as an exceptional irregularity. It need hardly be remarked that the material evidence in the case should, properly, be so fully and clearly set forth in the record of that part of the trial in which it was introduced as to render such a proceeding quite unnecessary.

**THE VOTING.** This may be *viva voce*, but is commonly and preferably conducted by written, unsigned ballots. The votes—usually collected by the judge advocate—are taken, first upon the specification and then upon the charge, or, when there are several specifications, upon the same in order beginning with the first, and lastly upon the charge. Where there are several charges, the same proceeding is had as to each of the charges and its specification or specifications, separately, in the order of their number.

**THE FINDING TO BE COMPLETE.** In military law a *general verdict*, (on all the charges, &c., together,) cannot properly be rendered; there must be, in fact and of record, a separate and independent formal finding upon each specification and each charge.[10] And where exceptions and substitutions
571 are made,[11] the accused must be acquitted or convicted on every part—every averment and particular—of each specification and charge.[12] "The

[5] 1 C. P. § 998 *a*.
[6] Wharton, C. P. & P. § 729. And see 1 Bishop, C. P. § 996.
[7] Wharton, C. P. & P. § 721.
[8] Courts-Martial § 613.
[9] O'Brien, 264; De Hart, 174.
[10] Simmons § 620; Kennedy, 185.
[11] See *post*—"Partial Findings."
[12] That the findings must "*exhaust*" the specifications and charges, see McNaghten, 195; O'Brien, 264; De Hart, 180.

verdict," says Bishop,[13] "should be a complete finding in due form upon the whole issue and all the issues." Such a finding indeed is necessary not only to perfect the judgment, but to protect the accused against a second trial for any of the offences set forth in the pleadings.

Where the charge is a *joint* one, there must similarly be separate and distinct votings and findings as to each of the joint accused.

**PROVISION OF ART. 95.** It is provided by the 95th Article of war that —"*Members of a court-martial, in giving their votes, shall begin with the youngest in commission.*" Accordingly the judge advocate, in taking a vote, calls first upon the junior member, then upon the next senior, and so on to the president. This provision—one of the oldest in our military law [14]—was enacted no doubt upon the theory that the voting would be *viva voce* and open, and the reason which has been assigned for it is that the junior members, if required to vote first, will be less liable to be influenced by the opinions of their seniors. Where however the voting, as it more usually is at this stage, is by written ballot, the reason of the statute scarcely applies: it is rather as to the voting upon interlocutory questions that the rule is important to be observed.

**EVERY MEMBER MUST VOTE.** All the members must join in the finding upon every charge and specification. A failure to vote would be a neglect of the duty impliedly enjoined by the order detailing the member upon the court, and also a violation in substance of his oath in which he swore "well and truly to try and determine;" and would thus constitute a military offence within the description of Art. 62.[15]

**THE FINDING MUST BE ACCORDING TO THE EVIDENCE.** The
572 votes of the members must be based upon and governed by the *testimony* in the case considered in connection with the *plea*.[16] The member swears to "well and truly try and determine *according to the evidence*," and if he allows his vote to be controlled by facts known to himself or communicated to him by another member, but not in evidence,[17] or by his personal notions, prejudices or feelings, he is chargeable with a dereliction of duty. He should also take into consideration *all* the testimony, for he is not at liberty to disregard the statements of any witness not seriously impeached or shown to have perjured himself.[18] And, in so doing, he may measure the relative weight and credibility of the witnesses not only by the substance and quality of their evidence but by their appearance and manner on the stand under the direct and the cross-examination.[19]

While all matter of legal *excuse* will justly affect the findings, it is quite otherwise with matter of *extenuation*.[20] Such matter can legitimately be con-

[13] 1 C. P. § 1004.

[14] It appears in the Code of Articles of James II, (1688.)

[15] Clode, M. L., 150. Further, the *accused* is *entitled* to have each member vote. Griffiths, 167–8.

[16] Simmons § 625; Kennedy, 184; O'Brien, 241, 263; G. C. M. O. 37, Div. Atlantic, 1890.

[17] "Statements by one juror to the rest of what he knows of the case should not be made or received, and if acted on they will furnish ground for a new trial." 1 Bishop, C. P. § 998 *a*. "The juror may use that general knowledge which any man may bring to the subject, but if he has a particular knowledge," (as of an expert or *quasi* expert character,) "he ought to be sworn and examined as a witness." Rex *v.* Rosser, 7 C. & P., 648. That a court martial may not allow its finding to be influenced by facts within the knowledge of individual members, but not in evidence, see G. O. 21, Dept. of the Ohio, 1866; Do. 20, Dept. of the South, 1866; G. C. M. O. 41, Dept. of Texas, 1874; Do. 8, Dept. of Arizona, 1874; DIGEST, 97.

[18] Evans *v.* George, 80 Ills., 51.

[19] DIGEST, 412–13. And see Chapter XVIII—"Number of Witnesses,"—"Manner of the Witness," and notes.

[20] G. O. 4 of 1843—remarks of Hon. J. C. Spencer, Secretary of War.

sidered only in connection with the *sentence*, (where the punishment is discretionary,) or as a basis for a recommendation to clemency; or more properly by the reviewing authority in taking action upon the proceedings.

The court cannot in general properly base its finding, in the absence of testimony, upon admissions of the accused in his statement; the same not being evidence.[21]

573 **CHANCE OR COMPROMISE VERDICT.** The voting must consist in an expression of the individual opinions of the members. A resort to *casting lots*, or other expedient by which the judgment is determined by *chance*, is grossly irregular, and, where known to have occurred, would properely induce a disapproval of the finding.[22] So, a "compromise verdict" is objectionable and improper, except where the result of an honest modification of individual views, and the expression of a matured opinion.[23] The effect of compromise however is a point more apposite to the subject of the *sentence* than to that of the finding.

**MAJORITY RULE.** Upon the finding, as elsewhere in the proceedings, the result—in all cases, whether grave or slight, and whether capital or other—is determined by a majority of the votes. If, for example, three members of a court of five vote Guilty on any charge or specification, the accused is legally convicted thereon. If—there being an even number of members—the vote is a *tie*, the accused is strictly neither convicted nor acquitted; but as he is certainly not convicted, the vote inures to his benefit and is equivalent to an acquittal, and the finding is entered on the record as Not Guilty.[24]

In capital cases. It has sometimes been supposed that a finding of Guilty of an offence for which the death penalty was prescribed must, to be valid, be made by a two-thirds vote, but this is a misconception. The 96th Article of war—the only law on the subject—simply requires a concurrence of two-thirds of the members to sustain a death *sentence*. In the case of the *finding* a majority governs whatever be the character of the sentence, a bare majority being equally sufficient to sustain a capital sentence as a sentence imposing a slight penalty.

**MODIFICATION OF FINDING.** A finding once made may be modi-
574 fied at a subsequent session of the court before the final conclusion of the proceedings in the case. For example, where the court, after a finding of conviction, has adjourned before taking up the matter of the sentence, it may, on reassembling, decide first to reconsider its finding and may thereupon change it entirely, (substituting an acquittal for a conviction or *vice versa*,[25]) or modify it in any part.

**THE FINDING AN ACT OF THE COURT—PROTEST.** In the findings as finally made and recorded, whatever they may be and however small may be the majority by which they were arrived at, the court acts as a *unit*. In law the finding is its act, not the act of certain members.[26] So, neither the

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[21] See G. C. M. O. 179, Dept. of Dakota, 1883.

[22] See Delafons, 148. In the civil procedure, "any device by which the verdict is in any degree determined by chance is illegal and renders it void." 1 Bishop, C. P., 998 *a*. Such a finding is in general ground for ordering a new trial. Wharton, C. P. & P. §732, 842.

[23] Compare Wharton, C. P. & P. § 842.

[24] Simmons § 616; Hughes, 85; Prendergast, 210; De Hart, 180: Coppée, 83; G. C. M. O. 17 of 1871; Do. 1 of 1872; Do. 38, Dept. of the Platte, 1868; DIGEST, 747. To the same effect was the maxim of the Roman law.—"*Paribus sententiis reus absolvitur.*"

[25] See a case of a substitution of a conviction for an acquittal cited in Griffiths, 92.

[26] Kennedy, 205; De Hart, 187.

majority nor any members or member can protest against a finding after it has been reached by a majority vote. No protest can be permitted to be entered in the record; nor can a member or members address a personal protest to the commanding general or other superior authority, without being chargeable with a grave irregularity.[27] In a case, in 1875, where the president of a court-martial added to the record a declaration to the effect that he disagreed with the majority in the finding of Guilty, stating his reasons,—his action was properly disapproved by the reviewing commander.[28]

**PRESERVING THE VOTES.** There existed at one time some difference of opinion among the authorities as to whether or not the paper ballots cast by the members of the court, in voting upon the finding, (or sentence,) should be preserved or some permanent minute of the same retained.[29] The better conclusion has prevailed that, in view of the provisions of Arts. 84 and 85 against the disclosure of the votes and opinions of the members, it is preferable to destroy the ballots, since otherwise they might fall into the hands of im-
575 proper persons.[30] A further and sufficient reason for this course is that they are *no part of the record* of the court. It is therefore no part of the duty of the court to retain them, and the almost universal practice now is to destroy them at the conclusion of the proceedings with the other waste paper made on the trial.

**THE FINDINGS MUST BE CERTAIN.** That is to say they must have no uncertain meaning, but must be intelligible and exact.[31] This will be illustrated in treating presently of the various allowable *forms* of finding.

**THE FINDINGS MUST BE CONSISTENT AND HARMONIOUS.** That is to say the finding on the charge must be responsive to that on the specification or specifications,[32] and the findings on both must be consistent and in harmony with each other; else they will be legally defective and will not support a sentence. Incongruous findings in general defeat each other—as will also be illustrated under the next head.

## II. FORMS OF FINDING.

**FINDING OF GUILTY OR NOT GUILTY.** The simplest and most usual form of military verdict is where the accused is found "Guilty"[33] or "Not Guilty" of both the charge and the specification. Here the findings are consistent and harmonious, and the finding on the charge is supported by that on the specification. And this is also the case where there are several specifications under the charge, and the accused is found Guilty or Not Guilty of *one*

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[27] Simmons § 469; Hough, (P.) 703; G. O. 19, Dept. of the Carolinas, 1866; DIGEST, 619.

[28] G. C. M. O. 24, Dept. of the Platte, 1875.

[29] See, as favoring the preserving of the votes, (or an abstract of the same,)—Adye, 224; 1 McArthur, 323; Delafons, 274; De Hart, 177: *Contra*—Simmons § 614; Kennedy, 237; Griffiths, 176; Benét, 127.

[30] Simmons § 614; Kennedy, who was Judge Advocate General of the Bombay Army, writes, (p. 237,)—"For my own part, from the first to the last general court-martial at which I officiated as judge advocate, I made it a point, as soon as the proceedings were confirmed, to destroy carefully the votes and opinions of the members."

[31] Compare 1 Bishop, C. P. § 1005.

[32] 1 Bishop, C. P. § 1005.

[33] In the naval practice, a common form of convicting is to find "Proved;" and of acquitting—"Not Proved." Note, for example, the case of Medical Director Wales, in G. C. M. O. 21, Navy Dept., 1885, and now *passim* in the G. C. M. O. of that Department. Where the plea has been—"guilty," a usual form of finding, upon a specification, is—"Proved by plea."

of the specifications and similarly of the charge. For, however many specifications there may be to a charge, such a finding upon any one, (which is properly pleaded and apposite to the charge,) is sufficient to support a similar finding on the charge, and—like a conviction on one good count of an indictment—to support a sentence. 576

But to find Not Guilty, (or Guilty without criminality,) of the specification, or of all the specifications where there are several, and then Guilty of the charge, is an inconsistent and incongruous verdict, since the finding on the specification or specifications deprives the charge of support,—leaves it wholly without substance,—and a finding of Guilty upon it is a nullity in law.[34]

On the other hand, to find Guilty of the specification, but Not Guilty of the charge, may be a good and legal verdict. It is such where the facts set forth in the specification do not as stated, or under the circumstances as developed by the evidence, constitute the military offence indicated by the charge. But where the specification is properly drawn, and the facts as averred therein must, if found, constitute such offence,—to find Guilty of the specification but Not Guilty of the charge is erroneous and contradictory, and such a finding will not support a sentence.

**Confirming the plea.** A familiar form of finding, (or rather of recording the finding,) upon a charge or specification, where the finding is the same as the plea, is by *confirming*, as it is expressed, the plea. But this form has no further or other effect than a simple finding of Guilty or Not Guilty as the case may be.[35]

**Expression of acquittal.** Where the accused is found Not Guilty on the charge or charges, it is usual to add in terms that he is *acquitted*. This is indeed unnecessary, since the findings as made fully acquit the party in law;[36] but the form is now so well recognized that to omit it in any case would be exceptional and invidious.

**GUILTY WITHOUT CRIMINALITY.** Usage has given sanction to a form of finding on a *specification*, of "Guilty but without criminality," or "attaching no criminality;" or in terms to such effect.[37] 577

It is principally resorted to where the accused is found to have committed the acts or done the things alleged in the specification, but without the guilty intent or knowledge essential to constitute the military offence charged. Such finding will of course properly be accompanied by a finding of Not Guilty of the *charge*, unless indeed there be in the case some other specification upon which an unqualified finding of Guilty has been arrived at. This finding, however, is not one to be encouraged. It is virtually a form of acquittal,[38] being a determination that the accused is not guilty in law. It will therefore be

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[34] DIGEST, 408. G. O. 60, 107, Army of the Potomac, 1861; Do. 95, Id., 1862; Do. 53, Dept. of the East, 1865; Do. 6, Dept. of Cal., 1865; Do. 9, Dept. of the Gulf, 1873.

[35] The form, that the court "confirm the plea of the prisoner," (without *adding* specifically that they find him Guilty or Not Guilty,) is expressly condemned by the reviewing authority in a case in G. O. 43, Dept. of the South, 1871.

[36] See McNaghten, 159.

[37] A more exact form would be that they "find the facts set forth but attach no criminality thereto." G. O. 11 of 1851; G. C. M. O. 30 of 1886; Do. 69, Dept. of the Mo., 1869. So in the Navy—"Proved without criminality."

[38] Circ., No. 4, Dept. of Pa., 1865. This form of finding has sometimes been resorted to where the accused has been found to have been insane or mentally deficient at the time of the offence. See instances in G. O. 13, Northern Dept., 1864; Do. 52, Dept. of the Gulf, 1862; Do. 49, Dept. of the Susquehanna, 1864. Properly, in such cases, the accused should be acquitted—the *ground* of the acquittal being specified; or the proceedings should be suspended, without making any finding, as indicated in Chapter XX—"Where the accused is insane."

more legally accurate, as well as more military and more just to the accused, to express and record the finding simply as "Not Guilty."[39]

**NOT PROVEN.** This refinement, derived from the Scotch law, though at one time somewhat resorted to, is no longer sanctioned in either the English or American military practice.[40] While, as a substitute for "Not Guilty," this form may in some cases express more nearly than the latter the actual opinion of the court, it yet lacks the directness and conclusiveness desirable to be attached to the judgments of a court-martial, and, because of its ambiguity, can hardly fail to have a sinister and injurious effect upon the reputation of the accused. It is also objectionable as countervailing the legal principle that a man is to be held to be innocent till he is duly proved, *i. e.* proved beyond a reasonable doubt, to be guilty. This finding is, however, in common use in the *naval* practice.[41]

578 **PARTIAL FINDING.** This term implies a much more considerable authority than does the term "partial verdict" in the civil procedure.[42] The different kinds of partial findings recognized at military law are as follows:—

**I. Finding with Exceptions—In Specifications.** Where a court-martial determines that the accused is guilty of a *specification* but not precisely as laid, that is to say is guilty of a part but not of the remainder, or is guilty of the substance of the entire specification but not of certain details, it may, and it is its duty, in convicting him thereon, to except specifically from the finding of Guilty such portions as are not proved, and thus declare the *exact measure* of the criminality deemed to be established.[43] Thus, it may find him Guilty of the facts set forth in certain of the averments, and Not Guilty of those set forth in certain other averments; or it may find him Guilty of the specification as a whole except only as to certain designated words, amounts, articles, quantities, or other matters of description set forth therein.[44] Having thus shaped its finding on the specification according to the proof, it may find the accused Guilty of the *charge*, provided of course there is enough left in the specification to support the charge. If so much has been excepted as not to leave enough to constitute the specific offence alleged, (or a minor offence legally included in it,) or if the effect of the exception has been to cause the specification to describe another and quite distinct offence from that designated by the charge,—a finding of guilty upon the charge can not be sustained, unless indeed there be in the case some *other* specification or specifications apposite to the charge upon which a substantial conviction has been arrived at. The most
579 simple and familiar illustration of an exception detracting from the legal virtue of a specification is the excepting by the court of the word

[39] G. C. M. O. 30 of 1886; Do. 9, Dept. of the Mo., 1890.

[40] Kennedy, 195; Simmons § 625; Griffiths, 76; Bombay R., 31; O'Brien, 267; De Hart, 182; Benét, 133; Coppée, 83.

[41] See Commander Mackenzie's Trial, also current G. C. M. O., Navy Dept., *passim*. A variation of this form, often occurring, is—"Not proved in part," (specifying what part;) or "Proved except" certain words or allegations, (specifying or indicating the same,) "which words are not proved." As to *Substitutions*, see *post*.

[42] See 1 Bishop, C. P. § 1009.

[43] See DIGEST, 409; De Hart, 181; O'Brien, 264; G. O. 59, Army of the Potomac, 1861; Do. 34, Dept. of the Cumberland, 1867; Do. 2, Id., 1870; G. C. M. O. 59, Dept. of Texas, 1872. This form of finding is now adopted in the British law. See Rules of Procedure, 43.

[44] Cases of extended exceptions may be noted in G. O. 43, 159, 282, of 1863; G. C. M. O. 160, 170, 191, of 1864; Do. 303, 565, 607, of 1865; Do. 19 of 1885.

or words which express the *gravamen* of the offence in law. As where the charge is Violation of the 60th Article of war, and the specification alleges the "knowingly" presenting of a fraudulent claim upon the United States: here, if the court, in convicting upon the specification, excepts the word "knowingly," it acquits the accused of the *gist* of the offence, and cannot, (upon such finding alone,) legally convict him under the charge.[45] Such instances, however, are now rare, while exceptions which yet leave the substance of the specification unaffected are frequently and judiciously resorted to in the practice of our courts-martial.

**In charges.** What has last been remarked has reference only to the *specification*, occasions for making exceptions in *charges* being seldom presented. It is only indeed where the charge is inartificially and faultily drawn, or is "double," or expresses more than the offence found, that an exception therein would be likely to be made. Thus in a case published in Orders of the War Department where one of the charges was "Embezzling and misapplying military stores," the finding of the court thereon was "Guilty, excepting the words 'embezzling and.'"[46] Where the charge is duly worded according to the terms of the Article of war upon which it is based, it is properly indivisible, and an exception of any part made in the finding will not be legitimate. Thus where the charge is "Conduct unbecoming an officer and a gentleman," to except from the conviction thereon—as was done in some early cases[47]—the words "and a gentleman," and find the accused guilty of conduct unbecoming an officer only, (or of "unofficerlike conduct,") would be irregular and unauthorized.[48]

580 The latter is not an offence specifically known to the military law, and if, in such a case, the court do not consider the conduct to be unbecoming a gentleman as well as an officer, they should either acquit the accused altogether, or find him guilty of "Conduct to the prejudice of good order and military discipline."

**2. Finding with exceptions and substitutions.** The authority of a court-martial to make a partial finding is not limited to the mere making of exceptions. Where, while the allegations in a specification are substantially made out, certain items therein are not precisely proved as averred, the court, in excepting the same, may *substitute* the true facts or details as established by the evidence. As, for example, where sums of money, numbers of things, kinds of quantities of articles, species of military stores, &c., words spoken, names of persons, dates, or places, have been incorrectly set forth in the specification, and the true particulars have been disclosed in the course of the testimony on the trial; in such cases the court, in its finding of Guilty, may and properly will except the erroneous and substitute for them the correct statements or

[45] See the point illustrated in G. O. 28 of 1859; Do. 34, Dept. of the Mo., 1863; Do. 20, 54, Northern Dept., 1864; Do. 28, Dept. of the N. West, 1865; Do. 11, Dept. of the Cumberland, 1867; Do. 41, Dept. of the Platte, 1870; also DIGEST, 409.

[46] G. O. 341 of 1863. As to the loose joining of embezzlement, misappropriation and misapplication in charges under Art. 60, see *post*, Chapter XXV.

[47] As in the case of Captain S. T. Dyson, where this finding was approved without comment. Am. S. P., Mil. Af., vol. 1, p. 588.

[48] This finding, which had been previously sometimes made by courts-martial, (as in Capt. Dyson's case, G. O., Tenth Mil. Dist., Nov. 17, 1814, where it was approved without remark by Maj. Gen. Scott,) was finally condemned and discontinued, as a finding neither of a lesser included offence nor of any offence known to military law, by G. O. 8 of 1856. And see G. O. 48, Dept. of Dakota, 1871; De Hart, 373; O'Brien, 161.

words of description.[49] The authority to make substitutions is subject to the same conditions as the authority to make exceptions, *viz.*, that the specification shall not be rendered legally defective, or the nature of the offence so modified that the finding upon the specification will not support a conviction upon the charge.

In regard to the authority to except and substitute in findings, it may be remarked that it is certainly one of no little practical value and convenience. By its exercise defects in the pleadings may to a considerable extent be
581 remedied, and variances between the pleadings and the proof be in the main cured. Moreover, the finding is thus made to correspond with the precise facts of the case, justice to both sides is more nearly done, and the accused is the more effectually protected against a second prosecution based upon the same transaction. It is of course always desirable in military cases that, where practicable, the charges and specifications should be so drawn, and the case so prepared, that the averments will accurately represent the facts, and the testimony will verify in detail the averments: where this can be done, it will rarely be necessary to qualify the findings in the manner indicated.

**CONVICTION OF A LESSER KINDRED OFFENCE.** This is a species of partial finding familiar to the civil procedure, and which at military law illustrates also the practice of exception and substitution. It is properly resorted to where the offence charged is one which includes, as a necessary constituent, another offence of lesser gravity, and where the evidence—the accused having pleaded Not Guilty—falls short of fixing upon the accused the superior but shows him to have committed the inferior offence. In such cases the court may find him Not Guilty of the offence charged but Guilty of the minor constituent.[50] And it *should* so find, since otherwise the true degree of criminality in the case will not be pronounced, and the accused will escape conviction and punishment altogether; for if simply found Not Guilty of the major offence he is fully acquitted of the minor contained within it.

Thus, under a charge of desertion, where the testimony, while showing an unauthorized absence, fails to fix upon the offender the *animus* peculiar to desertion, the court may and properly will find him *not guilty of desertion, but guilty of absence without leave*, and this whether his plea has been to such effect or he has simply pleaded Not Guilty.[51] Similarly, manslaughter

[49] See Simmons § 852–855; DIGEST, 409; and instances in G. O. 41, 353, 375, 396, of 1863; Do. 5, 7, 53, of 1864; G. C. M. O. 314, 325, of 1864; Do. 356, 422, of 1865; Do. 187 of 1866; Do. 54 of 1888; Do. 21 of 1889; Do. 24, Dept. of Texas, 1890.

A similar form is frequently observed in the naval practice. Thus, in G. C. M. O. 10, Navy Dept., of 1889, is the finding—"Proved except," or "Proved in part—proved except," (indicating certain words,) "which words are not proved, and for which are substituted the words italicized," (in the specification as published,) "which words are proved." And see instance in G. C. M. O. 82, Id., of 1892.

[50] See Adye, 214; Tytler, 321; Simmons § 622; Kennedy, 185; Maltby, 72; Macomb, 63; O'Brien, 265; De Hart, 185; DIGEST, 410. And compare Grant *v.* Gould, 2 H. Bl., 69; Reynolds *v.* People, 83 Ills., 479; Bankhead *v.* U. S., 20 Ct. Cl., 405. Note also the similar authority given in criminal cases in the United States courts, by Sec. 1035, Rev. Sts.

[51] 13 Opins. At. Gen., 460. Where an accused deliberately and intelligently pleads Guilty to a charge of desertion, he cannot legally be convicted of absence-without-leave under it. See G. O. 231, Fifth Mil. Dist., 1869; Do. 24, Dept. of the Platte, 1871.

582 may be found under a charge of murder, larceny under robbery, and an attempt to commit an offence under a charge for the offence itself.[52]

Wherever a lesser offence is thus found, the findings upon the specification and the charge should be so framed as to be consistent, and the finding on the specification should be such as to support the finding on the charge. With this view, there should properly be *excepted* from the specification such words as in law characterize only the superior offence. Thus, in finding manslaughter under a charge of murder, the allegation of *malice aforethought* in the specification, should be in terms excepted from the finding of Guilty thereon, and as to this the accused should be found Not Guilty. So, where, under a charge of desertion, the specification sets forth that the accused "did desert," &c., the court, if proposing to find Not Guilty of desertion but Guilty of absence-without-leave, should, from the finding of Guilty upon the specification, *except* the words alleging or describing a desertion; otherwise the two findings will be inconsistent. And, in so excepting, the court should further *substitute* the words—"did absent himself without authority," or other words properly descriptive of the real offence.[53]

It need scarcely be noted that while a court-martial may always convict of a lesser kindred offence, it is not empowered to find a higher or graver offence than the one charged, nor an offence of a different nature.[54] Murder

583 cannot be found under a charge of manslaughter, nor robbery under a charge of larceny; nor, on the other hand, can burglary be found under an indictment for larceny or arson. Similarly, drunkenness on duty cannot legally be found under a charge of simple drunkenness or disorderly conduct, nor can conduct unbecoming an officer and a gentleman be found under a charge of drunkenness on duty.[55] And this though the evidence clearly shows that the greater or the distinct offence was the one actually committed; for a party cannot be convicted of an offence of which he has not been notified that he is charged and which he has had no opportunity to defend.

**CONVICTION UNDER ONE ARTICLE OF WAR OF A VIOLATION OF ANOTHER ARTICLE**—Conviction of Conduct to the prejudice of good order and military discipline, under a specific charge. Though at one time otherwise ruled,[56] it is now fully settled by the uniform practice of the service that where the charge is of one of the specific designated offences made punishable by the Articles of war other than the general, or 62d, Article, and the evidence fails fully to sustain the charge as laid, but fixes upon the accused a neglect of duty or disorder as involved in the acts alleged in the specification, the court may properly find him Guilty of the specification, (with such excep-

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[52] See Dynes *v.* Hoover, 20 How., 79, where the finding, by a naval court-martial, of an *attempt to desert*, under a charge of desertion, appears to be recognized as legitimate. And see with this the case of Bankhead *v.* U. S., 20 Ct. Cl., 405. This finding is now expressly authorized by the British Army Act, Sec. 56.

In Prindeville *v.* People, 42 Ills., 217, the court, in affirming a conviction of assault with intent to commit rape under an indictment for rape, remark, generally, that—"Where the prosecution must prove every fact necessary to constitute the lesser offence, together with the additional facts which make it the higher offence, in order to justify a conviction for the latter, then a conviction may be had for the lesser offence under an indictment for the greater."

[53] DIGEST, 410. A simple finding, under a charge of desertion, of "Not Guilty but Guilty of absence-without-leave," *unaccompanied by any exceptions or substitutions*, though irregular and exceptional at military law, would yet be legal and effectual. Compare Morehead *v.* State, 34 Ohio St., 212.

[54] Kennedy, 185; Simmons § 700; Maltby, 72; Macomb, 63; O'Brien, 265; DIGEST, 410.

[55] See G. C. M. O. 6, Dept. of the Gulf, 1876; G. O. 14, Army of the Potomac, 1864.

[56] In G. O. 17 of 1856; Do. 28 of 1859.

tions, &c., as may be required,) and Not Guilty of the charge but Guilty of Conduct to the prejudice of good order and military discipline.[57]

This finding, of an offence in violation of the general Article under a charge for a violation of a specific Article, was first sanctioned where the charge was "Conduct unbecoming an officer and a gentleman," in violation of Art. 61, and is still most frequently resorted to thereunder.[58] It has since, however, been extended to *all cases of charges of specific offences* made punishable
584 by the code, having been especially applied to such as Disobedience of Orders, Disrespect to a commanding officer, Mutiny, Misbehaviour before the enemy, Breach of arrest, Violations of Art. 60, and—in time of war—Violations of Art. 58.

The legal theory upon which this form is based is that it is a finding of a *lesser included offence*, every specific offence being viewed as including either *a neglect of duty or a disorder in breach of discipline;* and it is resorted to in order to prevent the failure of justice which would in general be incurred were it not availed of. It should not, however, be employed where the specific offence charged is substantially established beyond a reasonable doubt. For though it might be agreeable to the court to relieve the accused of some share of the culpability thus fixed upon him, such action would be an evasion of responsibility on its part and a dereliction of duty under its official oath.[59]

**Conviction of a specific offence under a charge of another offence.** The authority, however, to employ this form does not extend beyond the cases above indicated. Thus the reverse of this finding—that is to say a finding of Guilty of a *specific* offence under a charge of "Conduct to the prejudice of good order and military discipline"—is not sanctioned, and, if made, would be disapproved as a gross irregularity.[60] Thus a conviction of a violation of Art. 21, (a capital offence,) could not legally be made under a charge of a violation of Art. 62.

And so of a finding of one *specific* offence under a charge of another specific offence. Thus findings of guilty of Conduct unbecoming an officer and a gentleman under a charge of Drunkenness on duty, of guilty of Mutiny under a charge of Misbehaviour before the enemy, of guilty of a Violation of the 32d Article under a charge of Violation of the 33d or 40th,[61] of guilty of a Violation of the 33d Article under a charge of Violation of the 32d or the 21st,[62] of guilty of a Violation of the 40th Article under a charge of Violation
585 of the 47th,[63] and of guilty of Violation of the 17th Article under a charge of Violation of the 60th—have been properly disapproved as without legal sanction and inoperative. In such cases the accused is convicted of an offence not alleged against him or included in that alleged,— an offence of

[57] See G. C. M. O. 8, Div. Atlantic, 1889.

[58] See 18 Opins. At. Gen., 114; Swaim *v.* U. S., 28 Ct. Cl., 173. The same form is found in the Navy. See G. C. M. O. 29, 30, Navy Dept., 1882. A corresponding frequent naval form is that of a conviction *in a less degree than charged.* Thus, in a case of an accused charged with Drunkenness on duty, but found to have been drunk but not on duty, the formal finding would be—"Guilty in a less degree than charged; guilty of drunkenness."

[59] G. C. M. O. 6, Dept. of the Platte, 1882.

[60] G. C. M. O. 78, Dept. of the Mo., 1874; Do. 6, Dept. of the Gulf, 1876.

[61] G. C. M. O. 24, Dept. of Texas, 1891.

[62] G. C. M. O. 91, Dept. of the Platte, 1892.

[63] "A soldier may be guilty of this offence," (quitting guard,) "without absenting himself from his command, and therefore it contains no element of desertion." Gen. Schofield. G. C. M. O. 53 of 1888.

which he has had no notice and to which he has not been called upon to plead or to make defence.[64]

It may be added that a finding under a specific Article may be sustained as a valid finding of "Conduct to the prejudice of good order and military discipline," though not formally so expressed, if it be in substance an equivalent. As where, under a charge of a Violation of Art. 21, the finding is Not Guilty but Guilty of "insubordination," or where under a charge of Drunkenness on duty in violation of Art. 38, the finding is Not Guilty but Guilty of "simple drunkenness."[65] Such forms, however, are now rare.

**CONVICTION OF A LESSER DEGREE OR GRADE OF A CRIMINAL OFFENCE.** While the military law does not recognize grades or degrees of criminal offences cognizable by courts-martial, such courts, when passing judgment, in time of war, upon crimes of the class specified in Art. 58, have in a few cases made findings of a lesser degree of the crime charged. So, military commissions, when acting as substitutes for the State courts under the Reconstruction Laws, have sometimes made similar findings. Such instances are now unknown in practice.[66]

## III. ADDITIONS TO THE FINDING.

It is a peculiarity of the military procedure that a court-martial, in its judgment, is not confined to a bare acquittal or conviction, but may characterize or explain the finding, (or sentence,) or accompany it with animadversions, recommendations or other remarks, as follows:—

1. Thus, in pronouncing the accused Not Guilty, the court, in lieu of a simple acquittal, may "*fully*," or "*honorably*," or "*fully and honorably*"
586 acquit. These terms add nothing to the legal effect of the acquittal, but are still occasionally employed, though less so than formerly.[67] "*Honorably*," according to the authorities,[68] is not in general to be employed except in cases where the alleged offence is not merely a violation of military duty but one of which a conviction would have dishonored the individual—as, for example, conduct unbecoming an officer and a gentleman, misbehaviour before the enemy, embezzlement or other fraudulent act made punishable by Art. 60. This and the other like forms, however, should be reserved for exceptional cases, since their use, if more frequent, would detract somewhat from findings of Not Guilty when expressed *without* such embellishment.[69]

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[64] G. O. 14, 27, Army of the Potomac, 1864; G. C. M. O. 8, Div. Atlantic, 1889; Do. 57, Dept. of the Platte, 1891; Do. 53, (H. A.,) 1888; Do. 20 (Id.), 1887; Do. 123, Dept. of Cal., 1882.

[65] Pipon & Col., 154.

[66] The naval form of "*Guilty in a less degree than charged*," has already been adverted to.

[67] Maj. Gens. Schuyler, St. Clair, and R. Howe, were acquitted "with the highest honour." See 3 Journals of Congress, pp. 142, 158, 714. (December, 1778, and January, 1782.) Recent cases of "honorable" or "full and honorable" acquittal are published in G. C. M. O. 20 of 1885; Do. 69 of 1892, (a case of an enlisted man;) Do. 125, Dept. of Cal., 1884; Do. 34, Dept. of Arizona, 1886. The form—"fully acquit," appears in G. C. M. O. 29, Navy Dept., 1891.

[68] Simmons § 624, 625; Kennedy, 196; Griffiths, 77; Bombay R., 31; Clode, M. L., 151–2; Maltby, 71; O'Brien, 268; De Hart, 182.

[69] See De Hart, 182.

2. The court, in connection with an acquittal, may also *reflect upon the charges* as malicious, frivolous, vexatious, unfounded, &c.,[70] or upon the *accuser or prosecutor*, (or prosecuting witness,) as actuated by personal animosity or other improper motive,[71] or as equally culpable with the accused, or more culpable—recommending that he be himself brought to trial,[72] or as offending against military usage by preferring stale or accumulated charges, &c.[73] Such comments, however, are not now frequent in our practice, the court commonly leaving this class of criticisms to be made by the reviewing authority.[74]

587 3. The court may *animadvert upon the statement* or argument of the accused, (or judge advocate,) as being disrespectful or otherwise objectionable in tone or particular language.[75] It may also reflect upon any *improper conduct*, during the trial, of either of the parties, counsel, or witnesses, and may—in a clear case—remark upon the *testimony* of the latter as inspired by personal feeling or prejudice: comments, however, upon civilian witnesses and persons will naturally and properly be more guarded than need be those upon members of the army. Where a witness is believed to have sworn falsely, the facts should be specifically brought to the attention of the reviewing commander.[76]

4. Where the evidence has disclosed a *defective state of discipline* or an objectionable practice at a post, &c., the court, in its discretion, has sometimes remarked upon the same, recommending administrative changes or reforms.[77]

5. Courts-martial are sometimes induced to add *explanations* of their findings or to give the reasons therefor, especially where the same, in view of the character of the testimony, may appear to require justification. Such action, however, must in general be unnecessary and unadvisable.[78]

6. Where indeed the evidence or proceedings indicate *insanity* or other mental incapacity on the part of the accused, the court, in acquitting, (or convicting,) will properly state the facts, and may add such *recommendation*—as that the accused be discharged from the service, or committed to the Government Asylum—as may seem to be called for.[79]

588 **Limitation of the authority.** But—it may here be noted—while the court may sometimes properly recommend or suggest action to the reviewing commander, it may not itself assume to take action pertaining to his province. Thus where the court, in acquitting a soldier, directed that he

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[70] 2 McArthur, 264, 266; Simmons § 703; Kennedy, 197; De Hart, 183; O'Brien, 268; G. O. of Nov. 11, 1816, (Maj. Gen. Gaines' case;) Do. 8, Middle Dept., 1865. And see Jekyll *v.* Moore, 2 Bos. and Pull, (N. R.,) 341. In a G. O. of Nov., 1817, the court, in declaring certain charges to be "frivolous," adds that it attaches no censure to the judge advocate who subscribed them, since he had done so merely *ex officio*.

[71] See cases in James, 35, 203, 266, 461, 727, also Simmons § 701, 702, (Cases of Lt. Col. Keating and Capt. Wathen;) Hough, 504, 538; Kennedy, 170; Clode, M. L., 151; O'Brien, 268; De Hart, 183; G. O. 3 of 1853; (remarks of Maj. Gen. Scott.)

[72] 2 McArthur, 267; Delafons, 278.

[73] James, 539.

[74] See Chapter X—THE CHARGE, p. 200, *note*.

[75] Simmons § 704; James, 461; O'Brien, 268; Lieut. Kennon's Trial, 63–4.

[76] As to reflections upon the testimony or deportment of *witnesses*, see James, 366, 539; Simmons § 705. (Case of Captain Theobald O'Doherty;) Kennedy, 197; Hughes, 85; O'Brien, 268; De Hart, 183–4.

[77] Simmons § 702; Bombay R., 58; O'Brien, 268; De Hart, 183. It is preferable, however, that this should be done by the Reviewing Authority. See remarks of President Cleveland in G. C. M. O. 27 of 1888.

[78] See instances in G. O. 874 of 1868; G. C. M. O. 73, 74, 200, of 1864; and remarks of reviewing officer in G. C. M. O. 21 and 86 of 1889.

[79] See Simmons § 590; Kennedy, 195; O'Brien, 266; G. O. 46 of 1824; Do. 36 of 1825; Do. 20, Western Dept., 1861; Do. 52, Dept. of the Gulf, 1862.

"be discharged from arrest and returned to duty with his regiment," this addition was properly disapproved as transcending the authority of a court-martial.[80]

In cases where a *conviction* is arrived at, any such additions as here specified, if any are made, are inserted *after the sentence.*

Where the Finding arrived at upon a trial is one of conviction, the court will naturally proceed to the consideration of its *sentence.* As a preliminary, however, to such action, in cases of enlisted men, the court may at this stage be required to be reopened for the introduction of *previous convictions* of the accused.[81]

**RECEIVING OF EVIDENCE OF PREVIOUS CONVICTIONS.** This proceeding, suggested by that authorized in the British law, (Rules of Procedure, § 45,) was ingrafted upon our military practice by a ruling of the Secretary of War of February 15, 1886,[82] which was, by his direction, published in the form of an Army regulation, in General Orders, No. 41, of June 26, 1886.[83] Its object was to ascertain, by an inquiry into his previous record, whether the accused was an old offender, with a view, if he were found to be such, of increasing the measure of his punishment and especially of inducing in his case a sentence of dishonorable discharge from the service. Such evidence would also indicate, for the information of the reviewing officer, that he was, in the words of the regulation, "less entitled to leniency."[84] In the Army Regulations of 1889, this regulation was published as par. 1018.

589 This regulation, having been several times modified, was finally amended by G. O. 16 of March 25, 1895, in which it appears in the following form:—

"In every case when an offence on trial before a court-martial is of a character admitting of the introduction of evidence of previous convictions, and the accused is convicted, the court, after determining its findings, will be opened for the purpose of ascertaining whether there is such evidence, and, if so, of hearing it. These convictions must be proved by the records of previous trials, or by duly authenticated orders promulgating the same, except in the cases of conviction by summary court, when a duly authenticated copy of the record of said court shall be deemed sufficient proof.[85] Charges forwarded to the authority ordering a general court-martial, or submitted to a summary, garrison, or regimental court, must be accompanied by the proper evidence of such previous convictions as may have to be considered in determining upon a sentence."

As to the efficacy of the evidence of previous convictions in inducing or increasing punishment, G. O. 16 of 1895 declares as follows:—

"When a soldier shall be convicted of an offence the punishment for which, as authorized by Article II of this order or the custom of the service, does not exceed that which an inferior court-martial may award, the punishment so authorized may be increased by one-half for every previous conviction of one or more offences within eighteen months preceding the trial and during the current enlistment; provided that the increase of punishment for five or more previous convictions shall not exceed that thus authorized when there are four previous convictions, and that when one or more of such five or more previous

[80] G. O. 60, Army of the Potomac, 1861.

[81] Such evidence is of course offered only after a finding of Guilty. It cannot be introduced where there has been an acquittal. See G. C. M. O. 18, Div. Atlantic, 1891.

[82] Circ. No. 1, (H. A.,) 1886.

[83] This evidence had previously in a few cases been introduced, without sanction of law. See note on page 550, edition of this work of 1886.

[84] See Circ. No. 1, (H. A.,) 1886.

[85] Compare Circ. No. 12, (H. A.,) 1891, par. II.

convictions shall have been by general court-martial, or when such convictions shall have occurred within one year preceding the trial, the limit of punishment shall be dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for three months.[86]

590 "When the conviction is of an offence, punishable under Article II of this order or the custom of the service with a greater punishment than an inferior court-martial can award, but not punishable with dishonorable discharge, the sentence may, on proof of five or more previous convictions within eighteen months and during the current enlistment, impose dishonorable discharge and forfeiture of all pay and allowances in addition to the authorized confinement, and when this confinement is less than three months it may be increased to three months.

"When a non-commissioned officer is convicted of an offence not punishable with reduction, he may, if he shall have been convicted of a military offence within a year and during the current enlistment, be sentenced to reduction, in addition to the punishment already authorized."

The "Order" of 1895, as will be perceived, is mandatory in terms, ("the court * * * *will be opened*," &c.,) and it should therefore be strictly complied with.[87] Copies of records introduced in evidence may of course be contested by the accused, as to the genuineness or correctness of the record,[88] but should not be rejected for immaterial and presumably clerical errors in the copy.[89]

The Order requires that orders of promulgation introduced in proof of convictions shall be "duly authenticated." They should therefore be attested by the signature of the Commander or of his adjutant general or other staff officer, or by that of the Adjutant General of the Army. If not duly authenticated, they should not, until the defect be remedied, be received by the court;[90] unless, being apparently genuine on their face, the accused may waive a formal authentication. Although the Order, (unlike its predecessor, G. O. 21 of 1891,) does not in terms require that the orders of promulgation shall show "the exact offences of which the soldier was convicted," it is clear that such an order should exhibit specifications as well as charges where the specific offences are not fully indicated by the latter alone.[91]

591 The conviction, whether exhibited by a copy of the record of trial or by an order of promulgation, must appear to have been duly approved.[92] The evidence of the convictions need not be specifically referred to the court by the convening commander: it is sufficient if they come to the hands of the judge advocate with the charges, or are obtained by him from the proper official.[93]

As to the proof of previous convictions on trials by *summary courts*, it is prescribed by Circular No. 2, of 1892, as follows:—"It is the duty of the officer who brings charges before a summary court for trial to submit evidence of previous convictions, or to cite them when the convictions have been by the same court. But when evidence of previous convictions is not thus submitted or cited, the

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[86] See the recent Circ. No. 7, (H. A.,) of June 1, 1895.

[87] G. C. M. O. 38, Dept. of Texas, 1892.

[88] G. C. M. O. 38, Dept. of Dakota, 1892.

[89] G. C. M. O. 88, Dept. of the Platte, 1892.

[90] G. C. M. O. 49, Div. Atlantic, 1887; Do. 10, Dept. of Texas, 1888. It need hardly be noted that, as held in Do. 21, Dept. of Arizona, 1891, the "statement" required by par. 1015, A. R., cannot serve as evidence of previous convictions. See Circ. No. 18, (H. A.,) 1890.

[91] Cir. No. 14, (H. A.,) 1890; G. C. M. O. 20, Div. Atlantic, 1891; Circ. No. 10, Dept. of Arizona, 1892.

[92] Circ. No. 10, (H. A.,) 1893.

[93] G. C. M. O. 44, Dept. of the East, 1892.

officer acting as the court may take judicial knowledge of what appears upon the records of his own court."

**Objections to introduction of this evidence.** When the above-mentioned Army Regulation, par. 1018, was originally published, sundry objections were made to it which were all more or less reasonable and cogent. These, mainly, were—1. That the proof of the previous convictions tended to prejudice the court against the accused in adjudging the sentence: 2. That the introduction of such evidence, in making apparent that there had been a conviction, was at variance with the spirit of Art. 84, which requires the members to make oath that they will not disclose any votes or opinions of members: 3. That the regulation, in contravention of an established rule of evidence, substantially authorized the introduction of evidence of bad character before due foundation had been laid therefor by the introduction of evidence of good character on the part of the accused: 4. That it intrenched upon the province of the reviewing officer, by whom alone, not by the court, such evidence could properly be entertained.

The regulation, however, having now assumed a mandatory form, such objections cannot profitably be raised in practice. In the opinion of the author indeed, the rules laid down as governing the introduction of these convictions are artificial and confusing, and the convictions themselves are much more
592 appropriate for the consideration of the *reviewing authority* than for that of the court. A regulation confined to a requirement that such information should be submitted to the commander, for examination in connection with his review of the proceedings of the trial, would, it is believed, be more in harmony with the principles of the law of evidence and with justice than the present mandate.

# CHAPTER XX

## SENTENCE AND PUNISHMENT.

593 THE Finding having been completed, and having resulted in a conviction upon the Charge or upon some one at least of the Charges where there are several, or in a conviction of a lesser offence included in one charged,—and, (the case being one of an enlisted man,) the proper evidence of previous convictions, if any, have been introduced,—the court next proceeds to adjudge the SENTENCE, *i. e.* to affix a penalty or penalties for the offence or offences found.[1]

The subject of this Chapter will be conveniently presented under the following heads:—

I. The Course of Proceeding.
II. Classification of Sentences.
III. Principles governing the imposing of Discretionary Sentences.
IV. Principles governing the framing and substance of the Sentence in general.
V. The specific punishments separately considered.
VI. Prohibited and Disused Punishments.
594 VII. Remarks with Sentence, and Recommendation.
VIII. Disciplinary Punishments.

### I. THE COURSE OF PROCEEDING.

**VOTING AND DELIBERATION.** Where the Article or Articles of war, under which the accused has been convicted, is or are mandatory in expressly requiring a certain punishment or punishments specified to be imposed upon conviction, the office of the court simply is to cause the legal sentence to be entered of record by the judge advocate, no discretion being allowed and no deliberation or vote being called for. In cases, however, in which the sentence is left by the code to the discretion of the court, the members, the verdict being completed, commonly proceed at once to vote for a punishment or punishments, in the manner usually observed upon the Finding, and already indicated.

[1] The term "Sentence" is now uniformly applied in practice to the formal designation by the court of the punishment or punishments. In the Resolutions of the Continental Congress, (see 3 Journals, 144, 158, 714; 4 Id., 268,) "sentences" of *acquittal* are sometimes referred to, the word sentence being employed as a general term equivalent to judgment. So, in the record of Gen. Wilkinson's trial, in 1811. And note a similar use of the word in cases reported by James, pp. 281, 462, 463, 471, 639, 760, 786, 791, 794, 820, 823; also in case cited by Simmons § 563.

In the General Orders of the period of our Revolution, a sentence of court-martial is often designated as an "*opinion*." See Washington's Newburg G. O. of May 2, of May 12, and of August 28, (Maj. Gen. McDougall's Case,) 1782; also G. O. of Oct. 31, 1780, &c. It was evidently appreciated at this early day that a sentence of a court-martial was no more than a submitted estimate or recommendation.

The court may of course take an *adjournment* between finding and sentence if deemed proper and expedient.

The voting may be either oral and open, beginning with the "youngest in commission" of the members as directed in Art. 95; or in writing and secret, the member's name not being appended to his vote. The latter form is, except in simple cases, that usually pursued: it is also in general the preferable one, not only because, the votes of individuals not being known, there can be no danger that the opinion of a senior member will unduly influence that of a junior, but also for the reason that the different awards, combining as they may several distinct penalties, will, when expressed in writing, be the more definite and explicit and the more readily compared.

The ballots—the judge advocate being excluded at this stage—are properly collected by the president, and counted and their contents or result announced by him. Where no punishment is found to be concurred in by a majority upon the first vote, further votings are to be had until—if practicable—some final sentence comes to be approved by a majority of the members present.[2]

595 After the first vote, or at any other stage of the voting, the members, with a view to the reconciling of differences of opinion, may engage in such discussion as may be desirable; and here, as upon the Finding, the equality of the members is to be preserved, a junior being entitled to the same freedom of expression and the same consideration as a senior.

Where the sentences originally voted are found all to differ, it has been an approved practice for the court to proceed to vote upon them in succession, beginning with the least severe, until one of them receives the vote requisite for its adoption.[3] A majority of the votes may sometimes be found to concur in some one penalty or more: in such a case the proceedings will be simplified by treating such penalty or penalties as agreed upon; the voting being then resumed upon the other propositions. The practice which has prevailed somewhat in British courts-martial of voting—when opinions differ—first upon the *species* of the punishment, and then upon the *quantum*,[4] has not been common with us, but may of course be resorted to if thought proper.

It may be remarked indeed that neither law nor regulation has prescribed any special routine to be pursued in the making up of the sentence. The usual form, as above outlined, is thus subject to variation at the discretion of the court, which may indeed, if it see fit, dispense with voting altogether, and arrive at its conclusions by a comparison of views in an informal conversation.

Case of joint accused. When two or more persons have been tried on joint charges and convicted, their sentences must be *several*, although the punishments awarded be the same. If the sentence be discretionary with the court, a *separate voting* or concurrence should therefore be had as to the sentence of each of the accused.

**MAJORITY AND TWO-THIRDS VOTES.** The question of the selection of the sentence, or of any punishment, like all other questions arising in the procedure of our courts-martial, is, (except in the single instance of the death penalty,) determined by a majority vote. In the excepted case two-thirds of the

596 members present and acting must—as required by Art. 96—concur; *i. e.* four of a court of five members, five of a court of seven, six of a court of nine, eight of a court of eleven, and nine of a court of thirteen. In all

[2] As to the form in general pursued in voting upon the sentence, see Tytler, 311; Griffiths, 84; Hughes, 90; Maltby, 82; O'Brien, 269.

[3] O'Brien, 270.

[4] Simmons § 641; Griffiths, 84; Hughes, 91, 93; Manual, 531; O'Brien, 270.

other cases a simple majority is sufficient, as it is necessary, to impose a punishment. A *tie* vote, given where there is an even number of members, is futile and determines nothing. Where it occurs, the voting must be continued till a majority in favor of a certain sentence or punishment is obtained.

The deliberation of voting need not of course be prolonged where, after repeated votes or comparison of views, the difference is found to be *irreconcilable*. In such a case the court, in lieu of coming to a formal sentence, can only enter upon the record the fact that they are wholly unable to agree, and thus terminate the proceeding, subject to the action of the reviewing authority. Such a contingency would be most likely to happen where—the sentence being discretionary—there was an even number of members: in any event, however, it would be of rare occurrence.

**DUTY OF MEMBERS WHO ON THE FINDING VOTED TO ACQUIT.** A marked diversity of opinion once prevailed upon the point whether the members, (where the sentence was discretionary,) were obliged to vote a sentence without regard to what may have been their vote upon the finding,—whether, in other words, those who had voted for an acquittal might not properly be excused from voting a punishment. At the first impression it might seem unreasonable and inconsistent that a member, fully persuaded that the accused was innocent, or at least that the evidence had failed to convict him beyond a reasonable doubt, and who had voted accordingly, in the minority, for an acquittal, should at the next moment be required to adjudge that a specific punishment be imposed upon him as upon a guilty person. But this apparent inconsistency disappears when the principle is recalled, which has heretofore been set forth as resulting from the fundamental rule of the government of the majority in court-martial proceedings; *viz.* that the finding, when completed, becomes the act and judgment of the court as a *unit*, the opinions of the majority and minority no longer existing as such but being absorbed in the conclusion of the whole. Where, therefore, the accused has been found guilty, the conviction is to be recognized and acted upon by each member as a fixed fact—
as something which has passed out of the region of individual opinion and
597 become ascertained and concluded. Though he may have voted not guilty, he is to vote upon the sentence precisely as if he had voted for a conviction, or as if the fact of guilt had been determined by some competent agency wholly independently of himself, and the rightfulness of such determination was beyond question.[5]

Further, he must not only vote a sentence but—when the punishment is discretionary—an adequate sentence, *i. e.* one commensurate to the offence or offences found. If, having voted to acquit, he gives his vote for a slight and inadequate penalty, he falls in his full duty as an officer and member of the court.[6]

**SOME SENTENCE NECESSARY ON CONVICTION.** But though the sentence pronounced be inadequate, *some* sentence must always follow a con-

[5] See, on this subject, McNaghten, 117–129, and Kennedy, 198–206, these two authors being especially full and pointed; also Simmons § 637–639; Griffiths, 81, 84; Hughes, 93; Bombay R., 35; O'Brien, 269; De Hart, 188–191; Lee, 155; Capt. Barron's Trial, (Navy,) 333; DIGEST, 696. Simmons § 639, cites a case of a member of a court-martial, who, having refused to vote a punishment after having voted to acquit, was himself brought to trial for the neglect of duty involved. It is now expressly provided by the English Rules of Procedure § 68, that—"*Every member of a court must give his opinion on every question which the court has to decide, and must give his opinion as to the sentence, notwithstanding that he has given his opinion in favor of acquittal.*"

[6] See McNaghten, 125; also G. C. M. O. 163, Dept. of the Mo., 1882; G. O. 58, (H. A.,) 1894.

viction. For a court, as has sometimes been done, to omit to award a sentence for the expressed reason that the actual offence is shown to have been a very slight one, or that the criminality of the accused was greatly palliated by the circumstances of the case, or that he has been held for an unreasonably long period in arrest or confinement before trial, &c.,—is a marked irregu-
598 larity.[7] And so of any mere direction as to the disposition of the accused, or recommendation as to his disposition addressed to the reviewing authority;[8] such not being a sentence or properly a substitute for one.

Where the accused has escaped. 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 his case; and the court may and should thus find and sentence precisely as in any other instance. The court, having once duly assumed jurisdiction of the offence 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.[9]

Where the accused is insane. Where indeed the evidence quite clearly shows that the accused was insane at the time of the offence, whether or not the insanity is specially pleaded as a defence, there can of course properly be *no conviction* and therefore *no sentence*. Where the fact is shown in evidence, or developed upon the trial, that the accused has become insane since the commission of the offence, here also the court will most properly neither find nor sentence, but will communicate officially to the convening authority the testimony or circumstances and its action thereon, and adjourn to await orders. In some instances of this class the court had added a recommendation that the accused be discharged from the service,[10] transcending however in so doing its strict province.

**COMPROMISE OR CHANCE SENTENCE.** For the court to make up its sentence by dividing the aggregate of the different quantities of punishment voted—as the terms of imprisonment, fines, or amounts of pay to be
599 forfeited—by the number of the members, and taking the average result as the sentence to be adjuged, is clearly not a proper or military proceeding.[11] Twyford[12] expresses the opinion that such a sentence is "illegal" and "not the sentence of the court." More correctly, however, this form, though not affecting the validity of the judgment, would be an objectionable

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[7] See G. O. 27 of 1835; Do. 12 of 1836; Do. 45 of 1864; G. C. M. O. 63 of 1874; Do. 8, Dept. of Cal., 1874; G. O. 20, Dept. of the South, 1866; Do. 69, Dept. of Dakota, 1870; Do. 41, Dept. of Arizona, 1886. In a recent case published in G. O. 58, (H. A.,) 1894, the court, in finding the accused "Guilty," add—"And in view of the circumstances of the case, the court does not consider punishment necessary." The General commanding the army, in disapproving this action, observes—"The accused being found guilty of the charge, it becomes the duty of the court to agree upon and award a sentence appropriate to the offense, leaving to the reviewing authority—upon a proper representation of the facts through a recommendation to clemency or otherwise—to take such action as may seem to him demanded in the interests of justice."

[8] See *post* under head of—"The sentence must constitute a criminal judgment."

[9] Compare Meade *v.* Dpty. Marshal, 1 Brock, 324; Fight *v.* State, 7 Ohio, 180; McCorkle *v.* State, 14 Ind., 39; State *v.* Wamire, 16 Id., 357. Upon the trial by military commission of Dodd and others, in Indiana, in 1864, the court, in the absence of Dodd, who had escaped, sentenced him to death, and its action was duly approved by the reviewing authority. These authorities have been referred to in Chapter XIX on the point that the court may *find* under similar circumstances.

[10] See Chapter XIX—"Additions to the Finding, 6."

[11] Compare Wharton, C. P. & P. § 842.

[12] Guide Book, p. 20.

irregularity:[13] it is certainly very rare in practice. To determine upon a punishment by *casting lots* would be still more irregular.[14]

**ADJOURNMENT AND RECONSIDERATION.** In a case of importance, or where a conflict of opinion is developed upon a material question, it is always proper for the court to take an adjournment, pending its deliberation upon the sentence, in order that the members may have an opportunity to reflect upon the issues raised, consult precedents, &c., or in order that the judge advocate may be enabled to prepare an opinion or statement of the law upon the point under discussion.

So, too, after a sentence has been agreed upon, the court possesses the power to reconsider and modify the same at discretion, at any time before the transmittal of the proceedings to the reviewing officer. This doctrine was substantially affirmed at an early period, (1819,) in private Williamson's case, where the action of a court-martial, which, having sentenced the accused to a term of confinement, adjourned and on the ensuing day reconsidered its sentence and substituted one of death, was held by Attorney General Wirt to have been authorized and regular.[15] And the power to reconsider would extend
600 to the substitution, for the sentence, of a full *acquittal*, if deemed by the court just and proper.[16]

**ENTERING UP OF SENTENCE.** The sentence having been completed, the court may properly be reopened and the case then formally adjourned as tried: this reopening after sentence, however, is not necessary, and in the majority of cases is not resorted to. In either event, the sentence is given to the judge-advocate, (to whom, under Art. 84, it may be disclosed,) to be duly entered in the record for the action of the Reviewing Authority.[17]

## II. CLASSIFICATION OF SENTENCES.

**DISTINCTION MADE BY THE ARTICLES OF WAR.** The power of selection of punishment which a court-martial may exercise in imposing sentence depends upon the Article of war or other provision of law under which the charge is laid. It is now also further dependent upon the statute law and General Orders relating to *maximum punishments*, presently to be noted. The penal code of the army, in providing for the punishment of military offences, either prescribes a particular penalty to be adjudged in the event of conviction, or (subject to the G. O. aforesaid,) declares that a certain penalty shall be imposed *or such other* as the court may direct, or, without naming any penalty,

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[13] See Simmons § 642; Hough, (P.,) 793; Manual, 531.

[14] Compare Wharton, C. P. & P. § 842; 1 Bishop, C. P. § 998 *a*.

[15] 1 Opinions, 296–9. This authority, as indeed indicated by Mr. Wirt, is analogous to that which may be exercised by civil courts, of modifying sentences when not in accordance with law. Thus in Miller *v.* Finkle, 1 Park., 376, the court says:—"If, by inadvertence in pronouncing a sentence, a requirement of the statute has been overlooked, it may be corrected by the same tribunal before further action is taken. * * * The court has the right to expunge or vacate the first sentence and to pass a new sentence." And see 1 Bishop, C. P. § 1298 and cases cited. A court-martial, however, is not restricted to errors of law as grounds for reconsidering and modifying its sentence, but may change it for any other good reason—as that it is insdequate, or too severe, or inappropriate to the nature of the offence.

[16] That the same number of members need not take part in the reconsideration, provided a *quorum of the same* be present—see 7 Opins. of Attys. Gen., 338.

[17] In the British law, as lately as in the reign of James II, (see Art. 48 of his Code, in Appendix,) the presiding officer pronounced the sentence in open court,—as is still done in the French *conseils de guerre*.

simply leaves the matter of sentence to the will of the court. In the first case the sentence or punishment may be distinguished as *mandatory;* In the other two cases as *discretionary.*

**MANDATORY SENTENCES.** The Articles of war which require that a certain specific punishment shall be imposed upon conviction are the 5th, 6th, 8th, 13th, 14th, 15th, 18th, 26th, 27th, 28th, 38th, 50th, 57th, 59th, 61st, 65th, 100th, and Sec. 1343, Rev. Sts. In imposing sentence for the offences made punishable under these Articles, the province of the court is simply ministerial—

to pronounce the judgment of the law. It has no power to affix a
601 punishment either more or less severe, or other, than that specified:

any different or additional punishment is simply a nullity and inoperative.[18] If more penalties than one are prescribed for the offence by the statute, all are to be included in the sentence: if any one is omitted the sentence is illegal and of no effect.[19] Where there has been a conviction upon several charges setting forth different offences for which different mandatory punishments are provided, all must be embraced in the sentence. Where the conviction has been of offences for some one or more of which the punishment is mandatory, while for another or others it is discretionary, the mandatory punishment or punishments must certainly be affixed, no matter how widely or variously the court may further exercise its discretionary power of punishment in the same sentence. Indeed in all cases of punishments of the mandatory class, it is not the court which decrees the penalty but the statute; the distinctive function of the *court* practically terminating with the conviction.

**DISCRETIONARY SENTENCES.** The Articles of war which leave the punishment to the discretion of the court, are the 3d, 16th, 17th, 19th, 20th, 21st, 22d, 23d, 24th, 26th, 27th, 28th, 30th, 31st, 32d, 33d, 34th, 35th, 36th, 37th, 38th, 39th, 40th, 41st, 42d, 43d, 44th, 45th, 46th, 47th, 49th, 50th, 51st, 54th, 55th, 56th, 58th, 60th, 62d, 68th, 69th, 86th and 101st.

**EXTENT OF THE DISCRETION—Code of Maximum Punishments.** The wide discretion here conferred extends not only to all punishments authorized by military law and usage but also to the imposing of different punishments in the same sentence.[20] For a long period also no *maximum* limit was

prescribed, and—except in Art. 58, where it is declared that the punish-
602 ment shall not be less than that provided for the like offence by the law

of the State, etc.—no *minimum.* At length, by an Act of Congress of September 27, 1890, enacted for the purpose of inducing something like uniformity in the penalties adjudged by courts-martial in similar cases, it was provided that whenever by the Articles of war the sentence is left to the discretion of the court, "*the punishment shall not, in time of peace, be in excess of a limit which the President may prescribe.*" Accordingly, a code of maximum punishments was prescribed by the President under this Act, *for cases of*

[18] See DIGEST, 696; G. O. 13, Dept. of the Susquehanna, 1864; Do. 5, Fourth Mil. Dist., 1867. And compare Wharton, C. P. & P. § 752.

[19] As—in the civil practice—"if a statute imposes a fine *and* imprisonment, both must be inflicted." 1 Bishop, C. L. § 941.

[20] Our law, (long settled on this point—see O'Brien, 276,) differs from the British, where, as it appears, two distinct punishments cannot, except when expressly authorized, be combined in the same sentence. Simmons § 687; Kennedy, 209. And see Army Act § 44. In a recent American case in which dishonorable discharge, forfeiture of pay and confinement in a penitentiary were combined in a sentence imposed upon conviction of a violation of Art. 62, the regularity and validity of the sentence were expressly affirmed by the Supreme Court. *Ex parte* Mason, 105, U. S., 700.

*enlisted men*, which was published in G. O. 21 of February 27, 1891, since amended by G. O. 16 of 1895. This code must be carefully considered by courts-martial in imposing sentence in such cases. The statute of 1890 and the Order prescribing the limits of punishments are set forth in the Appendix.[21]

This system of maximum punishments originated in an opinion, generally entertained in the army, that the punishments for *desertion* required to be adjusted and equalized. It was not originally contemplated that the scheme would be extended to other offences. In the opinion of the author, the present code, so far as it prescribes punishments for offences other than desertion, is artificial, complicated and embarassing in practice, and would preferably be amended and restricted to acts of desertion and a few other perhaps of the graver offences.

It has been ruled in regard to the maximum punishments thus prescribed that, if awarded at all, they must be awarded as fixed and in their entirety.[22] These punishments, it may be added, or lesser punishments of the same nature, are not necessarily adjudged where the case admits of some other penalty. Thus where there has been a conviction of two or more offences, for one of which the punishment is mandatory, the punishments for the others being discretionary, the sentence of the court will be legally sufficient if it contain no punishment other than the mandatory penalty or penalties.

It may be repeated that the law prescribing maximum punishments applies to enlisted men *only*. The discretion as to punishment with which general courts-martial are invested in cases of *officers* brought to trial before them, has been in no manner restricted otherwise than as defined in the Articles of war or by the usage of the service.

## 603 III. PRINCIPLES GOVERNING THE IMPOSING OF DISCRETIONARY SENTENCES.

**THE SENTENCE IS TO BE BASED UPON THE FACTS AS PROVED AND FOUND.** The sentence should follow the findings and be a judgment upon the facts as found. Thus, proof of valuable service, general good character, or other extraneous circumstances favorable to the accused but foreign to the merits of the case, (although sometimes properly considered upon the Finding as material especially to the question of *intent*,) cannot—*strictly*—be allowed to affect the discretion of the court in imposing sentence, but—if deemed to call for particular notice—should form the subject of a separate "recommendation" to clemency.[23] *In practice*, however, the fact that the accused is shown to have had a good character or record in the service prior to his offence is in general permitted to enter into the question of the punishment to be imposed, and a court-martial will sometimes add to a light sentence the explanation that it is "thus lenient" because of such character or record. Regularly, however, the same is rather ground for mitigation of punishment by the reviewing authority than for a milder judgment on the part of the court.[24]

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[21] See Circ. No. 10, Department of Arizona, 1892.

[22] See Circ. No. 12, (H. A.,) 1892; G. C. M. O. 54 of 1892.

[23] See G. O. 20, Dept. of the South, 1866; Do. 115, Dept. of the Mo., 1867; Do. 15, 16, Dept. of Dakota, 1868; Do. 69, Id., 1870; G. C. M. O. 163, Dept. of the Mo., 1882. And compare Simmons § 697; Harcourt, 146, 150.

As heretofore pointed out, the sentence cannot of course be influenced by facts not in evidence and known only to individual members. G. O. 20, Dept. of the South, 1866; Do. 8, Dept. of Arizona, 1874.

[24] See, in G. O. 57, Dept. of Dakota, 1867, remarks of the Dept. Commander upon certain sentences as being so inadequate as in effect to extend clemency and invade the province of the reviewing authority.

Basing then the sentence upon the facts as established by the evidence and ascertained by the finding, the punishment will regularly and properly be measured by the nature and comparative gravity of the offence as illustrated by the peculiar circumstances preceding and accompanying it, the intent manifested by the offender, his *animus* toward the aggrieved person if any, the consequences of his act, its effect upon military discipline, &c.

**DISCRIMINATION ON ACCOUNT OF RELATIVE RANK OF OFFENDERS.** Where there are *joint* accused, different degrees of punishment
604 will often properly be called for, according to the parts, whether leading or secondary, taken in the criminal transaction by the several individuals. Where a non-commissioned officer has been concerned with a private soldier in the offence, and is jointly charged and convicted with him, his sentence, for manifest reasons should be more severe than that of his associate. So, the sentence of an officer or non-commissioned officer convicted *singly* of a military offence should in general be more severe than would be that of an inferior under the same or similar circumstances. It is however to be noted that a punishment which affects military *rank* is in general a severe one, and the more severe in proportion as the rank is the higher, so that reduction in the case of a non-commissioned officer, or suspension in that of a commissioned officer, will often prove a more rigorous penalty than would a considerable term of imprisonment in the case of an enlisted man. The rank and office of the accused will thus properly enter into the question of the proper measure of punishment to be apportioned.

**DISCRIMINATION BETWEEN DEGREES OF CRIMINALITY.** In exercising its discretion as to the sentence, a court-martial will also properly discriminate between cases of persons tried and convicted by it, severally, of the same offence, where the degrees of criminality are shown to be materially different. In such cases the punishments should be different also, and to prescribe the same routine sentence in each instance is not a just or proper employment of the discretion devolved by the law.[25]

**DISCRETION AS AFFECTED BY JURISDICTIONAL GRADE OF OFFENCE.** The discretion of a *general* court-martial in adjudging sentence is not restricted by the fact that the offence of which the accused has been convicted is one cognizable by, and ordinarily referred to, a garrison or regimental court. While the punishment is not necessarily to be any the more severe because the case has been sent to a superior rather than to an inferior court,[26] it may yet properly exceed that which the latter could legally impose if the facts as proved are deemed to require it.[27]

605 **AS AFFECTED BY A FINDING OF A "LESSER" OFFENCE.** Where a *lesser* offence has been found under the specific charge, the court cannot, of course, impose a punishment legal only for the offence actually charged;[28] nor can it properly impose one as severe as that offence would justly have called for had it been found.

**DISCRETION AS AFFECTED BY THE LOCAL LAW.** Except in time of war, in a case of one of the crimes specified in Art. 58, the authority of a court-martial as to the awarding of punishment is not controlled by the local law. Where indeed the offence found is one which would also be punishable

[25] Note remarks of Gen. McDowell in G. O. 18, Dept. of the South, 1873.
[26] Manual, 54.
[27] This simple point is noticed because of the erroneous view expressed thereon by De Hart, 53, 64–5.
[28] See G. O. 77 of 1837.

by the courts of the State, &c., in which it was committed, (or in which the trial is had,) the civil statute fixing the penalty may well be consulted as an aid in arriving at a reasonable measure of punishment for the military crime. The court-martial, however, is in no respect *bound* by that statute but may affix such sentence as the interests of military discipline, as prejudiced by the offence committed, may be deemed to require, though in so doing it very considerably exceed the limit of the local law.[29]

**RESTRICTION UPON THE EXERCISE OF THE DISCRETION.** Wide as is the discretion as to the sentence which is reposed in a general court-martial by the 62d and the majority of the other Articles of war, the same is yet properly subject to such restrictions in regard to punishment as are prescribed by the Constitution, by the statute law governing the army, or by military usage.[30]

**By Constitutional provision.** The Constitution, in Art. VIII of the Amendments, provides that "excessive fines" shall not be "imposed, nor cruel and unusual punishments inflicted." This provision applies indeed only to the courts of the United States, but courts-martial, though, as we have seen, no part of the U. S. judiciary, and not legally *bound* by such provision, will properly observe it as a general rule of practice.

606 **"Excessive fines."** Fines at military law are adjudged mainly with a view to reimburse the United States for some pecuniary loss occasioned by the offence of the accused: the idea of punishment, however, of course enters into every fine, and a fine reasonably increased for the purpose of punishment above the amount required to make good the loss would not be subject to objection. But a fine which should greatly exceed such amount, especially where the purposes of punishment were adequately answered by other penalties embraced in the same sentence, would be liable to the objection of being "excessive" in the sense of the Constitution.

**"Cruel and unusual punishments."** Here, the word "punishments," distinguished as it is from "fines," is regarded as referring mainly to such punishments as are corporal in their nature, namely such as impose restraint or suffering upon the body. As to the terms "cruel" and "unusual"—an *unusual* punishment may be said to be one not recognized by law or usage.[31] Punishments may be rare without being unusual. Thus confinement on bread and water diet, and ball and chain, though now unfrequently imposed, are not "unusual" since they are still sanctioned by usage and not prohibited by law. Whether a punishment is to be stigmatized as *cruel* depends so much upon the nature and circumstances of the offence that no general definition of the word as here employed can well be framed. A punishment may certainly be harsh and severe, and even in a degree unmerited,[32] without being cruel; and perhaps as satisfactory an explanation of the term as can readily be given would be a punishment which inflicted an amount of bodily (or mental) suffering or injury out of all reasonable proportion to the full demands of justice.[33] In pro-

[29] See *Ex parte* Mason, 105 U. S., 700.

[30] See Simmons § 111; Kennedy, 208; Maltby, 100; De Hart, 68, 196; 10 Opins. At. Gen., 160.

[31] U. S. *v.* Collins, 2 Curtis, 194; Barker *v.* People, 20 Johns., 458; Done *v.* People, 5 Park., 364; 1 Bishop, C. L. § 947; De Hart, 68; Benét, 43; 10 Opins. At. Gen., 160.

[32] See 3 Opins. At. Gen., 632.

[33] See De Hart, 69; 10 Opins. At Gen., 160; also instance referred to in DIGEST, 697, and case in G. C. M. O. 24 of 1873—where a term of solitary confinement in a "dark cell," imposed in a sentence with other penalties, was disapproved as likely to impair the health of the prisoner, and so "amenable to the objection of being cruel and unusual." And see People *v.* Norris, 80 Mich., 634.

hibiting *cruel* punishments, the law doubtless had in view the punish-
607 ments involving torture or needless agony which were practised under the old English law and were the occasion, at a later period, of legislation from which our constitutional provision was derived. This subject has recently been reviewed in the cases in which was considered the legality of the punishment of death as inflicted by the application of *electricity*—a method which, while "unusual," was held to be not "cruel."[34]

**By the statute law.** The punishment selected must not be one either expressly or impliedly prohibited by the Articles of war or other statute. Thus Art. 96 expressly prohibits the imposition of the death penalty except in cases where the same is specifically authorized by the code. Art. 98 expressly prohibits the punishments of flogging, branding, &c. Art. 97, by a necessary implication from its terms, and similarly the recent Act of March 2, 1895, c. 189, prohibit confinement in the penitentiary for purely military offences. The limitations, declared by Art. 83, upon the power of *inferior courts* to inflict punishment, are familiar to the service.

**By military usage.** This is the limitation recognized in Art. 84, by which members of courts-martial are required, among other things, to swear that, in cases not determined by express provisions of the code, they will administer justice "according to the custom of war in like cases." A punishment, observes Atty. Gen. Bates, "contrary to the usage of the service would for that reason be forbidden by law."[35] This usage has sanctioned in practice two classes of punishments, *viz.* certain ones adopted from the common law, (or civil statute law,) as fine, imprisonment with or without hard labor, and disqualification to hold office, and certain others peculiar or nearly so to the military service, such as cashiering or dismissal, dishonorable discharge, suspension, loss of files, forfeiture of pay, reduction and reprimand. A punishment recognized by the laws of a foreign country as appropriate for military offences, such as the banishment recognized by the French law,[36] but which is
608 unknown to the usage of our service, would be illegal here.[37] So of a punishment which, though once temporarily authorized by our own statute law, (no longer in force,) has never been recognized by our military custom—reduction of an officer to the ranks.[38] And so of a penalty, formerly not unfrequently resorted to, but quite discountenanced by the existing usage—the imposing of *military service or duty* as a punishment by sentence.[39]

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[34] People *v.* Durston, People *v.* Kemmler, 119 N. Y., 579, 586; *In re* Kemmler, 136 U. S., 447, (citing Wilkerson *v.* Utah, 99 U. S., 135–6.)

[35] 10 Opins., 161. And see 12 Id., 529; Bombay R., 36; Macomb, 61; De Hart, 196.

[36] Code de Justice Militaire § 185.

[37] See an instance of this punishment in 3 Jour. Cong., 386. It has sometimes been adjudged by military commissions in time of war. See Part II.

[38] DIGEST, 653. And see *post.*

[39] "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." DIGEST, 698. This punishment—in the form of imposition of extra guard duty, extra drill, &c., or of an additional term of service, was declared by the Judge Advocate General, early in the late war, to be subject to grave objection, and his views were adopted by the Secretary of War and have been repeatedly followed in Orders. See G. O. 3, and G. C. M. O. 329, of 1864; Do. 7 of 1871; G. O. 17, Dept. of the Mo., 1861; Do. 8, Id., 1864; Do. 56, Army of the Potomac, 1862; Do. 3, Dept. of the N. West, 1864; Do. 49, Middle Dept., 1864; G. C. M. O. 26, *Navy* Dept., 1882. In a recent case, in G. C. M. O. 61, Dept. of Dakota, 1884, in which the court, in adjudging a period of confinement, added, as a further independent penalty, that the term of enlistment and service should be extended for a like period,—this part of the sentence is disapproved by Gen. Terry, who observes: "The term of enlistment in the United States army is fixed by law at five years, and there is no law which authorizes a court-martial to prolong that period of service. * * * The sentence of a court-martial

Par. 1019 of the Army Regulations, in specifying certain punishments,[40] (presently to be considered,) as legal for enlisted men, is but the expression of the usage or usages by which these punishments have been sanctioned. This paragraph, it may be remarked, is not viewed as necessarily restricting, at least in time of war, the punishments imposable upon soldiers to those designated;[41] others—hereafter to be mentioned—being also regarded as still authorized by the custom of the service and usage of war.

## 609 IV. PRINCIPLES GOVERNING THE FRAMING AND SUBSTANCE OF THE SENTENCE IN GENERAL.

**THE SENTENCE MUST CONSTITUTE A CRIMINAL JUDGMENT.** This principle results from the very nature of courts-martial as tribunals invested only with a *criminal* jurisdiction and power of punishment.[42]

In the first place, therefore, the requirement of the sentence must amount to a *punishment;* otherwise it is not only irregular but of no effect. Thus a sentence directing simply that the accused be "returned to duty" imposes no punishment, but the reverse, and is therefore no sentence in law.[43] And so of the form, adopted in one case, upon a conviction,[44]—"to be confined in a lunatic asylum;" such a confinement not being properly an imprisonment or a punishment at military law.

In the second place the sentence cannot assume to impose any form of *civil* liability, whether in the nature of debt or damages. It cannot appropriate or dispose of the *pay* of an accused or impose upon him a *fine*, to the use or for the benefit of any individual military or civil, but can forfeit or adjudge the same to the United States only.[45] Nor does the fact that the liability has grown out of a criminal transaction, as a liability for money or property stolen
610 or fraudulently or otherwise illegally obtained by the accused, affect the application of the principle: in neither case can the court, by its sentence,

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which increases the term for which a soldier has enlisted is illegal." Par. 1020, A. R., now specifically forbids—"sentences imposing tours of guard duty," adding—"The performance of the honorable and important duty of guards should never be considered as punishment."

[40] The punishments recited are—death; confinement; confinement on bread and water diet; solitary confinement; hard labor; ball and chain, forfeiture of pay and allowances; dishonorable discharge from service, and reprimand, and, for non-commissioned officers, also reduction to the ranks.

[41] G. O. 9, Third Mil. Dist., 1867.

[42] See Chapter VI.

[43] See G. O. 47, Army of the Potomac, 1862; Do. 5, 20, Dept. of the East, 1865; Do. 9, 53, Northern Dept., 1865; Do. 65, Dept. of Arkansas, 1865; Do. 5, Dept. of the Cumberland, 1866.

[44] In a case in G. O. 49, Dept. of the Susquehanna, 1864.

[45] G. O. 21 of 1851; Do. 2 of 1857; Do. 18 of 1859; G. C. M. O. 82, 478, of 1865; Do. 91, Dept. of Va., 1865; Do. 4, Dept. of Texas, 1865; Do. 33, Dept. of Ala., 1866; Do. 87, Dept. of the Mo., 1868; Do. 32, Fifth Mil. Dist., 1868; Do. 37, Dept. of Dakota, 1869; Do. 10, Dept. of the South, 1870; G. O. 33, Dept. of No. Ca., 1865; Do. 7, Dept. of the Tennessee, 1866; Do. 15, Dept. of the Miss., 1863; Harcourt, 173; DIGEST, 414, 418–9. And compare Warden *v.* Bailey, 4 Taunt., 78; O'Kelley *v.* Latham, Rowe, 462; Morris *v.* Whitehead, 65 No. Ca., 637.

Pay cannot now be forfeited by sentence in favor of a "company tailor" or "company shoemaker," to whom the accused may be indebted. (G. C. M. O. 30, Dept. of the Gulf, 1876.) Nor can it now be forfeited or stopped to satisfy the dues of a "laundress." Nor can it legally be forfeited to pay a "post trader" for articles previously sold by him to the soldier, or in favor of the *post exchange.*

require the accused to refund to the injured party or to reimburse him for his loss.[46]

Nor, further, can a court-martial, in imposing a pecuniary fine or forfeiture of pay, legally require, as has sometimes been done, that the amount shall be refunded to, or paid into, a particular fund—as a hospital or company fund,[47] or be expended for the use of sick soldiers, &c., or be allotted for the support of the family of the accused.[48] Nor can it, in forfeiting the pay of a soldier, on conviction of having stolen a sum of money from a disbursing officer, require that the amount of the forfeiture shall be credited to the account of said officer with the United States.[49] Further, a military court cannot condemn an accused to return a specific article of property to a person whom he has illegally deprived of the same; nor can it sentence him to be imprisoned until he pays a certain amount, or restores certain property, to a private individual.[50] Thus a court-martial, in framing its sentence, can recognize no liability or obligation on the part of the accused except to the United States.

611 **THE SENTENCE MUST NOT TRENCH UPON THE PROVINCE OF THE REVIEWING AUTHORITY.** The court, in its sentence, may not assume a duty or power belonging to the reviewing officer or other commander. Thus, it should not attempt to execute its own sentence; as by adding to a sentence of dismissal of an officer—"and he is hereby dismissed accordingly,"[51] or, to a sentence imposing a fine, that the same be enforced in a particular mode or by a particular official.[52]

Nor, for the same reason, is it authorized to direct in a sentence—as one of forfeiture for example—that the offender be "released from arrest, and returned or restored to duty;"[53] nor can it direct the assignment or transfer of a convicted soldier to a particular regiment or organization;[54] or that a

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[46] G. C. M. O. 177, 186, of 1864; Do. 478 of 1865; Do. 63 of 1868; Do. 33, Dept. of the East, 1866; G. O. 22, 26, Middle Dept., 1865; Do. 37, Dept. of Dakota, 1869; G. C. M. O. 22, Dept. of the Mo., 1883. And see G. C. M. O. 10, Dept. of the South, 1870, in which a direction in a sentence that a portion of the pay of the accused be appropriated to indemnify the owner of property *destroyed* by accused, was properly disapproved. Any appropriation of this class by a court-martial is in fact an assumption of *legislative* power.

[47] DIGEST, 418–19; G. C. M. O. 91, Dept. of Va., 1865; Circ. No. 9, (H. A.,) 1886. In G. O. 23, Dept. of Ala., 1866, a sentence imposing a fine, "to be appropriated to the use of the Freedmen's Bureau," was properly disapproved. In a case of a sentence, published in G. C. M. O. 217 of 1865, containing a forfeiture of the pay of a soldier, "to be appropriated for the benefit of the Soldiers' Home, if legal, and, if not, to be forfeited to the U. S. Government," it was properly directed by the reviewing authority that "the forfeiture of pay will be to the United States." It may be remarked that forfeitures, &c., of soldiers' pay, are appropriated for the benefit of the Soldiers' Home by operation of law, according to the provisions of Sec. 4818, Rev. Sts., and that any direction in a *sentence* in regard to such appropriation is unauthorized and surplusage.

[48] DIGEST, 418; G. O. 2, Middle Mil. Div., 1865.

[49] G. C. M. O. 7, Fourth Mil. Dist., 1868.

[50] G. O. 18 of 1859.

[51] James, 630, 660, 661; Simmons § 669; De Hart, 197.

[52] It would be especially irregular for a court-martial to direct a proceeding against a convicted party which it is for the *civil* authorities to initiate. Thus, in a case in G. O. 16, Mountain Dept., 1862, where, to a sentence imposed upon an officer for embezzlement, &c., it was added:—"And the court orders his property to be seized by the commanding officer of his post and held subject to future and legal disposition," this action was properly disapproved by the reviewing authority and the matter of the seizure "respectfully referred to the U. S. District Attorney for action."

[53] "This is transcending the province of a court-martial." G. O. 47, Army of the Potomac, 1862. And see G. O. 65, Dept. of Ark., 1865, and other Orders noted under head of—"The sentence must constitute a criminal judgment," *ante*.

[54] G. C. M. O. 408 of 1864.

soldier, sentenced to be dishonorably discharged, be furnished transportation to his place of residence;[56] or that a soldier deemed insane be confined in an insane asylum.[56]

A court-martial, in awarding the *death* penalty, need not and should not designate in its sentence any time or place for its execution;[57] nor, in connection with a sentence of *imprisonment* in a military prison or penitentiary, should it direct that the same be executed at a certain prison or place specified:[58] these also are particulars properly to be determined by the reviewing officer.

612 Again, the court may not trench directly or indirectly upon the *remitting or mitigating power* of the commander. This is in fact done where the court—as has occurred in some instances—declares that, in view of the long confinement undergone by the accused while awaiting trial, or some other circumstance indicated, it awards no sentence.[59] So, it is done, though less directly, where the court, because of the previous good record of the accused, or other extenuating circumstance foreign to the merits, is induced to adjudge a mild sentence quite out of proportion to the gravity of the offence committed. Sentences of this kind indeed are not unfrequently resorted to, but, strictly, as indicated in a previous part of this Chapter, the court, in such cases, practically invades the province of the commander, whose function alone it is to determine whether, for any cause, the sentence shall be mitigated or remitted.[60]

Further, a court-martial has of course no power to exercise, by its sentence, any discipline or authority over the accused beyond the limits of his punishment, or over any other person within the command. Thus where to a sentence of reduction to the ranks it was added by the court that the accused be precluded from holding any position as a non-commissioned officer for six months, such addition was disapproved as unauthorized, since the court could not prevent the regimental commander from promoting the accused if thought expedient.[61]

613 Similarly illegal was the action of a court, which, in imposing confinement and forfeiture, upon a conviction for drunkenness, added in the sentence that the sutler should be ordered not to sell the accused "anything on credit" thereafter.[62]

It need scarcely be added that any direction in a sentence which transcends the authority of the court, and encroaches upon that of the reviewing officer,

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[55] G. O. 44, Dept. of the N. West, 1863.

[56] G. O. 49, Dept. of the Susquehanna, 1864, cited *ante*.

[57] DIGEST, 112; Tytler, 327; Griffiths, 87; De Hart, 196; also, as to the similar rule in civil cases, Com. *v.* Webster, 5 Cush., 407; 1 Bishop, C. L. § 951; 1 Id., C. P., § 1311.

[58] See G. O. 9, 16, Dept. of Ark., 1865; G. C. M. O. 12, 13, Dept. of the Col., 1882; Circ. 4, Dept. of Penna., 1865.

[59] In G. C. M. O. 8, Dept. of Cal., 1874, in a case in which the court, in view of the long confinement of the accused prior to trial, concluded not to impose any punishment upon the conviction, the Dept. Commander, Gen. Schofield, remarked as follows:—"It is the duty of a court in all such cases to decide upon and award a sentence which shall be appropriate to the offence of which the prisoner shall have been convicted, and to leave to the Reviewing Authority—upon a proper representation of the facts through a recommendation to clemency or otherwise—to take such action as may seem to him demanded in the interests of justice." And see a similar case in G. O. 69, Dept. of Dakota, 1870.

[60] In G. C. M. O. 163, Dept. of the Mo., 1882, Gen. Pope, referring to the discretion of the court as to the awarding of sentence, says:—"It was never contemplated that the exercise of this discretion should usurp or encroach upon the pardoning power, residing only with the reviewing authority or the Chief Executive." And see Do. 8, Dept. of Cal., 1874; G. O. 57, Dept. of Dakota, 1867; Do. 20, Dept. of the South, 1866.

[61] G. O. 10, Dept. of N. Mexico, 1865.

[62] G. O. 35, Army of the Potomac, 1862.

may be wholly *disregarded* by the latter in his action upon the case.[63] He will properly, however, expressly *disapprove* the objectionable portion.

**THE SENTENCE SHOULD BE CONSISTENT WITH THE FINDING.** By this it is meant that the sentence must not impose a punishment not authorized by the finding. Thus, where there are several charges, and the accused is acquitted upon some and convicted upon others, the sentence must adjudge only such punishments as are authorized for the offences of which the accused is convicted; otherwise it will be inconsistent with the finding. So, where the finding upon a capital charge is Not Guilty but Guilty of conduct to the prejudice of good order and military discipline, a sentence of death will be inconsistent with the finding and therefore illegal.

**IT SHOULD DEFINITE AND UNAMBIGUOUS IN TERMS.** Where the punishment is one made mandatory upon the court, there need be no question as to the form of expressing the sentence; it being proper and sufficient merely to specify the punishment by the word or words employed in the Article. Where the sentence is discretionary, the punishment or punishments selected by the court, (subject to the law of *maximum* punishments, in cases of enlisted men,) should be stated in simple, clear, and unmistakable terms, and with such precision in regard to details as to convey the exact particulars intended to be conveyed by the court.[64] Amounts of forfeitures and dues, numbers of
614 files to be lost, and periods—years, months,[65] days,[66] &c.—of imprisonment, suspension, &c., should be defined explicitly and with certainty. Where—as is usual but not essential—the *name* of the accused is repeated in the sentence, it should be correctly given, and in such form that there will appear no material *variance* between the sentence and the finding or charge.[67]

Further, where there are imposed two or more different punishments, the *order* of the execution of which will be material in affecting the status or rights of the accused, or the interests of the service or of discipline, the sentence should be so framed as to indicate clearly the order in which the punishments are intended by the court to be executed. Thus where a soldier is sentenced

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[63] G. O. 9, 16, Dept. of Ark., 1865.

[64] "A sentence, like any other writing, must, to be valid, be in such terms that its meaning can be understood. And always the court should take especial care to make it precise and accurate." 1 Bishop, C. P. § 1297. "The sentence must be definite, exact, and peremptory." Wharton, C. P. & P. § 923. "It should obviously be expressed in clear and unambiguous language." Simmons § 644. "So that the kind and degree of punishment shall be set forth definitely and precisely." De Hart, 196. A sentence of imprisonment that fails to fix the *term* is inoperative, and should be disapproved unless corrected on revision.

[65] In the absence of any specific provision on the subject in our law, the word "*month*" or "*months*," as employed in sentences, is treated as meaning precisely what it means in ordinary parlance, and is held to mean in the civil practice, viz. *calendar* month or months. See Moore *v.* Houston, 3 Sergt. & Rawle, 184; Brudenell *v.* Vaux, 2 Dallas, 302; Com. *v.* Chambre, 4 Id., 143; Sheets *v.* Selden, 2 Wallace, 178, 190. And note the Act of March 3, 1875, (applied to military cases by G. O. 64 of 1875,) in regard to credits for good conduct of five days "in each and every calendar month," &c.

[66] In a case in G. O. 64, Dept. of the Cumberland, 1868, a sentence "to stand on a barrel three hours each day," without adding the number of days, was properly held to be enforceable for one day only.

[67] See cases of variance inducing a disapproval of the proceedings, referred to in DIGEST, 743; also cases in G. O. 6, Dept. of La., 1868, where the Christian name of the accused was given as *James* in the specification and *John* in the sentence; and case in G. C. M. O. 117, Mil. Div. Pacific & Dept. of Cal., 1881, where the same appeared in the specification and finding as *James W. F.*, and in the sentence as *William H. F.* A mere difference however in a middle initial is held to constitute no variance. DIGEST, 743, and authorities cited in note; also Keene *v.* Meade, 3 Peters, 1; Gaines *v.* Stiles, 14 Peters, 322; Lessee of Dunn *v.* Gaines, 1 McLean, 321.

both to dishonorable discharge and a term of confinement, and it is proposed by the court that the former punishment shall be—as it is in general preferable that it should be—executed before the latter, the sentence should read that he be discharged and *then* confined, &c., or in terms to such effect.[68]

**TO BE ENTIRE AND SINGLE.** In the absence of any statutory di-
615 rection on the subject, usage has established that the sentence of a court-martial shall be, in every case, an *entirety;* that is to say that there shall be but a single sentence covering all the convictions on all the charges and specifications upon which the accused is found guilty, however separate and distinct may be the different offences found, and however different may be the punishments called for by the offences.[69]

**NOT TO STATE THE VOTE, EXCEPT IN A CASE OF DEATH SENTENCE.** Although not required by law—by Art. 96 or otherwise—it is the uniform practice to add to a capital sentence that the same is concurred in by two-thirds of the court. But in no other case can the vote be stated in the sentence; nor can it be stated that the vote was unanimous, without a violation of the members' oath prescribed by Art. 84.[70]

**SENTENCES TO BE SEPARATE FOR JOINT ACCUSED.** Where several persons are charged and tried together for the same offence or offences, and all, or more than one, are convicted, separate *entire* sentences should be adjudged to each, precisely as if they had been separately tried. Different punishments may, and, where the measures of their criminality are materially different, should, be imposed upon the several individuals; but, even though the same punishment be awarded to each, the sentences—like the findings—should be formally distinct.[71]

**CUMULATIVE SENTENCES, HOW TO BE FRAMED.** Where a person, while under sentence of imprisonment, is again brought to trial and sentenced to a further measure of the same punishment, it is usual in the civil practice for the sentence to specify that the second imprisonment is to begin at the expiration of the first, indicating the date of such expiration.[72] At
616 military law, however, it is not habitual, nor is it necessary, so to specify,[73] or otherwise to direct in terms that the second punishment, (of imprisonment, forfeiture, or suspension,) is to be executed as additional to or continuous upon the first. It is sufficient and almost invariable to frame such punishment in the usual form, as an independent sentence; the mere fact that a similar sentence is pending and being executed at the time determining of itself that the second sentence is to be treated as concurrent but as a distinct additional penalty of which the execution is to commence upon the completion of the first, *i. e.* when the same is terminated by its due expiration,

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[68] Where this is not done, it is in general to be inferred, and in our present practice *is* inferred, that the punishment first mentioned is the one intended to be first executed. See DIGEST, 357.

[69] As to the civil practice, see Wharton, C. P. & P. § 910, 911; 1 Bishop, C. P. § 1325–1334.

[70] See similarly as to the statement of the Finding, in Chapter XIX.

[71] Where there are joint defendants, the sentence should be "in form several, not joint." 1 Bishop, C. P. § 1035. And see Wharton, C. P. & P. § 312, 314; U. S. *v.* Ismenard, 1 Cranch C., 150; Simmons § 644.

A joint sentence, where all are alike convicted of the same offence or offences, would indeed be *legal* and operative at military law, though irregular and exceptional as to form.

[72] See Wharton, C. P. & P. § 932; 1 Bishop, C. L. § 953.

[73] Recent instances in which it was done in the sentence are found in G. C. M. O. 24, 39, Dept. of Cal., 1885.

or by a remission on the part of the proper superior authority. The second sentence is thus made cumulative simply by operation of law.[74]

It may be added that a punishment, to be cumulative, must be one capable of being independently executed. Where a court-martial has imposed upon an accused a penalty which, from its nature, cannot be executed more than once, as dishonorable discharge or forfeiture of all pay, and such penalty has been approved and has taken effect, it will be futile and superfluous to repeat it in framing a subsequent sentence. In such a case, the court will, in the first instance, have exhausted its power over the subject, so far as concerns the particular penalty.[75]

**THE SENTENCE SHOULD NOT EMBRACE PENALTIES RESULTING BY OPERATION OF LAW.** Thus the sentence of a deserter need not and should not contain a direction to the effect that he make good the time lost by his unauthorized absence,[76] or that he incur the forfeitures specified
617 in the Army Regulations,[77] or that he be subjected to the loss of civil rights prescribed by the statute law;[78] the same being all penal consequences attaching upon the (approved) conviction, independently of the sentence. So, in convicting an officer under Art. 6 or Art. 14, (providing for the punishment of false musters, &c.,) it is not essential to add, in connection with the dismissal to be adjudged, that the accused be disabled from holding office or employment in the public service, since this disability must necessarily result from the judgment of the court.

## V. THE SPECIFIC PUNISHMENTS SEPARATELY CONSIDERED.

These will be presented in the following order:—I. Punishments legal and appropriate for officers: II. Punishments legal and appropriate for both officers and enlisted men: III. Punishments legal and appropriate for enlisted men only.

### I. Punishments Legal and Appropriate for Officers.

These are Dismissal or Cashiering, Disqualification for office, Suspension, Loss of relative rank or files, Reprimand or Admonition, and Apology.

**DISMISSAL OR CASHIERING.** Dismissal and cashiering[79] were formerly regarded as quite distinct in military law; the latter involving, in addition to a dishonorable separation from the service, a disability to hold military office

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[74] Digest, 444, 698. The legal effect will be the same where the soldier has been twice successively tried, and has received at each trial a term or quantity of the same punishment, but the first sentence has not been promulgated as approved, or has not commenced to be executed, at the date of the second sentence. Here the second sentence, when approved, will be cumulative upon the first. See par. 1029, Army Regs., containing ruling of the Sec. of War in concurrence with a previous opinion of the Judge Advocate General.

[75] See case in G. O. 10, Dept. of W. Va., 1862.

[76] G. O. 94, Dept. of the Mo., 1867; Do. 21, Dept. of the Lakes, 1873; G. C. M. O. 74, Dept. of the East, 1873; Digest, 42. It was formerly held *contra*. G. O. 45 of 1843.

[77] Digest, 416–17; U. S. *v.* Landers, 92 U. S., 79. The special regulations referred to are pars. 128 and 1514.

[78] By Secs. 1996, 1998, Rev. Sts.

[79] From the French *casser*, to break.

and thus constituting a more severe punishment than the former.[80] The two are now classified as separate punishments in the British Army
618 Act,[81] but in our law and practice all such distinction has long ceased to exist, cashiering having become identical with dismissal.[82] In all the present Articles of war in which this punishment is named except two—the 8th and 50th—"dismissed" is the word adopted, and in those "cashiered" was retained apparently through inadvertence. In sentences of courts-martial, as also in the common military parlance, "cashiering" or "cashiered" is now most rarely used, and "*dismissal*" will therefore be here exclusively employed in treating of this punishment.

Dismissal by sentence, it need hardly be observed, is simply an expulsion of the officer from the military service, carrying with it *no legal disability*.[83] A dismissed officer is not as such disqualified to hold either military[84] or civil office: disqualification for office is, in our military law, as will hereafter be noticed, a separate and distinct punishment.

Dismissal, to the exclusion of any other punishment, is *required*, by Arts. 5, 6, 8, 13, 15, 18, 26, 27, 28, 38, 50, 59, 61 and 65, to be adjudged upon conviction of the offences in these Articles specified. It is also *legally imposable* upon conviction of any offences of which the punishment is made discretionary with the court, and may therefore be adjudged under any of the Articles, other than those last named, which relate to the offences of officers—except only Art. 57 which enjoins, exclusively, the death penalty.

**Form of the sentence.** The proper *form* of the sentence is—"to be dismissed," or "to be dismissed the service," or "to be dismissed the service (or 'military service') of the United States." The term "dishonorably," though sometimes employed, need not be expressed, the notion of dishonor being necessarily involved in a dismissal by sentence. Nor, as it has already been noticed, is it proper to add—"and he is hereby dismissed accord-
619 ingly," since it is not the sentence that dismisses or can dismiss the officer, but its approval or confirmation by the reviewing authority.[85]

When the dismissal is "for cowardice or fraud,"—as where it is adjudged on conviction of misbehaviour before the enemy in violation of Art. 42, or of some offence to the fraud of the United States, as presenting a fraudulent

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[80] McNaghten, 12–16; Hough, 123–130; Maltby, 89, 92; O'Brien, 274–5; 2 Opins. At. Gen., 289; DIGEST, 214; G. O. 17, Dept. of Fla., 1866. Note also case in James, 377, and Simmons § 116, in which a sentence of cashiering was *mitigated* to dismissal.

A form of this punishment in Arts. 9 and 10, (Sec. I,) of Charles I, is—to be "cashiered the army without pay or passport." In Art. 165 of the Code of Guatavus Adolphus is a peculiar provision, that a "superior officer" who "shall *sollicite* for any man that is lawfully convicted" by a court-martial, "unless it be for his very neere kinsman for whom nature compels him to intercede, * * * shall be held as odious as the delinquent and *cashiered from his charge.*"

[81] Sec. 44. "Cashiering renders a person unfit to serve her Majesty again in any capacity." Story, 95.

[82] De Hart, 194; Benét, 44; G. C. M. O. 103 of 1875; DIGEST, 214, 355–6.

[83] It entails merely, where adjudged on conviction of cowardice or fraud, and after the sentence has been published as indicated in Art. 100, the loss of the privilege of associating with officers of the army.

[84] If reappointed and confirmed by the Senate. (Sec. 1228, Rev. Sts.) It is otherwise as to *naval* officers, who, when dismissed by court-martial, cannot again re-enter the navy as officers. (Sec. 1441, R. S.)

[85] Postponing, by sentence, a dismissal till after the execution of another punishment imposed by the same sentence, is a proceeding unknown in our military service, but seems to be sometimes resorted to in the *naval* practice. Thus, in G. C. M. O. 27, Navy Department, 1887, an officer, convicted of fraud, embezzlement, desertion and other offences, is sentenced to imprisonment for three years and *to be dismissed at the end of that term.* This sentence is duly approved and confirmed.

claim or embezzlement, in violation of Art. 60,—the sentence should "further direct" in regard to the publication of the crime, punishment, &c., as is prescribed in the 100th Article.

**Execution of this punishment.** This punishment is executed, by operation of law, immediately *upon approval or confirmation, and notice* to the officer. Upon the day of the official announcement to an officer of the approval or confirmation by the proper authority of a sentence dismissing him from the military service, his connection with the army at once ceases and he becomes a *civilian*. In some instances the day of actual notice will be the same as that of the final action giving effect to the sentence. In other cases, however, a certain period will elapse after the date of the confirmation and its promulgation in General Orders before the officer can be officially informed of the same. In such cases, the general rule is that the sentence shall be considered as taking effect on the day on which the Order, in and by which the sentence is thus confirmed, is received by him, by official mail or telegram, or is promulgated at the post or station at which he is serving or held in arrest.[86] All military persons are in general bound to take notice of General Orders officially promulgated at their stations;[87] and, in the absence of evidence to the contrary, an officer will be presumed to have been informed of an Order, 620 confirming a sentence dismissing him from the service, on the day on which the same was published or received, at his post or station.[88] It may happen, however—and this especially in time of war—that, on the day of promulgation or receipt, the officer may be involuntarily absent so that he cannot in fact take notice of the Order. Thus he may be absent on some duty upon which, (irregularly or because of some emergency,) he has been ordered, or he may be absent sick in a distant hospital, or may be a prisoner in the hands of the enemy. In cases of this character, proof of the fact of absence will rebut the presumption indicated, and the officer will, properly, not be charged with notice of the confirmation of the sentence, nor will his dismissal take effect, until *actual* official notice of the same as confirmed is given to him.[89]

The phrase, sometimes added to the official approval of a dismissal, as published in General Orders, that the party "ceases to be an officer of the army from the date of this order," is surplusage, being no proper part of the action required, and of no legal effect in fixing the date on which the dismissal goes into operation. The dismissal does or does not take effect at the date of the order, according as the officer may or not receive official *notice* of the same on its date.

It need hardly be added that, even where a considerable delay has, without fault of the reviewing officer, occurred in acting upon a sentence of dismissal,

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[86] See the general rule as stated in G. O. of Jan. 14, 1831, and Do. 103 of 1864, and illustrated in G. C. M. O. 20 of 1874; Do. 42 of 1879; DIGEST, 366, 545.

[87] See G. O. 2, Dept. of Va. & No. Ca., 1865; O'Brien, 85.

[88] DIGEST, 545; O'Brien, 85.

[89] DIGEST, 545. And compare Simmons § 788; also Allstaedt *v.* U. S., 3 Ct. Cl., 290, where an executive order of dismissal was held to have taken effect, not at its date but at the subsequent date of its receipt by the officer at his station. So, in Gould *v.* U. S., 19 Ct. Cl., 593, in a case of an officer of volunteers mustered out and discharged during the late war, but who did not receive notice of such action till at the end of three months, it was held that his discharge did not take effect till the notice reached him. Note also the similar principle incorporated in the 49th Art. of war, and recognized in Mimmack *v.* U. S., 97 U. S., 426, Barger *v.* U. S., 6 Ct. Cl., 35; G. O. 103 of 1864,—that an officer's *resignation* takes effect not at the date of the order accepting, but at the date on which he is officially notified of such order. Compare also G. O. 80 of 1880.

the same cannot legally be made, by the order of that officer, to take effect as of a date *prior* to that of his final action,—as of the date; for example, of the actual adjudging of the sentence by the court.

621 **Dismissal with ignominy.** In time of war, courts-martial have sometimes directed in sentences of dismissal that the same be accompanied by certain minor penalties impressing the dismissal with an ignominious character—such as taking away or breaking the sword of the officer, or cutting off his shoulder straps or other *insignia* of rank, publicly in presence of the command to which he is attached.[90] In a few cases, upon conviction of misbehaviour before the enemy, it has been directed in the sentence that the officer be paraded in front of the command bearing a placard inscribed with the word "coward,"[91] and further even that he be drummed out of the service.[92]

Such additional penalties are commonly executed through the officer of the day or adjutant, after the reading of the order promulgating the approval of the dismissal, at a parade or on some other occasion of the formal assembling of the command.[93]

622 **DISQUALIFICATION FOR OFFICE.** This punishment, though formerly, by a provision of the British Mutiny Act, specifically legalized in cases of embezzlement and some offences of a similar nature, ceased subsequently to be thus authorized,[94] and is not included in the list of legal punishments contained in the present Army Act.[95] In the American *civil* courts disqualification to hold office seems to have been recognized as a common-law punishment for treason,[96] but does not appear to have been employed in other cases except where expressly authorized by statute.[97] In sundry U. S.

[90] See cases in G. C. M. O. 61, 117, 285, 315, 332, of 1865; G. O. 25, Mountain Dept., 1862; Do. 9, Dept. of the Cumberland, 1862; Do. 55, 60, Army of the Potomac, 1863; Do. 19, 27, Id., 1864; G. C. M. O. 16, Id., 1865; G. O. 3, Dept. of W. Va., 1863; Do. 73, Dept. of Va. & No. Ca., 1864; Do. 29, Dept. of the Gulf, 1864; Do. 43, Dept. of La., 1865; Do. 8, Dept. & Army of the Tenn., 1865; G. C. M. O. 19, Dept. of Ky., 1865. In an old Order—G. O., Seventh Mil. Dist., Jan. 22, 1815, the form is—"to have his sword broke over his head." And see sentence of Capt. Manning, *post*. Punishments of this class are more common in foreign armies. In a late case in France, that of Captain Albert Dreyfus, an artillery officer on duty at the Ministry of War, convicted of disclosing State secrets to the German government, the sentence was—Imprisonment for life in a fortress and degradation from all military rank and honors. In the execution of this punishment the name of the accused was struck from the army rolls, and, in the presence of the garrison of Paris, his sword was broken and his buttons and military insignia were stripped from his uniform, and thus degraded he was marched along the four sides of the square in which the troops were formed. (January, 1895.)

[91] G. C. M. O. 332 of 1865; G. O. 19, 27, Army of the Potomac, 1864; Do. 73, Dept. of Va. & No. Ca., 1864.

[92] G. O. 73, Dept. of Va. & No. Ca., 1864. In a case in G. O. 9, Dept. of the Cumberland, 1862, it was directed in the sentence that the officer, after being publicly stripped of his *insignia* of rank, be "conducted by the guard without the lines of the command." In an Order of the Revolutionary period—G. O., Hdqrs., Valley Forge, March 14, 1778—the Commander-in-Chief, (Washington,) approves a sentence of a Lieutenant—"to be dismissed with infamy," and orders him "to be drummed out of camp to-morrow morning, by all the drums and fifes in the Army, never to return."

[93] See Order last cited; also G. O. 25, Mountain Dept., 1862.

[94] Simmons § 668. The first instance of a sentence of disqualification that I have met with in American history was that adjudged Capt. Manning, British Army, tried for surrendering New York to the Dutch in 1673, and sentenced to have his "sword broke over his head in public before the City Hall, and himself rendered incapable of wearing a sword and of serving his Majesty for the future, in any public trust in the government." Barber, Hist. Col., New York, 19–20.

[95] Sec. 44.

[96] Barker *v.* People, 20 Johns., 451.

[97] Com. *v.* Jones, 10 Bush, 725, Brackett *v.* McCarty, Id., 758.

statutes,[98] disqualification or ineligibility for office has been imposed not as a punishment but as a legal consequence upon removal from office or conviction of crime in cases of civil officials.

In our military code, disqualification, (except as it may, at an early period have been involved in cashiering,) has never been specifically authorized as a distinct punishment, though in some of the Articles—the present 6th and 14th for example—it has been attached as a legal consequence to the sentence of dismissal. The authority therefore for disqualification as a military punishment by sentence must rest upon *usage*.

In a case of a contractor tried in 1865 by a naval court-martial,
623 (under the Act of July 17, 1862, s. 16,) and sentenced to be excluded from thereafter contracting for naval supplies, the Attorney General, in pronouncing against the legality of this sentence, observes generally:—"A sentence of incapacity or disability does not seem to fall within the range of discretionary punishments allowable by the usage of the service."[99] As a general proposition, however, this statement of the law is too broad.[100] In a previous General Order of the Navy Department,[1] disqualification for office under the United States had been expressly recognized as an authorized punishment for naval courts-martial, and in the *army* a long series of precedents had given sanction to this form of penalty. Prior to the late war, indeed, this punishment, though from time to time imposed, was not a common one.[2] From an early date, however, in the war it was frequently resorted to, and, including the period from that date to March, 1870, (in which month it was imposed and approved in two instances,) the author has noted some one hundred and twelve cases published in Orders, in which this penalty was adjudged by court-martial in connection with dismissal;[3]—the disqualification pronounced being in most cases *general, i. e.* not confined to the holding of
624 *military* office merely, but extending to the holding of *any* office under the United States.

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[98] Revised Statutes, Secs. 243, 1229, 1441, 1734, 1781, 1782, 1788, 1789, 2105, 2233, 2873, 3167, 3890, 4187, 4188, 4373, 4374, 5332, 5334, 5392, 5408, 5449, 5499, 5502, 5508, 5532. The disabilities attached by Secs. 1996–1998 to convictions for *desertion* have been elsewhere remarked upon.

In an early case mentioned in 2 Journals, 204, (1777,) Congress, in summarily dismissing 12 Lieutenants of the Navy, rendered them at the same time "incapable of holding any commission or warrant under the authority of the United States."

This punishment was once not unfrequently resorted to by *militia* courts-martial in New England. See Militia Reporter, 145; Printed Trials of Maj. Gen. Goodale, and Capt. S. Watson, *et al;* Resolve of Mass. Legislature, of March 10, 1808, in regard to cases of Col. Robt. Gardner and Majors Benj. Harris and Amasa Stetson.

[99] 12 Opins., 528. (1868.)

[100] Had the ruling been confined to the sentence in the particular case it would scarcely have been subject to exception. Later indeed the Attorney General appears to recognize disqualification as a not illegal punishment for an *officer of the army*, in Gen. Porter's case, where he refers to it as "a continuing punishment," which may be at any time "remitted by the exercise of the pardoning power." 17 Opins., 303. See note 3, *post*.

[1] G. O. 44 of 1864.

[2] Instances are found in G. O. of April 2, 1818; Do. of Sept. 25, 1819; Do. 71 of 1829; Do. 15 of 1860.

[3] See the numerous cases collected in the author's note to DIGEST, 375–6. Those published, and approved in the Orders cited of the War Dept., included such leading cases as those of Maj. Gen. Porter, Brig. Gens. Hammond and Briscoe, B. G. Harris, M. C., &c. In the case of the former, the disqualification imposed—"to be forever disqualified from holding any office of trust or profit under the Government of the United

In a case, however, published in a General Order of April, 1870,[4] the punishment of disqualification, (included by the court in its sentence,) was disapproved as "unauthorized by law;" and the same action was repeated in a case of a similar sentence in December following.[5] Since the last date the punishment under consideration is not found to have been embraced in any sentence published in General Orders.

The disapproval in these cases is understood to have been induced by the ruling of the Attorney General above cited. But this ruling, as has been seen, was not properly applicable at least to sentences of disqualification in the army, and so far as usage and the practice of the Government could sustain such sentences, the same must be regarded as having been fully and amply sanctioned in our law.

But while this punishment has thus been sanctioned, and is one which might profitably be resorted to in aggravated cases of embezzlement, gross malfeasance in office, or other extreme offence exhibiting the offender to be quite unworthy to serve the United States at least in a military capacity, it is yet to be observed that the same, even though it were confined to military office only, would always remain objectionable as practically amounting to an inhibition for an indefinite period upon the constitutional appointing power of the Executive in the case of the officer, and thus constituting an exercise of authority apparently beyond the province of a court-martial. Were the disqualification limited to a certain term of years, as in some militia cases,[6] and the approval of the President required, as in cases of dismissal, to give the punishment legal effect, the objection indicated would be mainly done away with.

**Execution.** This punishment would be executed in the same manner as dismissal, *i. e.* upon *official notice* of the approval of the sentence by the President or proper Commander, as given either by the formal order of promul-
625 gation of the proceedings, or otherwise. Upon the date of such notice the disqualification is complete, and thenceforward continues to be in force till removed by the pardoning power.[7]

**SUSPENSION.** This punishment, (no longer authorized by the British code,[8]) is imposable in our service for any offence of an officer[9] of which the penalty is discretionary with the court. Though *recognized* in one of its forms—suspension from command—by the 101st Article of war,[10] it in fact rests for its authority upon *usage*. It may be imposed for any stated term of

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States"—was further recognized as legal by being expressly *remitted*, as a continuing punishment, by the President in 1882.

It may be added that disqualification could rarely be an appropriate punishment for an *enlisted man*. In one instance, in G. C. M. O. 98 of 1867, in which a soldier was sentenced, with confinement, "to be forever disqualified from holding any office above the rank of private in the U. S. army," this part of the sentence was very properly disapproved.

[4] G. C. M. O. 22, H. Q. A.

[5] G. C. M. O. 57, Id.

[6] See Militia Reporter, 145; Printed Trial of Maj. Gen. Goodale, (Mass. militia;) Printed Trial of Capt. S. Watson, *et. al.* (Id.)

[7] See 17 Opins. At. Gen., 303, cited *ante*.

[8] See Army Act, s. 44.

[9] Suspension from rank (and pay) of *non-commissioned officers* was at one time known to the British practice, (Simmons § 126; McNaghten, 35–37,) but is no longer authorized. (Army Act § 44.) In a few rare instances in our service, of which the latest known is a case in G. C. M. O. 33, Dept. of the East, 1872, non-commissioned officers have been sentenced to suspension, but such punishment has no sanction in usage, and is not recognized in the Army Regulations, par. 1019.

[10] As also in Sec. 1326, Rev. Sts., relating to cadets of the Military Academy.

months or years; and has in fact been adjudged in one instance for so short a period as fifteen days,[11] and in another for so long a period as twelve years.[12]

**Kinds of suspension.** There are properly but two kinds of suspension of commissioned officers—suspension from rank and suspension from command. The former indeed includes the latter; that is to say, a suspension of an officer from rank includes a suspension from such right of command, (and exercise of authority and performance of duty incident thereto,) as may be attached to his rank. "Suspension from the service" is a form which was once sometimes employed as substantially equivalent to suspension from rank but is now disused. "Suspension from duty" is a form more frequently
626 resorted to in the Navy[13] than in the military practice.[14] The "*suspension from pay*" indicated in Art. 101 is not properly suspension in the legal sense, but forfeiture. The pay for the term is not merely *withheld*—the right to receive it is not merely suspended or placed in abeyance—but the same is absolutely forfeited precisely as in any case of a forfeiture expressed as such in the sentence.[15] In suspending, however, an officer from command, a court-martial, in view of the provision of the Article, is not, as it is held, empowered to suspend, (*i. e.* forfeit,) his pay for a period longer than the term of suspension from command.[16]

**Suspension from rank.** This punishment involves a deprivation, during the period of the operation of the sentence, not only of the right of command but of all other rights and privileges incident to the rank, as such, of the officer, whether held in his relation to other officers or to enlisted men. Thus it deprives him of any right of promotion accruing during the term of suspension to which he would have been entitled had he not been suspended, and causes the same to accrue to the officer next junior.[17] It renders him ineligible to sit upon a court-martial, court of inquiry, or military board, and also divests him of the right of priority and precedence in the exercise of the minor privileges of the officer, such as the privilege of the selection of quarters whenever quarters become available for selection pending the term of suspension. And
627 so of any other right or privilege of priority, obedience, or deference, which would otherwise have been due to his rank; the same, with its incidents, remaining, during the term of the suspension, dormant and inoperative.

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[11] G. O. 61, Dept. of the East, 1865.

[12] G. C. M. O. 19, (H. A.,) 1885.

[13] See Naval Regulations, Art. 32, s. 2; Harwood, 134–5; G. C. M. O. 28, Navy Dept., 1890. The following are some of the more recent instances of sentences of suspension, combined with loss of pay in the Navy:—"To be suspended from rank and duty on furlough pay," for a designated number of years or months. G. C. M. O. 8, 23, 24, of 1886; Do. 12 of 1887; Do. 20, 48, of 1888; Do. 54, 82, of 1892. To be so suspended "on waiting orders pay." G. C. M. O. 67 of 1892. To be so suspended "on half of shore duty pay." G. C. M. O. 36 of 1892. Also—"on half of leave or waiting orders pay." G. C. M. O. 39 of 1892. Also—"on two-thirds of waiting orders pay." G. C. M. O. 41 of 1892.

[14] It appears in Gen. Swalm's case, in G. C. M. O. 19 of 1885. In the recent case of Major Wham, (G. O. 20 of 1895,) the sentence of dismissal is committed to "suspension, on half pay, from rank, duty and all privileges" until a certain date named.

[15] 18 Opins. At. Gen., 120.

[16] It was originally so held, in a case arising under a corresponding naval article, in 4 Opins. At. Gen., 324.

[17] McNaghten, 21; O'Brien, 275; G. O. of Jan. 23, 1811. It is a frequent form of suspension in the Navy, (intended to prevent this consequence,) to add to the suspension—"and to retain," or "retaining" his present number in his grade, or on the list of officers of his rank, during the period of the suspension. See G. C. M. O. 2, Navy Department, 1887; Do. 28, 29, Id., 1890, Do. 28, Id., 1891; Do. 36, 41, 75, Id., 1892.

But rights incident to his *office*, independently of rank, he may still enjoy. Thus his right to rise relatively or in files in his grade, (where a senior dies, resigns, or is dismissed, retired, or promoted,) is not affected by the suspension, this being a right incident to his *office*, according to the date of his commission. So, he may continue to occupy quarters occupied by him at the date of the sentence,[18] (where no new selection of quarters involving him is required at his station,[19]) to purchase fuel, commissary stores, &c., from the proper officer, to draw his pay,[20] (where the same is not expressly forfeited in the sentence according to Art. 101,) to receive his pecuniary or other allowances, &c.[21]

Suspension from command. This punishment merely deprives the officer of authority to exercise his proper military command, (devolving it upon his junior or some other officer specially assigned to the same,) and consequently of his right to give orders to, or exact obedience from, his inferiors, to convene the courts and boards which he would be empowered to convene by virtue of his command were he not suspended, to sign muster-rolls, reports, discharges, &c., as commanding officer, to appoint or reduce non-commissioned officers, to grant furloughs, make arrests, &c. It does not affect his right of promotion, or any military rights or privileges incident to rank or office, or other than those attaching simply to command as such. It is thus not in general an appropriate punishment for a staff officer.[22] It is also evidently a considerably less severe punishment than suspension from rank.

628 Suspension in general. Suspension—it may be added—is not dismissal nor any degree of dismissal. It does not divest the officer of his office or commission, but only holds in abeyance the rights and functions attached to his rank or command.[23] Though pending the term of suspension he is not in a legal capacity to receive or execute orders pertaining to his military specialty, he yet remains subject to such orders as may properly be given him in his official or personal character, irrespective of rank or command,[24] as well as amenable to the jurisdiction of a court-martial for any military offence

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[18] Unless his station be changed. Circ. No. 1, (H. A.,) 1892.

[19] Where the quarters occupied by an officer under suspension from rank are selected by a senior, he must ordinarily take such quarters as may be assigned him by the proper commander. See DIGEST, 730.

[20] 4 Opins. At. Gen., 444; 6 Id., 203; DIGEST, 731.

[21] McNaghten, 27; DIGEST, 731. Unless absent on leave. See Circ. No. 5, (H. A.,) 1886; Do. No. 3, (Id.,) 1888. But it is held by the Court of Claims in Gen. Swaim's case, (28 Ct. Cl., 173,) that an officer sentenced to suspension from rank *and duty* for twelve years, with forfeiture of one-half his monthly pay for the same period, was not entitled to *allowances*.

[22] If adjudged such an officer, the suspension will properly be—"*from rank and duty*," as in Gen. Swaim's case, *ante*.

[23] "Suspension from rank, though it has the effect of depriving an officer for the time of his rank, and putting a stop to the ordinary discharge of his military duties, does not void his commission, annihilate his military character, or dissolve that connection which subsists between him and the sovereign." Tytler, 126. And see Id., 316. "It may be considered as borrowed from the ecclesiastical jurisdiction which admitted suspension as a minor excommunication." Sullivan, 88. "Suspension is not expulsion; and the officer, although suspended, remains, in legal contemplation, on the establishment, although his capacities for service are for the time gone." 5 Opins. At. Gen., 740. And see 6 Id., 715; Hough, (P.) 710; McNaghten, 20–21; Maltby, 33; De Hart, 56.

[24] Thus an officer under suspension may be ordered to change his station. So, he may be required to attend a court-martial as a witness. 6 Opins. At. Gen., 714. In neither case is the status of suspension affected.

committed during such term.[25] The term being completed, he reverts to his former rank,[26] as well as to his former command if not meanwhile legally divested by superior authority. In the interim, however—the punishment being a continuing one[27]—he may be restored by the pardoning power, and his promotion by the appointing power will operate as a pardon and terminate
629 the suspension.[28] So the ordering of him by competent authority, (the officer who approved the sentence, his successor in command, or his authorized superior,) to resume command or to perform a duty incompatible with the terms of his suspension—as might be done in an emergency, as in battle—will properly operate as a constructive pardon and relieve him from further punishment.[29]

Suspension, also, is not *arrest*, and does not, *per se*, authorize a commander to subject the officer to bodily restraint.[30] Courts-martial indeed sometimes add to a sentence of suspension that the officer shall remain confined to the limits of his post or station pending the period for which he is suspended.[31] In the absence of such direction, the officer, though not *entitled* thereto, has sometimes been allowed, upon application, to have a leave of absence for the period of the suspension.[32]

**Suspension as a punishment in practice.** Suspension has been viewed by some authorities as an objectionable punishment for the reason that it withdraws an officer from use and service while yet retaining him in the army—an abnormal and embarrassing status.[33] In the British law, loss of relative rank has been substituted for it.[34] In our present practice, however, suspension remains a not unfrequent and apparently a generally approved form of punishment.[35] It is also resorted to as an appropriate minor penalty to which may be commuted a dismissal when the latter is deemed too severe a punish-
630 ment; in which case the status of the officer is the same as if originally sentenced to a suspension for the same term.

**Execution of this punishment.** As to its mode of execution, suspension, like dismissal, is executed, or rather commences to be executed, upon *notice* to the officer of the due approval of the sentence. From and after the date of

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[25] "An officer, though under suspension, does not cease to be an officer subject to the military law and, in all things lawful, subject also to the order of the President." 6 Opins. At. Gen., 715. And see Sullivan, 88; Tytler, 126–7; Hough, (P.) 710; McNaghten, 26; De Hart, 56; DIGEST, 729; also case, in G. C. M. O. 12 of 1878, of an officer tried for and convicted of drunkenness while under a previous sentence of suspension. The suspended officer would indeed be liable to trial and punishment if he wilfully assumed to exercise any of the rights or functions of which his sentence of suspension had divested him.

[26] "At the expiration of the term of suspension he becomes a perfect man again." Sullivan, 88. And see McNaghten, 27.

[27] See 17 Opins. At. Gen., 31.

[28] 4 Opins. At. Gen., 8.

[29] Tytler, 126; McNaghten, 22; 4 Opins. At. Gen., 715.

[30] Circ. No. 5, (H. A.,) 1886.

[31] As to the expediency of this form of the sentence, see G. O. 4 of 1843; Do. 68, Navy Dept., 1865.

[32] DIGEST, 731. In G. O. 42, Dept. of Washington, 1866, a regimental quartermaster, sentenced to suspension from rank for six months is "permitted," by the Dept. Commander, "after turning over all property and moneys in his hands, to leave the department during the period of his suspension."

[33] See Simmons § 115, note; De Hart, 55–58; Benét, 39; G. O. 43 of 1852. As to the injurious effect of the exceptionally protracted suspension in Gen. Swaim's case, see remarks of President Arthur in the G. C. M. O. noted *post*.

[34] Army Act, s. 44. See, "Loss of relative rank or files," *post*.

[35] In the recent case of Gen. Swaim, (G. C. M. O. 19 of 1885,) a sentence—"To be suspended from rank and duty *for twelve years*, and to forfeit one-half his monthly pay every month for the same period," was finally approved by the President.

the order promulgating the approved sentence if communicated to him upon its date, or the subsequent date upon which such order, or other official information of the approval, is actually personally made known to him, the term of the suspension begins and runs on to its end.

**Suspension from the Military Academy.** This is a further form of the punishment of suspension, applicable only to *cadets*. It has the effect of wholly severing the cadet from the Academy during the term adjudged. Where the suspension is for a considerable term, it is usually added in the sentence that at the end of such term the cadet shall join the next lower class.

**LOSS OF RELATIVE RANK OR FILES, OR REDUCTION IN GRADE.** This species of punishment, in substance legalized by the British code,[36] is, with us, sanctioned by the established usage of the service.[37] In our practice the punishment consists simply in subjecting the officer to lose a certain number of "files" or "steps" in the list, or to be placed at the bottom of the list, of officers of his rank in his regiment, arm, or corps. In resorting to the milder form of the punishment, the position on the list intended to be assigned the offender is in general specifically indicated by designating the inferior *number* which he is in future to have, or by some such addition as—"so that his name shall appear (or be borne) on the Army Register next below (or above) that of A. B.," (a certain officer named.)

The effect of this punishment is to deprive the officer of such relative right of promotion, as well as relative right of command and of precedence on courts or boards and in choosing quarters, &c., as he would have had, had he remained at his original number. It cannot, however, affect his right to pay or allowances.[38]

631 Like suspension, this punishment has, in some General Orders,[39] been declared to be an objectionable one, on account of the inequality of its effect upon the other officers in the list. But, like suspension also, though less frequently adjudged, it holds its place among the approved minor punishments for officers. It may, however, in some cases operate with more severity than suspension, since, unlike the latter, it has no fixed term but is a "continuing" punishment subsisting till removed by the pardoning power.[40] As remarked of suspension, it is sometimes resorted to by way of commutation for a more severe penalty, as dismissal.[41]

**Execution of the punishment.** This punishment, like dismissal and suspension, begins to be executed and to take effect at and from the date of the Order promulgating the approved sentence, or the date of the personal and official *notice* to the officer of the due approval of the same.[42]

**REPRIMAND OR ADMONITION, AND APOLOGY.** Reprimand is one of the punishments enumerated in the Army Regulations, (par. 1019,) as legal

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[36] It is designated in the Army Act, s. 44, as—"Forfeiture of seniority of rank in army or corps or both."

[37] See 12 Opins. At. Gen., 547.

[38] 12 Opins. At. Gen., 547.

[39] See G. C. M. O. 25 of 1873; Do. 2, Dept. of Dakota, 1873. But in G. O. 43 of 1852, a preference was expressed for it over suspension, by the Secretary of War.

[40] 12 Opins. At. Gen., 547; 17 Id., 31, 656.

[41] In G. C. M. O. 21 of 1868, a sentence of cashiering is commuted in the following terms:—"That he," (naming the officer,) "shall be placed at the foot of the list of second lieutenants, forfeiting all rank and claims and privileges arising from services rendered previous to the date of the promulgation of this sentence." The statement, however, of the *consequence* of the action is of course surplusage. In a recent case, in G. C. M. O. 53 of 1883, a sentence of dismissal is commuted (in part) to—"reduction in lineal rank to the foot of the list of lieutenant colonels of cavalry."

[42] See "Execution of punishment of dismissal," *ante*.

for *enlisted men*. Inasmuch, however, as it is most rarely adjudged offenders of this class, and is especially appropriate for cases of officers,[43]—it is preferred to consider it in this connection. This punishment is in terms recognized as a legal penalty for officers by the British code,[44] and in our law
632 is imposable by usage whenever the sentence is discretionary with the court. Though usually awarded for offences deemed materially excusable,—as where the offender has acted without bad motive, or upon a misconception of law or fact, or under extreme provocation,[45] &c.,—and intended as a light penalty,[46] it is yet one of which the quality must necessarily be left to the discretion of the authority who executes it.

A court-martial, in imposing a reprimand, may direct that it be either *public* or *private*,[47] according as it is contemplated that it shall be administered in public before the command[48] or published in General Orders, or shall be given by way of personal reproof by the commanding officer in the absence of witnesses. Sentences of private reprimand, though once not unusual,[49] are now most rare in practice. The more frequent form of the sentence is—"to be reprimanded in General Orders," or "to be reprimanded" simply. A designation of the authority by whom the reprimand is to be administered is sometimes added, as—"by the general commanding," "by the Secretary of War," &c. This however is not necessary, the duty properly devolving in all cases upon the legal reviewing authority—the officer who convened the court or his successor for the time being.[50] This officer should be designated, if any one:[51] for the court indeed to designate any *other* officer as the person to execute the sentence would be irregular and unauthorized,[52] and such action would properly be disregarded: the best form is to make *no* designation.

633 Further, the court in its sentence cannot properly direct as to the terms of the reprimand, nor as to the time or place at which it is to be given.[53] These also are matters which belong to the province of the reviewing officer.

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[43] That reprimand is not a regular or appropriate punishment for enlisted men, see Harcourt, 171; Hughes, 94; Bombay R., 37; Macomb, 62; G. O. 31, Dept. of the N. West, 1864; Do. 149, Dept. of the Gulf, 1864; Do. 7, Dept. of Arizona, 1870.

[44] It is designated as "Reprimand, or Severe Reprimand." Army Acts, s. 44.

[45] See Trial of Capt. S. Watson, (Mass. militia,) p. 100. (1811.)

[46] Maltby, 96.

[47] Adye, 221; Tytler, 317; Simmons § 115, 670; Maltby, 97; Macomb, 61; O'Brien, 275; De Hart, 194.

[48] In the early case of Col. Debbiegg, (2 McArthur, 383,) the court sentenced the accused "to be reprimanded in open court," and the reprimand was thereupon administered by the president of the court. Such a form is now unknown.

[49] See instances of sentences "to be *privately* reprimanded" in G. O. 45, Dept. of Washington, 1863; Do. 13, Dept. of Va., 1866; Do. 76, 84, Dept. of the East, 1867; and in the published naval Trials, in 1822, of Capt. Gordon, (p. 440,) and Capt. Hull, (p. 474.)

[50] See DIGEST, 660.

[51] G. C. M. O. 83, Dept. of the Mo., 1871.

[52] In a case in G. O. 15 of 1852, in which a court, convened by a department commander, sentenced an accused "to be reprimanded in Orders from the War Department," it was held by the Secretary of War that the court could not properly remove the execution of such sentence from the department commander, who was the legal reviewing officer, to the War Department, and that the sentence was therefore in this respect irregular.

[53] Simmons § 670; Tytler, 317; Maltby, 97; Macomb 62.

**Admonition** is but a milder form of reprimand.[54] A sentence "to be admonished" is an indication that the court deems the offence to be one of a comparatively venial character.[55] To sentence an officer, convicted of a serious offence, merely to be reprimanded or admonished, is a mockery of justice.[56]

**Execution of the punishment.** In cases of light offences, it has been a not unusual form for the reviewing officer, in approving the sentence, to add in the order:—"The publication of this order will be a sufficient reprimand," (or "admonition,") or in terms to such effect; this constituting the entire execution of the sentence.[57] In cases of more serious offences, the order commonly proceeds to administer a specific reprimand; and in some marked precedents very severe reprimands, in the course of which the merits of the case are
634 reviewed and commented upon, have been pronounced and promulgated to the army.[58] In a few instances the reviewing authority has directed that the reprimand be administered by an inferior commander. *Private* reprimands are executed in such form and at such time and place as the approving authority may in his discretion select.

**APOLOGY.** Courts-martial have sometimes required in sentences that the accused make an oral or written apology—generally in public, if oral—to another military person, commonly a superior, for disrespectful words, unjust imputations, or other personally offensive and improper language or conduct.[59] The sentence, however, may require that the apology be tendered in writing. In some cases the court has dictated the terms in which the apology should be expressed, or directed that it be dictated by a commanding officer.[60] The

[54] Other forms of this sentence which have been resorted to in our service may here be noticed—as: "to be severely reprimanded," G. O. 21, Dept. of the Tenn., 1863; "to be slightly reprimanded," G. O. 7, Army of the Potomac, 1862; "to be reproved," G. O. 5 of 1857; "to be censured in Orders by the Reviewing Authority," (the President,) G. C. M. O. 37 of 1885. In G. O. 51 of 1863, an officer convicted of allowing his men to pillage, is sentenced to be publicly reprimanded "and instructed" by the colonel of the regiment.

[55] See O'Brien, 276. In a recent case in G. C. M. O. 28 of 1880, the sentence adjudged on conviction of a slight offense, is—"To be privately admonished by the commanding general."

[56] See cases in G. O. 64, 68, of 1843; Do. 39 of 1845; Do. 21, Dept. of the Tenn., 1863; Do. 22, Dept. of the Platte, 1867; G. C. M. O. 1, Dept. of the Mo., 1888—in which sentences of reprimand, imposed on conviction of grave offences, are disapproved and commented upon as inadequate.

[57] G. O. 25 of 1830; G. C. M. O. 19 of 1871; Do. 109 of 1875; G. O. 5 Dept. of Alaska, 1868. And see Adjutant General Jones' case, O., No. 9, (A. G. O.) of March 13, 1830.

[58] As in G. C. M. O. 34 of 1872; Do. 3 of 1873; Do. 20, 31, 36, Navy Dept., 1881; Do. 1, Id., 1883.

[59] Simmons § 670, 671; Hough, (P.) 658; James, 56; O'Brien, 68.

[60] See authorities cited in last note. The most marked case is that of Col. Debbiegg, fully reported in 2 McArthur, 383. Here the accused, for disrespectful conduct to his commander, the Duke of Richmond, was sentenced to be reprimanded in open court, "and to make his submission" to that officer; the court dictating the form of submission or apology, in which the accused was caused to "declare his great concern that he should have made use of expressions in his correspondence with his superior officer which, in the opinion of the court, tended to the prejudice of good order and military discipline." This apology was read by the accused, in open court, before his commander present as prosecutor, who thereupon expressed to the court his acceptance of the apology, adding—like a true nobleman and gentleman—"*and I promise Col. Debbiegg that he shall never trace in my behaviour any ungenerous recollection of this transaction.*"

Samuel, (p. 379,) reports a remarkable case of a British Lieut. Colonel, tried in this country during our revolutionary war, for striking a subaltern, and sentenced to suspension; the court adding in the sentence that the junior officer "should draw his hand across the face of the Lt. Col., before the whole garrison, in return for the insult he had received."

British precedents, (which are few in number,) seem to be all cases of officers.[61] In our service the precedents have been nearly all cases in which *soldiers* have been sentenced, in connection with some other punishment, to tender
635 apologies to, (or ask pardon of,) *non-commissioned officers.*[62] This punishment, however, like reprimand, is regarded as a more appropriate one for officers than for enlisted men.[63] It is now indeed almost wholly disused in practice.

II. PUNISHMENTS LEGAL AND APPROPRIATE FOR BOTH OFFICERS AND ENLISTED MEN.

The punishments of this class are Death, Fine, Imprisonment and Forfeiture of pay, or of pay and allowances.

**DEATH.** It is provided in Art. 96 that—"No person shall be sentenced to suffer death except * * * in the cases *expressly mentioned*" in the code. This punishment is so mentioned—(1st,) in Art. 57, and in Sec. 1343, Rev. Sts., where it is specifically *required* to be adjudged upon conviction, to the exclusion of any lesser penalty; (2d,) in Arts. 21, 22, 23, 39, 41, 42, 43, 44, 45, 46, 47, (in time of war,) 49, 50, 51 and 56, where it is in terms *authorized* to be inflicted at the discretion of the court. In a further Article, the 58th, this penalty, though not *named*, is yet *in effect required* to be imposed upon conviction of offences made capital by the local law.

This last article, however, is operative only "in time of war, insurrection, or rebellion." So, it is only at a similar period that death sentences
636 are, by the provisions of Arts. 47, 49, 50 and 51, and Sec. 1343, authorized to be resorted to. Further, the acts made punishable in Arts. 41, 42, 43, 44, 45, 46, 56 and 57 are offences which, from their nature, would scarcely be committed except pending a state of war; and, as to the offences designated by Arts. 21, 22, 23 and 39, for which death may at *any* time be adjudged, these, in time of peace, will most rarely be so aggravated as to induce a court-martial to assign the extreme penalty. The result is that this punishment is, in our military law and practice, reserved almost exclusively for the purposes of the administration of justice and in time of *war*. About 550 death sentences imposed by courts-martial during the late war are published in the General Orders of the War Department alone.[64]

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[61] A leading case, where the court dictated the form of the apology, was that of Lieut. Gen. Murray, in 1783. Simmons § 671.

[62] See cases in G. O. of April 24, 1841; Do. 70 of 1864; Do. 5, Middle Dept., 1864; Do. 22, Dept. of the East, 1869. In a further case, of a civil employee directed to apologize to an officer, in G. C. M. O. 22, Dept. of Ky., 1865, the apology was directed by the court to be made "in the presence of the commanding general of the post."

Cases of sentence *to ask pardon* are few. In James, 58, is one of a captain sentenced to ask pardon of the major of the regiment. In G. O. 45, Dept. of the South, 1862, is a case of a private sentenced, (in addition to confinement on bread and water,) to ask pardon of a *sentinel*, in the presence of the regiment, for disrespectful language addressed to him.

In this connection may be noted the provision of the 25th Article of war, that a soldier using "reproachful or provoking speeches or gestures" shall be "confined, and required to ask pardon of the party offended in the presence of his commanding officer;" this penalty, however, being apparently intended to be exacted as a matter of official discipline without a resort to trial by court-martial.

[63] In the case, above cited, in G. O. 5, Middle Dept., 1864, the sentence, adjudging a private, to make apology to a corporal "in front of the parade," was disapproved, for the reason that it was "one which could not be executed except by the act of the prisoner, and could only be enforced by imprisonment, which might be perpetual."

[64] An additional large number appear published in the G. O. of the different departments and armies, issued during the late war. A further and greater number are to be found in the Orders promulgating the proceedings of cases tried by Military Commissions, where, however, the parties were mostly civilians. A very considerable proportion indeed of all these sentences were commuted or remitted.

Our code does not prescribe in any case[65] what form of death penalty shall be imposed. It would therefore be strictly legal for a court-martial to sentence simply that the offender be punished "*with death*," the authority empowered to approve the sentence thereupon directing as to the mode—shooting or hanging—which the usage of the service, in the absence of statutory requirement, has designated as appropriate to the particular offence. In practice, however, the court invariably specifies the form of the penalty, adjudging in general that the accused be *shot* where convicted of desertion, mutiny, or other purely military offence, and that he be *hung* where convicted of a crime other than military, as murder or rape, or of the crime of the spy.[66]

637 It is required by Art. 96 that two thirds of the members of the court shall concur in a death sentence. It has hence become *usual*, though it is not *essential*, for the court to add to such sentence—"two thirds of the members present concurring," or in terms to such effect.

**Execution.** The reviewing authority, on approving the sentence, will designate such time and place as the convenience or interests of the service may dictate. Where, on account of some exigency, it is found impracticable to proceed with the execution at the time named or at the place selected, another time or place may at the earliest opportunity be indicated, and the execution legally proceed according to the new designation.[67] By the same authority, an inferior commander—as the officer in command of the post, or of the regiment, brigade, &c., at which the prisoner is held or to which he belongs—may be, and usually is, ministerially charged with the direction of the act of execution.[68]

In the absence of an army regulation prescribing a ceremonial for the execution of a capital sentence, the form may be varied in its details at the discretion of the commander, as the want of proper facilities or the exigencies of the service may require, and, in time of war, the procedure is often materially simplified. According to the general usage, where the death penalty is to be inflicted by *shooting*, the prisoner, accompanied by the chaplain, is conducted by a detachment, including a firing party and coffin bearers, and headed by the provost marshal or other officer and band playing the Dead March, to an open space on three sides of which the command is formed facing inwards. The prisoner being placed, the charge, finding, sentence and orders are read aloud. The firing is directed by the officer, and, the execution being completed, the command breaks into column and marches past the body. In a case of *hanging*, the command is "formed in square on the gallows as a centre," and, after

[65] Except as indirectly indicated in Art. 58.

[66] Deserters *to the enemy* have sometimes been sentenced to be *hung*. The death penalty is usually unaccompanied by any other penalty in the sentence. In a case in an early G. O. of Dec. 9, 1820, the court, in sentencing a mutineer to be *hung*, add—"*and that his body be offered to the surgeons of the post for dissection.*" No other such instance, however, has been met with. An authority similarly to direct, in cases of persons convicted of murder, was conferred upon U. S. courts by a provision of an Act of 1790, now contained in Sec. 5340, Rev. Sts. In a case in G. O. 39, Dept. of W. Va., 1864, tried by a military commission, the sentence is—"to be hung to a tree and left hanging with the inscription, 'Murderer of a Union soldier;'" to which is added by the commission the recommendation "that the building in which the murder was committed be burned to the ground."

[67] See DIGEST, 112; also case of Coleman *v.* Tennessee, in 97 U. S. Reports, 519, and 16 Opins. At. Gen., 349, in which it was held that a capital sentence, adjudged a soldier by court-martial in May, 1865, but not executed by reason of his escape and the pendency of civil proceedings in his case, might legally be executed in 1879; and this though the soldier had meanwhile been discharged from the service.

[68] See Maltby, 104–5.

638 similar preliminaries, an "executioner," under the direction of the officer in charge, "performs his office."[69]

**FINE.** This punishment is specifically designated by Art. 60 of the code as a punishment suitable for embezzlement and other frauds upon the government. It is also recognized in Art. 83, relating to inferior courts-martial, where however it is viewed in practice as substantially synonymous with forfeiture of pay. Subject to the provisions of G. O. 16 of 1895, (in case of enlisted men,) it is legally impossible wherever the punishment is discretionary with the court, but is especially appropriate to those offences which consist in a misappropriation or misapplication of public funds or propery, being in general adjudged with a view mainly to the reimbursement of the United States for some amount illegally diverted to private purposes. Where indeed the pecuniary liability of the offender is comparatively slight, forfeiture of pay, as being more readily executed, is a penalty preferable to fine; but of course the amount of pay due at the time of the sentence to the officer or soldier will in general be quite inadequate to meet any considerable obligation. In aggravated cases of embezzlement by disbursing officers—in whose cases this punishment has been mostly resorted to—very heavy fines have been found necessary to measure the total extent of the spoliation of the treasury by the convict.[70]

639 **Execution.** Fine can in general be effectually executed only by means of imprisonment superadded in the sentence as indicated under the next head. In the absence of any such additional penalty, the military authorities cannot of course legally attempt to enforce the fine by any restraint of the person, seizure of the property, or other forcible act.[71] A fine duly adjudged by court-martial may, in the opinion of the author, legally be sought to be collected by a suit commenced in a U. S. court, as money due the United States: no instance however of such a suit is known in practice.

**FINE AND IMPRISONMENT.** "The ordinary and appropriate common-law punishment for misdemeanor is fine and imprisonment, or either of them at the discretion of the court."[72] In the military code, the 60th Article makes,

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[69] See Simmons § 759, 760; 2 McArthur, 345–7; Maltby, 104–8; De Hart, 247–8. And note in this connection 2 McArthur, 395–6, and Burke's Celebrated Naval & Military Trials, 88, 255, as to the impressive ceremonial upon the execution of the death sentence in the case of Admiral Byng, and in that of Richard Parker, leader in the Mutiny at the Nore.

[70] In cases published in G. C. M. O. 196 of 1864; Do. 187 of 1866; Do. 21 of 1871, respectively, fines of $35,000, $45,000, and $445,000 were adjudged disbursing officers convicted of misappropriation. And note, in this connection, cases in G. O. 55, Dept. of Ala., 1865; Do. 8, Id., 1866, where fines, respectively, of $90,000 and $250,000 were imposed by military commissions upon civil officials convicted during the late war of conspiring to defraud the U. S. of the value of captured cotton.

In a recent case in G. C. M. O. 24 of 1878, where the fine was the amount of a trust fund justly due from the accused, the court added in the sentence—"together with *interest* thereon, from June 1, 1864, to date of payment; said interest to be computed at *six per cent. per annum.*"

[71] Orders to such effect were in some cases made, during the late war,—see G. O. 61 of 1865; Do. 71, Dept. of the Mo., 1863; Do. 181, Dept. of the Gulf, 1864,—but were unauthorized as adding to the punishment.

[72] 1 Bishop, C. L. § 940. "It is a settled principle that where an offence exists to which no specific punishment is affixed by statute, it is punishable by fine and imprisonment. This is so invariably true that in all cases where the Legislature prohibit any act without annexing any punishment, the common law considers it an indictable offence, and attaches to the breach the penalty of fine and imprisonment." Story, J., in U. S. *v.* Coolidge, 1 Gallison, 493.

specifically, the offences therein described punishable "by fine or imprisonment," and, upon convictions under this article, and by usage under other articles of the code where the punishment is discretionary, the two penalties are frequently combined in the sentence. In the military, as in the civil, procedure, where a fine is imposed, it commonly is, and in general properly should
he, added in the judgment that the party shall be imprisoned till the fine
642 is paid.[73] But, especially as there is no process known to the military
law by which a convict, destitute of means, can, because of his inability, be relieved from an imprisonment imposed for the enforcement of a fine,[74] it is usual and proper in a military sentence to declare that such an imprisonment shall not exceed a certain term of months or years; otherwise—the pardoning power not intervening—the confinement might be indefinitely prolonged. When the imprisonment is intended to be inflicted for a separate purpose of additional punishment, as well as with a view to induce the payment of the fine, the form commonly adopted is to adjudge it for a certain period absolutely, and for such further period as the fine may remain unpaid—the latter period, however, not to exceed a certain term specified, or the whole not to exceed a certain term in all.[75]

**IMPRISONMENT.** This punishment, indifferently also styled "*confinement*" in the military practice, is in terms recognized as a legal penalty in Arts. 17, 60, 83 and 97, and indirectly in Art. 58: usage further sanctions its imposition by general courts-martial, upon officers[76] as well as soldiers, in all cases in which the sentence is left to the discretion of the court; confinement in a *penitentiary*, however, being restricted to cases of the class specified in Art. 97.
Imprisonment, where adjudged to *officers*, is almost invariably combined
641 with dismissal: the party is thus not subjected to the confinement as an
officer, but as a criminal, and the old rule that a commissioned officer could not properly be held imprisoned is thus substantially observed. Where adjudged to *non-commissioned officers*, it is properly accompanied, in the sentence, with reduction to the ranks.[77]

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[73] As to the rule in the civil practice, see Rex *v.* Bethel, 5 Mod., 21; 1 Bishop, C. P. § 1301. In G. C. M. O. 27 of 1872, the Secretary of War disapproves the omission "in the sentence of any direction that the prisoner should be confined until he should have made restitution to the United States of the amount of public money found to have been embezzled. Without this provision in a sentence there is no means, in the case of an officer not bonded, of enforcing such restitution beyond the extent of his pay." And see the earlier G. O. 61 of 1865, on the same subject.

In some cases, in directing that the offender shall be imprisoned till the fine is paid, the court has restricted the period by adding—"abating the same at the rate of five (or other number of) dollars *per* day," or in terms to such effect. See G. C. M. O. 633 of 1865; Do. 88, Dept. of Ky., 1865; G. O. 4, Mil. Div. of the Tenn., 1866. In G. C. M. O. 17, Dept. of Miss., 1865, a form of sentence is—to be fined three hundred dollars, and to be imprisoned "one day for every two dollars of said fine, or any part thereof that remains unpaid."

[74] By Secs. 1042 and 5296, Rev. Sts., provision is made for the discharge of poor convicts, sentenced by federal courts to be fined and imprisoned till their fines are paid.

[75] In this class of military sentences, a provision as to the proportionate abatement of the fine is added even more frequently than in the class of cases of fine and imprisonment last above referred to. See, for example, cases in G. C. M. O. 159, 266, of 1865; Do. 31 of 1866; Do. 24, 1867; G. O. 22, 38, Northern Dept., 1865. In G. C. M. O. 155 of 1865, in a sentence imposing a fine of $5000 and a certain term of imprisonment, in which it is added that if the fine is not paid at the expiration of such term, the party shall be confined "one year additional for each thousand dollars until it is paid."

[76] So, the British Army Act, § 44, authorizes, among the punishments for officers,—"Imprisonment, with or without hard labor, for a term not exceeding two years."

[77] Simmons § 687; De Hart, 58, 195; G. O. 11, Dept. of the Cumberland, 1869; G. C. M. O. 112, Dept. of the Mo., 1871; Do. 33, Dept. of the East, 1873.

There are five species of this punishment now recognized in military law: Simple confinement; Confinement at hard labor; Confinement in a penitentiary; Solitary confinement; Confinement on bread and water diet. The two latter, however, are by usage, as expressed in par. 1019, Army Regulations, reserved for enlisted men alone, and will be considered among the punishments appropriate to that class.

**Simple confinement.** This is either confinement in a guardhouse,[78] imposed for slight offences, or confinement (without hard labor) in a military prison[79]—such as that established by military order on Alcatraz Island in the harbor of San Francisco, or such as may be maintained at any military post or station.

Where simple confinement in a military prison is imposed, the usual form
642 of the sentence is, in general terms,—"To be confined at such prison, or military prison,[80] (or place,) as the proper authority may designate, for ——— years or months;" no particular place of confinement, or reviewing official, being specified.

**Confinement at hard labor.** "Hard labor" is really a distinct punishment, and has formerly, in some instances, been adjudged alone—*i. e.*, unaccompanied, in the sentence, by confinement.[81] It necessarily implies, however, *per se*, a restraint of the person, and is now never imposed except in connection with confinement;—"*to be confined*" (or "*imprisoned*") "*at hard labor*," at a prison named, for a certain specified term, being the customary form of the sentence. Hard labor, being a separate penalty, must be expressed in terms in the sentence, or it cannot be administered[82] except—as will hereafter be

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[78] Sometimes expressed in the sentence under the form of—"To be confined under charge of the guard at his station," or "at the post where he is serving," (for a certain period,) or in terms to a similar effect.

A further mild form of "confinement," sometimes imposed, which, however, is rather a deprivation of privilege than confinement, is—*confinement to the limits of the post.*

A form similar to this occurs in the Navy—"To be restricted to the ship," or to a particular ship—naming it—"to which he is attached," for a certain period stated. Where the sentence is imposed at sea or in a foreign port, the form often is—"To be confined on board ship, (or on a particular ship,) in irons (or double irons) for safe keeping, until he can be sent, (or brought,) to the United States," for a certain further imprisonment specified. See G. C. M. O. 20, 21, 22, 30, 31, 32, 34, 35, 36, Navy Dept., 1886; Do. 17, 18, 36, Id., 1889; Do. 32, Id., 1892. And see Do. 26, 27, 49, 79, Id., 1893; Do. 4, Id., 1894. In Do. 4 & 5, Id., 1887, the form is—"To be confined in irons in port, and as a prisoner at large at sea, until," &c.

[79] Confinement "in light prison," and "in dark prison," are forms peculiar to the discipline exercised over Cadets. See Regs. Mil. Acad., par. 107.

[80] In some instances during the late war persons were sentenced by court-martial to be confined in a "fort" or "fortress." See Vallandigham's Case, in G. O. 68, Dept. of the Ohio, 1863.

[81] Sentences simply of "hard labor," or of "hard labor on the public works," or of certain particular labor or labor on particular works—as fortifications bridges, roads, &c., or in breaking stone—unconnected in the sentence with confinement, were not unfrequently imposed during the late war. See G. O. 11, Dept. of the Mo., 1862; Do. 72, Id., 1866; Do. 11, 44, Id., 1867; Do. 101, 102, Dept. of the East, 1864; G. C. M. O. 16, Army of the Potomac, 1864.

Two exceptional sentences of this class are found in the early Orders—G. O. of Oct. 31, 1820, and Do. 56 of 1824—as follows: To serve at hard labor for a certain term "with an iron collar around his neck weighing eight pounds;" and to similarly serve, "chained to a wheelbarrow."

[82] See DIGEST, 441; Simmons § 684; Clode, M. L., 171. The two punishments are referred to as distinct in our 83d Article, in par. 1019, Army Regs., and in the British Army Act § 44.

noticed—where necessarily involved in the peculiar species of punishment adjudged, as in the case of confinement in a penitetiary.[83]

643 **Confinement in a penitentiary.** This form of imprisonment, which had previously been recognized by the legal authorities as a punishment sanctioned by usage for military offenders,[84] was specifically authorized and provided for in a section of an Act of Congress of July 16, 1862, now incorporated in the 97th Article of war[85]—as follows:—"*No person in the military service shall, under the sentence of a court-martial, be punished by confinement in a penitentiary, unless the offence 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.*"

The effect of this provision was to add *confinement in a penitentiary* to the punishments which may be adjudged by courts-martial of the Army,[86] when the offence is of the class specified in the statute. That is to say, a court-martial is authorized to impose this penalty only upon a conviction of an offence of a *civil* nature cognizable by such court—as embezzlement, larceny, robbery, homicide or other crime, properly so cognizable under Art. 60 or 62, or in time of war, under Art. 58—and which is also punishable under the local criminal law. For a purely military offence, as desertion, mutiny, misbehavior before the enemy, etc., this punishment cannot legally be imposed.[87]

644 It is here to be noted that by the recent Act of March 2, 1895, c. 189, by which the Military Prison at Leavenworth, Kansas, is "transferred from the Department of War to the Department of Justice, to be known as the United States Penitentiary," the use of this prison for the confinement of persons "convicted by courts-martial" is expressly restricted to those who

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[83] In the Navy where the confinement is on board ship, "single irons," or "double irons," are not unfrequently added. In a case in G. C. M. O. 48, Navy Dept., 1892, where was imposed a sentence of confinement at hard labor *on shore*, the Secretary of the Navy observes—"In view of the impracticability of employing prisoners at hard labor in naval prisons, the part of the sentence relating to *hard labor* is remitted."

It is a further practice in the Navy to add the penalty of *extra police duty* to sentences of confinement. This is sometimes imposed "during the term of confinement," and is sometimes limited to certain days or hours. "Daily," (or during specified hours of the day,) "Sundays and holidays excepted," is a frequent form.

[84] Dynes *v.* Hoover, 20 Howard, 65; 9 Opins. At. Gen., 80; 10 Id., 158, 248.

[85] Appropriation is annually made by Congress, generally in the "sundry civil" appropriation Act, for the cost of the "care, clothing, maintenance, and medical attendance," of military convicts confined in State penitentiaries, under this Article of war.

[86] In the Navy, this punishment in cases of officers is of rare occurrence. A case of an officer, in which it was resorted to, is found in G. C. M. O. 27, Navy Dept., 1887. In *Ex parte* Van Vranken, 47 Fed., 888, it was held that under Art. 7, of the Articles for the Navy, it could be adjudged only for a capital offence.

[87] DIGEST, 113, 115; G. O. 4 of 1867; Do. 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 Mo., 1870.

In *Ex parte* Mason, 105 U. S., 700, a case of assault with intent to kill in violation of the 62d Article, the Supreme Court say—"When the act charged, as 'Conduct to the prejudice of good order and military discipline,' is actually a crime against society which is punishable by imprisonment in the penitentiary, it seems to us clear that a court-martial is authorized to inflict that kind of punishment. * * * The 97th Article does no more than prohibit the court from sentencing the offender to imprisonment in a penitentiary in a case where, if he were tried for the same act in the civil courts, such imprisonment could not be inflicted." And see, to a similar effect, *In re* Esmond, 5 Mackey, 64—a case of larceny charged under Art. 62.

have been "convicted of offences now punishable by confinement in a penitentiary, (and sentenced to terms of imprisonment of more than one year.") A soldier convicted of a purely military offence can therefore no longer legally be confined at the Prison at Leavenworth.

In resorting to penitentiary confinement in a case of *larceny*, a court-martial should assure itself that the property stolen is of such *value* as to admit of this form of imprisonment under the civil statute.[88]

By the term "*penitentiary*," as used in the Article, is understood any public civil prison—as the new U. S. penitentiary at Leavenworth, Kansas, aforesaid, the U. S. penitentiary in the District of Columbia, or the prisons "erected by the United States"[89] in the several Territories, or those established by the laws of the different States[90]—in which prisoners are subjected to a course of discipline and labor. A sentence of confinement in a penitentiary is one in which the penalty of "hard labor" is necessarily involved,[91] and in which therefore it need not be added in terms.

A court-martial, in adjudging this punishment, should leave the designation of the particular penitentiary to the reviewing official. The usual form in the sentence is—"To be confined (for a certain term specified) in such
645 penitentiary as the reviewing or proper) authority may designate."[92]

The Army Regulations—par. 1022—contemplate that the court will indicate in terms in the sentence a "penitentiary" as the place of confinement, if such is intended. Where the sentence, however, imposes confinement in "such prison" or "such place" as the proper reviewing commander may designate, and the offence of which the accused is convicted is one within the description of the Article, the commander may legally designate a penitentiary as the place of imprisonment.[93] Dismissal in the case of an officer, and dishonorable discharge in that of a soldier, should be *added* in a sentence imposing this form of confinement.[94]

**Term of imprisonment in general.** The term of imprisonment imposable by a general court-martial is, (except in the two minor species of confinement appropriate to enlisted men only, and yet to be noticed,) without other limit than such as is prescribed—as to the maximum penalty—by G. O. 16 of 1895, and such as may be prescribed inferentially, in time of war, by Art. 58. In the late war, imprisonment for ten, fifteen, eighteen and twenty years,[a]

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[88] G. C. M. O. 17 of 1887; Do. 9, Dept. of the Mo., 1886.

[89] See Sec. 1892, Rev. Sts.

[90] DIGEST, 114. And see par. 1023, Army Regs. The penitentiary at Albany, New York, has been resorted to more frequently than any other State institution. In the recent case of Sgt. Mason, (G. C. M. O. 26, Dept. of the East, 1882,) the order as to the execution of the confinement in a penitentiary adjudged by the court, is—"Subject to approval of the Secretary of War, the penitentiary at Albany, N. Y., is designated as the place of execution."

[91] Miliar *v.* State, 2 Kans., 174.

[92] A usual form in the Navy, where the fleet, &c., is at sea or in a foreign port, is—"To be confined on board such vessel, (of the ——— squadron,) as the Commander-in-chief of the Station may direct, until such time as he (the offender) may be sent to the United States in a public vessel; and then in a penitentiary to be designated by the Secretary of the Navy."

[93] G. C. M. O. 8, Dept. of Arizona, 1892; Do. 10, Dept. of the Mo., 1894.

[94] See G. O. 36, 58, 72, Army of the Potomac, 1862; Do. 50, Id., 1864.

[a] See instances in G. O. 397 of 1863; Do. 1 of 1864, G. C. M. O. 210, 506, 577, 582, 625, of 1865; Do. 95, 153, 154, 186, of 1866; G. O. 90, Dept. of the Gulf, 1863; Do. 14, 27, Mil. Div. West Miss., 1865; also Gen. Mack's case, Hough, (P.) 161.

and even for life,[95] were in some instances imposed for specially aggra-
646 vated crimes. To be imprisoned "during the war" was at that period also a not unfrequent form.[96] Sentences of confinement "during the remainder of the term of enlistment" of the soldier were then also more common than now.[97] At present—in time of peace—the term of imprisonment fixed for *desertion* is from three months to five years:[98] the latter limit is also rarely exceeded for any *other* offences, except aggravated instances of violent crime taken cognizance of under Art. 62.[99]

As to the term of confinement in a *penitentiary*, this is not limited or affected by Art. 97 above set forth, and, where the sentence is discretionary—as under Art. 60 or Art. 62—may, (subject to the law fixing maximum punishments,) be imposed without regard to the provision of the civil statute fixing the term of punishment for the act as a civil crime. While such provision may well be taken into consideration in estimating the proper measure of punishment for the offence found, the court may, in its discretion, (subject as above,) considerably exceed the limit of the statute.[100]

**Imprisonment after discharge or expiration of term of enlistment.** It is now settled by the long-continued usage of the service and practice of the War Department that a military offender may be sentenced to an imprisonment continuing after he has been discharged—*i. e.* that he may be sentenced to be dishonorably discharged and then imprisoned for a certain term. The legality of such imprisonment consists in the fact that, after the discharge, the party is held confined not as a military person but as a *civilian convict*—as an offender against the laws of the United States under the sentence of a tribunal authorized by public statute to punish at discretion the offence committed.

647 Upon similar grounds it is equally settled that a court-martial may legally sentence a soldier to a term of imprisonment which must necessarily extend beyond the period of his existing term of enlistment, and that the soldier may legally be held confined under the sentence beyond such term, in full execution of the punishment.[1]

**Execution of the punishment of imprisonment.** Confinement *at a military prison*, which was executed at a great variety of fortified posts during the late

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[95] See instances in G. O. 335 of 1863; G. C. M. O. 391 of 1865; G. O. 1, Defences of Washington, 1863; Do. 70, Dept. of the Mo., 1865; Do. 19, Dept. of the Gulf, 1865; Do. 52, Dept. of the Pacific, 1865; Do. 30, Dept. of So. Ca., 1866; Do. 37, Dept. of Va. & No. Ca., 1863; G. C. M. O. 39, 42, 93, Id., 1865; Do. 25, Dept. of Ky., 1865; Do. 31, Fourth Mil. Dist., 1867; Do. 23, Id., 1868; Do. 59, Id., 1869; Do. 153, 175, Fifth Id., 1869; Do. 53, Id., 1870. Imprisonment for life was still more frequently imposed by Military Commissions.

[96] See case of sentence of imprisonment "for during the war in Missouri," in G. O. 10, Dept. of the Mo., 1863.

[97] In such sentences courts should indicate the date on which the enlistment of the accused expires, (if it does not appear from the specification,) so that the reviewing officer may be at once advised of the exact *term* of imprisonment adjudged and facilitated as to his action. See DIGEST, 440.

[98] See G. O. 16 of 1895.

[99] As in case of Sergt. Mason, (G. C. M. O. 26, Dept. of the East, 1882.)

[100] DIGEST, 114. And see *Ex parte* Mason, 105 U. S., 696, where the term adjudged, of *eight years*, is recognized as legal.

[1] See O'Brien, 276; G. C. M. O. 61, Dept. of Dakota, 1884; Barrett *v.* Hopkins, 7 Fed., 312. As to the effect of a sentence, imposing imprisonment until or beyond the expiration of the soldier's term, in forfeiting his *retained pay*, see G. C. M. O. 56 of 1891.

war,[2] is now (since the Military Prison at Leavenworth, Kansas, has been superseded as already mentioned,) executed at the prison on Alcatraz Island in the harbor of San Francisco, or at any place of confinement established at a military post.

Confinement *at hard labor* is executed—at places other than the late Military Prison—now U. S. Penitentiary—at Fort Leavenworth—by employing the prisoners in road-making, bridging, erecting or repairing of fortifications or quarters, gardening, wood cutting, policing, &c. At Leavenworth this punishment is executed by means of the "labor and trades" prescribed for the prisoners by Sec. 1351, Rev. Sts., and the manufacturing of supplies for the army authorized to be done by them by the Act of March 3, 1879, c. 182. But, as heretofore remarked, persons sentenced or committed to the Leavenworth prison, are subject to be put at the labor and employments indicated in the statute, whether "hard labor" be or not expressly imposed by the sentence.

A sentence to hard labor is not legally executed by putting the prisoner at *light* work, or work less severe or continuous than that required of other prisoners held at the same prison and similarly sentenced.

The provision of the Act of June 25, 1868, known as the "eight-
648 hour law," does not apply to prisoners employed at hard labor under sentence of court-martial.[3]

Confinement *in a penitentiary* is executed by the forwarding of the prisoner under guard to the penitentiary designated by the proper authority,[4] and his delivery, with copies of the necessary orders, &c., to the warden or other official in charge. Upon his commitment, the military prisoner becomes subject to the same government and discipline and to the performance of the same labor as are the civilian prisoners.

**Period of execution.** The *point of time* at and from which a sentence of Imprisonment for a definite term *begins to be executed*, in the absence of any statutory provision on the subject, is now fixed by par. 1025 of the Army Regulations,[5] which declares that "when the date is not expressly fixed by the sentence or the order promulgating it," (as it rarely is,) "the term of confinement begins at the date of such order." Thus beginning, the execution, regularly, continues to the end of the term of years, months, &c.,[6] adjudged by the court, or till the happening of some event—as the payment of a *fine*—upon which its duration may be expressly made by the sentence to depend, or till a pardon, or remission of the unexpired portion of the punishment, granted by the competent authority; subject also to the possible abridgment of the period by a *credit* gained by good conduct, a matter presently to be noticed.

As heretofore remarked, the fact that the soldier, being sentenced with the confinement to dishonorable discharge, has been discharged accordingly, or that the term for which he enlisted has expired pending the confinement,

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[2] Among the principal were Forts Preble, Adams, Warren, Wood, Schuyler, Lafayette, Mifflin, Delaware, Whipple, Norfolk, Macon, Pulaski, Marion, Jefferson, Pickens, Pike, the Rip Raps, Dry Tortugas, Johnson's Island, Camp Chase, Camp Hamilton, Ship Island, and the posts of Wheeling and Nashville.

[3] See G. O. 71, Dept. of the South, 1869.

[4] As indicated in Army Regs., par. 1023.

[5] As last amended by G. O. 8 of 1894. The regulation concludes—"The sentence is continuous until the term expires, except when it cannot be executed on account of the unauthorized absence of the person sentenced."

The execution of a *cumulative* sentence of confinement commences of course upon the expiration of the term of the previous sentence. See *post*.

[6] "In calculating the period of imprisonment, the day on which the sentence commences, and that on which the prisoner is to be released, are both to be counted." Simmons § 779.

affects in no manner the due course of the execution of the punishment.
649 The military jurisdiction having once duly attached in his case while he was a soldier, and he having been as such duly tried and convicted, and his sentence of confinement having been duly approved, it is immaterial to its execution whether he actually remain or not in the military service, his status being now simply that of a public prisoner held by the authority of the United States as an offender against its laws.

Commencing as indicated, the *term of the execution* continues to run without regard to any intermediate periods during which the prisoner, though in military custody, may not be undergoing the specific confinement adjudged,[7]—as a period during which he is detained at a depot or elsewhere before being forwarded to the place of confinement, or during which he is being transferred to such place, or from such place to another when the place of confinement is changed by competent authority,[8] or during which he may be held in hospital or his quarters under medical treatment.[8] Otherwise, however, as to a period of *unauthorized* absence from military custody, occasioned by an *escape;* the party, on recapture, being legally remanded to serve out the period of his sentence which remained to be served at the date of the escape.[10] So, if he be taken prisoner by the enemy, his confinement will legally commence, or re-commence, after his exchange or parole and return.

That the period of an arrest in confinement before trial, or before final action upon the sentence, however unreasonably protracted, cannot legally be *credited* upon the term of imprisonment imposed by the sentence, in executing the same, and that the reviewing authority, if he thinks it just and proper that this period should be deducted from the term adjudged by the court, can do so only by a proportionate mitigation of the sentence in approving the same,
650 or, subsequently by a partial remission,—is also well established.[11] Remissions of what is commonly known as "guard-house time" are not unfrequent in practice.

**Time credits.** The term of imprisonment may, however, legally be abridged in its execution where the prisoner, by *good conduct* pending his confinement, becomes entitled to such abridgment under the law. By the Act of Congress of March 3, 1875,—"*all prisoners convicted of any offence against the laws of the United States, and confined in execution of sentence in any prison or penitentiary of any State or Territory, (which has no system of commutation for its own prisoners,) shall have a deduction, from their several terms of sentence, of five days in each and every calendar month during which no charge of misconduct shall have been sustained against them, and shall be discharged at the expiration of their several terms of sentence less the time so deducted.*" In view of this Act, (as also of the provision of Sec. 1352, Rev. Sts., authorizing in general terms a similar indulgence for the convicts at the late Military Prison—now U. S. Penitentiary—at Leavenworth,) a General Order, (No. 64,[12]) was, on June 21, 1875, issued from the War Department, by

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[7] See Simmons § 782.

[8] Par. 1027, A. R., declares—"The authority which has designated the place of confinement, or higher authority, may change the place of confinement." Of course, in the procedure of transfer, the punishment must not be *added to*. An *unauthorized* transfer of a prisoner is in the nature of a *trespass* upon him, (Clode, M. L., 171,) and entitles him to be discharged upon *habeas corpus*, as from an illegal imprisonment. *In re* Allen, 7 Jurist, 234.

[9] Simmons § 783; Griffiths, 152, 176; Harcourt, 168; De Hart, 249.

[10] Simmons § 784; Griffiths, 172.

[11] G. O. 105 of 1874; Par. 1028, A. R.

[12] Now made an army regulation—par. 1045, A. R., which has recently been amended by G. O. 40 of Aug. 29, 1894.

which the rule prescribed in the Act was applied to *military* prisoners, as follows:—"To equalize the practice in regard to punishment of military prisoners, so far as practicable, an abatement of five days for each month of consecutive good conduct may be allowed upon each sentence to confinement for over six months." And it is directed that the commanders of the Departments in which the places of confinement are situated shall issue the special orders for the release of the prisoners who shall become entitled to the allowance. Since the policy of the Government in regard to its convicts has thus been extended to military cases, a large majority of the prisoners confined both at Fort Leavenworth and Alcatraz Island have always been induced so to conduct themselves as to earn and receive considerable abatements of their terms of imprisonment.[13]

651 **Execution of cumulative sentences of imprisonment.** As has already been indicated in this Chapter, a sentence of imprisonment duly adjudged a military person who is at the time undergoing a sentence of the same character, (or who has received such a sentence which however has not yet been approved or commenced to be enforced, but is duly approved presently,) is *cumulative* upon the earlier sentence and to be executed accordingly, *i. e.* its execution is to follow immediately upon the completion of the execution of the former punishment, and to proceed in due course till itself completed. This principle is now incorporated in par. 1029, A. R., where it is declared, in general terms—"When soldiers, either undergoing or awaiting sentences, commit offences for which they are tried and sentenced, the second sentence will be executed upon the expiration of the first."

**FORFEITURE OF PAY, &c.—Authority for this punishment.** This, though in terms authorized as a punishment by the Articles of war in one instance only—*viz.* by Art. 101 in connection with suspension from command[14]—is in fact authorized, by the *usage of the service*, wherever the sentence is discretionary with the court, and, in cases of soldiers, is the most frequent of all the military punishments.

**Distinguished from fine, &c.** Forfeiture is to be distinguished from *fine*, a punishment which imposes a pecuniary liability in general, not necessarily affecting pay;[15] and also from *stoppage*, which is not properly a punishment at all but a charge on account, sometimes indeed resulting from punishment as a mode adopted for executing the same.[16]

**Different forms of forfeiture.** Forfeiture by sentence may be expressed in different forms according to the particular pay or amount of pay in-

652 tended to be affected. Thus the forfeiture may be general and entire, *viz.* of "*all pay due*," or—a form which is usual where the officer or soldier is detached from the service by a dismissal or dishonorable discharge adjudged by the same sentence, and the object is to cover all possible claims to pay up to the date of the actual execution of the sentence—of "*all pay due or to become due.*" Such a full and absolute forfeiture covers, with the ordinary pay, all retained pay, additional pay, merit pay, &c. Where it is not intended by the court to deprive the accused of his entire pay, the sentence may impose a forfeiture of his pay for a month or months, or of a portion—as

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[13] As to the regulation of this abatement at the Military Prison, see the Regulations for its government in G. O. 4 of 1891.

[14] As to the nature of this forfeiture see "Suspension," *ante*.

[15] See under "Fine," *ante*.

[16] As to the discretionary authority of the Secretary of War, under Sec. 1766, Rev. Sts., or par. 1489, A. R., to order a stoppage of the pay of an officer in arrears to the United States, see Billings *v.* U. S., 23 Ct. Cl., 166. A *judgment* against the officer is not essential to authorize a stoppage. 17 Opins. At. Gen., 30.

one-half, or so many dollars—of such pay,[17] or simply of so many dollars in general terms, or of the pay or a portion of the pay "for the same period" as that of the term of an imprisonment (or suspension) adjudged in the same sentence. A sentence, in forfeiting certain pay, may *except* from the forfeiture an amount stated, to be rendered to the soldier for his use or benefit.[18] Such exceptions, however, are much more rare in the military than in the naval practice.

**The forfeiture of "allowances."** The forfeiture may include "allowances" with pay, though a forfeiture of "pay" alone will not embrace allowances.[19] A forfeiture of "pay *and* allowances" affects, with his pay, any money-commutations or other pecuniary emoluments incidental to the office, rank, or duty of the party and due him at the date on which the sentence takes effect—as the allowance for quarters in the case of an officer, and the allow-
653 ance for clothing in the case of a soldier.[20] A forfeiture of allowances other than pecuniary—as of rations or clothing as such, would not now be sanctioned by the usage of the service.[21]

**The forfeiture to be to the United States only.** We have heretofore noticed the principle that a court-martial can neither forfeit pay for the benefit of an individual, nor by its sentence direct as to its disposition.[22] All forfeitures of pay accrue to the United States, and the disposition of the same as public funds is a matter belonging to the province of Congress.[23]

**It must be express, and clearly defined.** A further principle governing this subject is that pay can be forfeited only in express terms—that a forfeiture cannot be involved in any other penalty. A simple sentence of death,[24] dismissal, dishonorable discharge, or imprisonment, cannot affect the right of the party to such pay as may be due him at the date of the approval or execution of such sentence. Where, therefore, the court intends to forfeit pay, it must express its intention in terms: pay cannot be forfeited by implication.

That the terms of the sentence declaring the forfeiture should be so clear and precise that the specific pay and amount of pay proposed to be divested may fully appear; and that the nature and extent of the forfeiture should be

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[17] As to the effect of a forfeiture of a portion of the monthly pay, see par. 1032, A. R.

[18] See Chapter XXI—"Mitigation," and G. O., Dept. of the South, of 1881, referred to in note. In the Navy, courts-martial, in sentencing offenders to confinement and forfeiture of pay, frequently except from the amount forfeited so much as may be necessary for "prison expenses," and also a certain small sum to be paid the party on discharge. In a case of this class in G. C. M. O. 22, Navy Dept., 1887, where the sentence, *inter alia*, is "to lose pay and clothing allowance," it is added—"except $2 per month, and such articles of clothing as may be actually necessary for his use."

[19] DIGEST, 418, 560, 731; McNaghten, 27.

[20] In U. S. *v.* Landers, 92 U. S., 77, in which it is held that the term allowances included bounty-money, (and see, to the same effect, 13 Opins. At. Gen., 198,) the court say that—"under the term allowances everything was embraced which could be recovered from the government by the soldier, in consideration of his enlistment and services, except the stipulated monthly compensation designated as pay." And see Sherburne *v.* U. S., 16 Ct. Cl., 491.

[21] Sentences forfeiting all clothing, &c., "except fatigue clothing;" and sentences expressly excepting from a forfeiture of pay and allowances "the necessary clothing and subsistence," or in terms to such effect, are found in the early G. O., but have been long disused in practice.

Forfeiture, by sentence, of *pension*, as an "allowance" or otherwise, is unknown to our military law.

[22] See par. 1035, A. R.

[23] Circ. No. 4, (H. A.,) 1886. As to the appropriation of forfeitures, ("stoppages or fines,") adjudged by court-martial, to the support of the Soldiers' Home, see Sec. 4818, Rev. Sts.

[24] Major Hsrod's Case, 13 Opins. At. Gen., 103.

evident from the sentence itself without any reference to other source of information being required—are points which have already been illus-
654 trated under a previous general head.[25] An instance in which the omission to define the forfeiture intended has caused embarrassment is that of the class of sentences in which a non-commissioned officer is adjudged to be reduced to the ranks with forfeiture of a certain part of his monthly pay. Here it has sometimes been difficult to determine whether the forfeiture applied to pay due the soldier as a non-commissioned officer or to pay to become due him as a private.[26]

**Forfeiture as a punishment in general.** While forfeiture is the most effective of the minor punishments when judiciously imposed, it may yet be so employed as to be subject to serious objection. Thus depriving an officer or soldier of his *entire* pay, while retaining him in the army, (*i. e.* not dismissing or discharging him in the sentence,)—leaving him nothing for the support of his family, or for the purchase of articles necessary to health, cleanliness, &c.—has been commented upon as in general contrary to public policy and detrimental to the interests of the service,[27] and is now most rarely resorted to.

**Execution of this punishment.** Where the operation of the forfeiture is specifically limited by the sentence itself to a particular period, as where it is imposed for the same period as a term of imprisonment or suspension adjudged in the same sentence, there is no difficulty in defining the execution of the forfeiture, the same being concurrent with the term of the principal punishment as determined by the general rules heretofore considered.

Where the operation of the penalty is not thus fixed by the sentence, the date or mode of its execution will depend upon the nature and extent of the forfeiture. Where the sentence in general terms forfeits all pay *due*, the forfeiture, as a general rule, attaches *upon the approval of the sentence* by the proper authority, and to such pay as may then be due and payable to the accused. The approval, *ex vi*, by operation of law, divests his right to
655 such pay and the same thereupon accrues to the United States. Where, however, pay due is forfeited in connection with dismissal or dishonorable discharge imposed by the same sentence, the forfeiture is in general to be considered as intended to take effect simultaneously with the execution of the dismissal by which the military service of the party, and with it—regularly—his right to pay, is terminated.

Where the sentence forfeits pay both due and "to become due," the forfeiture attaches both to pay due at the date of approval and pay accruing monthly thereafter so long as the party remains in the service.[28]

Where the forfeiture is not of the entire pay of the party but of a portion only—as the pay of one month or several months, or a fraction or specified number of dollars of the pay of such a period, or simply a certain number of dollars of his pay in general—such forfeiture may *legally* be, and, it would seem, should be, satisfied out of any amount—whenever accrued—which may be due and payable to the soldier at the regular bi-monthly or other payment next after the approval of the sentence, or out of such amount so far as it

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[25] See *ante*—"Principles governing the framing of the Sentence," also G. C. M. O. 65, Dept. of Dakota, 1880.

[26] See instance in Circ. No. 3, (H. A.,) 1886.

[27] See G. C. M. O. 2, 5, Dept. of Texas, 1876; G. O. 41, Dept. of the Mo., 1882; Clode, (2 M. F.,) 108.

[28] Or until the sentence be remitted. Circ. No. 4, (H. A.,) 1886. In a case indeed of a *deserter*, such a sentence would affect only pay accruing subsequently to his apprehension or surrender, that accrued before being already divested by operation of law, unders pars. 132, 1514, A. R.

will go, where it is less than the amount of the forfeiture, leaving the remainder to be satisfied at the succeeding payment or payments. In practice, however, it seems to have been preferred to exclude from the application of the forfeiture pay due and payable at the date of the approval, and to apply it only to pay accrued subsequently to that date.[29]

Where, pending the execution of a forfeiture of a certain amount of pay or a certain number of months' pay, the term of enlistment of the soldier comes to an end, he cannot be retained in the service for the purpose of satisfying the forfeiture and until it is satisfied, but is entitled to be discharged equally as if no forfeiture had been adjudged in his case. Nor, if he thereupon or subse-
656 quently re-enlists, can the unsettled forfeiture be revived as a charge against his pay. For, a pecuniary liability incurred under a certain enlistment can legally constitute an offset only against the amount payable for services under that contract, and can no more be charged against the pecuniary consideration of a new and distinct contract than it can against the pay of another soldier.

A forfeiture adjudged after, or pending the execution of, a separate forfeiture, and expressed in general terms, or not specifically restricted to a distinct period, becomes *cumulative* upon the earlier one, and is to be executed as an additional liability.[30]

**Where the forfeiture is unauthorized in amount.** In Circular No. 12, (H. A.,) of 1892 it was declared—"When a sentence of (confinement or) forfeiture is in excess of the legal limit, that part of it which is within the limit is legal, and may be approved and carried into execution." This would apply to the punishments of inferior courts, and to the punishments exceeding the maximum limits fixed by the order of the President. The ruling, if of doubtful authority, certainly conduces to discipline and to the convenience of administration.[31]

**Official noting of forfeiture and action of paymaster.** In all cases where soldiers remaining in the service are subjected to sentences of forfeiture, the amount and particulars of the forfeiture, with the date, number and source of the General Order approving and promulgating the sentence, should be noted by the company or other proper commander opposite the name of the soldier upon the Muster-and-Pay Roll made out for the command next after the publication of the sentence at the post or station. The forfeiture will then be enforced by the paymaster who pays the command and who will either deduct the amount of the forfeiture from the amount of pay accruing to the soldier, or will omit to pay him altogether, according to the extent of the forfeiture and the nature of the sentence. The forfeiture, if not cancelled at the first payment, must be continued to be noted on successive rolls till fully discharged.[32]

657 **Effect of a remission upon execution of pending forfeiture.** A remission in whole or in part of a pending forfeiture may and properly should, in the opinion of the author, take effect upon any pay accrued and payable, and not actually forfeited, at its date. Thus if a soldier is sentenced in January to forfeit two months' pay, and in February the forfeiture is re-

[29] See par. 1032, A. R. Unless the rule here declared has been adopted for reasons of convenience to the Pay Department, I can perceive no justification for it. It would appear to be implicated with the direction in the last clause of par. 1034, as to which see *post*.

[30] Compare par. 1034, A. R.

[31] See a recent case in G. C. M. O. 4, Dept. of the East, 1894, of the approval of that proportion only of a forfeiture which was considered to be within the legal limit.

[32] See G. O. 89 of 1883.

mitted, he would be entitled. at the bi-monthly payment at the end of February, when his pay account for the two months is regularly settled, to receive his full pay for the two months, the forfeiture being entirely removed by the remission. The practice, however, is not in accordance with this view, being governed by par. 1034 of the Army Regulations, which declares that—"*An order remitting a forfeiture of pay operates only on the pay to become due subsequent to date of the order.*" In adopting this rule, for the convenience quite evidently of the Pay Department, it was apparently not perceived that it has the effect of restricting the plenary pardoning power vested in the President and that exercisable under the 112th Article of war, and is thus without legal authority.

III. PUNISHMENTS LEGAL AND APPROPRIATE FOR ENLISTED MEN ONLY.

These are Reduction, Dishonorable Discharge, Solitary Confinement, Confinement on bread and water diet, Ball and Chain.

**REDUCTION.**—Nature of and authority for the punishment. This punishment, commonly termed reduction to the ranks,[33] consists in our service, in the degrading of a non-commissioned officer—sergeant or corporal of a company—to the rank and status of a private.[34] Reducing to an intermediate grade, as from sergeant to corporal, is not known to our law.[35]

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The punishment, as adjudged in our practice, is absolute, *i. e.* without limitation as to *term*.[36] It is specifically mentioned in a single Article of war, the 37th, where it is *required* to be imposed upon conviction of the offence of conniving at the hiring of his duty by a soldier. By the authority, however, of the usage of the service, recognized indeed in par. 1019 of the Army Regulations, it may be imposed by any court-martial wherever the sentence is discretionary. Reduction by sentence as a *punishment* is to be distinguished from the reduction authorized by the Army Regulations, (par. 254,) which may be ordered by the commander of a regiment.

**Properly adjudged with confinement.** As has already been remarked,—when a term of imprisonment is adjudged a non-commissioned officer, the sentence should also embrace reduction. This for the reason assigned by the authorities, that to retain the sergeant or corporal under the circumstances in his rank must tend to degrade the same and detract from the respect due to it, and that therefore, when thus punished, he should be punished as a private soldier. In such a case also the sentence should properly be so worded as to require or allow the reduction to take effect before the imprisoument is entered upon.[37]

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[33] It was formerly sometlmes designated as reduction to the "rank" or "station" of a "private sentinel." See Tytler, 318; Macomb, 62; also cases in the early General Orders.

The following are forms of sentences of reduction found In the G. C. M. O. of the Navy:—A "seaman, to be disrated to landsman;" A "seaman-apprentice"—to "second-class apprentice;" A "first-class fireman"—to the "next inferior rating;" The same—to the "rate of a coal-passer;" A "boatswain's mate, second class," to seaman; A "bayman" to "landsman;" A "writer, second class, to the rating of landsman."

[34] A non-commissioned officer of the Engineer Battalion may he reduced to a private of clther the *first* or *second class*, estabilshed by Sec. 1155, Rev. Sts. See a case of such reduction to a private of the "second" class in G. C. M. O. 70 of 1868.

A reduction, by sentence, of a sergeant "to the grade of a recruit," was properly held illegal, there being no such grade. G. C. M. O. 21 of 1893.

[35] Otherwise in the British code. Army Act § 44, 183.

[36] In G. O. 76 of 1824, is a case of a corporal sentenced "to perform the duties of private sentinel *for one month*." Such a sentence would not be warranted by present usage.

[37] See Hughes, 95; Hough, (P.,) 734.

**Reduction with ignominy.** In some few cases reduction has been made ignominious, *i. e.* has been directed in the sentence to be accompanied by the cutting off, in the presence of the command, of the chevrons and stripes of the non-commissioned officer.[38]

659 **Execution of the punishment.** This is a punishment which, like dismissal in the case of an officer, executes itself, taking effect, as it does, at once upon the approval of the sentence and notice to the accused. Upon the promulgation and announcement to him of the approval by the competent authority, he ceases forthwith to be a non-commissioned officer and becomes a private, no further act being requisite to make the punishment operative in law: his pay also is from the same date correspondingly reduced. He cannot however legally be required to surrender his *warrant* as sergeant or corporal, unless it is expressly declared therein, or is accepted by him upon the express condition, that it shall be surrendered upon reduction.

A non-commissioned officer duly reduced by sentence remains reduced, (and borne on the muster-rolls as a private,) till the end of his enlistment, or till the punishment, (which is a "continuing" one,) is remitted by the competent pardoning authority. But even a remission will not restore him to his former rank if the vacancy caused by his reduction has been filled. In such a case he cannot, after remission, be restored till a vacancy occurs and he is reappointed by his regimental commander.

**Reduction of officers.** By two statutes enacted and in force during the late war, reduction to the ranks was authorized as a punishment for *commissioned officers*. These were the Act of March 3, 1863, c. 75, s. 22, empowering courts-martial—"*to sentence officers, who shall absent themselves from their commands without leave, to be reduced to the ranks to serve three years or during the war;*" and the Act of the same date, c. 120, s. 6, requiring the imposition of this punishment upon officers convicted of failing to turn over to the proper official "*captured or abandoned property*" coming into their possession. No case is known of a conviction under the latter statute, and but few trials were had under the former.[39] No Act passed since the war has

660 authorized such punishment. Reduction of officers *in grade*—as from captain to lieutenant—is also unknown to our law.[40]

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[38] See instances in G. O. 11 of 1849; G. C. M. O. 70 of 1868, G. O. 46, 67, Army of the Potomac, 1861. In G. C. M. O. 7, Navy Dept., 1887, is a sentence of a non-commissioned officer of Marines—"To be reduced to the rank of private, and to have his insignia stripped off in presence of all the marines at the station."

[39] Instances of officers convicted under this statute and sentenced to reduction are published in G. O. 27 of 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 the Potomac, 1864; Do. 12, Id., 1865.

Reduction is authorized of *cadet officers*, (Mil. Acad. Regs. § 107,) but these are not commissioned officers of the army.

Reduction is a recognized punishment for officers in the European armies. See recent case of the reduction to the ranks of a Russian general officer by the Czar in 1892. N. Y. Herald, September, 1892. In 1887, the Czar commuted to this punishment the sentences of exile to Siberia of eighteen young officers convicted of engaging in a revolutionary conspiracy. N. Y. Herald, Nov. 30, 1887.

[40] In Gen. Swaim's case, (G. C. M. O. 19 of 1885,) a sentence, *afterwards withdrawn*, prescribed that the accused, in addition to suspension, should be reduced to a lower grade and rank in his corps. Upon this it is remarked by the President as follows—"The provision that the accused shall, after a suspension for the period of one year from rank and duty in the office now held by him, be placed in another office of lower rank in the department of which the office now held by him is a part, is one impossible of enforcement by the Executive alone. That office of lower rank can only be filled in the method pointed out by the Constitution, namely, nomination by the President and confirmation by the Senate, and then only in case of an existing vacancy. The amended sentence, in effect, creates an office and fills it, thus at once embodying the

**DISHONORABLE DISCHARGE.**—Nature of and authority for the punishment. This punishment corresponds to dismissal in the case of an officer, in that it expels the offender with disgrace from the army and remands him to the status of a civilian: it entails however no legal disability either military or civil.[41] It is to be distinguished from the discharge given by executive *order*, as authorized by Art. 4, the latter being, not a *punishment*, but a mere rescinding or discontinuance of a contract.[42]

Dishonorable discharge, though not expressly required or authorized to be adjudged for any particular offence by the Articles of war, is indicated in general terms by Art. 4, as a penalty which courts-martial may award, and is recognized in the Army Regulations, (par. 1019,) as a legal punishment for enlisted men: it may thus be imposed wherever the sentence rests in the discretion of the court.

**When properly resorted to.** This punishment is usually and properly adjudged by courts-martial in connection with terms of imprisonment
661 in a military prison or penitentiary; it being in general regarded as for the interests of the service that a military convict, before being subjected to a protracted confinement, should be formally separated from the army.[43] The view has also been repeatedly declared in General Orders that dishonorable discharge *alone* is not an adequate or proper penalty for desertion or other grave military offence, since merely to require soldiers, upon conviction of such offences, to leave the army is in effect to offer a premium for their commission.[44] On the other hand it has been viewed as an inappropriate, and too severe, punishment for a single act—especially where a first offence—of breach of discipline.[45] The result is that dishonorable discharge, except in combination with confinement, has become a comparatively rare form of sentence in our service; and, where resorted to, it is usually also accompanied with forfeiture of pay.

**Form of the punishment.**[46] The ordinary and proper form of this punishment in a sentence is—"to be dishonorably discharged;" the words "the service," or "from the service" or "military service," or "the service of the United States," being often added. The form—"to be discharged the service," without using the word "dishonorably," though unusual, is sufficient in law, and has the

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exercise of legislative and executive functions, and the approving power of the Senate." In consequence of this disapproval, a new sentence, not legally objectionable, was substituted.

[41] Dishonorably discharged soldiers, who have also been confined under their sentences at Fort Leavenworth or Alcatraz Island, are not unfrequently re-enlisted where their record for conduct in confinement has been good.

[42] See FOURTH ARTICLE, in Chapter XXV, *post*.

[43] See G. O. 36, 58, 73, Army of the Potomac, 1862; G. C. M. O. 50, Id., 1864; Do. 71, Dept. of Texas, 1873. The discharge not only relieves the army of a member found unworthy, but—the number of enlisted men being fixed by statute—enables the authorities to enlist a new man in his place.

[44] Such a sentence is particularly objectionable where the soldier has yet a long time to serve under his enlistment. G. C. M. O. 23, Dept. of the Mo., 1870.

[45] G. O. 9, Dept. of the South, 1873; Do. 61, Id., 1874; G. C. M. O. 42, Dept. of Texas, 1874; Do. 18, Div. of Pacific & Dept. of Cal., 1881. Otherwise where the offence is a grave one, exhibiting the soldier as morally unfit to remain in the service—such as larceny. G. O. 48, Dept. of Dakota, 1869. In a case of a post quartermaster sergeant, convicted of drunkenness on two occasions, it is observed by Gen. Merritt, (G. C. M. O. 30, Dept. of the Mo., 1887,)—"A non-commissioned staff officer, convicted of drunkenness, should not be permitted to remain in the service."

[46] In the Navy, beside *dishonorable discharge*, imposed as in the Army, occurs sometimes the following form—"*To be discharged with bad-conduct discharge.*" G. C. M. O. 37, Navy Dept., 1887; Do. 70, Id., 1889.

same effect as if such word were not omitted; the discharge adjudged
662 by a sentence being a *punishment* and therefore necessarily dishonorable.[47]

A sentence—" to be *dismissed* the service," while a rare and irregular form, inappropriate to a case of a soldier, has, where employed,[48] the same effect as if the word *discharged* had been used.[49] Where dishonorable discharge and imprisonment are imposed together, the sentence will preferably be so expressed as to indicate that the soldier is to be first discharged and *then* imprisoned.[50]

It may be added that the court, when proposing to award this punishment, should adjudge it in specific terms. No other punishment, (except death,) nor any conviction of an offence however grave, can operate *per se* to discharge a soldier from the army.[51]

**Discharge with ignominy.** A mode of dishonorable discharge, sanctioned by usage for time of war,[52] is *drumming*, (or bugling,) *out of the service*,[53] with the "Rogue's March," in the presence of the command. This ignominous form is sometimes conjoined with circumstances of *special* ignominy. Thus soldiers have been sentenced to be drummed out after having their cloth-
663 ing stripped of all military insignia, or after being tarred and feathered, or with their heads shaved or half-shaved, or with straw halters around their necks, or bearing placards inscribed with the names of their offences.[54]

**Execution of the punishment.** This punishment is executed by the delivery to the soldier of a certificate or "discharge in writing," which, as required by the 4th Article of war, must be "*signed by a field officer of the regiment to which he belongs, or by the commanding officer when no field officer is present.*" The delivery may be constructive. If the soldier is at the time in confinement awaiting sentence, (or under a previous sentence,) a delivery of the discharge to the post commander, or other proper officer, *for him*, to be rendered to him on his release from confinement, is equivalent to a delivery to

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[47] It is of course not within the power of a court-martial to award an *honorable* discharge. Nor can it award what is now designated as a "discharge without honor." See FOURTH ARTICLE, ch. XXV, *post*.

[48] See instances in G. O., May 17, 1821; Do. 298 of 1863; G. C. M. O. 227, 616, of 1865; Do. 58, 66, of 1866.

[49] G. O. 45, Dept. of the Cumberland, 1867.

[50] A sentence adjudging a dishonorable discharge "to take effect at such period *in a term of confinement* as shall be designated by the reviewing officer," was disapproved as exceptional and irregular, by the Secretary of War, (concurring with the Judge Advocate General,) in G. O. 90 of 1872, (now incorporated in par. 1930, A. R.) And to a similar effect see G. O. 30, Dept. of Cal., 1872.

In the *naval* practice, the dishonorable discharge is usually adjudged to *follow* the imprisonment.

[51] It has been held in a civil court that a conviction of *bigamy* could not so operate. Regina *v.* Creamer, 10 Lower Canada R., 404.

[52] This punishment—as also shaving of the head—has been referred to in some Orders, (see G. O. 44, Dept. of the Mo., 1867; Do. 51, Id., 1880,) as not authorized because not contained in the list of "legal" punishments set forth in G. O. 4 of 1867, (now par. 1019, A. R.) Instances of these punishments, however, occur as lately as in G. C. M. O. 23, 40, of 1867; Do. 6, 36, 55, of 1868; G. O. 52, Dept. of the South, 1870; Do. 30, Id., 1871. As to the non-application of par. 1019 to time of war, see text *ante*, p. 400.

[53] The sentence has sometimes been phrased in general terms—"to be ignominiously discharged." As in G. C. M. O. 596, 616, of 1865.

[54] Instances of these forms are to be found in G. O. of Aug. 6, 1813; Do. of Feb. 1, 1814; Do. 32 of 1822; Do. 34 of 1826; Do. 4 of 1828, Do. 29 of 1835; Do. 39 of 1838; Do. 80 of 1842; G. C. M. O. 124, 163, 276, 294, 432, 442, 513, of 1865; Do. 11, 224, 227, of 1866; Do. 23, 40, of 1867; Do. 6, 36, 55, of 1868; G. O. 49, Army of the Potomac, 1862; Do. 49, Dept. of the South, 1862; Do. 11, 20, Northern Dept., 1864; Do. 33, Dept. of the East, 1868.

him personally. The discharge will be worded in the usual form, as "furnished from the Adjutant General's Office,"[55] but the blank in the body of the certificate, for the insertion of the cause or occasion of discharge, will be filled by a statement to the effect that the same has been given in consequence of the sentence of a general court-martial published in a certain General Order, describing it by the command or authority from which it has proceeded, its number and date.[56] Such statement will show that the discharge was awarded as a *punishment* and is therefore *dishonorable* in law.

The clause generally added in discharges, that "no objection to the reenlistment of the soldier is known to exist," is properly struck out; and the space at the bottom of the certificate headed "Character," (which, however, is no part of the discharge,) is filled out or cut off as directed in the Army Regulations.[56]

Where this punishment is imposed in connection with *imprisonment*, the terms of the sentence will in general indicate whether the discharge is intended by the court to take effect before the imprisonment is entered upon or
664 after it is completed. To *postpone* until after a term of imprisonment a dishonorable discharge required by the sentence to be executed first in order, has been held by the Judge Advocate General to be beyond the authority of a reviewing officer.[57] In practice, where the penalty of dishonorable discharge is mentioned in the sentence *before* that of the confinement, it is understood as intended to be executed first and is executed accordingly.

Forfeiture of pay usually accompanies dishonorable discharge in a sentence. Where not expressed, however, the effect of the dishonorable discharge is to forfeit the pay due at the date of the discharge and dependent upon its character for its payment—as all *retained pay*.[58]

Ignominious discharge by drumming out, &c., is generally executed upon the party in the presence of the command, under the immediate direction of the adjutant, provost marshal, or other suitable officer, the proceedings and orders in the case being first publicly read.[59] In a case in the Army of the Potomac,[60] the form of the execution was indicated as follows:—"To be drummed along his regiment at dress parade, preceded by the drum band playing the Rogue's March and a file of soldiers with arms reversed, and followed by a file of soldiers at 'charge bayonets.'"[61]

**SOLITARY CONFINEMENT.** The usage of the service, as recog-
665 nized and expressed in par. 1019 of the Army Regulations, is the authority for this form of imprisonment. In par. 1021 it is specified that the

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[55] Par. 146, A. R.

[56] Par. 143, A. R.

[57] This opinion was approved by the Secretary of War in G. O. 71 of 1875, and is now incorporated in Army Regs., par. 1031.

So, when a sentence provides for the dishonorable discharge of a soldier at the termination of an imprisonment, (now a rare case in the army,) it has been held by the same authority that it is not within the province of the reviewing officer to order his immediate discharge. DIGEST, 357. See this opinion followed by Maj. Gen. Hancock in two cases, in G. O. 52, Dept. of Dakota, 1872.

[58] Secs. 1281, 1282, Rev. Sts.; Par. 1503, A. R.

[59] See De Hart, 249.

[60] G. O. 49 of 1862.

[61] In an old case—in G. O. of Aug. 6, 1813—two privates, on conviction of mutinous conduct, are sentenced in full as follows: "Each to be kept in close confinement, fasting, and in irons, for 24 hours; after which to have, severally, the hair on the left side of the head shaved off and on the right side painted, and to be tied together by the neck, and sent with a guard, and drums and fife playing the Rogue's March, from the encampment on the Severn, through the streets where the offences were committed, through Church street and on to the suburbs of the town," (Annapolis,) "where they shall be discharged."

same," *shall not exceed fourteen days at a time*, or *eighty-four days in any one year*." [62] The term, therefore, of this confinement can in no case legally transcend the limit here fixed,[63] nor can it properly transcend for any period the *proportion* indicated.[64] Such term has in some instances indeed been extended, but not lawfully since the adoption of the regulation.[65]

In the early sentences the solitary confinement was sometimes required to be "in the black hole." [66] Later it has in a few cases been directed to be executed in a "light cell," [67] or in a "dark cell." [68] In one of these cases [69] solitary confinement in a dark prison was disapproved, as being a punishment likely to impair the health of the prisoner.

**CONFINEMENT "ON BREAD AND WATER DIET."** This form of confinement, which is derived from an early period, being mentioned in Arts. 43, 81 and 129, of the Code of Gustavus Adolphus, is specified in par. 1019 of the Army Regulations as among the legal punishments for soldiers. Though formerly frequently employed in our service, it is now comparatively
666 rare. Where resorted to in the later cases,[70] it has generally been adjudged in connection with solitary confinement, and the Regulations, (par. 1021,) prescribe for it the same limits as to duration.

**BALL AND CHAIN.** This punishment, still recognized as legal by the Army Regulations, (par. 1019,) has been adjudged in sentences from an early period, generally in cases of soldiers convicted of desertion, or of aggravated offences characterized by violence, and in connection with the punishment of imprisonment. In some instances it has been imposed continuously for long periods—in one instance indeed for and during an entire term of five years' confinement.[71] In another class of cases this penalty has been awarded for a portion or portions only of the term of the sentence,—as for the "first twenty days of each month" of a term of five years' confinement,[72] or the "first week of every three months" of a term of one year,[73] or for "each alternate week" of a confinement "during the continuance of the rebellion." [74]

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[62] That is to say, "no more than six such periods" of fourteen days "in any one year." G. O. 75, Army of the Potomac, 1862.

The total of 84 days is, of course, the quantum by *one* sentence. Simmons § 683.

[63] In a case in G. O. 75, Army of the Potomac, 1862, a penalty, in a sentence, of *one year's* solitary confinement was properly disapproved as unauthorized.

[64] Thus, where a sentence imposed solitary confinement for two days out of every three in a term of two months—*i. e.* forty days out of sixty—the legal proportion was held to be exceeded. DIGEST, 708.

[65] In a case in G. O. 72 of 1832, (before the date of the regulation,) a term of this confinement for *six months* was legally adjudged. In a case in G. O. 234 of 1863, (since the date of the regulation,) a sentence, (upon a conviction of a soldier of murder,) which embraced solitary confinement at hard labor for *eighteen years*, was (improperly) approved; but the unexecuted portion was remitted in the later G. C. M. O. 186 of 1866.

[66] See G. O. of April 3, 1809; Do. of Aug. 12, 1836.

[67] G. C. M. O. 50 of 1873.

[68] G. C. M. O. 24 of 1873.

[69] See the G. C. M. O. last cited. More recently, however, it has been employed at Fort Leavenworth as a punishment for convicts tried under Sec. 1361, Rev. Sts. See G. C. M. O. 3, Dept. of the Mo., 1878, imposing dark cell on bread and water.

[70] G. C. M. O. 68 of 1867; Do. 24, 50, of 1873. In G. O. 287, Navy Dept., 1882, this punishment, and also "solitary confinement on diminished rations," are condemned, and it is declared that they "will hereafter be disused." In G. C. M. O. 47, Navy Dept., 1886, however, is a sentence imposing "solitary confinement on bread and water for a period of 30 days, with full rations every fifth day." And see similar case in Do. 20, Id., 1891.

[71] This part, however, of the sentence was remitted. G. C. M. O. 465 of 1865.

[72] G. C. M. O. 595 of 1865.

[73] G. C. M. O. 651 of 1865.

[74] G. C. M. O. 306 of 1865.

It has been remarked in a General Order [75] that whenever ball-and-chain is imposed, the sentence "should state the weight of the ball, the length of the chain, and how to be attached." In practice, the court has generally fixed the weight of the ball [76] at from six to forty, (most frequently perhaps twenty-four,) pounds, and the length of the chain at from three to six feet, and has specified that the latter should be attached sometimes to the right leg or ankle and sometimes to the left. In certain of the cases the weight indi-
667 cated is that of ball and chain combined; in others the chain is directed to be of a "convenient" length; in others it is specified simply that the party is to be confined "with ball and chain." In an early instance, a part of the sentence is—"to wear a ball and chain attached to his *neck* for two weeks." [77]

This punishment, however, though very frequently imposed during the late war, is now comparatively rarely adjudged. The opinion was expressed by Judge Advocate General Holt that it was not a penalty to be resorted to except in aggravated cases, and, in his reviews of the proceedings of court-martials which directed it, he commonly advised that it be remitted except where the offender was shown to be a violent person, or where attempts to escape were to be expected and he could not otherwise be secured.[78]

## VI. PROHIBITED AND DISUSED PUNISHMENTS.

As a part of the history of Military Punishment, it is proper here to make reference to certain penalties, formerly adjudged by sentence of court-martial, but now either expressly *prohibited* by statute, or *disused* in practice, at least in time of peace.

**OBSOLETE PENALTIES.** Some of the military punishments of the Romans and early Germans have been mentioned in Chapter II. In the early English Articles and contemporary Code of Gustavus Adolphus are prescribed sundry punishments long obsolete, such as—Decimation, (where regiments were concerned in misbehaviour before the enemy; [79]) Beheading; [80] "To be drawn," (in connection with the death penalty; [81]) To be drowned or buried, bound to the person killed, (a punishment for homicide; [82]) To have the tongue perforated with a red hot iron, (for blasphemy; [83]) Loss of the right hand, or of a
668 hand; [84] Loss of an ear; [85] Running the Gate-lope; [86] To be "beaten

[75] G. O. 8, Dix's Division, Baltimore, 1862.
[76] A shell filled with lead has sometimes been indicated instead of a ball.
[77] G. O. of Jan. 26, 1814.
[78] DIGEST, 697.
[79] Arts. 60, 67, 73, of Gustavus Adolphus; Art. 8 of James II. And see Art. 13, Sec. VI, of Charles I.
[80] Arts. 2, 7, 10, 20, 21, of Richard II.
[81] Arts. 2, 9, 17, of Richard II.
[82] Ordinance of Richard I.
[83] Art. 1, Sec. I, of Charles I; Art. 4 of James II.
[84] Ordinance of Richard I; Arts. 22, 29, 32, 33, of Gustavus Adolphus.
[85] Arts. 8, 11, 24, of Richard II.
[86] See Art. 122 of Gustavus Adolphus. "Running the gantlet," (the same punishment,) was sometimes practised in our army in the Revolutionary War. See Thacher's Military Journal, 183.

through the quarters;"[87] To be ducked in the sea;[88] To perform the duty of scavenger;[89] To forfeit his horse,[90] or his horse and armor.[91]

**IN AMERICAN LAW.** In our law, of the class of *prohibited* punishments are Flogging, and Branding or Marking; of *disused* punishments are Weight carrying, Wearing of irons, Shaving of the head, Placarding, Standing on or carrying a barrel, and a variety of other forms of corporal punishment.

**FLOGGING—The law on the subject.** Our original code of 1775, in enumerating—in Art. 51—the punishments authorized to be imposed by courts-martial, specified—"whipping, not exceeding thirty-nine lashes," and in the "Additional Articles" of that year, certain offences were declared to be punishable with "not less than fifteen" (or "twenty") "nor more than thirty-nine lashes." In the code of 1776, it was provided, by Art. 3 of Sec. XVIII, that "not more than 100 lashes should be inflicted on any offender at the discretion of a court-martial." To the same effect was Art. 24 of 1786; a proposition to extend the limit to 500 lashes having meanwhile—in 1781—been rejected by Congress.[92]

Public whipping was also authorized by certain statutes of this period as a punishment for sundry *civil* offences—as, by the Act of April 30, 1790, c. 9, for larceny, embezzlement, &c., the limit being fixed at "thirty-nine stripes," and by the Act of March 2, 1799, c. 43, for robbing the mail, &c., the limit being forty lashes. It was finally abolished as a punishment for civil offences by the Act of February 28, 1839, c. 36, s. 5.

669 In the military code of 1806, the 87th Article fixed the maximum of this punishment at fifty lashes; but, a few years after, by an Act of May 16, 1812, this provision was expressly repealed, and whipping or flogging for the time done away with. By the Act, however, of March 2, 1833, this form of discipline was revived for cases of *deserters*. At length, at the beginning of the late war, by a statute of August 5, 1861, it was enacted—"*that flogging, as a punishment in the Army, is hereby abolished.*"

The code of 1874—in Art. 98—merely states the existing law, in regard to flogging, in enacting that—"*No person in the military service shall be punished by flogging, (or by branding, marking or tattooing on the body.)*" An Article of the Naval Code—No. 49—is expressed in almost identical terms. By Sec. 1354, Rev. Sts., it is forbidden to subject to whipping a prisoner at the Fort Leavenworth Military Prison.[93]

In the British law, flogging is no longer authorized to be adjudged as a punishment by courts-martial,[94] though it may be employed as a corrective, to the extent of twenty-five lashes, at military prisons.[95] For some *civil* offences—

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[87] Art. 80 of Gustavus Adolphus.

[88] Ordinance of Richard I.

[89] Art. 40 of James II. And see Arts. 60, 72, 79, of Gustavus Adolphus; Art. 13, Sec. VI, of Charles I. The doing of "police duty," however, though no longer adjudged by sentence of court-martial, is sometimes, though not always legally, imposed as a measure of discipline.

[90] Arts. 4, 11, 24, of Richard II.

[91] Arts. 5, 6, 8, 13, 14, 15, 23, 26, of Richard II. And see Arts. 1, 17, of Same, as to penalty of forfeiture of goods and heritages; also Arts. 66, 67, 68, of Gustavus Adolphus, as to confiscation of goods.

[92] 3 Jour. Cong., 634.

[93] The whole Sec. is—"*In no case shall any prisoner be subjected to whipping, branding, or the carrying of weights for the purpose of discipline, or for producing penitence.*" And see—as to the carrying of a heavy log, as a punishment for military prisoners—Circ. No. 4, (H. A.,) 1887.

[94] Army Act § 44.

[95] Army Act § 133, (2.)

mainly violent assaults—it may legally be inflicted to the extent of not more than fifty lashes at one time.

**As heretofore administered.** The disrepute into which this punishment has fallen is in great part due to the fact that formerly, in the British service, it was carried to a brutal and perilous extreme. "Five hundred lashes" was a not uncommon sentence; one thousand were imposed in repeated recorded cases; and fifteen hundred and even two thousand were sometimes reached.[96] The execution of such sentences, while savage in its cruelty to the subject was demoralizing to those who inflicted and who witnessed it. The offender
670 being secured in an unnatural position, the lashes were applied by an enlisted man, (a "right-and-left-handed drummer" being preferred,) with the "cat," (its thongs sometimes steeped in brine or salt and water,) upon the bare back and shoulders, which soon became flayed and raw. The victim was not relieved till the surgeon pronounced that he had endured as much as could safely be inflicted for the time. He was then removed to the hospital, to be brought out again, when his wounds were partially healed, for a second instalment of the punishment, and this process was repeated till the whole number of lashes had been administered. The sufferer, however, sometimes perished under the blows, or in consequence of the injuries received, before the law had been fully vindicated.[97]

In consequence no doubt of these extreme proceedings, and the fact that the employment of this punishment, subject as it was to abuse, became the occasion of suits in which heavy damages were recovered,[98] the authority to resort to the same was gradually restricted by the Mutiny Act till, in 1832, the maximum was fixed at 200 lashes.[99] In 1868 it was abolished for time of peace, and in 1881 altogether, (except as above indicated.) As a penalty to be resorted to in moderation, it has not been without its advocates among English writers.[100] In the *American* service, after the Revolution,[1] comparatively few sentences of flogging were adjudged[2] until after the punishment
671 had been revived for deserters in 1833, when the same was frequently resorted to,[3] especially during the period of the Mexican war. By reason of the legislation of August, 1861, it was scarcely employed in our late war. An instance of a sentence, approved, of fifty lashes is found in a

[96] See McArthur, Table of Trials in Appendix; Hough, 80, 91, 99, 100, 103, 105, 110, 147–8, 643–4; Id., (P.) 3, note; Col. Quentin's Trial, Table op. p. 218; Grant *v.* Gould, 2 H. Black., 72; Warden *v.* Bailey, 4 Taunton, 67.

[97] See Napier, 150–1, 159–60, 163–4; Stocqueler, (Hist. Brit. Army,) 295–6; Gov. Wall's Case, 28 Howell S. T., 57, 157; De Hart, 244–247.

[98] Grant *v.* Gould, Warden *v.* Bailey, Gov. Wall's Case—*ante;* Comyn *v.* Sabine, 1 Cowper, 169.

[99] Clode, 1 M. F., 155.

[100] McNaghten, 222–232; Harcourt, 28–9, 31; Napier, 188; Clode, 1 M. F., 155.

[1] During the Revolutionary War, this punishment was not unfrequent. Thacher's Military Journal, 182–183. In G. O., Hdqrs., Valley Forge, March 25, 1778, a soldier, convicted of attempting to desert to the enemy, is sentenced "to receive 100 lashes, 50 per day, two days successively," and "to be well washed with salt and water after he has received his last fifty." The Commander-in-Chief, (Washington,) approves, and orders the execution of the sentence "to-morrow a. m., at the head of his regiment."

[2] See instances in G. O. of May 9, May 31, Aug. 11, and Dec. 26, of 1809; Do. of Nov. 5, 1811. These are in the interval between the enactment of the code of 1806, and the original abolition of the punishment in 1812. In the case of Col. Wm. King, 4th Infy., (G. O. of Feb. 7, 1820,) one of the offences of which the accused was convicted was the approving and executing of sentences imposing flogging, in violation of the Act of 1812. In 1832, Lt. Col. Woolly was sentenced to dismissal, on conviction, (with other offences,) of illegally flogging a soldier. IV Am. S. P., Mil. Af., 850, 854.

[3] In G. O. 45 of 1841, Gen. Scott mitigates several sentences of fifty lashes with a "*cowskin*" to thirty, on the ground that the "instrument" named is deemed much severer than a "cat o'nine tails."

General Order of July, 1861:[4] a similar one adjudged by court-martial in February, 1862, (the last case of the kind discovered by the author,) was disapproved by the reviewing authority on account of the previous abolition of the punishment.[5]

**BRANDING OR MARKING—As now prohibited.** This punishment, as heretofore remarked, is prohibited by Art. 98, which is but a reiteration of the provision of sec. 2 of the Act of June 6, 1872, (the only previous legislation on the subject,) by which it was declared that—"*hereafter it shall be illegal to brand, mark, or tatoo on the body of any soldier by sentence of court-martial.*" This provision is inadvertently repeated in Art. 38. Marking in the *British* service was abolished in 1871.

**As heretofore administered.** The marking of deserters with the letter "D" dates from the Roman law,[6] and was authorized by the British Mutiny Act at an early date.[7] Later, that Act also authorized the marking of offenders discharged with ignominy, with the letters "B. C." (Bad Character.[8])

In our service this punishment has been carried considerably far-
672 ther, additional forms of it having been sanctioned by usage. Soldiers have been sentenced to be branded, as well as marked,[9] with D, both for desertion and for drunkenness. The mark has commonly been placed on the hip,[10] but sentences to be branded on the cheek[11] and on the forehead[12] have been adjudged. Other markings imposed by our courts have been H D for habitual drunkard,[13] M for mutineer,[14] W for worthlessness,[15] C for cowardice,[16] I for insubordination,[17] R for robbery,[18] T for thief.[19] Sometimes also entire words were required to be marked as "Deserter,"[20] "Habitual Drunkard,"[21] "Mutineer,"[22] or "Swindler."[23] The branding was done with a hot iron; the marking with India ink or gunpowder, usually pricked into the skin or tattooed.

This species of punishment, except in so far as necessary or expedient in cases of *deserters*, was repeatedly during the late war unfavorably commented

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[4] G. O. 32, Dept. of Washington.

[5] G. O. 16, Dept. of Kansas. Similar action was taken about the same time, in G. O. 31, Dept. of the Mo., 1862, in a case tried by military commission. And see case in G. C. M. O. 64 of 1865, noted under "Disciplinary Punishments," *post*.

[6] Vegetius, De Re Militari, p. 1, c. 8.

[7] The marking, as adjudged by the court-martial, was required, by an army regulation, "invariably to be performed under the personal superintendence of a medical officer."

[8] Simmons § 119, note.

[9] The branding, however, was of rare occurrence compared with the marking.

[10] To be marked with the letter D on his right hip" is recognized as a legal penalty, as adjudged by sentence of a *naval* court-martial, in 9 Opins. At. Gen., 80. In a case in an Order of April 4, 1833, a soldier is sentenced to be marked with D "on both thighs."

[11] G. O. 65, Dept. of the East, 1864. Here the sentence is *mitigated* by the reviewing authority to a branding on the hip.

[12] G. O. of Feb. 1, 1814.

[13] G. O. 35 of 1838; Do. 31, Army of Occupation, 1846.

[14] G. O. 81 of 1833; G. C. M. O. 513 of 1865.

[15] See Order last cited; also G. O. 66, Dept. of Washington, 1866; Do. 14, Dept. of the East, 1868.

[16] G. C. M. O. 107, 115, 126, of 1865.

[17] S. O. of Jany. 6, 1862.

[18] G. O. 45, Dept. of So. Cs. 1866.

[19] G. O. 2, Dept. of the East, 1868; Do. 6, First Mil. Dist., 1868.

[20] G. O. 25, 48, of 1827; Do. 29 of 1835.

[21] G. O. 25 of 1827.

[22] See Order last cited.

[23] G. O. 59 of 1826; Do. 34 of 1827.

upon by Judge Advocate General Holt as being "against public policy" and "not conducive to the best interests of the service." These views were repeated by other authorities, until Congress took the matter into consideration, and at length, by the enactment already cited, prohibited such punishment altogether.

673 Military prisoners, however, convicted of escape or attempted escape from the late Military Prison (now "U. S. Penitentiary") have been frequently sentenced, (in connection with other penalties,) "to have the letter E marked upon their clothing."[24]

**DISUSED PUNISHMENTS.**[25]—**Carrying weights.** Among the more usual of the punishments by sentence, now practically disused, was the carrying of weights, which consisted mostly in marching for a certain time, in front of the guard-house, on the parade, on a ring, &c., carrying a loaded knapsack, (loaded with brick, sand, &c.,) a log, a fence-post, or other weighty article; the weight, (commonly 25 or 30 lbs.,) being generally prescribed in the sentence.[26]

**Wearing of irons.** This has been in some cases so imposed in the sentence as to amount to a distinct punishment. The following forms may be cited from the General Orders:—"To be well ironed with handcuffs and leg-irons,"[27] (in connection with confinement;) To be confined "in double irons;"[28] "To be sent to his regiment in irons;"[29] "To be sent in chains to the Dry Tortugas,"[30]

**Shaving of the head.** This has already been noticed as imposed in some instances as a mark of ignominy in connection with Dishonorable Dis-
674 charge. The sentence has sometimes directed that the head be "half-shaved;"[31] also, that it be "close-shaved" and a "pitch canvas cap" worn upon it.[32]

**Placarding.** Standing or marching for a certain time bearing a placard or label inscribed with the name of the offence—as "Deserter," "Coward," "Mutineer," "Marauder," "Pillager," "Thief," "Habitual Drunkard"—was at one time a not uncommon punishment. In some cases the inscriptions were more extended—as "Deserter: Skulked through the war;"[33] "A chicken-thief;"[34] "For selling liquor to recruits;"[35] "I forged liquor orders;"[36] "I presented a forged order for liquor and got caught at it;"[37] "I struck a non-commissioned officer;"[38] "I robbed the mail—I am sent to the penitentiary for

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[24] Recent instances appear in G. C. M. O. 24, 26, 30, 64, 79, 82, 85, of 1893.

[25] None of the punishments indicated under this head are mentioned in the list of legal punishments for soldiers contained in par. 1019, Army Regulations. Viewing this paragraph, however, as applying strictly to time of *peace* only, some of these "disused" penalties may perhaps properly be revived in a time of *war*.

[26] In a recent order—G. C. M. O. 10, Dept. of the Mo., 1885, the Dept. Commander, (Gen. Augur,) in disapproving so much of a sentence as required *walking in a ring and carrying a log*, adds:—"Such punishment is a great waste of man power; something useful ought to be found for prisoners to do instead of such idle exercise." See Circ. No. 4, (H. A.,) 1887.

[27] G. O. 72 of 1832.

[28] G. O. 103 of 1832. "Double irons" have been much more frequently employed in the Navy, in cases in which the confinement has to be executed on board a vessel.

[29] G. C. M. O. 173, 195, of 1864.

[30] G. O. 33, Northern Dept., 1864.

[31] G. O., Seventh Mil. Dist., Jan. 22, 1815; G. C. M. O. 23 of 1867; Do. 6, 86, of 1868.

[32] G. O. of Feb. 1, 1814. Compare Ordinance of Richard I, in Appendix.

[33] G. C. M. O. 451 of 1865.

[34] G. O. 23, Dept. of the Pacific, 1866.

[35] G. C. M. O. 7, Army of the Potomac, 1865.

[36] G. O. 15, Dept. of Va. & No. Ca., 1865.

[37] G. O. cited in note 3.

[38] G. O. cited in note 3.

5 years;"[39] "The man who took the bribe from deserters and assisted in their escape."[40]

**Standing on a barrel, &c.** Soldiers have been not unfrequently sentenced, for minor offences, to stand on the head of a barrel for certain periods, sometimes also bearing a placard. Another punishment by the use of a barrel was—"to carry a barrel with his head through a hole in one end, and resting on his shoulders."[41]

**Other punishments.** Less usual were such punishments as the fol-
675 lowing:[42]—Riding the wooden horse,[43] (sometimes with hands tied behind the person, or a musket tied to each foot;) Wearing a wooden jacket; Wearing an iron collar or yoke;[44] Wearing partly-colored clothes, or Marching with coat turned wrong side out; Bucking; Picking; Tarring and feathering;[45] Pillory;[46] Stocks; Gagging; Fasting; Tying up by the thumbs; Stopping "grog," or "ration of whiskey."[47]

## VII. REMARKS WITH SENTENCE.

As has been indicated in the last Chapter, a court-martial may, in connection with its Sentence, as with its Finding,[48] present such animadversions, recommendations, explanations, or other remarks, as it may deem properly to be called for. Thus it may comment unfavorably upon the accuser or prosecutor;[49] may recommend that an officer or soldier, (other than the accused,) compromised by the evidence, be brought to trial;[50] may reflect upon certain action, discipline, or want of discipline, developed by the testimony, &c. It is not uncommon for a court, in adjudging an unusually mild sentence, to add that it is "thus lenient" on account of certain circumstances mentioned—as that the accused has undergone a long confinement in arrest before trial, or has borne a good character or rendered valuable services prior to his offence, or has voluntarily surrendered himself from desertion, or has been captured and imprisoned by the enemy, or is young or inexperienced as a
soldier, or physically or mentally deficient, &c.[51] So the court may ex-
676 plain an exceptional sentence by a statement of its conclusions from the

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[39] G. C. M. O. 58 of 1866.

[40] G. O. 76, Dept. of the East, 1864.

[41] G. O. 8, Dept. of the West, 1861; G. C. M. O. 58 of 1866.

[42] Of these punishments, "bucking" and "tying up by the thumbs," have been specially condemned as "not warranted by law or usage."

See G. O. 80 of 1842; Do. 3 of 1853; Do. 44, Dept. of the Platte, 1871; Do. 1, Dept. of the South, 1873.

[43] This punishment is prescribed in Arts. 43 and 49 of Gustavus Adolphus, and Arts. 30 and 34 of James II.

[44] A comparatively recent instance of this punishment, to wit—"to wear an iron yoke weighing nine pounds, with three prongs six inches long," is found in G. O. 38, Army of the Potomac, 1861.

[45] Imposed in connection with Dishonorable Discharge. See instances in G. O. 34 of 1827; Do. 29 of 1835.

In the Ordinance of Richard I. (see Appendix,) it is prescribed that one convicted of theft "shall have his head cropped * * * and boiling pitch shall be poured thereon, and then the feathers of a cushion shall be shaken out upon him."

[46] Abolished as a punishment for *civil* crimes by Act of Feb. 28, 1839, c. 36, s. 5.

[47] G. O. of April 19, 1814; Do. of June 7, 1817.

[48] See Chapter XIX.

[49] G. O. of 1853. See Chapter XIX—"Additions to the Finding."

[50] G. O. 45, Dept. of Washington, 1866.

[51] See G. O. 20, Dept. of the South, 1866; Do. 115, Dept of the Mo., 1867; Do. 47, Dept. of the Lakes, 1868; Do. 8, Dept. of Arizona, 1874; G. C. M. O. 10 of 1883; Hough, 488.

testimony, or an expression of its estimate of the amount of criminality involved in the case, or otherwise.[52] But in general it will be more military and dignified on the part of the court to abstain from any remarks which may have the effect of an excuse rendered for its action. Where some material proceeding, or the general course of proceeding, has been unusual, but justified by the peculiar character of the case, it will not be objectionable for the court to state the reason for the same in connection with the sentence. As was done by the court on the trial of Lt. Col. Fremont, where the great mass of evidence admitted was accounted for on the ground that, in view of the variety and complication of the circumstances surrounding the alleged offences, it was deemed proper to allow the fullest scope to the defence.[53]

**RECOMMENDATION.** Where a severe sentence, made imperative by a mandatory provision of the code, has been adjudged by the court, or—though more rarely—where a severe discretionary sentence has been imposed, the members, or a portion of them, sometimes join in a *recommendation, i. e.* a written statement commending the accused, for reasons stated, to the clemency of the reviewing authority.[54]

This statement is not a proceeding of the court, and no part of the record of the trial. It is therefore not properly incorporated with or added to the sentence,[55] but, in practice, is usually appended to the record as a separate paper. It may indeed form the subject of a distinct official communication to the reviewing commander or pardoning power, and this is the form which it usually takes in the French and German procedure.[56]

677 Being the act, not of the court, but of the members who take part in it,[57] the recommendation may be subscribed by all the members, or by a majority or minority, or by one member only. There may be two or more recommendations, signed by different members, and on different expressed grounds.[58] The judge advocate may properly join in a recommendation.

A recommendation should not omit to state the reasons upon which it is based.[59] Among the grounds generally advanced have been—the previous military services of the offender, his general good character, his youth or inexperience, the fact that he has been held for an unusual period in arrest or confinement awaiting trial, or that he is in infirm health, the absence in his case of a deliberate criminal intent, &c. A recommendation should proceed

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[52] See the explanations of the sentences of admonition and reprimand in G. O. 250 of 1863; G. C. M. O. 212 of 1866.

[53] Printed Trial, p. 338.

[54] Unfavorable recommendations—as that the accused be dismissed or discharged, though recognized in the British, (see Hough, (P.,) 762; Hughes, 99; Bombay R., 41,) can scarcely be said to be sanctioned in our practice.

[55] See Army Regs., par. 1040. So, in the civil practice, a recommendation to mercy by a jury is no part of the verdict, but only a communication addressed to the judge. People *v.* Lee, 17 Cal., 76.

[56] In Marshal Bazaine's Case, in 1873, after the court had agreed upon the death sentence, seven of the ten members addressed a communication to the President of the Republic recommending a commutation of the punishment, which was commuted accordingly to twenty years' imprisonment in a fortress.

[57] "Only those members who concur in the recommendation will sign it." Army Regs., par. 1040. And see DIGEST, 638.

[58] In a late case, in G. C. M. O. 92 of 1875, there were two separate recommendations, one being signed by a single member.

[59] In a case in G. O. 70, Dept. of Dakota, 1870, it is remarked by the reviewing officer, Gen. Hancock, as follows:—"As the members of the court are silent with regard to the considerations by which they were influenced in making their recommendation in the prisoner's behalf, it is impossible for the reviewing authority to determine whether their reasons for making the recommendations were sufficient to justify a mitigation of the sentence. No consideration can, therefore, be paid to it." And see G. O. 27, Div. of the Atlantic, 1874; Hough, (P.,) 793.

upon *facts*—mainly or entirely upon facts in evidence on the trial. It should not be actuated by the personal feelings of the members, whether feelings of partiality toward the accused or of disfavor toward the prosecutor.[60] It should of course not disclose opinions on the question of guilt or innocence.[61] Further, it should not assume to dictate, or to suggest, to the reviewing authority what mode or measure of clemency will properly be resorted to in the case.[62]

678 It seems to be the sentiment of the authorities that recommendations are not much to be encouraged.[63] They have indeed been characterized in some instances rather by a weakly lenient or temporizing spirit than a sound appreciation of the circumstances or merits of the case; in others they have been so materially inconsistent with the findings and sentence as to detract materially from their weight. In a proper case, however, a recommendation, especially if signed by all the members, will be duly deferred to, as being in effect a qualification of the sentence.

## VIII. DISCIPLINARY PUNISHMENTS.

**NOT AUTHORIZED BY LAW.** The different specific penalties which have been considered in this Chapter practically exhaust the power to punish conferred by our military law. We have in that law no such feature as a system of disciplinary punishments[64]—or punishments imposable at the will of military commanders without the intervention of courts-martial—such as is generally found in the European codes. Except so far as may be authorized for the discipline of the Cadets of the Military Academy,[65] and in the cases mentioned in two or three unimportant and obsolete Articles of war,[66] our law

679 recognizes no military punishments for the Army, whether administered physically, or by deprivation of pay,[67] or otherwise, other than such as may be duly imposed by sentence upon trial and conviction.

**NOT SANCTIONED BY USAGE.** By the authorities nothing is more clearly and fully declared than that *punishments* cannot legally be inflicted at the will of commanders—that they can be administered only in execution of the

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[60] See James, 619.

[61] See Benét, 145.

[62] James, 527, 528; Simmons § 698; Kennedy, 211; De Hart, 108; Coppée, 85.

[63] The Secretary of War is "surprised to find that any officer of the court could recommend remission or commutation of the sentence in a case where the conduct of the officer tried was as reprehensible as that of" the accused. G. C. M. O. 92 of 1867. "The practice of the members of a court-martial first finding an officer guilty, and then recommending him for clemency, is to be deprecated. It is an endeavor, too frequently made, to transfer the responsibility of their findings to the Department of War when it should rest upon the court itself." G. O. 36 of 1843. And see Do. 39 of 1845; Do. 26 of 1851; Do. 342 of 1863; G. C. M. O. 27 of 1871.

[64] It is quite otherwise in the Navy. See Art. 24 of the code of Articles for the Government of the Navy, Rev. Sts., Sec. 1624. In the British Navy, where a similar authority exists, "courts-martial," according to Clode, (M. L., 44,) "are seldom resorted to." The power of summary punishment accorded to naval, but denied to army, commanders, is analogous to the authority to chastise or punish disorderly and disobedient seamen in the merchant service. See Turner's Case, 1 Ware, 77; Bangs *v.* Little, Id., 520.

As to the summary power of disciplinary punishment now vested in commanding officers of the army in the British Law, see Manual, 35, 36; Army Act, ss. 46, 138, Queen's Regs., Sec. VI.

[65] See Regulations of the Military Academy § 107, 108.

[66] Arts. 25, 52 and 53. The nearest approach, however, to a disciplinary punishment in our law is the reducing of non-commissioned officers by *order*, under par. 172, Army Regulations. But this may be resorted to for purposes quite other than punishment.

[67] See Circ. No. 14, (H. A.,) 1890.

approved sentences of military courts.[68] Such punishments, whether ordered by way of discipline irrespective of arrest and trial, or while the party is in arrest awaiting trial, or between trial and sentence, or after sentence and while awaiting transportation to place of confinement, or while he is under sentence and in addition to the sentence,—have been repeatedly denounced in General Orders and the Opinions of the Judge Advocate General,[69] and
680 forbidden in practice by Department commanders.[70] Officers who have resorted, or authorized inferiors to resort, to them have not unfrequently been brought to trial and sentenced, sometimes to be dismissed:[71] if acquitted or lightly sentenced, the proceedings have in general been disapproved or severely commented upon.[72] On the other hand, 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.[73]

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[68] De Hart, 218; O'Brien, 487–8; DIGEST, 700; and Orders cited in succeeding notes.

[69] "No officer has the authority in any case to inflict punishments for past offences of any kind. This authority is possessed by courts only." J. C. Spencer, Sec. of War, in G. O. 4 of 1843. And see Do. 81 of 1822; Do. 23 of 1824; Do. 28 of 1829; Do. 25 of 1840; Do. 53, 80, of 1842; Do. 2 of 1843; Do. 39 of 1845; Do. 31, Div. of the Atlantic, 1873, (where to impose solitary confinement before trial is declared "clearly illegal;") Do. 1, Dept. of the South, 1873; Do. 23, Id., (where the inflicting of a punishment—without trial—on a soldier *when drunk* is especially disapproved by Maj. Gen. McDowell;) G. C. M. O. 90, Dept. of the East, 1871, (where a soldier, for disorderly conduct in ranks under liquor, was ordered to carry a fence-post, and on refusal was gagged and subsequently confined with ball and chain and in irons till brought to trial—action severely condemned by the same commander;) Do. 71, Dept. of Dakota, 1882; DIGEST, 364, 365. In G. C. M. O. 195, Dept. of Dakota, 1883, the requiring of a soldier, confined in the guard-house before trial, to perform unusual police work, was held unauthoried. In G. O. 53, Dept. of Va. & No. Ca., 1864, the striking, &c., of *colored* soldiers without sufficient cause is especially reprobated; these troops being docile and obedient if properly treated and set a good example. And compare case of Lt. Col. Broughton, an officer of a "black corps" in the West Indies, James, 261. See also G. O. 148, Navy Dept., 1869; Do. 168, Id., 1872; Do. 217, Id., 1876—where the transcending of the authority of summary punishment by naval commanders is severely commented upon by the Secretary of the Navy.

It may be noted here that, by the authority of *express statute*—Sec. 1353, Rev. Sts.—*convicts* at the Leavenworth Military Prison, (now "U. S. Penitentiary,") offending against discipline, were sometimes subjected to solitary confinement; the system here being analogous to that of a penitentiary.

[70] G. O. 23, Dept. of the Lakes, 1870; Do. 44, Dept. of the Platte, 1871; Do. 7, Dept. of the Gulf, 1872, also Orders cited in last note.

[71] See G. O. of Feb. 7, 1820, (case of Col. Wm. King;) Do. of June 30, 1821, (case of Col. Talbot Chambers, sentenced to suspension for inflicting illegal punishment in "cropping" the ears of two soldiers;) Do. 23 of 1824; Do. 8, 20, of 1826; Do. 28 of 1829; Do. 25, 47, of 1830; Do. 64 of 1832; Do. 34 of 1842; (Capt. Howe's Case;) Do. 2, 4, 17, of 1843; Do. 39 of 1845; G. C. M. O. 645 of 1865; Do. 112, Dept. of the East, 1870; Do. 53, Dept. of Va. & No. Ca., 1864; Do. 9, Div. of the Atlantic, 1869; Do. 14, Dept. of the South, 1869; G. C. M. O. 50, Dept. of the Mo., 1871; Do. 30, Id., 1883; Do 37, Dept. of Texas, 1880; Do. 5, 6, Id., 1885; Do. 2, 6, Dept. of Arizona, 1883; G. C. M. O. 1, Div. of the Mo., 1890; Hough, 465; Id., (P.,) 400. And see G. O. 168, Navy Dept., 1872; Do. 217, Id., 1876. Note also, in this connection, the case in G. C. M. O. 64 of 1865, of a Brig. Gen., convicted of causing two soldiers to be flogged with 39 lashes each, as a disciplinary punishment, and sentenced to suspension. The findings and sentence were however disapproved.

[72] G. O. 4, 64, of 1843; Do. 2 of 1844; Do. 39 of 1845; Do. 22, Dept. of the Platte, 1867; G. C. M. O. 112, Dept. of the East, 1870. And see G. O. 9; Div. of the Atlantic, 1869; Do. 5, Id., 1870; G. C. M. O. 29, Dept. of the Mo., 1890.

[73] See G. O. 49, 76, Northern Dept., 1864; Do. 40, Dept. of the East, 1868; G. C. M. O. 90, Id., 1870; G. O. 63, Dept. of Dakota, 1868; Do. 76, 106, Id., 1871; Do. 93; Dept. of the South, 1873. And see cases specified in Am. S. P., Mil. Af., vol. II, p. 38–41.

The practical result is that the only discipline in the nature of punishment that, under existing law, can in general safely or legally be administered to soldiers in the absence of trial and sentence is a *deprivation of privileges* in the discretion of the commander to grant or withhold, (such as leaves of absence or passes,) or an *exclusion from promotion* to the grade of non-commissioned officer, together with such discrimination against them as
681 to selection for the more agreeable duties as may be just and proper.[74]

To vest in commanders a specific power of disciplinary punishment, express legislation would be requisite.

**SUMMARY DISCIPLINE IN CASES OF EMERGENCY.** Cases will indeed sometimes arise in the military service when a superior is called upon to employ toward an inferior a degree or quality of force not in general permissible. As where he is required to defend himself against an assailant, to suppress a mutiny, to quell a dangerous offender or quiet a turbulent one, to overcome resistance made to an arrest, to secure a soldier attempting to desert, or to capture a prisoner escaping from custody:—in such instances the superior may in general resort to the necessary personal force, use of arms, imprisonment, ironing, or other available form of constraint,[75] and in *extreme* cases may even be warranted in taking life.[76] Especially in time of *war*, and when the command is before the enemy, will such forcible and vigorous measures be justified.[77] This, however, is *repression* and *restraint*, not *punishment;* no greater force or more severe restriction is therefore to be employed than may be reasonable and needful under the circumstances; and where the commander is provided with the usual or with adequate facilities for apprehending and confining an offender with a view to trial, he is not, even in time of war, to inflict personal chastisement upon him or subject him to any arbitrary punitory treatment, much less, by the use of arms, to put him in danger of his
682 life.[78] In violating these rules the superior subjects himself to charges and trial by court-martial,[79] as well as to civil suit or prosecution.[80]

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[74] See G. O. 7, Dept. of the Gulf, 1872.

[75] See G. O. 81 of 1822; Do. 53 of 1842; Do. 2, 4, of 1843; Do. 21 of 1851; Do. 3 of 1853; G. C. M. O. 47 of 1877; Do. 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. 1, 93, Dept. of the South, 1873; Do. 31, Div. of the Atlantic, 1873; G. C. M. O. 37, Dept. of Texas, 1880; Do. 23, Dept. of Arizona, 1891; DIGEST, 701.

[76] G. C. M. O. 47 of 1877; G. O. 29, Dept. of N. E. Va., 1861, Do. 5, Dept. of N. Mexico, 1863; Do. 54, Dept. of So. Ca., 1865; Do. 25, Dept. of La., 1866; U. S. *v.* Carr, 1 Woods, 484; DIGEST, 486–7.

[77] DIGEST, 487; Clode, M. L., 117, 118.

[78] G. O. 54, Dept. of So. Ca., 1865; Do. 40, Dept. of the East, 1868; G. C. M. O. 112, Id., 1870, (Remarks of Maj. Gen. McDowell;) G. O. 5, Div. of the Atlantic, 1870; G. C. M. O. 45, Dept. of Dakota, 1880. See also Do. 93 of 1867; Do. 36 of 1880; DIGEST, 701. And compare cases at maritime law—as Turner's Case, Ware, 77; U. S. *v.* Freeman, 4 Mason, 505; Perkins *v.* Hill, 1 Sprague, 119.

[79] "An excess wantonly committed would itself be punishable in the superior." Maj. Gen. Scott, in G. O. 53 of 1842. And see cases in Orders cited in the previous notes under this head.

[80] See PART III, "Amenability to Criminal Prosecution in State Courts," where, among other adjudications, is noticed the recent (1892) remarkable case of Commonwealth *v.* Hawkins and Streator, in which certain commanding officers of the Pennsylvania militia, indicted for assault and battery in summary disciplining a private (W. L. Iams,) by tying him up by the thumbs, shaving his head, and drumming him out of camp, for a trifling offence—the use of foolish words savoring of insubordination, but unaccompanied by acts—are held justified and acquitted!

# CHAPTER XXI.

## ACTION ON THE PROCEEDINGS—THE REVIEWING AUTHORITY.

683 **THE NEXT REQUISITE.** While the function of a court-martial is, regularly, completed in its arriving at a sentence or an acquittal, and reporting its perfected proceedings, its judgment, so far as concerns the *execution* of the same, is incomplete and inconclusive, being in the nature of a *recommendation* only. The record of the court is but the report and opinion of a body of officers, addressed to the superior who ordered them to make it, and such opinion remains without effect or result till reviewed and concurred in, or otherwise acted upon, by him.[1] This superior, sometimes referred to as the Approving or Confirming Authority, but more commonly known in military parlance as the Reviewing Authority or Officer,[2] is, as will presently be more fully indicated, the official—military commander or Commander-in-chief—by whom the court was originally constituted and convened, or—where there has been a change in the command since the convening—his successor therein. In some cases indeed where, beside the approval of the original commander, further confirmatory action by a higher commander or the President is required by law, there are in fact, as will also be pointed out, two separate reviewing officers.[3] It is the function of such officer (or officers) which we now proceed to consider.

684 **THE LAW ON THE SUBJECT.**[4] The provisions of our statute law which relate to the authority and action of the "Reviewing Officer," in the approving and confirming, &c., of sentences and judgments, and in the executing, pardoning and mitigating of punishments, are contained in Articles 104 to 112 of the code, and—as to the execution of the sentences of courts for the trial

[1] See Tytler, 163, 169, 227; Kennedy, 212, 217; Simmons § 709; Macomb, 33; 5 Opins. At. Gen., 511. A sentence is "interlocutory and inchoate" till duly approved. Mills *v.* Martin, 17 Johns., 30; Runkle *v.* U. S., 122 U. S., 555.

[2] The term "Reviewing Authority" occurs in Sec. 1228, Rev. Sts.

[3] In the case of *In re* Esmond, 5 Mackey, 74, the court, having in view the commanders, as well as the Judge Advocate General, by whom the proceedings are passed upon, well observes that Congress has provided, in addition to the court-martial, a "separate and complete line of reviewing authorities terminating in the Executive."

[4] By the earlier statutes—Art. 67 of 1775; Arts. 8 of Sec. XIV and 2 of Sec. XVIII, of 1776; Resolutions of April 14, May 27 and June 18, of 1777; Art. 2 of 1786, and Arts. 65 and 89 of 1806—the general in chief, and subsequently the general commanding in the State, and the commanders of separate departments and armies, were authorized to act, (with some limitations hereafter to be noticed,) as reviewing officers. Prior, however, to the adoption of the Constitution, Congress itself, in which then resided the executive power of the government, not unfrequently exercised the power of finally acting upon the proceedings of general courts-martial and of remitting and mitigating their sentences. See 2 Jour. Cong., 69, 195; 3 Id., 5, 37, 144, 158, 210, 223, 386, 433, 714; 4 Id., 255, 259, 268, 367.

of Cadets—Sec. 1326, Rev. Sts. These provisions, with a few Army Regulations and some usages of the service relating chiefly to the return of proceedings to the court for correction, the formulating and publication of the final action taken thereon, and the ultimate disposition of records of trials, constitute the law on the subject of this Chapter. Art. 110, and the Act of October 1, 1890, (relating to summary courts,) which refer to the action of sentences of Inferior Courts, will be more specifically noticed in Chapter XXII. The matter of the execution of *particular punishments* has already been remarked upon in the preceding Chapter. Except as thus treated, the present subject will here be examined under the heads of—

I. Approval or Disapproval of the proceedings.
II. Return of the proceedings for correction.
III. Action of the President as confirming authority.
IV. Action of commanding general as confirming authority.
V. Execution of sentences.
VI. Suspension of execution of sentences.
VII. Pardon and mitigation of punishments.
VIII. Formulating of action and promulgation.
IX. Disposition of records.

685 I. APPROVAL OR DISAPPROVAL OF THE PROCEEDINGS.

**APPROVAL—Art. 104.** Upon this subject this Article provides as follows: "*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 approval by the proper superior is thus seen to be as necessary to the operation of the sentence as is the judgment of the court which awarded it. It is indeed the final, conclusive, official act in the absence of which the judgment would remain as a mere award without sanction or efficient quality.[6]

**SIGNIFICANCE OF TERM "APPROVED."** This word, as technically construed in practice, designates the fact of the *official* acceptance of and concurrence in the proceedings or sentence by the reviewing authority. Art. 109 uses the word "confirmed" as describing the ratification of the *sentence*, and it would indeed be in general more strictly precise to speak of the proceedings (except the sentence) as approved, and of the sentence as confirmed.[6] In practice, however, no essential difference in meaning is recognized between the two terms, "approved" and "confirmed,"[7] but both are often indifferently employed in reference to the sentence. Inasmuch, however, as "confirmed" is the word used in Arts. 105–108 to describe the action of the President, (or other superior authority,) in cases where his action is required upon the sentence, in addition to that of the original reviewing authority, this term has come to be more commonly reserved for the designation of such action, while "approved" is more usually employed to indicate the action of the
686 original commander—the commander of the department for example—by whom the court was ordered, (or his successor, if there has been a

[5] "The effect and conclusiveness of any action of the court stands as much upon the reviewing officer's approval and order as upon the original proceedings and sentence of the court. The two constitute an entire proceeding and are to be considered together." *In re* Esmond, 5 Mackey, 70.

[6] In some cases the expression "approved *and* confirmed" has been adopted in passing upon proceedings and sentence together, but this has been more common in the British service, (see James' Precedents,) than with us.

[7] O'Brien, 277; De Hart, 111–112.

change in the command.) The two terms will accordingly thus be distinguished in this Chapter, and generally throughout this treatise.

In exceptional cases, reviewing officers, in acting upon a sentence have declared of the same that it was "confirmed but not approved," the intent being to impart the mere official assent necessary in law to the execution of the sentence while withholding personal approbation of the same or of the proceedings or findings upon which it is based. Such a distinction, however, in giving to the two words the one a technical and the other a colloquial meaning is a departure from established usage and without *legal* significance.[8]

**APPROVAL AS AN ESSENTIAL.** Approval is necessary, not only to vitalize the sentence as such, but to give it substance as material upon which further official action can be predicated. By Art. 104 the official approval of the convening commander, (or his successor,) is made an essential requisite to the taking effect of the sentence, both in cases where such approval is final and conclusive *per se*,[9] and in those where further action is necessary to supplement it. In other words, approval is equally essential where the sentence, in order to be executed, requires the subsequent confirmation of superior authority, (as in the cases specified in Arts. 105–108, and Sec. 1326, Rev. Sts.,) as where the same is fully executed by the act of the original commander alone.[10] It is, similarly, a prerequisite to the suspending of the sentence for the action of the President under Art. 111, as also to the exercise of the pardoning power by him, or by a commander under Art. 112.[11] Unless the sentence has been previously duly approved, and has thus a legal existence, it cannot, nor can any punishment included in it, be either remitted or mitigated.

It may be observed that while an approval is necessary to give effect
687 to a sentence, it cannot validate what is in itself invalid and inoperative. Thus an illegal sentence—as a sentence adjudged by a court without legal existence—cannot be cured or rendered operative by the approval of a commander or of the President.[12]

**BY WHOM TO BE APPROVED.** The Article requires the approval of the sentence by "the officer ordering the court," or "the officer commanding for the time being."

"The officer ordering the court." This is of course the officer, (President or military commander,) who, by virtue of the authority vested in him by the law as already considered in Chapter VI, on the Constitution of General Courts-Martial, has originally convened the court by which the sentence has been adjudged. In the great majority of cases he is the official by whom the sentence is approved or otherwise acted upon.

**Extent of his discretion.** Whether and how far the proceedings and sentence, or any part of the same, shall be approved, &c., is a subject wholly within the discretion of such officer. As to this he is invested by the Article with the sole authority, and cannot therefore be directed either by the President or other superior. While deferring to any known views of a superior as to any question of law or discipline involved in the particular case, it is yet his duty as it is his right, in the exercise of the power of approval or disapproval, to act according to his own best judgment, and in the light of the facts and the law as understood and held by himself.

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[8] Simmons, (§ 730,) observes of the term "confirmed but not approved," that its "legal effect differs in no degree from an approval."

[9] See *post*—"V. Execution of sentences."

[10] G. O. 27, Army of the Potomac, 1863.

[11] G. C. M. O. 101, Division of the Atlantic, 1874; Do. 66, Dept. of Cal., 1885.

[12] See Lieut. Cobb's Case. Am. S. P., Mil. Af., vol. 4, p. 854.

**Delegation of his authority.** This officer must act personally. He cannot delegate his function as reviewing authority to another officer—as a staff officer or an inferior commander—to act in his stead. If he assumes to do so, the acts of his delegate will be of no legal virtue.

**Effect of his absence from command.** While the personal presence of the commander within the territorial limits of his command may not be absolutely essential to give validity to his action as a reviewing officer, or the mere fact of his absence therefrom sufficient to invalidate such action,[13]
688 yet where he is absent on a duty or under orders practically detaching him from his command, or the effect of which is, in a military sense, properly incompatible with its exercise, his power to act upon the sentences of courts-martial convened by him may be materially affected. Thus while a Department Commander, who has temporarily passed the boundary of his department when pursuing hostile Indians, or while engaged in some other military service as such commander, is not so absent from his command as to be disqualified from taking the action required by Art. 104 or 109, it may be quite otherwise where he is absent under orders placing him upon a distinct and separate duty of some continuance, or by virtue of a leave of absence for any considerable term.[14] Under any such circumstances, indeed, it will in general be safest to devolve the command temporarily upon some other officer, and for such officer to act as reviewing authority for the time being.

**Effect of the absence of the accused.** It cannot however affect the authority of the convening officer to approve, &c., the proceedings, that since the trial the accused may have been transferred with his company to another department, &c., or is otherwise absent from the command, as by reason of having been taken prisoner by the enemy or having deserted. The authority of the commander having once attached to the case, he still remains the reviewing authority whose formal approval is necessary to the execution of the sentence, though the matter of its actual enforcement may have to be directed by a superior or other commander.

**"The officer commanding for the time being."** This is an officer who, by reason of the absence, removal, disability, &c., of the officer who originally ordered the court, or the merger or discontinuance meanwhile of his command, has succeeded to the exercise of such command and is exercising the same at the time when the proceedings and sentence are completed and require to be acted upon. Such officer will usually have been temporarily or indefinitely detailed for the command by the President, (or other superior;) but, where no such formal detail has been made, and none is required by statute or regulation to be made, he may be an officer upon whom the command has
689 devolved by reason of his seniority in rank according to the usage of the service. Upon duly assuming the command "for the time being," such officer succeeds to all the rights of review and action which would have been possessed by the convening authority had his exercise of the command not been interrupted.

It may be noted that the rank of such successor is not fixed by the Articles, and it cannot therefore be held to be essential that he should be of equal rank with the officer who convened the court, or of a rank sufficient to authorize him himself to convene such a court. Thus a department or an army commander,

[13] 16 Opins. At. Gen., 679.

[14] G. C. M. O. 26 of 1878; Do. 9, Dept. of the Columbia, 1880.

to be empowered to assemble a general court under Art. 72, must be a general or a colonel, but "the officer commanding for the time being," in the absence of any requirement as to his rank, may legally and effectually act upon and approve the proceedings though,—as might be the case in time of war,—his rank be less than colonel.

Where, pending the proceedings in a case on trial, the command of the convening officer has been discontinued and included in a larger or other command, as where one department has been merged in another or in a Division, the commander of the latter will be the authority answering to the description of "the officer commanding for the time being," and will properly act upon the proceedings and sentence as indicated in Arts. 104 and 109. Where, under similar circumstances, the command of the convening officer has been discontinued altogether without being renewed in any form or included in another command, the General, if any, duly assigned by the President to the command of the army, will be "the officer commanding for the time being," or, if there be no authorized military commander of the entire army, the President himself as constitutional Commander-in-chief.[15]

"The officer commanding for the time being" is invested with the same authority and discretion, and held to the same obligation, in the exercise of the power of approval, &c., as would be "the officer ordering the court" in whose stead he acts.

690 **DISAPPROVAL—Its nature and effect.** "Disapproval," in military law, is not a mere expression of disapprobation,[16] but a technical term employed to indicate the action of the reviewing officer where he does *not approve* the sentence or a punishment. Such officer, wherever authorized to approve, may, instead, disapprove; disapproval being simply the absence or withholding, stated in terms,[17] of the approval or confirmation which is necessary to the taking effect of the judgment of the court. As approval or confirmation vitalizes and makes operative the sentence or a punishment, disapproval nullifies and vacates it.[18] Like approval, it may be full or partial, *i. e.* where a sentence imposes several punishments, one or more may be disapproved, and the other or others approved; the disapproval of a part not affecting the validity or execution of the remainder.[19] Where the entire sentence is disapproved, the proceedings in the case are wholly terminated and nugatory; there remains therein no material upon which the original reviewing officer, or the President or other superior authority whose confirmation would be necessary to the enforcement of the sentence, can exercise the power of execution, or that of pardon or mitigation; and to transmit proceedings, for the confirmation of the sentence or other action by higher authority, when the sentence or judgment has been formally disapproved in the first instance, must be as futile as it is unauthorized. Upon such a disapproval also the accused is restored *ex vi* to his normal legal status as existing before his arrest, and is entitled to be at once released from any form of restraint to which he may have been subjected, and to be returned

[15] Martin *v.* Mott, 12 Wheaton, 34.

[16] As to the action, commonly classed as "disapproval," but which is no more than unfavorable comment upon proceedings of secondary importance, see *post*—"Disapproval not affecting the sentence."

[17] That is must be *express*, see DIGEST, 671; 16 Opins. of At. Gen., 312.

[18] G. O. 209, 341, of 1863; Do. 27, Army of the Potomac, 1863; O'Brien, 277; 1 Opins. At. Gen., 242; DIGEST, 671.

[19] See G. O. 72, Dept. of the East, 1865.

to the duties and rights of his rank or office; his legal rights and privileges remaining no more affected than if the trial had resulted in an acquittal.[20]

691 Where the disapproval of the sentence is but partial, its effect is to nullify the punishment or punishments disapproved, leaving the other or others which are approved to be executed, remitted, or mitigated, precisely as if the sentence had included this or these only.

**Grounds of disapproval.** The grounds upon which the authority to disapprove a sentence or punishment may properly be exercised are mainly of two classes; some going to the legal validity or to the regularity of the proceedings, and others to the justice or expediency of allowing the judgment to stand or the sentence or punishment to be enforced. Thus where the court was not legally constituted or composed, or was without jurisdiction of the offence or offender, or proceeded with the trial when below the minimum of members; or where the record discloses irregularities which, though not amounting to fatal defects, are of a gross character; or where the accused has been denied material testimony, or otherwise prejudiced in his defence;[21] or the findings or a part of them are unwarranted by the testimony; or the sentence itself is inadequate to the offence, or too severe, or quite unmerited, or imposes a punishment not authorized by law,—in any such case the Reviewing Officer may, in his discretion, withhold his approval from, and formally *disapprove*, the sentence, in whole or in part, as the law or facts may require or render proper. His discretion indeed is here without restriction; its exercise does not depend upon the quality of his reasons: whether or not *any* reasons are stated by him, or whether his actual reasons are in point of fact good and sufficient, or the reverse, the disapproval is equally effective in law. At the same time he will, of course, not properly disapprove without good reason—without better reason than the court had for the action which he fails to approve. Where, for example, the evidence in the case was conflicting, and it is apparent that the court, having the witnesses before it, must have been the best judge of their relative credibility and of the weight of the testimony,

692 it will in general be wiser for the Reviewing Officer to defer to, rather than disapprove, its conclusion.[22] Nor will he properly disapprove a sentence on account of a mere error on the part of the court which does not affect the merits or impair the final judgment—as, for instance, an improper rejection of testimony offered by the defence, which however would have added to the case no material facts.[23] Nor will he ordinarily disapprove where he can have the defect remedied by a *revision* by the court, as presently to be indicated.

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[20] "The effect of the disapproval is not merely to annul the sentence but also to prevent the accruing of any disability, forfeiture, &c., which would have been incidental upon an approval." DIGEST, 672. And see Circ. 12 of 1883. The disapproval is "tantamount to an acquittal by the court." 13 Opins. At. Gen., 460. That the fact of the disapproval does not divest the accused of the right to plead the acquittal or conviction in the event of a second arraignment for the same offence—see Chapter XVII—"Plea of Former Trial."

[21] See an instance in G. C. M. O. 43 of 1885.

[22] Capt. Weisner's case, Am. Archiv., 5th Series, vol. 2, p. 895; also G. O. 153, Dept. of Dakota, 1881; Opinion of Atty. Gen. Brewster in 18 Opins., 113. Similarly, upon an application for new trial in the criminal practice,—"if there be conflicting evidence on both sides, and the question be one of doubt, it seems the verdict will generally be permitted to stand." Wharton, C. P. & P. § 813; also Wright *v.* State, 34 Ga., 110; Whitten *v.* State, 47 Id., 297.

[23] See G. O. 70, Dept. of So. Ca., 1865. In such a case the reviewing authority should in general simply express his disapprobation of the ruling, as indicated under the next head.

**Approval or disapproval of proceedings other than sentence.** Art. 104, as has been seen, provides for an approval of the *sentence*, and in no other of the Articles is any other form of approval indicated. In practice, however, the Reviewing Officer approves also, or disapproves the "finding" or "proceedings," both in connection with or distinct from the sentence, if any. Where there is a sentence, he may, and often does, exercise the authority of disapproval as to some portion or portions of the proceedings not essential to support the sentence; such disapproval not being a determinate legal act like the other, but an expression of disapprobation or difference of opinion on the part of the commander. Thus he may, in his review, disapprove a ruling of the court upon an objection to evidence, or a ruling upon some interlocutory matter as a motion for a continuance, which, though erroneous, does not impugn the final judgment; or he may disapprove some statement or omission in the record, which, not being at variance with a statutory requirement, does not constitute a fatal defect. But this form of unfavorable comment is entirely consistent with a final approval of the sentence or of a punishment: a disapproval indeed of certain of the proceedings is often accompanied by an approval of the sentence or of a part of it.

**Censure with Disapproval.** The expression of a disapproval is sometimes and properly accompanied by animadversion upon the court,[24] the prose-
693 cution, the administration of a command,[25] &c. Such comment has not unfrequently been added where the court, in the opinion of the reviewing authority, has failed to appreciate the gravity of the offence and awarded a too lenient punishment. Reviewing officers have also not unfrequently been induced to remark upon the very improper admission or rejection of testimony offered.[26]

**Allowance of new trial, upon disapproval.** It was held by Atty. Gen. Wirt, in the early case of Captain Hall,[27] that a reviewing officer, in disapproving a sentence, is authorized further, in his discretion, (for the allowance is not a matter of right,) to order a new trial of the accused; provided he specifically applies therefor, thus waiving his privilege under the provision against second trials for the same offence now contained in Art. 102. But, beside the new trial granted under these circumstances in the case of Hall, the similar instances in our service have been very few and rare,[28] and the subject of *new trial* is now one quite without material significance in our military law and need not therefore be dwelt upon. It is to be noted that it is only upon, and as an incident to, a disapproval of a sentence that the new trial can be allowed; after approval there can legally be no such proceeding.

**Action where the accused is insane or imbecile.** Here should be
694 noticed the action to be taken in cases in which the accused is found

[24] See, for example, the recent instance in G. C. M. O. 56 of 1893. In this case, where the court, in finding the accused guilty of a duplication of pay accounts, sentenced him only "to be reprimanded," the Secretary of War observes—"That a court-martial, comprising officers of rank and experience, should so lightly regard the offences here fully established and found, is a reproach to the service, and the proceeding is in marked inconsistence with the duty of protecting and maintaining that high sense of personal honor which has long characterized the reputation of the army."

[25] "An examination of this case and that of" (another officer named) "tried by the same court-martial, has fully convinced me" (the President) "that a condition exists at Fort ——— that must, if allowed to continue, result in scandal and demoralization." G. C. M. O. 27 of 1888.

[26] G. C. M. O. 37, 44, 84, Dept. of the Platte, 1892; Do. 78, Dept. of Dakota, 1892.

[27] 1 Opins. At. Gen., 233, (1818.)

[28] See instances in G. O. 18 of 1861; Do. 8, 9, 26, First Mil. Dist., 1869. "The privilege 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." DIGEST, 536.

by the court, or deemed by the reviewing authority himself, to have been at the time of the offence or the trial, or to be at the time of the review, mentally deranged or otherwise irresponsible. When the accused was apparently insane, &c., at the commission of the offence, and the court, notwithstanding, have sentenced him, the reviewing officer will properly *disapprove* the sentence; and in such a case, or in one where the court has not proceeded to sentence, but the fact of insanity, &c., appears from the evidence, or the finding, or a recommendation of the members, he will in general properly discharge the accused, (under the 4th Article of war,) or recommend his discharge by superior authority, and take measures for his commitment, if the case warrants it, to the Government Asylum for the Insane. Where the insanity, &c., has developed since the commission of the offence, the reviewing officer will in general properly *approve and remit* the sentence, (if any,) with similar action as to discharge, &c.; first, if desirable, assuring himself as to the question of sanity by causing the accused to be examined by a medical officer or board.[29]

## II. RETURN OF THE PROCEEDINGS FOR CORRECTION.

**Nature of the Authority.** Incident to the discretion, vested by the code in the Reviewing Officer, (whether military commander or President,) to approve or otherwise act upon the proceedings and sentence, is the authority, long recognized at military law,[30] (and now affirmed in the Army Regula-
695 tions,[31]) to cause any error or errors appearing in the record, and capable of correction, to be corrected by the court before final action taken by him on the case. Where, in reviewing the record as transmitted to him, he believes that he has discovered a material omission or other defect, either in the findings or sentence or some interlocutory proceeding of the court, which may properly call for a *disapproval*, he may, instead of formally disapproving, return the record to the court for the purpose of having the requisite amendment made, with a view, if it be duly made, to a final *approval*. To this alternative indeed a reviewing officer will in general naturally and properly resort, provided the court has not yet been dissolved—as of course, (except in an emergency,) it should not be before a case tried by it has been finally acted upon. He may also be called upon to take this course by a superior commander or the President, who, upon the proceedings being transmitted to him for final action, has discovered some material error therein. It is evidently only by the return of the record to the court that the correction can legally be procured to be made, since the reviewing officer cannot make it himself independently of the court,[32] nor can the court, after it has once duly completed and forwarded to him the record, recall it for modification.[33]

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[29] See, as illustrating the text, cases in the following Orders:—G. O. 54, Dept. of the Pacific, 1864; Do. 13, Northern Dept., 1864; Do. 49, Dept. of the Susquehanna, 1864; Do. 81, Middle Dept., 1865; Do. 5, Dept. of Ark., 1866; Do. 22, Dept. of Cal., 1866; Do. 40, Dept. of Va., 1866; Do. 62, 73, First Mil. Dist., 1867; Do. 1, Div. of the Pacific, 1872; G. C. M. O. 39, Dept. of the Mo., 1868.

[30] Kennedy, 214; McNaghten, 146; O'Brien, 277; De Hart, 203; 18 Opins. At. Gen., 119; Swaim *v.* U. S., 28 Ct. Cl., 173. It is equally recognized in the Navy. 4 Opins. At. Gen., 19; 6 Id., 204; *Ex parte* Reed, 100 U. S., 22; Smith *v.* Whitney, 116 U. S., 168. And see recent cases in G. C. M. O. 35, 38, Navy Dept., 1892; Do. 9, 93, 102, 103, Id., 1893. Compare the analogous authority of the criminal judge to call upon a jury to correct a defective verdict. Wharton, C. P. § 751; 1 Bishop C. P. § 1004; Regina *v.* Meany, 9 Cox, 233.

[31] Par. 1043.

[32] The action taken by the court is usually designated in practice by the term "Revision."

[33] The situation is of course to be distinguished from that of a court which has not yet transmitted its proceedings to the reviewing officer for his action, and which, until it does so, may reconsider and reform its findings and sentence at discretion.

**OCCASIONS AND GROUNDS FOR ITS EXERCISE.** These, as stated in the Army Regulations, (par. 1043,) are—"When the record of a court-martial exhibits error in preparation, or seemingly erroneous conclusions on the part of the court." More fully and specifically, these grounds and occasions, (similarly to those which may warrant a disapproval of the proceedings,) may be said to consist of the following:—1. *Clerical omissions or mistakes* in material formal particulars in the making up of the record; such as—an omission to prefix or append a copy of the order convening the court or of an order modifying the detail, &c., or to specify the numbers present at any session, or to state the fact of the administration of the oath or of the according
696 of the right of challenge, or to include a portion of the charges of specifications, or to enter the pleas made thereto or any special plea, or to show that the witnesses were sworn, or fully to record the evidence, finding, or sentence, or to attach an exhibit; or a mis-statement of the name of the accused in the sentence or a specification, thus making a material variance. And with these is to be classed an omission by the presiding officer or judge advocate to certify the sentence or authenticate the record: 2. *Errors of law or fact, or of judgment or discretion*, on the part of the court, in its rulings or conclusions. Such are, mainly, errors in the substance of the findings or sentence—as that the findings, or some of them, are not warranted by the evidence, or are based upon the improper admission or rejection of evidence;[34] or that the sentence is not warranted by or consistent with the findings, or is not itself legally authorized for the offence or offences found; or that the sentence is inadequate, or undûly severe, or inappropriate or inexpedient under the circumstances of the particular case.

Whether the defect be occasioned by inadvertence, or arise from a misconception of law or military usage, or from an imperfect logic or a misuse of the judicial faculty, it is of course most desirable that it be removed, if practicable, from the proceedings, and the due and rational course of justice be relieved from obstruction and embarrassment. This is particularly to be desired where there has been a *conviction*, since, in the absence of the correction, the sentence may not legally be capable of execution or for other reason may properly have to be disapproved. But in a case of *acquittal* also it is no more than just that an error in form or substance should be caused to be corrected, in order that the record may go on file so perfected that the accused will be fully sustained by it in the event of a subsequent plea of *autrefois acquit*.

**ERRORS WHICH CANNOT BE CORRECTED.** Radical fatal defects, such as an illegality in the constitution or composition of the court, or a want of jurisdiction of the offence or offender, are of course irremediable by this
697 procedure. So, defects or errors cannot here be corrected which from their nature can be remedied or prevented only at the stage of the proceedings at which they occur, or at least at some time pending the trial—as errors in the charges or specifications, or misrulings of the court upon objections to testimony. Further, the object of the revision being to make the proceedings conform to the *fact*, the power in question does not extend to the correction of errors of form, capable of being corrected if the facts warrant,

[34] A modification by the court of a finding may require a modification in the sentence, Griffiths, 90. The court, on the revision, may so far change the finding as to substitute a conviction for an acquittal, adding thereupon a sentence. Griffiths, 92; G. O. 6, Dept. of Va. & No. Ca., 1864; Do. 13, Dept. of Va., 1866.

*when the facts do not warrant the correction.* Thus if the members or judge advocate were not *in fact* sworn, the court, on being reassembled, could not supply an omission of the usual statement in regard to the administering of the oath, by a statement to the effect that the members, &c., *were* duly sworn; nor could it cure the defect by thereupon causing itself, or the judge advocate, to be sworn *nunc pro tunc.* So, if only four members were present on a certain day of the trial, the court could not, on reassembling, declare that a quorum was really then present, nor could it make good or replace the proceedings of that day by repeating them formally and with an actual quorum.

**CORRECTION BY MEANS OF NEW TESTIMONY NOT ALLOWABLE.** Nor can the record be returned on account of an error which can be corrected only by means of the introduction of testimony on the merits. The object of the proceeding is not to reopen an investigation which has been closed, or rehear a case once tried and brought to judgment, but simply to revise what has been judicially completed. To permit the introduction of such additional testimony upon the merits would amount substantially to a new trial.[36] Moreover such testimony would have to be received subject to the usual objections and to cross-examination, and to the further introduction of other testimony to meet it, on the part of the defence; and the investigation would thus not only be reinitiated but indefinitely prolonged. And although the evidence admitted were simply that of previous witnesses recalled to elucidate their former statements, there would still practically be a rehearing, and the proceedings would be liable to be protracted in the same manner as where the witnesses were new, only in a less degree. *Interest reipub-*
698 *licae ut sit finis litium,* and most of all that part of the republic embraced in the military state, where prompt and final action is of the very essence of government and discipline. That no evidence whatever shall be presented or heard at this stage is indeed a principle established by the great weight of authority,[37] and this principle, upon a recent reconsideration of the subject, has been emphatically reaffirmed in General Orders,[38] and incorporated in the Army Regulations.[39]

**COURSE OF PROCEEDING.** The record is returned to the court, through the president, or through the judge advocate, (from whom, pursuant to par. 1041, Army Regulations, it should have been received,) with an order or official communication requiring it to reassemble in the case and reconsider the proceedings, or the findings or sentence, with the view of making a certain indicated correction, (or corrections,) therein. Where the alleged error is merely clerical or formal, it is commonly sufficient merely to specify it. In an instance of a supposed error of law or opinion, in the verdict or award of punishment, a brief statement of the reasons deemed to call for the amendment is usually added, or indicated as contained in an accompanying indorsement or report.

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[36] 6 Opins. At. Gen., 204–5; G. C. M. O. 67, Div. Atlantic, 1888; Do. 89, Dept. of the Platte, 1892.

[37] McNaghten, 146; Simmons § 724; note 3; Clode, M. L., 167; Macomb, 69; O'Brien, 280; De Hart, 204; G. C. M. O. 16, Dept. of the Platte, 1875. And see 6 Opins. At. Gen., 201. The present British law is to the same effect. Army Act § 54, (2;) Rules of Procedure, § 51, (A.)

[38] G. O. 47 of 1879; publishing an opinion of Judge Advocate General Dunn. And see DIGEST, 679; also G. C. M. O. 130, Dept. of Dakota, 1885. In a case in G. C. M. O. 36, Dept. of the Mo., 1886, the proceedings were returned to the court for the insertion of evidence of previous convictions. But this is not evidence on the merits. And see Do. 36, Id., 1887, where the record was returned "because of an irregularity in receiving" such evidence.

[39] Par. 1043.

Upon the receipt of the order, the judge advocate, (or president,) notifies the several members, who proceed to reassemble at the original place of meeting, or at a new one if the order, as it may, shall name such. The same rule prevails at such meeting as at all the sessions of a general court-martial, that five members are both necessary and sufficient for the transaction of
699 business.[40] If meanwhile, by absence or any casualty of the service, the members who sat on the trial have been reduced below five, the order cannot take effect. But if five at least can assemble, it is immaterial that their number be considerably less than the original number of the court in the case, *provided*—for this is essential—such five all took part in the trial and judgment.[41] If the court has been *increased* in the number of its members, it cannot, as increased, (*i. e.* composed in part of the new and additional members,) be convened to revise proceedings taken by it before such increase.[42]

A proper quorum being convened, the judge advocate should withdraw, the proceeding being analogous to that which takes place upon a deliberation when the court is cleared.[43] The accused is not present. Of course, if evidence were taken, the accused would properly attend, (with his counsel, if any,) and the session would be open to the public; but, as already stated, the occasion is not one at which testimony can be introduced. If indeed the correction be one which cannot accurately or fairly be made without the concurrence of the accused, as where it concerns the form of some peculiar special plea, motion, objection, &c., interposed by him, it will be regular and proper to admit him (with the judge advocate,) to the revision. Such cases, however, are most rarely presented, since the reading, on each day of the trial, of the previous day's proceedings will in general enable the accused to have every particular relating to his defence fully and precisely set forth.

Upon the assembling of the requisite members, the order, and accompanying papers if any, are read, and the court, after such deliberation and voting as may be necessary, proceeds, if concurring with the Reviewing Officer, to rectify the error by making the proper minute on the subject.[44] If it determine that no error has been committed, it will return the record with an official
700 communication, declining, for reasons stated[45] to make the correction.[46] In such event the Reviewing Officer cannot of course actually compel the court to take the action proposed,[47] but he may return to it the record for a *reconsideration* of its conclusion, at the same time responding to or commenting upon the reasons of the court as he may deem expedient. The court

[40] DIGEST, 678; 7 Opins. At. Gen., 338; G. C. M. O. 54, Dept. of Texas, 1873; Do. 35, Dept. of the Platte, 1891. In the case of a regimental or garrison court, it would be necessary of course that all the three members should reassemble.

[41] DIGEST, 678; G. O. 45, Dept. of the East, 1865. In a case in G. O. 28, Northern Dept., 1865, the proceedings were disapproved because one officer of the original detail who did not sit on the trial took part in the revision.

[42] G. O. 64 of 1827. (Ruling of President J. Q. Adams.)

[43] See Clode, M. L., 167.

[44] The request to make the correction is one which, in a proper case, "a court with a soldierly sense of its duties never refuses." G. C. M. O. 7, Dept. of the Platte, 1893.

[45] The court is not obliged to give reasons for adhering to the proceedings as they stand, but it will in general be no more than properly deferential for it to do so.

[46] Instances of the court declining to amend may be noted in the following Orders:—G. O. 48, Dept. of Va. & No. Ca., 1864; Do. 21, Dept. of the Ohio, 1866; Do. 48, Dept. of Dakota, 1868; Do. 5, Dept. of the Lakes, 1869; G. C. M. O. 159, Dept. of the Mo., 1871; Do. 55, Dept. of Cal., 1875.

In G. C. M. O. 20, Dept. of the Colorado, 1894, the Reviewing Officer notices an "unbecoming pride of opinion," on the part of the court, in refusing to make a proper correction.

[47] DIGEST, 678. Pipon & Col., 63.

may then decide to adopt his view and make, finally, the correction, or it may again return the proceedings with an official statement to the effect that it adheres to its former determination, adding such argument or observations as it may see fit. There is in our military practice no limit to the number of times that the record may thus be returned,[49] but it is not often that the same is in fact returned a second time after the court once decide not to make the amendment. Upon such conclusion the Reviewing Officer, (unless convinced that the court is in the right in the matter,) will commonly dispose of the case with an expression of disapproval of its action on the revision, as also, in general, of the sentence, finding, or other proceeding in respect to which the desired correction has been declined to be made. If, however, the error
701 does not affect the validity of the sentence, he may, while disapproving the conclusion of the court, approve the sentence rather than that the offender go unpunished.[49]

**Form of recording the revision.** The proceedings of the court upon the revision are to be recorded with the same formality as those had at any other session.[50] The record of the revision will properly consist of a continuation of, or rather supplement to, the previous record in the form of an addition at the end of the original proceedings.[51] It will regularly comprise the reconvening order and accompanying papers, or copies of the same, a statement of the fact of the reassembling at the time and place specified, with a designation of the quorum of members present, and a brief account of the action taken in considering the matter of the alleged error, making the correction, &c. In setting forth the details of a correction, proper reference will be made to the part of the original record in which the error appears. The record of the revision will be authenticated by the signature of the president: if an amended sentence is adjudged it will be certified in the same manner as the original sentence.[52]

It is particularly to be noted that the action had and correction made by the court, (except where consisting merely in the affixing of an omitted signature,) can legally appear—be stated and made—*only* in and by the supplementary record of the revision; that it cannot, by interlineation, annotation, or otherwise, be inserted in, or attached or added to, the original proceedings. *These* must remain intact as recorded; no word or statement thereof, however erroneous or objectionable *per se*, can be erased, expunged, or modified; nor can a re-written and corrected page or extract be substituted for a defective portion in the body of the record.[53]

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[49] G. O. 2 of 1844; O'Brien, 279. DIGEST, 678. So a criminal judge may "send back" a jury "any number of times to reconsider their finding." Regina *v.* Meany, 9 Cox, 233. In the British military law the proceedings may be returned to the court for correction but once. Army Act § 54, (2.)

It may be noted that where the court has been made or attempted to make the correction, the proceedings may again be returned for the correction of errors in the form or substance of the revision itself, or for the purpose of having it completed or elucidated. See the marked instance in Gen. Swaim's Case, as fully set forth in G. C. M. O. 19 of 1885.

[49] See case in G. C. M. O. 16, Dept. of the Platte, 1875; also G. C. M. O. 19 of 1885.

[50] DIGEST, 646.

[51] See G. C. M. O. 29, Dept. of the Mo., 1874.

[52] Griffiths, 90; Clode, M. L., 167; O'Brien, 280; G. O. 42, Dept. of the Tenn., 1863; DIGEST, 646.

[53] Simmons § 726; Kennedy, 215; Griffiths, 90; Clode, M. L., 167; Macomb, 69; O'Brien, 280; De Hart, 205; DIGEST, 646, 679; Capt. Barron's Trial, p. 47; G. O. 42, Dept. of the Tenn., 1863; Do. 26, Northern Dept., 1865; Do. 54, Dept. of Dakota, 1867; Do. 42, Id., 1868; Do. 3, Dept. of the South, 1870. G. C. M. O. 47, (H. A.,) 1886; Do. 36, Dept. of the Mo., 1886; Do. 35, Dept. of the Platte, 1891; Do. 5, 26, Dept. of Cal., 1891. In a recent case in G. C. M. O. 114, Dept. of Cal., 1882, Gen.

702 **The correction must be the act of the court.** The proposed amendment can only be made by the court as convened for the purpose, and must be the act of the court *as such*. That the error is a merely clerical one does not authorize its being amended by the judge advocate alone, and *any* correction assumed to be made either by that official, or by the president or other member, apart from the court and without its authority, by means of an erasure, interlineation, addition to the record or otherwise, must be wholly unauthorized and ineffectual in law.[54] Nor can either the president or the judge advocate, at this stage, properly add his signature, (previously omitted,) to the original proceedings without the concurrence of the court. In a word, each and every amendment, whether of form or substance, must be made by the court, or by its direction, and as a part of its formal proceedings had under the order reassembling it.

## III. ACTION OF THE PRESIDENT AS CONFIRMING AUTHORITY.

**PROVISIONS OF THE ARTICLES OF WAR.** We have seen that, under Art. 104, the President is the *approving* officer in all cases in which he has himself ordered the court. The law on the subject of the *confirmation* 703 of military sentences by the President, which has been compared to "the judgment of a court of last resort,"[55] is contained in Arts. 105, 106 and 108, as follows:—

"ART. 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 guerilla-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.*

"ART. 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.*

"ART. 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.*"

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Schofield disapproves the action of the court, in "the revision of the *plea*, which was incorrectly made by inserting the omitted words in the body of the *original record*, instead of adding them in the record of the revision with the proper reference to the original proceedings." (Citing DIGEST.) "The irregularity, however, is not regarded as affecting the legality of the proceedings."

[54] G. C. M. O. 47, (H. A.,) 1886; Do. 38, Dept. of Texas, 1893; Do. 22, Dept. of the Col., 1894; G. O. 3, Dept. of the South, 1870.

Compare, in connection with the present Title, the following Orders, in which are published proceedings had upon Revision, in a variety of cases:—G. O. 61, 75, 76, 90, Army of the Potomac, 1862; Do. 23, Dept. of Va. & No. Ca., 1863, Do. 6, 48, 53, 60, Id., 1864; Do. 13, Dept. of Va., 1866; Do. 21, Dept. of the Ohio, 1866; Do. 48, Dept. of Dakota, 1868; Do. 5, Dept. of the Lakes, 1869; Do. 57, First Mil. Dist., 1867; Do. 22 Id., 1869; G. C. M. O. 159, Dept. of the Mo., 1871; Do. 55, Dept. of Cal., 1875. Such proceedings are now rarely specifically promulgated. In general, where a revision has been had and a correction made in the findings or sentence, or otherwise, only the proceedings as *finally settled* are published.

[55] "Like the judgment of a court of the last resort, final and conclusive." Wooley *v.* U. S., 20 Law Rep., 631. But the *approval by a military commander* of a sentence which does not require the action of the President, (or other superior authority,) is equally final and conclusive. See *ante*—"Approval."

**ART. 105—ACTION UPON DEATH SENTENCES.** This Article consists of a provision of Art. 65 of the code of 1806, consolidated with and modified by provisions of the Act of July 17, 1862, c. 201, s. 5, the Act of March 3, 1863, c. 75, s. 21, and the Act of July 2, 1864, c. 215, s. 1. The Article of 1806 had required the approval of the President in cases of death sentences, only in time of war. The Act of 1862 made this approval a requisite to the execution of *all* death sentences. The Act of 1863 engrafted an exception upon this general rule by authorizing the execution of such sentences "upon the approval of the commanding general in the field," in cases of "any person convicted as a spy or deserter, or of mutiny or murder." The Act of 1864 extended this authority by empowering "the commanding general in the field, or the commander of the department, as the case may be," to carry into execution all sentences imposed by *military commissions* upon "*guerilla-ma-*
704 *rauders* for robbery, arson, burglary, rape, assault with intent to commit rape, and for violations of the laws and customs of war." It may be observed that Art. 105, probably by inadvertence, has included this class of war-criminals as subject to trial by *court-martial:* they are properly triable only by military commission,—the tribunal employed for their trial during the late war,—as the Act of 1864 recognizes.

These exceptions related to *time of war*, and are therefore so distinguished in the present Article. The effect of the Article thus is—that, in time of peace, and in time of war except in the particular cases specified, (when the military commanders indicated may finally act upon and enforce the sentence,) a confirmation by the President is essential to authorize the execution of the death penalty.

In Chapter XXV will be considered in what consists the crime of the spy, and the crimes of desertion, mutiny and murder. What is the further offence of "violation of the laws and customs of war," and what is the class termed in the statute "guerilla-marauders," or, as they have commonly been designated, "guerillas," will be set forth in PART II relating to the Law of War.

The established principle that a sentence of death, (or any other sentence,) requiring the confirmation of the President, must receive the approval of the proper military commander—the original Reviewing Officer—before it is forwarded or presented for the action of the President, or confirmed by him, has already been stated. Of course if such sentence is *disapproved* by such commander, nothing remains for the President to act upon, and the proceedings are not forwaraded.

The further principle that, in the absence of any legal requirement as to the *form* of the confirmation, the same may be authenticated and declared by the Secretary of War, as the representative of the President, will be more particularly noticed under the next head.

**ART. 106—ACTION UPON SENTENCES OF DISMISSAL.** This Article is but a transcript of a provision to the same effect contained in Art. 65 of the code of 1806. In providing that, in time of *peace*, sentences of dismissal, in order to have effect, shall be confirmed by the President,[56] it impliedly
705 authorizes their being executed upon the approval of the proper military commander alone, in time of *war*—an authority further conferred by Art. 109.

[56] In a single case—that of Surgeon Sumby—the President has exercised the power of confirming a sentence of dismissal of an officer of the *District of Columbia Militia*, after the same had been duly approved by the Brig. General Commanding. G. O. 17, Hdqrs., D. C. M., July 14, 1890. These militia were not at this time "called forth," but the power was apparently exercised in view of the Act of March 1, 1889, c. 328, which, in sec. 6, provides "that the President of the United States shall be the commander-in-chief of the militia of the District of Columbia."

**Form of confirmation—Authentication by the Secretary of War.** The only material questions which have been raised under this Article are—whether, and if so in what form, the action of the President, in confirming a sentence of dismissal of an officer, may legally be authenticated by the Secretary of War. These questions have within a recent period given rise to much judicial consideration. It had been held by Judge Advocate General HOLT in Major Haddock's case, in 1867, and later in that of Major Runkle,[57] (see *post*,) that a confirmation of a sentence of dismissal made and subscribed by the Secretary of War was presumptively the act of the President and sufficient in law. In the latter case this view was sustained by the Court of Claims.[58]

In this case, in which the court-martial was convened by the President, the action taken on the sentence consisted of an endorsement signed by the Secretary in which it was stated that the findings and sentence were "approved," and it was added that, for reasons specified, "the President is pleased to remit all of the sentence except so much thereof as directs cashiering, which will be duly executed." On appeal of the case to the U. S. Supreme Court, it was there held,[59] (in 1886,) that the action required of the President, in passing upon a sentence of dismissal under Art. 106, was judicial not administrative, and therefore not one of those cases in which, in the exercise of executive power, he "may act through the head of the appropriate executive department;" that his personal action and decision were here required; but that it did not affirmatively appear, in that instance, that the proceedings had been ever laid before or submitted to him. "Under these circumstances," the court observe, "we
706 cannot say it positively and distinctively appears that the proceedings have ever in fact been approved or confirmed in whole or in part by the President as the Articles of War required." The court does not decide "what the precise form of an order of the President approving the proceedings and sentence of a court-martial should be, nor that his own signature must be affixed thereto. But"—the court concludes—"we are clearly of opinion that it will not be sufficient unless it is authenticated in a way to show, otherwise than argumentatively, that it is the result of the judgment of the President himself, and that it is not a mere departmental order which might or might not have attracted his personal attention. The fact that the order was his own should not be left to inference only."

The court refers, in its opinion, to the exercise by the President of the pardoning power, at the end of the action upon the proceedings, but treats this as a quite distinct and independent act, not affecting the matter of the approval of the sentence. But the important point, familiar to military law, does not appear to have been considered—that there can be no remission without an approval, and that the fact of the remitting by the President of a specific part of the sentence necessarily implies that the sentence must have been first submitted to the President and duly approved by him.

The decision in Runkle's case took the army and the War Department by surprise. In the opinion of the author it was unsound law, and indeed it has been since so qualified by decisions made in similar cases by the same court as to convey the impression that the court has little confidence in it as settling the law. Thus in Lieut. Page's case—one very similar to that of Runkle—the Court of Claims,[60] following, as it supposed, the ruling of the Supreme Court,

[57] Published in G. C. M. O. 7 of 1873.
[58] 19 Ct. Cl., 396.
[59] 122 U. S., 543.
[60] 25 Ct. Cl., 254.

in the latter case, had decided in favor of the claimant on the ground that the approval of the sentence signed by the Secretary of War was insufficient and inoperative. But, on appeal to the Supreme Court, this decision also was reversed, and it was held[61] that, inasmuch as it was stated, in the form of action and approval, that, in conformity with the Articles of war the proceedings had been "forwarded to the Secretary of War and by him submitted to the President," the approval was to be presumed to be the act of the Presi-
707 dent, whose actual sign manual, it was now held, need not be affixed. The court say—the "only possible conclusion" from this statement "is that the approval was by the President."

Later, in Captain Fletcher's case, the statement, signed by the Secretary of War, in the form of action and approval, was that, in conformity with the Articles of war, "the proceedings of the general court-martial in the foregoing case have been forwarded to the Secretary of War for the action of the President. The proceedings, findings and sentence are approved, and the sentence will be duly executed." It was held by the Court of Claims[62] that, as the statement did not show affirmatively that the proceedings had been actually submitted to the President, the ruling in Runkle's case, and not that in Page's case, was to be allowed as controlling. On appeal to the Supreme Court, this decision was reversed.[63] The court remark that—"it would be unreasonable to construe the Secretary's endorsement as meaning that he had received the proceedings for the action of the President, in conformity with Article 65," (now Art. 106,) "and had approved them himself and ordered execution of the sentence in contravention of the Article. * * * While it is not said that the proceedings were submitted to the President, it is stated that they had been forwarded to the Secretary of War for the action of the President, and as that is followed by an approval and the direction of the execution of the sentence, which approval and direction could only emanate from the President, the conclusion follows that the action taken was the action of the President." And with regard to the case of Runkle, the court adds—"Reference to the report of that case shows that the circumstances were so exceptional as to render it *hardly a safe precedent in any other!*"

The ruling in Runkle's case has thus practically ceased to be authority.[64] But while it can now scarcely be questioned that an approval by the Secretary of War of a sentence of dismissal of an officer of the army, where the proceedings had presumptively taken the usual direction, would be held valid and effective, the result of the ruling in that case has been that the President now personally subscribes all such forms of confirmation, as well as all other
708 approvals required of him by the Articles of war, with his sign manual, and they appear so signed in the General Orders promulgating the proceedings and action in the case.[65]

**ART. 108—Sentences respecting General Officers.** This Article, repeated from a provision of Art. 65 of 1806, does not call for extended remark. It may merely be observed that a sentence "*respecting a general officer*" is a sentence imposing any punishment whatever, whether light or severe, upon an officer of that rank.

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[61] 137 U. S., 673. And see 17 Opins. At. Gen., 19, 43.

[62] 26 Ct. Cl., 541.

[63] 148 U. S., 84. Affirmed in Ide *v.* U. S., 150 U. S., 517.

[64] As further illustrating this ruling, see 15 Opins. At. Gen., 290; 17 Id., 43, 397; Ide *v.* U. S., 25 Ct. Cl., 401; Armstrong *v.* U. S., 26 Ct. Cl., 387; Senate Report, 868, 45th Cong., 3d Sess., March 3, 1879.

## IV. ACTION OF COMMANDING GENERAL AS CONFIRMING AUTHORITY.

The statutes authorizing and defining this action are Articles 105 and 107.

**ART. 105.** The cases in which, under this Article, sentences of death may be confirmed and executed by "*the commanding general in the field, or the commander of the department,*" have already been indicated under the Title of the Action of the President as Confirming authority.

**ART. 107.** This Article prescribes as follows:—"*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.*"

This Article is a provision of the Act of December 24, 1861, of which the main portion is contained in Article 73, considered in Chapter VI, where are defined the terms "division" and "separate brigade." Like Art. 73, the present Article is operative only in time of *war*.

It need only be observed that, as in cases of sentences required to be confirmed by the President, the sentences indicated in this Article, preparatory to being confirmed by the army commander, must be duly *approved* by the officer who convened the court or his successor in the command.

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## V. EXECUTION OF SENTENCES.

**THE LAW ON THE SUBJECT.** The general law authorizing the execution of sentences, (and which may be regarded as including sentences imposed by regimental and garrison as well as general courts,) is contained in Art. 109, as follows:—"*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.*"

**EFFECT OF THE ARTICLE.** The effect of this Article is, that the sentence may be executed or caused to be executed by the officer who ordered the court and has approved the sentence, (or his successor in command,) in all cases except those in which the President, (by Art. 105, 106, 108, or Sec. 1326, Rev. Sts.,) or a superior commander, (by Art. 105 or 107,) is required finally to confirm the sentence; and that, in the excepted cases, the order for the execution shall proceed from the President or such superior. In all but the excepted cases, the approval of the original reviewing officer remains a complete and sufficient warrant and order for the execution; and his action thereon is final and conclusive,[65] and to forward the record for the action of the President, &c., must be not only superfluous but unauthorized.[66]

**DISCRETION OF "THE OFFICER ORDERING THE COURT," &c.** The discretion of this officer is absolute under the Article in all cases not belonging to the excepted classes. Whether he shall confirm and execute the sentence rests entirely with him, and is for him alone to determine. Here no superior can direct or instruct him. Where the case involves a question

[65] "The action" (under Art. 109,) "is not final until the officer ordering the court shall confirm it. This confirmation is the judgment of the law." 19 Opins. At. Gen., 107.

[66] Where the sentence "may be lawfully carried into execution on the confirmation of the officer ordering the court, neither the President nor Secretary has lawful authority to approve or disapprove" the same. 11 Opins. At. Gen., 251. And see G. O. 341 of 1863.

of law or fact upon which, in a similar instance, an opinion has been expressed by an official superior, he will, as remarked in referring to the
710 exercise of the power of approval under Art. 104, properly take such opinion into due consideration; but he is not required to concur therein, nor should he do so if the same does not accord with his own views of law and justice. To the exclusive authority here conferred upon him is attached an obligation to exercise such authority in conformity with law, and for the best interests of the service as he understands them.

**THE TERMS USED IN THE ARTICLE.** The technical or descriptive terms employed in Art. 109, such as "confirmed," "the officer ordering the court," "the officer commanding for the time being," have been construed in considering the subject of Approval and the provisions of Art. 104.

**EXECUTION OF SPECIFIC PUNISHMENTS.** The execution of the different specific punishments imposable by sentence—as death, dismissal, imprisonment, forfeiture, reduction, discharge, &c.—has already been fully considered in Chapter XX.

**GENERAL PRINCIPLE GOVERNING EXECUTION—PUNISHMENTS NOT TO BE ADDED TO.** When a legal military sentence has been duly passed upon and approved by the competent authority, "it becomes," in the language of the U. S. Supreme Court,[67] "final and must be executed;" that is to say unless the power of pardon or mitigation, conferred by Art. 112, (or by the Constitution upon the President,) be interposed. That the adjudged punishment may not be *added to*, by or through the action or order of the reviewing officer, is a fundamental principle of the law of the execution of sentences.[68] Thus a sentence of simple dismissal, suspension, or discharge may not be made to work a forfeiture of pay, nor may a sentence of simple imprisonment be made to involve compulsory hard labor or solitary confinement. This principle has also been illustrated in treating of the different punishments in Chapter. XX. The most marked instance in our military history of
711 a violation of this principle was the action of Major General Jackson, when commanding in Florida in 1818, in the case of Robert C. Ambrister, tried by a general court-martial for inciting and aiding the Creeks in prosecuting war against the United States. The court first sentenced the accused to be shot; then, having reconsidered, as it could legally and regularly do, its judgment, substituted therefor the milder punishment—which thereupon became the legal and only sentence—"to receive fifty stripes on the bare back and be confined with a ball and chain to hard labor for twelve calendar months." In acting upon the case as reviewing officer, Gen. Jackson disapproved of the reconsideration, approved—as he could not legally do, since it did not legally exist—the first sentence, and ordered that the accused "be shot to death agreeably to the sentence of the court;" and he was shot accordingly.[69] This order not only contained a false statement of fact, but—not being an act of war or resorted to in the exercise of martial law, but official action taken upon the proceedings of a court-martial under the Articles of war—was

[67] Dynes *v.* Hoover, 20 Howard, 81.

[68] Harcourt, 133, 146; Maltby, 101; Simmons § 762; 11 Opins. At. Gen., 139. "A commanding officer charged with the duty of reviewing the proceedings of the court, cannot increase the severity of a sentence. He may approve or disapprove or mitigate, but he cannot impose a new sentence of a more severe character." Swaim *v.* U. S., 28 Ct. Cl., 174.

[69] The record of this trial, with that of A. Arbuthnot tried by the same court, is contained in full in American State Papers, Military Affairs, vol, I, pp. 721–734. And see Printed Trials of Arbuthnot and Ambrister, London, 1819.

wholly arbitrary and illegal.[70] For such an order and its execution a military commander would *now* be indictable for murder.

**CONCLUSIVE EFFECT OF AN EXECUTED SENTENCE.** It is a further general principle that a sentence once duly approved or confirmed, and carried into execution, is beyond the reach, *i. e.* no longer subject to the action, of the Reviewing Officer, in the exercise of his authority under the Articles of war. In the first place, a sentence thus duly executed is wholly beyond the control of the *revisory function*—is no longer subject to review by the commander who has approved or the President who has confirmed it. Of course a thing *done*—as an imprisonment undergone, for example—cannot, physically, be *undone*.[71] But where, though the punishment itself cannot be undone, its effect may be—as in a case of a sentence of dismissal of an officer or of
712 the forfeiture of the pay of a soldier—here also the sentence cannot be recalled or reopened, nor can the executed penalty be reversed, rescinded, or modified.[72] Further, such a sentence is beyond the reach of the *pardoning power:* neither can the commander, under the authority conferred by Art. 112, "pardon or mitigate" an executed punishment, nor can the President remit it by a pardon of the offender under the Constitution.[73] Thus, as to a sentence of court-martial when duly and fully executed, the Reviewing Officer is *functus officio*, his authority is exhausted; some new act quite outside of the powers of revision and pardon must be resorted to for the rehabilitation or relief of the party. An officer, for example, duly dismissed the service by sentence of court-martial cannot be restored to the army by an attempted revoking of the confirmation or setting aside of the sentence, or by a pardon or remission, but can be so restored only by a new appointment made by the President and confirmed by the Senate. And an officer or soldier who has been condemned by an executed sentence to forfeit or pay to the United States a sum of money, can be relieved from or reimbursed for such payment, only by an act of legislation in his behalf on the part of Congress.

## VI. SUSPENSION OF EXECUTION OF SENTENCES.

**ART 111.** The provision of law on this subject is contained in this Article, as follows:—"*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.*"

**EFFECT AND OBJECT OF THE ARTICLE.** This Article, derived from a provision to a similar effect of Art. 89 of 1806, extends to officers, when authorized, (under Art. 105, 106, or 107,) to execute sentences of death or dismissal, the privilege of suspending the execution of the same till they shall have been submitted to and finally acted upon by the President; in other words
713 the privilege of devolving upon the President the responsibility of the action to be taken upon such sentences.

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[70] The Report of the House Committee on Military Affairs condemned Jackson for this very conduct, and other conduct in the case, and also reflected upon the court. Am. S. P., Mil. Af., vol. 1, p. 735. (Jan. 12, 1819.)

[71] See Hoffman *v.* Coster, 2 Whart., 468.

[72] 4 Opins. At. Gen., 170, 274; 6 Id., 369, 514; 10 Id., 64; 15 Id., 291, 433; 17 Id., 32, 297; 18 Id., 21.

[73] *Ex parte* Garland, 4 Wallace, 381; 12 Opins. At. Gen., 548. As to the remission of *continuing* punishments, see *post.*

The principal object, however, of the Article, which is operative only *in time* of war, would appear to be, not to relieve commanding officers of their due responsibility in proper cases,[74] but to afford an opportunity for the remission or mitigation of a sentence of death or dismissal when, in the opinion of the commander, it should properly be remitted or mitigated.[75] The power of pardon or mitigation in cases of such sentences cannot, even in time of war, legally be exercised by a military reviewing officer, but, by Art. 112, is expressly reserved to the President.[76] By the suspending, therefore, of the execution of the sentence as indicated in the Article, an opportunity is afforded for the exercise of executive clemency, if the President think proper to extend it.

**APPROVAL A PREREQUISITE TO SUSPENSION.** As has already been remarked, the exercise of the function specified in this Article must have been preceded by a formal *approval* of the sentence by the officer; in other words, the execution of a sentence which has not been duly approved, or which has been disapproved, by the convening authority, (or his successor in command,) cannot legally be *suspended*, nor can the sentence be acted upon by the President under the Article.[77]

**TRANSMISSION OF THE ORDER AND PROCEEDINGS.** The "order of suspension" is merely the official statement, appended to the record after the sentence, and signed by the reviewing authority, to the effect that the sentence is approved but its execution suspended, and that the proceedings are transmitted to the President for his action under the 111th Article of war. The transmittal of *copies* only is called for by the Article: in practice, however, the original proceedings, with the original action of the reviewing officer, are always forwarded.

**"THE PLEASURE OF THE PRESIDENT."** This term is a broad
714 one, and the Article has been construed in practice as not limiting the President to a remission or mitigation of the punishment or punishments, but as empowering him to approve or disapprove the suspended sentence, (or to approve in part and disapprove as to other part,) in the same manner and with the same effect as if it had been a sentence to the execution of which his confirmation was made requisite by Art. 105 or 106.

## VII. PARDON AND MITIGATION OF PUNISHMENT.

**EXERCISE OF PARDONING POWER BY THE PRESIDENT, IN MILITARY CASES.** The President, where he is Reviewing Officer, *viz.* when acting upon the sentence of a court convened by himself, or a sentence requiring his confirmation or action, while he may of course exert the plenary power vested in him by the Constitution, in practice almost invariably exercises a partial pardoning power of *remission* of the punishment analogous to that conferred upon reviewing officers by Art. 112, (see *post.*) In *other* military cases,—as in cases of applications or appeals addressed to him for clemency by officers or soldiers, whose sentences have been sometime finally acted upon by the competent authority and who are undergoing the same,—here, where he acts not as reviewing officer but as constitutional pardoning power, he exercises a full or limited measure of such power according to circumstances. In some early cases formal pardons were issued by the President to enlisted

[74] See G. O. 139, A. & I. G. O., Richmond, 1863.
[75] Note context of Art. 89 of 1806.
[76] See G. O. 97, 101, 147, of 1863; 6 Opins. At. Gen., 124–5.
[77] G. O. 209 of 1863.

men under sentence,[78] but at present, in cases of prisoners confined at Leavenworth or Alcatraz Island, the mere remission in Orders[79] of the unexecuted portion of the punishment of imprisonment is the form, commonly, of the act of grace. In cases of *officers* under sentence, formal pardons, in terms similar to the pardons issued to civilian offenders, have more frequently been granted,[80] but even these have not been common.

715 **AS EXTENDED TO CLASSES OF PERSONS—AMNESTY.** The constitutional pardoning power, being plenary, is not restricted in its exercise to the pardoning, or remitting of the punishment, of a single individual at a time. The authority of the President, under the pardoning power, to extend amnesty to a *class* of similar offenders has been affirmed by the authorities,[81] and he has repeatedly, by proclamation or general order, offered pardon to *deserters* who may return to duty within a time specified.[82] This instance indeed illustrates another attribute of the power under consideration, *viz.* that it may be exercised prior to the conviction or trial of the offender.[83]

Other attributes of the pardoning power will be considered in connection with the next Subject.

**EXERCISE OF THE POWER OF PARDON AND MITIGATION BY COMMANDERS—ART. 112.** This provision, derived from Art. 89 of the code of 1806, and which completes the grant of powers to the officers authorized to act upon the sentences of courts-martial, is expressed as follows:—"*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.*"

**Nature of the Authority Conferred—Remission.** This Article confers upon the commanders specified two distinct powers—a power to "pardon" and a power to "mitigate." As to the former, this, though of a quality similar to that of the pardoning function vested in the President by the Constitution, is different from and inferior to the same in effect and scope. *That* is a *plenary* power to pardon the *offence* and the *offender*, by the exercise of which the stigma of the conviction is done away with, the penalties and disabilities 716 incident thereto or to the sentence are removed, and the offender is personally completely rehabilitated in law.[84] But the power given by the Article is a power only to "pardon" a "punishment," that is to say a

[78] The early Order books in the A. G. O. contain formal pardons issued by President Monroe to soldiers, under sentence of death for desertion or mutiny, dated March 17, 1817, and March 5, Oct. 13, and Dec. 22, 1818.

[79] The President, in remitting punishments, may act through the Secretary of War, in Orders emanating from the War Department, as he may in approving or confirming sentences. See *ante*—"Art. 106."

[80] A formal pardon was issued to Fitz John Porter, formerly Maj. Gen., on May 4, 1882; but this in terms only *remitted* the *punishment, i. e.* the continuing punishment of disqualification for office adjudged by sentence of court-martial in January, 1863.

[81] Jones *v.* U. S., 137 U. S., 202; Jenkins *v.* Collard, 145 U. S., 547; U. S. *v.* Klein, 13 Wallace, 141, 147; Armstrong *v.* U. S., Id., 154; Pargoud *v.* U. S., Id., 156; Cooley, Prins. Const. Law, 100; Do., Const. Lim., 139. And see the very interesting opinion on this subject of Solicitor General Taft in 20 Opins., 330.

[82] See instances cited in Ch. XVI—"Plea of Pardon," p. 270 and note.

[83] In military cases, the instances in which the pardoning power has been exercised before trial have generally been of the class known as *constructive* pardons. See *post*—"Constructive Pardon;" also "Plea of Pardon" in Ch. XVI, p. 270.

[84] "The pardon makes him, as it were, a new man, and gives him a new capacity and credit." 2 Hawkins, c. 37, s. 48. And see *Ex parte* Garland, 4 Wallace, 380; U. S. *v.* Klein, 13 Id., 128; Osborn *v.* U. S., 91 U. S., 474; Knote *v.* U. S., 95 U. S., 149.

power of *remission;*[85] and if the word *remit*—the term properly describing the pardoning of a punishment—were substituted for the word *pardon* in the Article, its phraseology would be less antiquated[86] and more precise. The exercise of this limited power simply relieves the accused in whole or in part from the *punishment;* the guilt of the offender as found, and the penal liabilities consequent thereupon, remaining unaffected in law. Thus a mere remission of the punishment adjudged a deserter will not relieve him from the civil disqualification attached by statute to his conviction;[87] nor, in a case contemplated by Art. 100, will such a remission relieve an officer from the consequence, incident upon his conviction and sentence, of not being associated with by other officers: in either case a pardon of the offender by the President will be necessary to restore the forfeited right. So—it has been held by the Attorney General[88]—a remission of a continuing sentence of suspension will not restore to the officer the relative rank which he has meanwhile lost, while a full pardon may have that effect.

The "power to pardon" accorded to commanders is thus seen to be quite distinct from the pardoning power of the President, which, devolved upon him alone by the Constitution, could not indeed be delegated by Congress to any other official or person. This power in fact, and also that to "mitigate," given by Art. 112, are not modes or measures of the constitutional function, but
717 powers attached as incidents to the power to order courts and approve and execute their sentences, being simply forms of discretion vested in the reviewing officer to reduce or dispense with, when deemed by him just or expedient, the punishment or a punishment awarded by the court.

**ATTRIBUTES OF THE POWER OF PARDON OR REMISSION—1. It is co-extensive with the punishment.**[89] Assimilated in a measure to pardon proper, remission has, within its scope, some corresponding attributes. Thus its exercise is not restricted to the time and occasion of the formal approval of the sentence by the reviewing authority, but may be resorted to at any stage of the execution of the punishment, and so long as any portion of the same remains unexecuted.[90] What remains, for example, of a term of imprisonment of a soldier may be remitted, at any time before its expiration, by the commander who originally ordered the court and approved the sentence, or by his successor meanwhile in the command, provided of course the soldier is still confined within the command. So, a *continuing* punishment—as one of disqualification to hold office, or of a loss of files—may be remitted at any time prior to the completion of its term.[91] The President has frequently pardoned military punishments pending the period of their enforcement, and in repeated instances at or near the end of the late war remitted the unexpired portions of the sentences of a large class of offenders, in and by one and the same General Order.[92] The same course was also pursued by department and

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[85] As to the distinction between remission and pardon, compare Perkins *v.* Stevens, 24 Pick., 277; Lee *v.* Murphy, 22 Grat., 799; 1 Bishop, C. L. § 763; 2 Opins. At. Gen., 329; 5 Id., 588; 8 Id., 283–4.

[86] The term has been derived without change from the early codes of 1775 and 1776.

[87] As those imposed upon deserters by Secs. 1996, 1998, Rev. Sts. So forfeitures by operation of law remain unaffected—as those attaching by the operation of Sec. 1265, Rev. Sts., and pars. 128 and 1514 Army Regs. And see 18 Opins. At. Gen., 427.

[88] 17 Opins., 31; 20 Id., 243.

[89] "Coextensive with the offence and the punishment." Rawle on the Const., 178.

[90] The counter view, as expressed in 1888 by Atty. Gen. Garland, (19 Opins., 106,) was not accepted by the Secretary of War but dissented from, as indicated by the Army Regulations of 1889, par. 1044, and by the uniform practice.

[91] 12 Opins. At. Gen., 547; 17 Id., 303, 656.

[92] As by G. C. M. O. 98 of 1865; Do. 46 of 1866; G. O. 19, Mid. Mil. Dept., 1866.

army commanders.[93] At present military reviewing officers are authorized to remit the unexpired terms of soldiers confined within their commands, though such soldiers have been dishonorably discharged under their sen-
718 tences;[94] except that in cases of convicts confined at the Military Prison at Leavenworth, or, (after discharge,) in penitentiaries,[95] the remissions have been ordered by the President through the Secretary of War.

2. It may be full or partial. That is to say, where a sentence includes several punishments, the President, or a commander thereto authorized by Art. 112, may remit all, or one or more; and a remission of one will not affect the authority to execute, or interrupt the execution of, another or the others.[96] So a part of a punishment may be remitted at one time and another part at a subsequent time.[97] A full and unqualified remission—it may be added—of a particular punishment will operate to remit an additional punishment the execution of which is made dependent upon the execution of the other. Thus a remission of a term, or the unexecuted portion of the term, of an imprisonment, will remit a penalty of dishonorable discharge directed by the sentence to take effect at the end of the full term.

4. It may be unqualified or conditional. That a pardon or remission may be conditional, and that the condition may be *precedent* or *subsequent*, is settled law.[98] During the period especially of the late war, pardons on express conditions, granted, in Orders, both by the President and by army commanders, were not unfrequent in military cases. Thus sentences were remitted on the conditions precedent—that the accused re-enlisted, or enlisted "during the war;"[99] that he paid back certain bounty money received by him;[100] that he paid a fine, or part of a fine imposed by his sentence;[1] or gave satisfac-
719 tory security for its payment;[2] that he turned over the company fund in his hands;[3] that he made good an amount found to have been embezzled by him;[4] that he reimbursed the expenses incurred in his apprehension as a deserter;[5] or the value of public property, (as a horse, carbine, &c.,) appropriated in deserting,[6] or that he made good the time lost by his absence;[7] that he allotted certain pay sentenced to be forfeited, or other pay, to the support of his family.[8] Similarly sentences of military commissions have been remitted on the condition precedent that the accused took an oath of allegiance and obedience to the laws, or gave bond for his future good behaviour, or both.[9]

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[93] In G. O. 8, Mil. Div. of the Tenn., 1865, Maj. Gen. Thomas remitted the unexpired terms of 245 military prisoners confined in the military prison at Nashville. And see Do. 26, Id., Do. 2, 3, 7, Id., 1866—in each of which a similar authority was exercised in a large number of cases.

[94] Circ. No. 3, (H. A.,) 1893.

[95] Circ. No. 5, (H. A.,) 1888.

[96] Perkins *v.* Stevens, 24 Pick., 280. And compare the provision of the Act of Feb. 20, 1863, relating to punishments for civil offences, now incorporated in Sec. 5330, Rev. Sts.

[97] 3 Opins. At. Gen., 418.

[98] 2 Hawk., c. 37, s. 45; 4 Black. Com., 401; 1 Bishop, C. L. § 760; U. S. *v.* Wilson, 7 Peters, 150; *Ex parte* Wells, 18 How., 307; Com. *v.* Haggarty, 4 Brewst., 326; 1 Opins. At. Gen., 77, 341, 482; 5 Id., 368; 6 Id., 405; 11 Id., 229; 14 Id., 124.

[99] G. O. 3, 6, 104, Dept. of Va. & No. Ca., 1864. Compare 1 Kent, Com., 308.

[100] G. O. 184, Dept. of Va. & No. Ca., 1864.

[1] G. C. M. O. 428, 640, of 1865.

[2] G. C. M. O. 117 of 1864.

[3] G. C. M. O. 14 of 1868.

[4] G. C. M. O. 228 of 1865. And see DIGEST, 554.

[5] G. O. 29, Dept. of the Platte, 1869.

[6] G. O. 32, Dept. of the Platte, 1869.

[7] G. O. cited in last note.

[8] G. C. M. O. 214 of 1864; Do. 503, 668, of 1865.

[9] G. C. M. O. 103, 119, 151, 156, 203, 229, 251, 256, 270, 528, of 1865.

So, though more rarely, military pardons have been granted on express conditions *subsequent*. As where an officer was pardoned on condition of his resigning his commission;[10] where the sentences of soldiers in confinement were remitted on condition that they faithfully served their full terms of enlistment;[11] where, in certain cases tried by military commission, the sentences were remitted on the condition that the party should forthwith quit a certain place or part of the country and remain absent during the war,[12] or that he should engage in no illicit trade, nor aid or have intercourse with the enemy, during the war.[13]

720 Where the pardon is conditional, the condition must be *accepted* by the beneficiary:[14] in military cases, the acceptance is generally indicated, not formally, but by his voluntarily submitting to the proceeding or performing the act required as a condition.[15] As remarked by the court in a case in Pennsylvania[16]—"It lies upon the grantee to perform the condition. If he does not, in case of a condition precedent, the pardon does not take effect; in case of a condition subsequent, the pardon becomes null; and if the condition is not performed the original sentence remains in full vigor and may be carried into effect."

The condition, whether precedent or subsequent, must be legal, reasonable, and not repugnant to the grant.[17]

But, at present, in time of peace, *conditional remissions*, under Art. 112 are of most rare occurrence.[18]

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[10] See I Opins. At. Gen., 343.

[11] G. O. 46 of 1866. And see G. C. M. O. 94 of 1867; G. O. 104, Dept. of Va. & No. Ca., 1864; G. O. 108, Dept. of the East, 1872, Compare the terms of the offers of amnesty to deserters in G. O. 43 of 1866; Do. 102 of 1873.

[12] G. O. 34, Dept. of Washington, 1865. So, it is held in the civil courts that a condition attached to a pardon of a convict sentenced to imprisonment, that he leave the State or the country, and do not return during his term or at all, is a valid condition; and that if, after accepting the condition, he does return, he may be remanded to prison to serve the sentence. Flavell's Case, 8 W. & S., 199; Com. *v.* Haggarty, 4 Brewst., 326; People *v.* Potter, 1 Edmonds, 235; *Ex parte* Lockhart, 1 Disney, 105.

[13] G. C. M. O. 99 of 1865. In Do. 131, Id., the party, sentenced to be imprisoned "to the end of the rebellion," was "enlarged to remain at liberty so long as he does not misbehave."

[14] "The offender may accept or not at his option." 6 Opins. At. Gen., 405. For "the condition may be more objectionable than the punishment." U. S. *v.* Wilson, 7 Peters, 161. And see 5 Opins. At. Gen., 537; Lee *v.* Murphy, 22 Grat., 798.

Some form of acceptance indeed is necessary to give effect to *any* pardon. As the court say in U. S. *v.* Wilson, *ante*—"A pardon is a deed to the validity of which delivery is essential, and delivery is not complete without acceptance." And see In the matter of De Puy, 3 Benedict, 307.

[15] In civil cases the condition is often formally accepted in writing upon the pardon by the beneficiary. In *Ex parte* Welis, 18 Howard, 307, the form of acceptance was as follows:—"I hereby accept the above and within pardon, with condition annexed." And see the similar form of acceptance in Lee *v.* Murphy, 22 Grat., 790.

[16] Flavell's Case, 8 W. & S., 199. Or, as the law is stated by Bishop, (1 C. L. § 914)—"If the condition of the pardon is precedent, that is if, by its terms, some event is to transpire before it takes effect, its operation is deferred until the event occurs. If the condition is subsequent, the pardon goes into operation immediately, yet becomes void whenever the condition is broken." In *Ex parte* Wells, the law is stated to be that where the condition is not performed, "the party may be brought to the bar and remanded to suffer the punishment to which he was originally sentenced." If the conditional pardon has been granted *before trial*, and the condition not performed, the party may be brought to trial for his offence. See DIGEST, 554.

[17] People *v.* Pease, 3 Johns. Cas., 335. Flavell's Case, *ante;* People *v.* Potter, 1 Edmonds, 235; Com. *v.* Haggarty, 4 Brewst., 326.

[18] See an instance of a conditional *mitigation* recognized as legal, under "Mitigation," *post.*

721 **BY WHOM THE POWERS MAY BE EXERCISED UNDER THE 112th ARTICLE.** The Article describes in general terms the persons by whom the powers specified may be exercised, by the words—"Every officer who is authorized to order a general court-martial." A better designation—one more in harmony with the other provisions relating to the action of the reviewing authority—would be: "Any officer authorized to execute the sentence of a court-martial." As expressed, the Article includes—(1) the officers authorized by Arts. 72, 73, 81 and 82, and Sec. 1326, Rev. Sts., to order certain courts, and who have ordered such courts, which have adjudged sentences; (2) the successors in command of such officers or "commanding for the time being"—a class already defined in construing Arts. 104 and 109.

An officer thus authorized must of course exercise *personally* the powers conferred: he cannot *delegate* the same—to an inferior commander or staff officer—any more than he may delegate the power to order the court or approve its proceedings.

**EXECUTION OF REMISSION.** Remission is pointedly distinguished from pardon proper by the form and manner of its execution. Thus while a constitutional pardon is a deed which takes effect upon delivery and acceptance,[19] remission is executed by *order* simply. The remission is an order made in his discretion by the commander, and, like any other military order, executes itself, that is to say is executed upon its promulgation to the party affected. Whether or not he may have applied for the remission, no acceptance by him is necessary or material.

**COMMUTATION.** Commutation is conditional pardon. It is pardon granted on the condition subsequent that the party receive and undergo a less
722 severe punishment of a different nature[20]—a condition which, like all conditions annexed to pardons, must be accepted or the grant will not take effect. In military cases, the acceptance is general given, not formally, but impliedly by the party's entering upon without objection, and duly undergoing, the substituted punishment.[21] Commutation is distinguished from *mitigation*, which, as will hereafter be noticed, is a reduction of a punishment in degree or quantity only; the power to mitigate not authorizing the changing of the species of the penalty adjudged. But there are certain punishments not susceptible of being reduced in degree; consequently where one of these is imposed by the court, and the same is deemed too severe a penalty to be inflicted upon the accused, who yet, it is considered, deserves some measure of punishment, the mere power of mitigation is inadequate for the occasion, and *commutation*, or the substitution of a lesser penalty of a different nature, must be resorted

[19] U. S. *v.* Wilson, 7 Peters, 150.

[20] The leading adjudged case on the quality of commutation is *Ex parte* Wells, 18 Howard, 307, with which see Opinion of the Justices, 14 Mass., 472; Perkins *v.* Stevens, 24 Pick., 278; Lee *v.* Murphy, 22 Grat., 789; Cooley, Prins. Const. Law, 100;—also 5 Opins. At. Gen., 369, in which is practically overruled an earlier opinion of Mr. Wirt, in 1 Opins., 328, in which commutation is confused with mitigation. It may be added that the phraseology of some of the existing statute law has also tended to confuse the student. Thus, while the Act of July 13, 1866, provided that in time of peace no officer should be dismissed except in pursuance of the sentence of a general court-martial, or "in *commutation* thereof," using here the proper term, this term, though retained in one part of the Revised Statutes,—Sec. 1229—has been carelessly changed to "*mitigation*" in the 99th Art. of war and in Art. 36 of the naval code.

It may be noted in this connection that the naval code—in Arts 54 and 33—expressly prohibits the commutation of sentences.

The provision of the modern British code corresponding to our Art. 112—Army Act § 57, (1)—expressly empowers the reviewing authority to "*remit, mitigate or commute*" punishments adjudged by sentence of court-martial,—a form of conveying the power much to be preferred to that retained in our statute.

[21] See *ante* as to acceptance of conditional pardons in general.

to. Death and dismissal, for example, are punishments not admitting of lesser degrees or capable of being mitigated; they must therefore, when deemed too rigorous, be exchanged or *commuted* for distinct penalties of minor severity.

Thus death may be commuted to dismissal or dishonorable discharge, or to imprisonment, or to both,—indeed to any recognized military penalty or combination of penalties, since any such penalty or combination is in law less grievous than the *summum supplicium* of death. So, dismissal may be commuted to suspension,[23] loss of files, or other punishment appropriate to
723 an officer and less severe than an absolute and disgraceful separation from the army.[24] And, in a case of an enlisted man, a sentence of dishonorable discharge or reduction to the ranks may be commuted to a moderate forfeiture of pay.

It is to be noted, however, that commutation, though more appropriate to cases of punishments which do not admit of mitigation, is not restricted to these in its application. It thus may be resorted to in cases where mitigation is permissible and in lieu thereof. Thus a considerable term of imprisonment, instead of being mitigated to a less term, may be commuted to dishonorable discharge or to a forfeiture of a small amount of pay.[24]

Like other conditional pardon, commutation is, in practice, employed at the time of the approval or confirmation of the sentence or punishment: unlike remission, it is rarely if ever resorted to at a later stage.

Not authorized under Art. 112. The "power to pardon" given by this Article being a power of remission only, and remission consisting simply in the doing away with a punishment, the exercise of the authority to commute would appear to be excluded from the contemplation of the statute. We have seen that commutation is distinct from mitigation. The conclusion would thus be that a military commander could not legally commute a punishment by the authority of this Article.[25] In this connection there may be some significance in the fact that the Article expressly excepts from the application of the power conferred the punishments of death and dismissal, these being punishments which can be abated by commutation only. In practice, however, com-
724 mutation has not unfrequently been resorted to by military reviewing officers, and there has at yet been no authoritative ruling that such action is not legitimate.

**CONSTRUCTIVE PARDON.** A party may sometimes be relieved of punishment by an executive act attaching to him a status inconsistent with the infliction or continuance of such punishment.[26] An act of this character oper-

[23] Suspension has indeed sometimes been regarded as an inferior degree of the punishment of dismissal, and as a penalty to which the latter might therefore be *mitigated*. (See 4 Opins. At. Gen., 434; 5 Id., 43.) But such view is a mistaken one, dismissal being an absolute and final separation of the person from the military office and from the army—a status admitting of no degrees. Dismissal is therefore *commuted*, not mitigated, when suspension is substituted for it by the pardoning power.

[24] Dismissal has in a few cases been *commuted* to reprimand. See instance in G. C. M. O. 18 of 1868. In cases of *Cadets*, dismissal and suspension have been commuted by the President to confinement in a light prison for one to three months. G. C. M. O. 70 of 1887.

In G. C. M. O. 31 of 1889, is a peculiar instance of a commutation by the President of a sentence of dismissal of an officer to—"confinement within such limits as the Secretary of War may prescribe and to deprivation of the right to wear the uniform and insignia of his rank in the army for a period of five years."

[24] In substituting one distinct punishment for another by commutation, special care is to be taken that the rule forbidding any *adding* to the punishment by the reviewing officer is not transgressed.

[25] See ruling in DIGEST, 131 §7.

[26] 6 Opins. At. Gen., 715. But the mere ordering of an officer under sentence of suspension to attend a court-martial as a witness, does not operate as such pardon. Id., 714.

ates as an implied, or, as it is usually designated, *constructive* pardon.[27] Thus the appointment to a new office of an officer in arrest under charges will operate to pardon constructively the offence with which he is accused.[28] So, the promotion of an officer under sentence of suspension from rank, or the replacing in his proper command, by authority competent to remit the sentence, of an officer under sentence of suspension from command, will constructively pardon and terminate the suspension.[29] So, the ordering on active duty of a soldier under a sentence of confinement will have the same effect as a formal remission of the punishment;[30] and it will remit also any other punishment the execution of which is made dependent upon that of the confinement—as a dishonorable discharge directed by the sentence to be executed at the end of the confinement. Similarly, a *constructive* remission of a sentence of confinement of a soldier is effected where, pending the execution of a confinement adjudged to be suffered during the remainder of his term of enlistment, a discharge from the service is given him by competent authority.[31]

725 The subject of constructive pardon, as granted prior to trial, has already been considered under the title of the Plea of Pardon, in Chapter XVII.

**MITIGATION.** This, which, as already observed, is distinct from and not included in the pardoning power,[32] differs from commutation in that it consists, not in changing the nature or quality of the punishment or in substituting a different punishment for it, but simply in reducing it in quantity.[33] Thus an imprisonment or suspension adjudged for a certain term is mitigated by reducing it to one for a less term;[34] a fine or forfeiture of a certain amount, by reducing it to one of a less amount;[35] a loss of a certain number of files, by

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[27] In Sir Walter Raleigh's Case, (Cro. Jac., 495; Prendergast, 245,) it was held that had his offence been less than treason,—had it been only felony,—his being released from imprisonment while awaiting the execution of his sentence, and placed in command of an army and sent on a foreign expedition, would have operated as an implied pardon.

[28] 8 Opins. At. Gen., 237.

[29] 4 Opins. At. Gen., 8; 6 Id., 123, 715; McNaghten, 22; DIGEST, 732. But allowing an officer under sentence of suspension from rank to turn over property, &c., with a view to settling his accounts as acting quartermaster, has been held not to have any such effect. DIGEST, 554.

[30] See De Hart, 249; Benét, 168; G. O. 98, Dept. of the East, 1868.

[31] This ruling of the Judge Advocate General was approved by the Secretary of War, and communicated to department commanders, from the A. G. O., under date of Aug. 12, 1871. See the same, (published as a decision of the Secretary,) in G. O. 72, Dept. of Dakota, 1871; G. C. M. O. 118, Dept. of the Mo., 1871; Circ., No. 15, Dept. of Texas, 1871.

[32] That the President may exercise the power of mitigation only in the capacity of reviewing officer, see note *ante*, citing 2 Opins. At. Gen., 289; DIGEST, 606–7.

[33] "The right of *mitigating* only extends, in my opinion, to lessening the degree of punishment in the same species prescribed, and does not imply any authority to change the nature or quality of it altogether." Washington to Gates, Feb. 14, 1778. Sparks' Writings of Washington. vol. 5, p. 236. And see DIGEST, 131; Circ. 2 (H. A.) of 1885; also 1 Opins. At. Gen., 328, 331; 4 Id., 433, 446. These Opins., however, so far as they relate to commutation, were corrected by 5 Opins., 369. [See note *ante*.]

[34] In the late war, imprisonments for life or for very long periods were not unfrequently mitigated to imprisonment "during the rebellion."

[35] A general forfeiture of pay, imposed in connection with confinement, has sometimes been mitigated by directing that a small sum, as $10 or $20, or "so much of that amount as may be found due the soldier on the settlement of his account," be retained and paid him on his discharge from confinement. See, for example, G. C. M. O. 1, 4, 8, 10, 13, Dept. of the South, 1881. The object of this form of mitigation is to provide against the party's being discharged in a destitute condition; *practically*, it is uncertain and scarcely to be recommended in general.

reducing it to one of a less number.[36] But dishonorable discharge, or forfeiture of pay, cannot, by mitigation, be substituted for confinement, or *vice versa.*

726 The punishment as mitigated must be *ejusdem generis* with original; that is to say must be a part of the very punishment imposed by the court.[37]

Pardon and mitigation, though separate functions, may concur in action. Thus where a sentence imposes imprisonment and forfeiture, the reviewing authority may at the same time remit the imprisonment and mitigate the forfeiture, or *vice versa.*

A mitigation must of course be preceded by an approval or confirmation, in whole or in part, of the sentence, since, if the sentence is wholly *disapproved,* there remains nothing to be mitigated. The punishment at least which is mitigated must have been approved, although other punishments contained in the same sentence may have been disapproved. But mitigation, unlike remission, (and *like* commutation,) is rarely if ever employed at a stage subsequent to the approval or confirmation, but, in practice, is contemporaneous with and a part of the same action.

As already noticed, the power conferred by Art. 112 is to mitigate, &c., a *punishment,* not the *sentence.* So, where a sentence contains several punishments, action taken thereon which detracts from the severity of the sentence in the aggregate but does not specifically reduce any punishment as such, is not a legal exercise of the power of mitigation. Thus where a court-martial sentenced a soldier to be dishonorably discharged and then imprisoned for a certain term, and the reviewing officer directed that the discharge be *postponed* till after the imprisonment, it was held by the Judge Advocate General that this action was not legal mitigation and was unauthorized.[38] A case illustrating the same point and also the principle that an adjudged punishment cannot be *added to,* was that of a naval officer in which it was held by the Atty. General that the President could not legally mitigate a sentence of five years' suspension from rank to one of six months' suspension with forfeiture of pay for the same period, although by such action the sentence would as a whole be rendered less severe.[39]

727 So, it has been held, in a case of an enlisted man, that a punishment of a term of confinement without hard labor could not legally be mitigated to a shorter term *with* hard labor. Nor, in such a case, could a mitigation legally have the effect of causing a punishment to exceed the established *maximum.* So, a punishment *in itself* illegal cannot of course be mitigated. Thus a confinement in a penitentiary, not authorized by Art. 97, is not susceptible of mitigation to confinement in a military prison.

A *conditional* mitigation has been recognized as legal in a case where a soldier, sentenced to a term of confinement, was allowed, by way of mitigation, a credit of his "guard-house time," (*i. e.* time spent awaiting sentence,) on the condition subsequent of continuous good conduct to the end of his term.

**GROUNDS OF PARDON OR MITIGATION.** The subject may well be illustrated by noting here some of the principal grounds upon which the discre-

[36] Or a public reprimand to a private. G. O. 31, Dept. of the East, 1868. So, a sentence of imprisonment for three years in a penitentiary has been held to be "mitigable to an imprisonment for two years in a military prison." DIGEST, 131. So, one year in a penitentiary to one year in the Military Prison. G. C. M. O. 37, Dept. of the East, 1893.

[37] See 1 Opins. At. Gen., 327; 4 Id., 434, 447.

[38] See this opinion published as approved by the Secretary of War in G. O. 71 of 1875, and incorporated in par. 1031, Army Regs.

[39] 4 Opins. At. Gen., 444. And see 5 Id., 46. Action which diminished the severity of the sentence as a whole, by mitigating one punishment and increasing another, would, as to the *latter* proceeding, be illegal and inoperative.

tion to "pardon or mitigate" has been, in practice, exercised under the Article. Among these, which are as varied as the circumstances of the different cases tried, are the following:—That the accused had been formally recommended to clemency by members of the court; that his previous general character or conduct had been exemplary; that his record in war or Indian hostilities had been good; that he had received a wound in battle or a certificate of merit; that the war services of his father or family had been distinguished; that he had behaved with gallantry before the enemy since the commission of his offence; that he had been required to take part or had voluntarily taken part in an engagement while under arrest; that he had been held an unreasonable time in arrest or confinement before trial, or while awaiting action on his sentence; that he had already been subjected to a disciplinary punishment by his commander; that he had been punished by the civil authorities for the civil offence involved in his act; that he had never had read to him, or been informed of, the Articles of war; that he had been but a short time in the United States, or had but an imperfect knowledge of the English language; that he was a recruit or unusually young and inexperienced; that he had been required to perform an unreasonable proportion of an onerous duty; that he had been improperly put on duty when under the influence of liquor; that, as a deserter, he had voluntarily returned or surrendered himself; that
728 his offence had been induced in part by the harsh treatment or unjustifiable conduct of a superior, or had been attended by special circumstances of provocation or extenuation to which the court had not given sufficient weight, or—the punishment being mandatory—could not legally allow to affect the sentence; that his health was such that he could not safely undergo the confinement adjudged; that his conduct had been good in confinement; that he had become morally reformed; that a remission of his sentence had been asked for by civil officials or other citizens of high standing; that he had testified fully and honestly as a material witness for the government on another trial. In cases of *officers* the more usual grounds have been that their military record, especially in war, has been distinguished, or their public services valuable; that they have borne a high personal character; that their offences were not apparently actuated by a fraudulent or criminal intent, or wilful and deliberate design; that they had made good to the United States or to individuals the losses occasioned by their misconduct; that they were wholly unable to satisfy a fine imposed by the sentence; that the payment of a forfeiture adjudged would impoverish their families, &c.

These and similar circumstances, while, (unless connected with the merits of the case,) not such as legitimately to affect the judgment of the *court*, may, especially when two or more exist in combination, properly be taken into consideration by the Reviewing Officer in determining how much of the sentence it may be just or expedient to execute.[40]

## VIII. FORMULATING OF ACTION, AND PROMULGATION.

**STATEMENT OF APPROVAL, &c.** It is directed in the Army
729 Regulations, par. 1041, that the reviewing authority "shall state at the

[40] See Chapter XXI—"Principles governing the imposing of discretionary sentences." In a case in G. C. M. O. 103, Hdqrs. of Army, 1885, in which the court had added to its sentence the following—"The court is thus lenient in view of faithful service before and after desertion and the good character of the accused," it was remarked as follows by Gen. Sheridan: "The Lieutenant General is of opinion that the better practice is for a court-martial to award punishment appropriate to the offence established, leaving it to the reviewing authority, in the exercise of his vested powers, to take into consideration previous good character."

end of the proceedings in each case his decision and orders thereon;" but no *form* for the statement of the action of such authority is prescribed in the military code.[41] Usage, however, has indicated a form for the purpose which is in general substantially followed. This form, (given in the Appendix,) consists of an official statement, (with a proper heading, designating the headquarters, &c., place and date,) to the effect that the proceedings, findings and sentence in the case of (naming the accused) are approved or disapproved, in whole or in part; or that the proceedings and findings are approved in whole or in part, and the sentence, punishment or punishments, is or are remitted, commuted, or mitigated, as the case may be; with a direction as to the disposition of the prisoner in case of conviction, designation of place of confinement if imprisonment be adjudged, &c. Where the sentence is one required to be executed at once in connection with the approval, as is usual in a case of a reprimand, the formal administering of the reprimand is added. The statement, (which, where no more cases are to be tried, generally concludes with an order dissolving the court,) is subscribed by the reviewing officer in his official capacity.

Where the sentence is one requiring the action of the President, (or other superior,) the statement, after the formal approval, adds—"and the proceedings are hereby forwarded for the action of the President," &c., or in terms to such effect.

**"ORDER OF SUSPENSION."** Where the action authorized by Art. 111 is resorted to, the statement, after the approval, proceeds to add what is referred to in the Article as the "order of suspension," which is simply a declaration to the effect that the execution of the sentence is suspended until the pleasure of the President shall be known, and that the proceedings are accordingly transmitted to him for his action, under the Article.

**STATEMENT OF CONFIRMATION, &c.** The action of the President, (or superior commander,) as confirming authority, is simply a formal statement to the effect that the sentence in the case is confirmed and will be executed; or that it is disapproved, remitted, or, in a manner specified, commuted or mitigated, as the case may be; the statement being authenticated by the proper
730 official signature. As above remarked, the action, here, of the President may legally be attested by the Secretary of War: it is the present practice, however, for the President to subscribe the same in person.[42]

**ACTION TO BE ATTACHED TO RECORD.** The action of the original reviewing officer is properly written upon a blank page at the end of the record or upon a sheet attached thereto, below or after the sentence, adjournment, or other final proceeding of the court in the case.[43] The action of the President, &c., if any, is properly written below or after that of the original reviewer, or upon a subsequent attached sheet.

**ACCOMPANYING REMARKS.** To the *formal* action or orders thus indicated, the commander or President may, if he thinks proper, add such reflections upon the proceedings or conclusions of the court, the conduct of the prosecution or defence, the make-up of the record, &c., as the facts may warrant. Such comments have the more frequently been resorted to where the finding,

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[41] See Vanderheyden *v.* Young, 11 Johns., 150.

[42] *Ante*—"Action of the President as Confirming Authority: Art. 106."

[43] It is to be noted that the action taken upon the proceedings of *inferior courts* is often less detailed than here described, consisting sometimes in the mere signing, by the regimental, post, &c., commander, of the single word *"Approved,"* written at the foot or in the margin of the record. Usually, however—and more properly—a formula, similar to that employed for the proceedings of general courts, but briefer and simpler, is adopted.

sentence, &c., has been in whole or in part *disapproved:* the same, however, have been not unusual where it has upon the whole been deemed expedient that the proceedings or sentence should be approved. In some instances the remarks have taken the form of emphatic stricture or censure. Thus courts have been severely criticised for acquitting where, in the opinion of the reviewing officer, the testimony called for a conviction;[44] for imposing sen-
731 tences regarded by him as inadequate to the offences found;[45] for findings held by him to be unwarranted by the proof;[46] for errors in admitting or rejecting evidence;[47] for ignorance or neglect inducing grave irregularities in the proceedings or form of the record;[48] for the personal misbehaviour of the members,[49] &c. The conduct not only of the accused[50] but also of the judge advocate, prosecutor, or officer preferring the charges, has also been reflected upon,[51] as well as that of superiors of the accused whose
732 acts, deemed illegal or improper, have been regarded as having induced or aggravated the offences committed,[52] or that of other officers implicated with the accused or otherwise culpable.[53] In rare cases even a subordinate

[44] See G. O. 81 of 1822, Do. 23 of 1824; Do. 4 of 1843; Do. 2 of 1844; Do. 6 of 1858; Do. 250, 385, of 1863; Do. 74, Army of the Potomac, 1862; G. C. M. O. 112, Dept. of the East, 1870.

[45] See G. O. 64, 68, of 1843; Do. 39 of 1845; G. C. M. O. 88 of 1864; Do. 123 of 1865; G. O. 85, Dept. of the Gulf, 1862; Do. 21, Dept. of the Tenn., 1863; Do. 22, Dept. of the Platte, 1867; G. C. M. O. 50, 80, Dept. of the Mo., 1871; Do. 37 Id., 1875. In G. O. 78, Dept. of So. Ca., 1865, the action of the court is commented upon as inconsistent in its adjudging sentences differing very considerably in severity in cases "entirely similar."

[46] See G. O. 81 of 1822; G. C. M. O. 88 of 1864; Do. 123 of 1865.

[47] See G. O. 23 of 1824; Do. 4 of 1843; Do. 1 of 1861; Do. 185, Dept. of the Ohio, 1863; Do. 51, Dept. of the East, 1864; G. C. M. O. 11, Army of the Potomac, 1864.

[48] See G. O. 185, Dept. of the Ohio, 1863; Do. 64, 68, Id., 1864; Do. 29, Northern Dept., 1864; Do. 51, Dept. of the East, 1864; Do. 51, Dept. of the South, 1864; Do. 4, Dept. of N. Mexico, 1864; Do. 29, Twenty-fifth Army Corps, 1865; Do. 25, Dept. of So. Ca., 1866; Do. 45, Dept. of the Cumberland, 1867; Do. 33, Dept. of Arizona, 1871; Do. 28, Id., 1876; G. C. M. O. 8, Dept. of Miss., 1865. In G. O. 64, Dept. of the Ohio, 1864, Gen. Schofield, in ordering that the members and judge advocate of a certain court, (whose neglect and carelessness had been exceptional,) "be and they are hereby reprimanded," adds: "The Asst. Adj. Genl. of the Department is hereby cautioned against putting any officer of this court on any important court-martial duty. Of the entire number of cases tried by this court, at least nine-tenths have been disapproved for fatal irregularities."

[49] In G. C. M. O. 123 of 1865, the Secretary of War, in commenting upon the findings as not in conformity with the evidence, and upon the sentence as inadequate, adds: "The reviewing officer also reports that the members of the court were guilty of conduct prejudicial to good order and military discipline in drinking with the accused at various times, and holding private conversations with his counsel, and of other irregularities,"—and he thereupon proceeds to summarily *dismiss* all the members of the court, as well as the accused, from the service.

[50] In a recent G. C. M. O., Dept. of Dakota, (134 of 1884,) Gen. Terry reflects severely upon an accused officer for taking advantage of the privilege allowed to a person on trial, by assailing and insulting his superior officer both in his cross-examination of the latter as a witness and in his statement to the court.

[51] In reviewing a case in G. O. 86, Dept. of the Mo., 1867, Gen. Hancock remarks, generally:—"There being no evidence shown by the record to sustain any one of the charges or specifications, the case has the appearance of a malicious prosecution to gratify personal resentment. To prefer accusations which cannot be maintained is highly injurious to the service and reflects discredit upon those who prefer them; and if upon trial the charges are found to be groundless, the officer preferring them should be held accountable, and be tried himself for preferring malicious charges." And see G. O. 42 of 1851; Do. 239 of 1864; Do. 47, Dept. of the Cumberland, 1867.

[52] See G. O. 62 of 1863; Do. 22, Dept. of Dakota, 1868; Do. 25, Id., 1873; G. C. M. O. 5, 38, Dept. of Texas, 1873; Do. 43, Id., 1875.

[53] G. O. 39, 41, 46, of 1835. And see Lieut. Jno. Mahon's Case. Simmons § 61.

commander who has acted upon the proceedings has been censured.[54] Observations, suggested by the evidence, upon matters affecting discipline or other interest of the service, have sometimes also been promulgated.[55]

In this connection, it may be said that where the subject of the unfavorable criticism is an error capable of being corrected by the return of the proceedings to the court for the purpose, it is but just that this course should first be pursued. Further, the reviewing authority, if he deems it his duty to indulge in reflections such as above instanced, should in general, where practicable, confine himself to comments upon *facts*, and, rather than resort to direct strictures upon individuals, should prefer or cause to be preferred against them formal charges. Such strictures, however, are in some cases quite legitimate, and cannot be avoided: in such cases if the party reflected upon demands a trial by court-martial for the misconduct imputed, his application cannot in general fairly be denied.

733 **ORDER OF PROMULGATION.** This is the formal written or printed General, (or Special,) Order, in and by which, by the invariable usage of the service, the final reviewing authority publicly announces his action, (and that of a previous reviewing officer, if any,) upon the proceedings of the court in a case tried. It consists simply of a re-statement of such action, (with the accompanying remarks, if any,) as originally written and subscribed in or upon the record as above indicated, preceded by the details proper and sufficient to identify the particular case, *viz.* a designation of the court, and a recital of the charges and specifications,[56] the pleas, (including special pleas,) the findings, and the sentence in case of conviction; the whole being headed by the name of the Headquarters from which issued, the date of issue, (which should preferably be identical with that of the original action,[57]) and the number of the Order in the current series. Where the record has been returned to the court for correction, this fact, together with the procedure upon the revision, is sometimes set forth, but such mention is in general neither necessary nor desirable.

The Order is mainly useful—1st, as a publication to the Army of the result of the trial, and of the opinion of the commanding general, and, (where his action is required,) that of the President, upon the proceedings; 2d, as forming a permanent and convenient memorandum of the more material particulars of the case, for general reference and use in evidence, or for exhibiting *previous convictions;* 3d, as constituting actual or presumptive *legal notice* to the accused of the operative sentence or other conclusion of the court, and of the approval, disapproval, remission or mitigation by the reviewing authority.

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[54] In G. O. 25, Dept. of So. Ca., 1886, Gen. Sickles, in remarking upon fatal errors appearing in a considerable number of cases, censures the original reviewing officer—a District commander—for repeatedly permitting records containing errors to pass through his hands, without having them returned for correction to the court, and thereupon proceeds to revoke an existing order by which the District command had been designated as a "separate brigade,"—thus divesting the commander of the power to convene general courts.

[55] See cases in James, 500, 501, 694, 831, 832. And see unfavorable comments on the course of official business, in Gen. Talcott's case, G. O. 36 of 1851. In G. O. 43, Dept. of Cal., 1867, Gen. McDowell, in observing that several soldiers belonging to the same command, in pleading guilty to the charge of desertion, "allege, as the reason for committing it, that the comfort of the soldier is neglected, that the food is insufficient, that an undue proportion of the ration is sold for the purpose of forming a company fund, and that reports that the rations were made away with were not attended to,"—orders that the District commander "will immediately investigate the matters contained in these allegations, and will report the result to these Headquarters."

[56] The specifications are sometimes omitted, but should always preferably be inserted except where they are too numerous or extended, or set forth grossly indecent language or matter otherwise improper to be published.

[57] That the dates should be the same is now directed in par. 1026, A. R.

As already observed, upon the subject of the execution of punishments, the day upon which the order promulgating the approved sentence is published to the command, or served upon and made known to the accused in person,[58]
734 is that on and from which a sentence of dismissal, disqualification, suspension, loss of files, or reduction, in general takes effect, and the rights of the party to pay, rank, &c., are divested or affected. 4th. It is to be added that in cases in which imprisonment is adjudged, the date of the Order of promulgation fixes, as heretofore noticed,[59] the date at and from which the term of the imprisonment begins to be executed in law.

The Order, however, though thus important, is not essential to the execution of the sentence or otherwise, and may be wholly dispensed with.[60] This for the reason that the same is not an original proceeding and contains no original matter, its details being merely *copies* of the original particulars contained in the record and of the action taken upon the case. Not being original it is not signed as such; the signature of an assistant adjutant general or other staff officer, sometimes appended to it, being simply for the purpose of *authenticating* it as a true copy.

As a form merely of publication, the Order, if found to contain an error or errors, may be withdrawn or cancelled and a new and correct form substituted, or it may be amended by a supplementary Order specifying and rectifying the mistake.

**SPECIAL ACTION IN CASE OF ACQUITTAL.** In such a case, if there is likely to be any material delay in the issuing of the Order promulgating the proceedings, the commander properly may, and in practice not unfrequently does, direct that the accused be forthwith released from arrest and restored to duty. In the absence of such anticipatory action, an officer or soldier fully exculpated on his trial might be held in undeserved restraint, and subjected to unnecessary suffering or humiliation, for a considerable period, while awaiting the publication of the formal Order.[61]

## IX. DISPOSITION OF RECORDS.

735 **TRANSMITTAL OF RECORDS OF GENERAL COURTS.** Par. 985 of the Army Regulations directs that—"the original proceedings of all general courts-martial," &c., "which require the confirmation of the President, but which have not been appointed by him, will be forwarded to the Judge Advocate General," and that "the proceedings of all courts appointed by the President will be sent direct to the Secretary of War." The last duty of the military reviewing officer, after fully acting upon the proceedings of a general court, thus is to forward the record with reasonable promptitude to Washington, as here directed. The transmittal is by mail or express: in cases of unusual public importance the records have sometimes been conveyed by the judge advocate of the court or other officer detailed for the purpose. A copy of the order of promulgation, if any, is properly transmitted with the record.

[58] Not only where the accused is sick, a prisoner, &c., and cannot be present at the publication of the Order to the command, but in *all* cases, a copy of the Order should be furnished to him personally.

[59] Chapter XX—"Imprisonment."

[60] In any event—whether or whenever the proceedings are formally promulgated—the accused should be notified of the result as promptly as is reasonably practicable. Note remarks of Samuel Warren, (Letter to the Queen on a late Court-Martial, p. 254–5,) on the cruelty of keeping an accused long in ignorance of the result of his trial.

[61] In an Act of the Confederate States Congress, of June 14, 1864, relating to the proceedings of military courts, it is provided that, in cases of acquittals, "*the findings of the court shall be announced immediately, and the person so tried and acquitted, if a soldier, shall be released from arrest and returned to duty; and if other than a soldier, discharged from custody, without awaiting the examination or report of the reviewing officer.*"

# CHAPTER XXII.

## INFERIOR COURTS-MARTIAL, AND MILITARY BOARDS.

### INFERIOR COURTS-MARTIAL.

736 THERE are known to our law three species of Inferior Courts-Martial, which will be considered in this Chapter under the titles respectively of—

I. Regimental and Garrison Courts-Martial.
II. The Field Officer's Court.
III. The Summary Court.

#### I. REGIMENTAL AND GARRISON COURTS-MARTIAL.

**THE LAW ON THE SUBJECT.** Courts for inferior commands have been authorized by our military codes from the beginning. The substance of the earlier Articles still remains; the variations which the law has undergone will be noticed as we proceed. The *existing* statutory law relating to the courts under this Title, and to the taking of action upon their sentences, is contained in Arts. 81 to 83, Art. 84, Art. 104, Art. 109, and Art, 112—as follows:

"ART. 81. *Every officer commanding a regiment or corps shall, subject to the provision of article eighty, be competent to appoint, for his own regiment or corps, courts-martial, consisting of three officers, to try offences not capital.*

"ART. 82. *Every officer commanding a garrison, fort, or other place, where the troops consist of different corps, shall, subject to the provisions of article eighty, be competent to appoint, for such garrison or other place, courts-martial, consisting of three officers, to try offences not capital.*

"ART. 83. *Regimental and garrison courts-martial, and field officers, detailed to try offenders, shall not have power to try capital cases or commissioned*
737 *officers, or to inflict a fine exceeding one month's pay, or to imprison or put to hard labor any non-commissioned officer or soldier for a longer time than one month.*[1]

"ART. 84. *The oath administered to the members of a general court-martial 'shall also be taken by all members of regimental and garrison courts-martial.'* * * *

"ART. 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.*

"ART. 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.* * * *

"ART. 112. * * * *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.*"

[1] The *naval* courts-martial are but two—the "General" and "Summary."
As to the British courts-martial, other than General, *viz.*, the District, Regimental, Field General, and Summary—see Army Act, s. 47, 48, 49, 55.

The province and function of a Regimental Court, when acting not as a court but in quite a distinct capacity under the provisions of Art. 30, will be separately considered in Chapter XXV.

The law of Regimental and Garrison Courts-Martial, as now established, will be presented under the following heads: 1. Constitution; 2. Composition; 3. Jurisdiction; 4. Power of Punishment; 5. Procedure; 6. Action upon the Proceedings; 7. Disposition of Records.

**CONSTITUTION.** Arts. 81 and 82 authorize the convening of inferior courts by three sorts of commanding officers:—Commanders of Regiments; Commanders of "Corps;" and Commanders of garrisons, forts, or other places, "where the troops consist of different corps." The courts convened under Art. 81 are commonly distinguished as "Regimental," and those convened under Art. 82 as "Garrison" courts: regimental courts proper, however, are those ordered by the first-named commanders only.

**Commanders of regiments.** The "officer commanding a regiment," referred to in Art. 81, is the colonel, or other officer in command of the same
738 whatever be his rank. But he must be in the actual command of the regiment *as such*, and competent to issue orders to it as a body. The command must subsist as a regimental organization; if companies are detached so that no officer properly commands it as a regiment, a *regimental* court cannot legally be ordered in or for it under Art. 81.

**Commanders of corps.** The term "corps" may have different significations in different connections. As employed in Art. 81, it is deemed to signify a separate integral portion of the army, (other than a regiment,[2]) "organized by law with a head and members." It must be complete within and of itself, not a body made up of detachments from different commands temporarily acting together.[3] Further, it must contain not only a force of soldiers enlisted for or incorporated in it, but also officers commissioned in or for it as such who may compose the court contemplated by the Article. The Corps of Engineers, (including the engineer battalion,) as organized under Secs. 1094 and 1151, Rev. Sts., completely answers this description, and the Chief of Engineers is authorized to convene a court as a commander of a "corps" in the sense of the Article. The same has been held in regard to the Chief of Ordnance, in view of his separate command of officers and enlisted men authorized and organized under Secs. 1094, 1159 and 1162, Rev. Sts. So, the Signal Corps, as constituted, under existing law, of both officers and enlisted men under the command of the Chief Signal Officer, is properly such a corps as here contemplated. On the other hand, the Corps of Cadets of the Military Academy is not regarded as a "corps" within the meaning of Art. 81, because it comprises no commissioned officers of the army and thus no material out of which the commandant could compose a court for it as a "corps." The Superintendent of course, as commander of the post of West Point, where the force always consists of "different corps" in the sense of Art. 82, may convene *garrison* courts for the trial as well of cadets as of the enlisted men of the army on duty at the post.

739 "Corps" courts, as such, even when clearly authorized, are rarely resorted to in our practice; general courts, or—where legally convenable—garrison courts, being commonly employed instead.

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[2] The Article distinguishes it in terms from a regiment. So it may be regarded as distinglished from any component of a regiment or multiple of regiments—as a company or a brigade.

[3] See Scott's Military Dictionary—"Corps."

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**Commanders of Garrisons, &c.** While Art. 81 authorizes courts for commands consisting of a single element, *i. e.* comprising only officers and men of one and the same organization, Art. 82 provides for the assembling of courts in commands of a *composite* character. The one Article is thus the complement of the other.

**Construction of Art. 82—"Where the troops consist of different corps."** The first point to be noticed in construing this Article is that the term of description—"where the troops consist of different corps," is, according to the weight of authority, to be understood as general, *viz.* as applying not merely to the words "other place," but also to the words "garrison" and "fort."

The original British article relating to inferior courts for mixed commands would seem to have distinguished between commanders of "districts, garrisons, forts, castles, or barracks," *as such*, as one class, and commanders of "towns or places where the force was made up of detachments," as a separate class.[4] The context and punctuation, however, of our own earliest Articles of 1775 and 1776, favor the view that the limitation—"where the troops consist of different corps" was intended to apply alike to all the commands previously specified;[5] and though this punctuation was modified—by the dropping of the comma before "where"—in the Articles of 1786 and 1806, it has been revived in the code of 1874. Moreover, that the limitation was a *general* one was clearly the construction of Major General Scott in the General Order presently to be cited,[6] and was evidently also that of O'Brien:[7] further, it was expressly ruled to the same effect by Judge Advocate General Holt,[8] and this view is now uniformly acted upon in practice. If it be objected that
740 this interpretation would preclude from convening a court-martial the commander of a garrison whose force was wholly made up from a single corps or arm of the service, it may be answered that it can scarcely happen that a properly constituted garrison command will be so entirely simple; one or two representatives at least of some corps other than that composing the body of the command being almost invariably present with it.[9]

**Meaning of "other place."** As to the term "other place," this, it is to be observed, is a designation of the most comprehensive character, including any camp, post, barracks, bivouac, rendezvous, hospital, arsenal, transport, or other situation or locality whatever at which there may be stationed, or may temporarily remain, a command of the nature contemplated by the Article.

**Meaning of "different corps."** In the original article of 1775 the language employed was: "where the troops under his command consist of detachments from different regiments or of independent companies." The term "*different* corps" would thus appear to have reference primarily to detachments from different arms or branches of the military force serving together—as infantry and cavalry, artillery and engineers, &c. By the construction, however, already indicated as announced from Army Headquarters in 1843, a significance was attributed to the description, "where the troops consist of different corps," which considerably enlarged their purport and application. This was, that, to fix upon the command the character of one consisting of "different corps," and to authorize its commander to convene a garrison court, it is sufficient that there should be on duty with the command, as a part of it, a *single* representa-

[4] See Samuel, 622.

[5] And the same is to be inferred from the British article of 1765 from which our own was immediately derived. See Appendix.

[6] G. O. 5 of 1843, cited *post*.

[7] Page 288.

[8] See G. O. 13, Fourth Mil. Dist., 1867, cited *post*.

[9] See *post*—"Meaning of 'different corps.'"

tive only—officer or enlisted man—of some arm or component of the military establishment other than that one of which the command, with this
741 exception, is made up.[10] Thus, if the body of the command consists of a regiment of infantry, it will be sufficient for the purpose indicated if there be stationed or serving with it a single officer or enlisted man of a cavalry or artillery regiment, or of any branch of the staff of the army, as, for example, a medical officer or hospital steward, officer or non-commissioned officer of the quartermaster or subsistence department, chaplain, &c.[11]

**Rank of the commander, in general.** As observed of the commander of the "regiment" or "corps" specified in Art. 81, it is not necessary that the commander of the "garrison, fort, or other place," should be of the degree of a *field officer*. To empower and enable him to assemble the court he need only be a *line* officer, with *four* officers under him eligible to serve as members and judge advocate.

**The commander as accuser, &c.** Inasmuch as the provision of Art. 72, in regard to the contingency of the convening commander being "accuser or prosecutor," does not apply to inferior courts or cases of enlisted men, the commander of a regiment, garrison, &c., is authorized to convene a court-martial under Art. 81 or 82, although he may be the actual accuser or prosecutor of the party, or a party, to be tried. It is of course desirable that the officer constituting the court should not be the person from whom the charges emanate or who is the prosecuting witness in the case; but the requirements of discipline may sometimes necessitate that the two characters be united where the command is a small one or the exigencies of war enjoin immediate action.

**Form of convening order.** Until recently no judge advocate was de-
742 tailed with regimental or garrison courts, but the junior member acted as *recorder*.[12] *Now*, in view of the comprehensive provision of Art. 74 of the present code, a judge advocate may be, and in practice is, appointed in the convening order precisely as in an order convening a *general* court.[13]

In view of the injunction, applicable to both species of courts, of Art. 94, the commander may properly convey in the order a specific authority to "sit without regard to hours;" occasion for adding this, however, is much less frequently presented than in orders convening general courts.

In time of *war*, in view of the provisions of Art. 80, a statement is sometimes appended in an order detailing a regimental or garrison court to the effect that the same is resorted to for the reason that it is impracticable to convene a field officers' court. Such statement, however, is not an essential; and, where not employed, the law would presume from the face of the order that the court was authorized and legal.

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[10] This construction, as expressed by General Scott in G. O. 5 of 1843, was as follows:—"In order that the practice throughout the army, under the second sentence of the 66th Article of war, 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 offences committed at the same."

[11] O'Brien, 288; Coppee, 41. In G. O. 13, Fourth Mil. Dist., 1867, Gen. Ord. states the law as follows:—"At posts where, in addition to the troops forming the chief part of the garrison, there is on duty an officer or enlisted man of the Ordnance, Medical or any other Corps, as a hospital steward or ordnance sergeant, the Commanding Officer can, if a sufficient number of officers are present, constitute a Garrison Court-Martial and act on the proceedings in accordance with the 66th and 89th" (now 82d, 109th and 112th) "Articles of War."

[12] O'Brien, 289; De Hart, 129; Macomb, 86; G. O. 49 of 1871.

[13] G. O. 15 of 1880, incorporated in general terms in par. 1007, Army Regs.

**COMPOSITION**—"Of three officers." By the codes of 1775 and 1776 it was directed that regimental, &c., courts should consist of not less than five members where that number could be conveniently assembled, otherwise of three. The present Arts. 81 and 82 provide that such courts shall consist "of three officers." *Officers* is of course identical with *commissioned* officers,[14] and—subject to the provision of Art. 78[15]—means of course officers of the *army*.

**Detailing of himself by the commander.** Of the three members of the court, the commander is not authorized to detail himself as one. A prohibition substantially to this effect—that the commander should not act as a member—was indeed contained in the earliest Articles:[16] that the same is not
743 repeated in the later codes is doubtless owing to the fact that the principle that the officer who constitutes the court and executes the sentence should not also assume to act as judge upon the trial is too firmly established to require to be reasserted in terms. Thus if, beside the commander, there are not present in the command three other officers available for detail as members, (together with one eligible as judge advocate,) no court can be convened. The commander must wait until he is supplied with the requisite number of officers, or the case be referred for trial to a general court.

**Rank of the detail.** As to the rank of the members, it is to be said that the same is not regulated by any statute. It is indeed recommended by some authorities[17] that the detail consist in general of a captain and two subalterns: in the smaller commands however the court must often be composed of three lieutenants.

**JURISDICTION—Prohibitions as to exercise of.** Articles 81–83 expressly preclude regimental and garrison courts-martial from taking cognizance of *capital* offences or offences of *commissioned officers*.[18] They may therefore legally take cognizance of the offences, other than capital, not only of all soldiers, but of all non-commissioned officers belonging to regiments, or to corps in the sense of Art. 81, or forming part of garrisons, &c., as defined in Art. 82. Any Orders or Regulations,[19] which prohibit the trial by inferior courts of any such non-commissioned officers or other enlisted men, except by the "special permission" of department or other commanders, operate as a restraint upon the statutory jurisdiction of these courts, and are so far unauthorized, as encroaching upon the province of legislation.

A capital offence, as has been remarked in a previous Chapter,[20] is not only one expressly required to be visited with the death penalty, but one
744 *punishable* with death at the discretion of the court. An inferior court, therefore, cannot legally assume jurisdiction of any of the offences, however slight they may be, which are specified in Arts. 21 to 23, 39, 41 to 46 and 56, because the same are therein made punishable "by death or such other

[14] Sec. 1342, Rev. Sts. That the members may also have military *rank*, and that professors (and cadets) of the Military Academy are not competent to act as members of the inferior courts, see 1 Opins. At. Gen., 469; 2 Id., 251; 6 Id., 328, 330; also Chapter VII, *ante*, on the Composition of General Courts.

[15] See Chapter VII, *ante*, "Regulars and Marines associated."

[16] It occurs in the Articles of 1775 and 1776, in the Massachusetts Articles of 1775, and in the British Articles of 1765 from which they are derived. See Appendix.

[17] Adye, 92; Tytler, 177; Macomb, 85.

[18] In the code of 1775 *officers* were expressly made subject to the jurisdiction of a regimental court, by Arts. XVII, XIX, XXIII and XXIV, and by Additional Article 16. See Appendix.

[19] As G. O. 36, 38, 92, of 1890; Do. 29 of 1891; Do. 67 of 1893, amending pars. 105, 232, 254, 1563, A. R.

[20] Chapter XVIII—"Testimony by Deposition;" Chapter XX—"Death."

punishment as a court-martial may direct."[21] But an offence made punishable simply "as a court-martial may direct" is not a capital offence for the reason that, by Art. 96, the punishment of death cannot legally be imposed unless expressly designated as an authorized penalty: such an offence is therefore not within the prohibition.

There may be distinguished a *third* class of offences which, though not capital, are not triable by inferior courts. These are the civil crimes which, when committed by soldiers in *time of war*, are, by Art. 58, made exclusively punishable by "*general* court-martial."

**Jurisdiction of the different inferior courts distinguished.** It is further to be noted that a "*regimental*" court may adjudicate only the cases of soldiers of the specific regiment or corps, the 81st Article authorizing the commander to appoint courts for his own regiment or corps alone:[22] a *garrison* court, on the other hand, may try enlisted men belonging to any one of the detachments or contingents of which the command is made up.

**Extent of jurisdiction in general—Cognizance of grave offences.** Except as thus limited by the Articles, the jurisdiction of the inferior courts is coextensive as to all offences and offenders with that of the superior court-martial. In other words, a regimental or garrison court is *legally authorized* to take cognizance of all military offences of soldiers, *however grave*, provided the same are not made punishable capitally, or exclusively by a general court. But while inferior courts are thus empowered to pass upon many cases of serious offences, their authority to *punish* is so inadequate to the proper disposition of such cases in the event of conviction that they should not be
745 called upon to try them if it can be avoided, but the same should be reserved for the action of general courts.[23] Thus a case of larceny from a fellow soldier or officer should properly be referred to the higher court. And so of aggravated instances of drunkenness on duty, of absence without leave, or of other breach of military discipline.[24] But where a case of more than ordinary gravity has, by competent authority, been duly referred for trial to an inferior court, it cannot decline to proceed with the trial on the mere ground that its power of punishment is not considered adequate to the offence charged. Where indeed the offence as developed by the testimony turns out to have been a considerably more serious one than the commander could probably have anticipated, the court may well suspend proceedings and report the facts to him, with the suggestion whether, in the interests of discipline, the case might not preferably be disposed of by a general court.[25]

**As affected by Arts. 102 and 103.** It has been noted in a previous Chapter[26] that the provision of Art. 102, that "no person shall be tried a second time for the same offence," is of general application, and precludes inferior equally with general courts from taking cognizance of cases once duly tried.

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[21] Macomb, 86; De Hart, 62, 63; Benét, 41, 42; DIGEST, 94–5; G. O. 17 of 1852; Do. 21 of 1858; Do. 18 of 1859; Do. 9, Dept. of Utah, 1858. In Capt. Howe's Case, (G. O. 10 of 1857,) the attempting to compel a garrison court to assume jurisdiction of a violation of the 21st (then 9th) Article was treated as a military offence, the officer being specifically charged with and convicted of the same.

[22] See Maltby, 19.

[23] By the original articles of 1775 and 1776, the regimental, &c., courts were in terms declared to be instituted for the trial and punishment of "small offences."

[24] It need hardly be added that *desertion*, though legally cognizable by an inferior court in time of *peace*, (not being then a capital offence,) could only adequately be punished, and therefore properly passed upon, by a general court.

[25] See O'Brien, 289.

[26] Chapter XVI—"Plea of Former Trial."

On the other hand it has been remarked that the jurisdiction of inferior courts is not restrained by the limitation of Art. 103, this being confined in terms to "general" courts. But designed as the inferior courts especially are for a summary administration of justice, it will be of the rarest occurrence that so long a period as two years will have elapsed before a case suitable for trial by one of these tribunals is brought before it.

**POWER OF PUNISHMENT.** Art. 83 declares that inferior courts "*shall not have power * * * to inflict a fine exceeding one month's pay, or*
746 *to imprison or put to hard labor any non-commissioned officer or soldier for a longer time than one month.*"[27]

"*Fine*," here, measured as it is by the month's pay of the soldier, has practically the same meaning as forfeiture. A fine, in the sense in which the word is employed in the civil procedure, is rarely if ever adjudged by a regimental or garrison court; the pecuniary mulct imposed under this provision of the Article being almost invariably a forfeiture of a month's pay, or of a certain number of dollars of pay of a lesser amount.

The limit of the so-called "fine" or forfeiture, being thus fixed, cannot of course legally be exceeded.[28] Where the sentence, in the event of a conviction, will probably include a forfeiture of a larger amount than a month's pay, as where the accused is charged with the loss or destruction of public property of a greater value, the case should properly be referred for trial to a general court.[29]

Care should especially be taken, in imposing forfeiture *with reduction*, not to make the forfeiture too great in view of the pay of the rank to which it is to apply. Thus a sentence, adjudged a sergeant, to be reduced and forfeit fifteen dollars monthly pay, was declared illegal for the reason that the pay forfeited, which—it was held—must be private's pay, was in excess of the monthly pay of that grade.[30]

Should the accused be entitled to any monthly *pecuniary* allowance
747 in addition to pay, to sentence him to forfeit his *pay and allowances* for a month would be an exceeding of the power of punishment accorded by the Article, and therefore illegal.

Imprisonment and hard labor. In regard to these further specified punishments, (which, as has already been remarked, are quite distinct,) it need only be repeated that the court should clearly observe the limitation as to quantity prescribed by the Article. Thus where a sentence, "to be confined till the expiration of his term of service," was adjudged by an inferior court in a case in which it did not appear from the evidence or otherwise that the term of the soldier would certainly expire within a month from its approval, it was held by the Judge Advocate General that the sentence should be disapproved unless corrected upon a reassembling of the court.

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[27] That "month," where used in the Articles, means *calendar*, (not lunar,) month—see Chapter XX, *ante*.

It may be noted that, by the Act of Oct. 1, 1890, c. 1259, s. 1, the President is "authorized to prescribe specific penalties for such minor offences as are now brought before garrison and regimental courts-martial;" but this authority has not as yet (1894) been exercised.

[28] As to the "*retained pay*" that may be included in a forfeiture imposed by an inferior court, it is declared in Circ., No. 10, (H. A.,) 1893, as follows—"Under the 83d Article of War an inferior court-martial has power to award a sentence forfeiting a specific amount of money equal to the soldier's pay, including retained pay, for one month; but when the sentence recites a forfeiture of pay for one month (or, in a trial by general court-martial, of pay for several months), without a specification of a fixed amount, or without expressly including the retsined pay, it will be held that the retained pay is not forfeited."

[29] See De Hart, 60.

[30] Circ. No. 3, (H. A.,) 1886.

The imprisonment here authorized is commonly executed by confinement in the guard-house. "Hard labor," as a distinct penalty, is now rarely adjudged by inferior courts, being mostly reserved for cases of persons sentenced by general courts to confinement in a military prison.

**The measure of punishment in general.** While a soldier may be sentenced by an inferior court *both* to forfeit a month's pay *and* be confined (or put to hard labor) for a month, the measure of punishment imposed *at one trial* cannot legally exceed that prescribed by Art. 83, however many or grave may be the offences charged and of which the accused is convicted. Upon different trials, however, by the same court or different courts, and by different sentences thereby adjudged, a soldier may legally be subjected to forfeitures and confinements of which the total shall considerably exceed the month's limit.[31]

Up to a recent period it had uniformly been held that an exceeding by an inferior court of the scope of the power of punishment to which it was limited by the statute could not be made good by any action of a reviewing commander. But, in Circular No. 12 of October 6, 1892, it is announced as a decision of the Acting Secretary of War, as follows—"When a sentence of confinement or forfeiture is in excess of the legal limit, that part of it which is within the limit is legal, and may be approved and carried into execution." The practice has been modified accordingly.

748 **The provision as to punishments not exclusive.** The Article, in specifying that inferior courts shall inflict only a certain quantity of three designated punishments, does not necessarily exclude, and is not in practice construed as excluding, such courts from imposing other punishments suitable for enlisted men. Thus *reduction to the ranks* may be and often is adjudged by these courts to non-commissioned officers, either as the sole penalty or in addition to one or more of the penalties named in the Article. Where indeed imprisonment or hard labor is awarded to a non-commissioned officer, reduction is generally and properly imposed with it, it being deemed prejudicial to discipline that an enlisted man should be subjected to a degrading punishment while still holding the office and wearing the chevrons of a sergeant or corporal. But *dishonorable discharge*, (in view of the provisions of Art. 4,) can be imposed only by a general court.

Solitary confinement, or confinement on bread and water diet,[32] may also, (subject to the limitation of Art. 83, as to time,) legally be, and sometimes, though not often, is adjudged by inferior courts. These courts have in some cases also, for petty offences, imposed such corporal punishments as carrying logs, marching with a loaded knapsack, &c., but this class of punishments, not being recognized in par. 1019 of the Army Regulations, has become in great measure disused, at least for time of peace.[33] A sentence "to be drummed out of the service,"—an ignominious form of discharge,—if imposed by an inferior court, would be illegal,[34] general courts only being authorized, (by Art. 4,) to discharge soldiers by sentence.

**PROCEDURE.** The procedure of a regimental or garrison court is in most respects substantially identical with that of a general court-martial.[35] The majority of the Articles of war which relate to the conduct of a military trial refer in terms to "courts-martial" without distinction, and are thus applicable to the inferior equally as to the superior courts. Such, for example, are Art.

[31] See G. O. 18 of 1859.
[32] See par. 1021, A. R.
[33] See Chapter XX—"Restrictions by military usage."
[34] G. O. 33, Dept. of the Mo., 1861.
[35] See O'Brien, 289; Coppée, 40.

84, prescribing the oath to be taken by the members; Art. 86, providing
749 for the punishment of contempts; Art. 88, recognizing the right of challenge; Art. 91, relating to the use in evidence of depositions; Art. 93, authorizing the granting by the court of continuances; Art. 94, fixing the hours of session; Art. 95, directing as to the order of voting by the members. As to matters not regulated by statute, the rules of the procedure and practice of general courts, as fixed by the common law of the service, are ordinarily applicable to, and to be followed by, inferior courts. Thus it is the duty of the senior member of the court to preside, preserve order, &c.; the action or judgment of the court is determined by the vote of the majority;[36] the function and authority of the judge advocate are as set forth in the Chapter treating of that official; the rights of the accused are similar to those heretofore indicated as customarily accorded him. So, the record of a regimental or garrison court is made up and authenticated in substantially the same manner and form as that of a general court,[37] and, when completed, is transmitted to the convening authority.[38] Such distinction indeed as exists between the procedure of the inferior and that of the superior court consists mainly in the fact that the former is in general simpler and more summary than the latter.

**ACTION UPON THE PROCEEDINGS**—In general. Art. 66 of the code of 1806, following in substance the earlier forms, provided that the officers convening regimental and garrison courts should "decide upon their sentences." A similar provision is not embraced in the present Arts. 81 and 82, but in Art. 104 it is declared—generally—that "no sentence of a court-martial shall be carried into execution" until the approval of the same by "the officer ordering the court," (or "the officer commanding for the time being;"[39]) and in Art. 109—also generally—that "all sentences of a court-martial may be confirmed and carried into execution" by such officer, &c. The pro-
750 ceedings and sentences, therefore, of the courts authorized by Arts. 81 and 82 are to be reviewed and acted upon by the commanders indicated therein respectively. The principles set forth in Chapter XXI, as governing the subject of the authority, discretion, and duty of the Reviewing Officer, will apply in general to the action of these commanders.

**Form of action.** Par. 1041 of the Army Regulations, referring to courts-martial in general, declares that the reviewing officer "shall state at the end of the proceedings in each case his decision and orders therein."[40] The form of this action, as subscribed in or upon the proceedings of an inferior court, is substantially the same as that adopted in expressing the action taken upon a case tried by a general court, only that it is usually briefer and simpler. Some commanders, in approving the sentence, content themselves with writing and subscribing the single word "Approved," at the end of the record—a form, however, not generally advisable.

**Power to return proceedings for correction.** As in the instance of a case tried by a general court-martial, the convening authority, (or his successor

[36] In the original Article of 1775 and 1776, it is declared in express terms that regimental courts "shall give judgment," and "determine upon the sentence, by the majority of voices."

[37] Par. 1037 Army Regs., being expressed in general terms, governs as to the form of authentication of both kinds of courts. The statement sometimes made, (see Coppée, 42,) that the members *all* sign, is not correct.

[38] According to the general rule laid down in par. 1041, A. R.

[39] As to the meaning of this term, and the construction, generally, of Arts. 104 and 109, see Chapter XXI.

[40] In Lt. Col. Robertson's case, one of the offences with which the accused was charged, and of which he was convicted, was—"permitting sentences of regimental courts to be carried into execution, without affixing his approval to the proceedings of the same." James, 828; Simmons § 720, note.

in command,) is empowered to return the proceedings to the court, (reassembling it if necessary,) for revision and the correction of errors.[41]

**Power of pardon and mitigation.** Art. 112, in empowering officers authorized to act upon the sentences of *general* courts to remit, &c., the same, adds:—"*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.*" What has been said, therefore, in regard to the nature and extent of this power in Chapter XXI will in general apply here. It may be repeated that, in the opinion of the author,

751 power is given by this Article, not only for the pardon or mitigation of a punishment or punishments by the officer in command at the time of and in connection with the original action and approval, but also for the pardon or remission of the same by such officer or his successor, at any time thereafter before the sentence is fully executed. The beneficial nature of the provision justifies a liberal construction, and the practice has sustained this interpretation.

**Promulgation.** The proceedings, in our practice, are published by the commanding officer of the regiment, garrison, &c., to the command, in a regimental or post, &c., general order, the form of which follows in substance that of the General Order by which the proceedings of the superior courts are commonly promulgated.

**Action not subject to supervision.** Arts. 109 and 112 vest, as has been seen, in regimental and garrison commanders the power to confirm and execute, as well as pardon or mitigate, the sentences of the courts ordered by them under Arts. 81 and 82. Upon a familiar principle of interpretation this power is to be regarded as *exclusive:* no superior authority, therefore, can legally reverse or revise their action. The Army Regulations, indeed, of 1863, contained two paragraphs, (numbered 898 and 899,) which declared that such commanders should transmit the proceedings of these courts to the department headquarters "for the supervision of the department commander," and, again, that the latter might in certain cases "suspend" the execution of the sentence. Par. 899, however, which contained the latter provision, was held by Judge Advocate General Holt to be void and inoperative because in conflict with the Articles of war, and this opinion was concurred in by the Secretary of War.[42] In the later authorized editions of the Regulations, those of 1881 and 1889, not only was par. 899, but also par. 898 of 1863, wholly omitted; the last apparently as being subject to the same legal objection as the other. In the opinion of the author, the latter regulation was as properly required to be omitted as the former. An army regulation is inferior in force to an Act of Congress, and such an Act having vested in regimental, &c., commanders the exclusive power

752 to finally act upon and fully execute the sentences of inferior courts, their action cannot, by an army regulation, be made subject to the revision of superior or other authority. Par. 898 of 1863 was thus an illegal assumption and of no effect, and has properly been abandoned. Thus, at military law, the action of the commanders authorized to pass upon the proceedings and sentences of the inferior courts is as exclusive and final as is the action of the class of commanders authorized to pass upon the proceedings and sentences of general courts-martial.

**DISPOSITION OF RECORDS.** Par. 1041 of the Army Regulations declares, generally, that—"the judge advocate shall transmit the proceedings

[41] Par. 1043, Army Regs., is expressed in general terms, thus embracing *all* courts-martial. See this subject as treated in Chapter XXI.

[42] In G. O. 72 of 1873.

without delay to the officer having authority to confirm the sentence." A provision of the Act of March 3, 1877, directs that all records of inferior courts 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.*" This provision was enacted in view of the fact that the Bureau of Military Justice had become gradually burthened with a vast mass of such records, the accumulation of which it was desirable to discontinue. Under this Act, regimental and garrison commanders, after having finally acted upon the proceedings and sentences of the courts ordered by them, transmit the records to department headquarters to be disposed of as prescribed.

## II. The Field Officer's Court.

**ITS NATURE IN GENERAL.** This is a distinct species of tribunal from the Regimental or Garrison Court, differing from the latter mainly in that (1) it is authorized only for time of war, (when it takes the place of the regimental or garrison court whenever it can practicably be convened:) (2) that its sentences are not ordinarily executed by the simple order of the convening officer, but may require, to give them effect, the approval of a higher commander. As will be seen, however, it is assimilated to the Regimental Court authorized by Art. 81, being itself a simple form of regimental court provided for periods when a summary disposition of cases of minor offenders is especially called for.[48]

753 **THE LAW ON THE SUBJECT.** This special agency for the administration of military justice was inaugurated during the late war by the Act of July 17, 1862, c. 201, s. 7. The provisions of this statute were incorporated in the code of Articles of 1874, and the existing law relating to this court is contained in Arts. 80, 83 and 110, as follows:—

"Art. 80. *In time of war a field officer may be detailed in every regiment, to try soldiers thereof for offences 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.*

"Art. 83. * * * * * * *Field officers detailed to try offenders shall not have power to try capital cases or commissioned officers, or to inflict a fine exceeding one month's pay, or to imprison or put to hard labor any non-commissioned officer or soldier for a longer time than one month.*

"Art. 110. *No sentence of a field officer, detailed to try soldiers of his regiment, shall be carried into execution, until the whole proceedings shall have been approved by the brigade commander, or, in case there be no brigade commander, by the commanding officer of the post.*"

Art. 83, which applies alike to all inferior courts, have been fully considered in the first part of this Chapter, in treating of the Jurisdiction and Power of punishment of Regimental and Garrison Courts.

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[48] Except as to the formality required for the execution of its sentences, this court resembles the "Drum Head," or "Field Court-Martial," formerly known in the English practice. As to the existence and procedure of this summary tribunal, which was held, without regard to the usual forms, in "cases supposed to require an immediate example," see reference in Adye, 97; Mil. Law of Eng., 56; Simmons § 251; Hough, 235; Id., (P.) 554, 683, 686–7, 797–9; D'Aguilar, 77; Gov. Wall's Case, 28 How. St. T., 151; Picton's Case, 41 Hansard's Debates, (3) 1271, 1273. That a resort to a Drum Head Court was considered to be permissible only in an emergency, as during war or the occasion of a mutiny, see case of Col. Allan, convicted of the offence of employing such a court in cases not justifying it. Hansard, N. S., vol. VIII, p. 490. Debate in Ho. of Com., 1823. No such court has ever been sanctioned in our law or practice.

**CONSTITUTION OF THE COURT.** The Articles are silent as to the officer by whom the Field Officer may be detailed as a court. Following, however, the analogy between this and the Regimental Court, it would seem clear,
754 as held by Judge Advocate General Holt,[44] that it was intended that the regimental commander should make the detail where practicable; *i. e.* where there is, besides himself, at least one other field officer of the regiment present and serving with it. In the absence of such an officer, the court, (the regimental commander not being authorized to detail himself,) must, if detailed at all, be detailed by superior authority; and it may be inferred, from the provision of Art. 110 in regard to the taking of action upon the sentence by the brigade (or post) commander, that such commander would be, under the circumstances indicated, the proper authority to make the detail.[45] Upon this point the law is incomplete. *In practice*, Field Officers' Courts, where resorted to, have commonly been detailed by commanders of regiments. Where it has been impracticable to convene them on account of the want of material, or where, because the regiment was not embraced in a brigade or post command and its sentence could not therefore be executed, it would have been futile to have done so, the ordinary regimental or garrison court, or a general court, has been convened instead; and, in convening the former court, the order, in view of the concluding provision of Art. 80, has usually specified in terms that it was "impracticable to detail a Field Officer."

It is evident that an officer having a command which is less than a regiment, or which though greater does not embrace a regiment, is not empowered to detail a Field Officer under Art. 80.

**COMPOSITION.** The court must consist either of a colonel, lietenant-colonel, or major, or of an officer who, though of a lineal rank inferior to major, has the brevet rank of a field officer and has been duly assigned to duty according to his brevet rank. Such assignments, however, are rarely if ever made in regiments, and, in practice, the, (or a,) *major* of the regiment has commonly been detailed for the court. A captain, who is merely *acting* as major, cannot legally be so detailed.

Further, from the terms of Arts. 80 and 110, it is clear that the
755 Field Officer must be a *regimental* officer and an officer of the regiment to which the parties tried belong, and that a *staff officer* is not eligible for the detail.

**JURISDICTION.** As has been remarked, the jurisdiction of the Field Officer is restricted to time of war. He cannot therefore legally be detailed under Art. 80 in time of peace. As to the persons within his jurisdiction, these, as indicated by the Article, are the enlisted men of the regment in and for which he is detailed as a court. The regiment is the exclusive field of his jurisdiction and its limit. While he may try soldiers of the different companies of the regiment though serving at separate stations, &c., provided they are all under the command of the regimental commander, he may not try members of the regiment who are *detached* from it and serving with other and distinct commands. In brief, both as to offenders and offences, his jurisdiction is identical with that, heretofore defined in this Chapter, of the Regimental Court of three officers authorized by Art. 81.

**POWER OF PUNISHMENT.** The authority also of the Field Officer to award punishment upon conviction is made, by Art 83, the same as that vested in the other inferior courts and already considered in this Chapter.

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[44] DIGEST, 90–91.

[45] In some instances during the late war, *department* commanders detailed these courts or ordered them to be detailed. See G. O. 24, Dept. of the Cumberland, 1862; Coppée, 43.

**PROCEDURE—No oath required.** Neither the 84th[46] nor other Article of the code requires that the Field Officer shall be specially sworn as a court, and in practice he has never been sworn as such.

**No judge advocate detailed.** Under the general authority of Art. 74, a judge advocate may probably be as legally detailed to attend a Field Officer's as a regimental or garrison court. In practice, however, no judge advocate or recorder has ever been so detailed. The Field Officer himself performs the whole duty of the court—conducts the investigation and keeps the record.

**The form of the record.** The original Act of 1862 expressly provided that the Field Officer "*shall make a record of his proceedings*," and Art. 110
756 declares that no sentence adjudged by a Field Officer "*shall be carried into execution until the same shall have been approved by the brigade commander*," &c. As to the record of proceedings to be made by the Field Officer, this, in view of the summary nature of his action, need only be, and has in practice been, of a brief and simple character. Unlike the records of other inferior, or of general, courts, his record does not ordinarily set forth the testimony, when any is taken, nor does it contain any reference to the affording to the accused of an opportunity for challenge, the Field Officer not being liable to challenge. In other respects the record will properly follow the essential features of the records of other courts, setting forth such particulars as are requisite to exhibit the authority and the action of the Officer. It will thus properly recite the order of detail, the names, &c., of the offenders tried, their offences as charged and their pleas, the findings of the court and the punishments adjudged upon conviction; the whole being authenticated by the Officer's signature.

**ACTION UPON THE PROCEEDINGS.** Art. 110, in making it essential to the legal execution of the sentence that the proceedings shall first be approved by the brigade, (or, if there be none, the post,) commander, is construed, upon the familiar principle of *expressio unius exclusio alterius*, as confining the authority of approval to the particular commanders named,—excluding therefrom, for example, a division or department commander.[47] Where, therefore, a regiment is a part neither of a brigade nor a post command, it will, as already remarked, be quite useless for the regimental commander to detail a field officer as a court, since no punishment adjudged by him can take effect: some other court will therefore properly be resorted to.

The Article requiring that the proceedings and sentence, to be operative, shall be approved by the brigade (or post) commander, it follows that where he *disapproves* the proceedings, the same, as in the case of the proceed-
757 ings of a general court, are rendered nugatory[48] and no punishment can be enforced. Where the proceedings are *approved* by such commander, the execution of the sentence will in general properly be devolved upon the regimental commander.

**PARDON AND MITIGATION.** The present Articles of war—in Art. 112 or elsewhere—fail to authorize the convening officer or other military com-

[46] The "regimental" court referred to in this article is evidently the old regimental court of three officers, of Art. 81; the only one in existence when the original of Art. 84 was enacted.

[47] Proceedings of Field Officers' Courts have indeed been published as acted upon and approved by department (and district) commanders in sundry General Orders, of which the greater number were G. O. of the First Military District, of 1868–9. This was, however, before the publication of the Articles of 1874, in which the law on the subject of the action upon the proceedings of these courts is more succinctly expressed than in the Act of 1862.

[48] Except of course that they may be pleaded as a "former trial." See Chapter XVI, *ante*.

mander, or the Field Officer, to pardon or mitigate punishments awarded by the latter.[49]

### III. The Summary Court.

This Court, of which the title is taken from that of courts of the same name, (but otherwise quite different, especially in their composition and power of punishment,) in the British law and our own Naval code, was established by an Act of Oct. 1, 1890, c. 1259, s. 1, (entitled "An Act to promote the administration of justice in the Army,") which provides as follows—"*That hereafter in time of peace all enlisted men charged with offenses now cognizable by a garrison or regimental court-martial shall, within twenty-four hours from the time of their arrest, be brought before a summary court, which shall consist of the line officers second in rank at the post or station or of the command of the alleged offender, and at stations where only officers of the staff are on duty the officers second in rank shall constitute such court, who shall have power to administer oaths and to hear and determine the case, and when satisfied of the guilt of the accused party adjudge the punishment to be inflicted. There shall be a summary court record-book or docket kept at each military post, and in the field at the headquarters of the 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 post or other commander: Provided, That when but one commissioned officer is present with a command he shall hear and finally determine such cases as require summary action: Provided further, * * *
758 That any enlisted man charged with an offence and brought before such summary court may, if he so desires, object to a hearing and determination of his case by such court and request a trial by court-martial, which request shall be granted as of right, and when the court is the accuser the case shall be heard and determined by the post-commander, or by regimental or garrison court-martial: And provided further, That post and other commanders shall, 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 offences committed and the penalties awarded, which reports shall be filed in the office of the judge advocate of the department.*"

An amendatory Act of July 27, 1892, provided—"*That the commanding officers authorized to approve the sentences of summary courts, shall have the power to remit or mitigate the same.*"

**PURPOSE OF THE COURT—Exceptions to its use.** This court is intended as a substitute, in time of peace, for the regimental or garrison court[50]—mainly as a substitute for the garrison court in post commands. Inasmuch as the Act declares that, "in time of peace, all enlisted men, charged with offences cognizable by a garrison or regimental court-martial," shall be brought before this court for trial, except under certain circumstances further specified, it results, and has been so ruled by the Secretary of War,[51] that whenever, (in time of peace,) a garrison (or regimental) court is ordered in the case of an enlisted man, the order should state the fact which brings the case within one of the excepted classes, "and thus makes it a legal court." Thus the order should specify either that the accused, having been "brought before" a sum-

[49] The "regimental" court referred to in Art. 112 is evidently the court, commonly designated by that title, authorized by Art. 81. See note *ante*, as to the "regimental" court referred to in Art. 84.

[50] See opinion of Solicitor General of March 14, 1892, published in G. O. 27 of 1892.

[51] Circ. No. 9, (H. A.,) 1891.

mary court, "objected to a hearing and determining of his case by such a court and requested a trial by a" regimental or garrison court, as the case may be, (which request the Act declares is to be "granted as of right;") or it should set forth that the officer composing the summary court which would have tried the case is the "*accuser*"[52] therein of the accused, in which
759 contingency the Act declares that the case "shall be heard and determined (by the post commander or) by a regimental or garrison court-martial." A third instance would be that—not provided for by the Act or other statute, but initiated by par. 254 of the Army Regulations[53]—where the accused, being a sergeant, objects to be tried by a summary (or other inferior) court; in which case it is declared that he shall not be so tried except by special permission of the authority competent to order his trial by general court-martial. But this regulation is at variance with the provisions of the Act, since under the Act a noncommissioned officer is amenable to trial in the same manner and to the same extent as a private soldier, and therefore without any reference to the department or other commander, such as is indicated, being necessary or material.

**CONSTITUTION.** The summary court, like those for which it is a substitute, will be ordered either by the commander of a regiment or "corps," or by a post commander—in general by the latter. The Act seems also to contemplate the possibility of a command other than a regimental, or corps, or post command—one answering for example to that of a "place where the troops consist of different corps," specified in Art. 82, of which the commander may be authorized to convene a summary court; but such a contingency must be a rare one in a time of peace.

**COMPOSITION.** Under the provisions of the Act of 1890, a summary court will ordinarily consist of the line officer second in rank at the post, station, or command of the offender. Or, where there are only staff officers on duty at the station, it will consist of the staff officer second in rank.[54] The presence however of a line officer on duty at the same post will render a staff officer also on duty there ineligible to act as such court; thus he cannot legally sit as such where the post commander is a line officer. Where there is "but one commissioned officer present with a command," that officer, who will necessarily be the commanding officer, will officiate as the court. So, where a line (or staff) officer, second in rank, detailed as the court, is the "accuser"
760 of the party to be tried, the court must be composed of the post commander, who will thus detail himself. If indeed the post commander, being the only officer present with the command, occupies the attitude of accuser, there can be no summary court, and the case under the Act must go to a garrison or regimental court.[55] But, unless specially requested, a garrison, &c., court will not be legal where the post commander can officiate.

**JURISDICTION.** It is clear from the terms of the Act that the jurisdiction of the summary court is intended to be the same as that of the regimental or garrison court, subject to the same limitations as prescribed in Art. 83. It has legal cognizance, therefore, of all offences committed by enlisted men of the command of the convening authority which would be cognizable by a garrison or regimental court. The classes of offences which are excepted from its jurisdiction are thus the same as those specified in considering the jurisdiction

[52] See this term defined in Chapter VI.

[53] As amended by G. O. 67 of 1893. And see G. O. 47 of 1894.

[54] The medical officer second in rank at a hospital post, (where there were no line officers,) would thus be eligible for this court.

[55] See Circ. No. 1, (H. A.) 1891.

of the other inferior courts. It has been ruled that as the jurisdiction of the summary court extends to enlisted men only, the discharged soldiers held as convicts at the late Military Prison, at Leavenworth, Ks., being civilians, were not amenable to trial by such court.

**PROCEDURE.** In General Order No. 29 of 1891, it is directed as follows—"Soldiers against whom charges may be preferred for trial by summary courts shall not be confined in the guard house but shall be placed in arrest in quarters, before and during trial and while awaiting sentence, unless in particular cases restraint may be deemed necessary." This direction is repeated in almost identical language in the more recent G. O. 16 of 1895.

The Act of 1890 provides that such soldiers shall be brought before the summary court "within 24 hours from the time of their arrest." It has been remarked in Orders that the limit here specified is not twenty-four hours from the commission of the offence but from the arrest only, and that as arrest may be deferred in the discretion of the commander, the period between offence and trial may thus be considerably prolonged beyond twenty-four hours without affecting the legality of the proceedings. The provision is a *directory* one, not one affecting jurisdiction, and it has been held by the Secretary of War
761 that it is for the responsible commanding officer, not the court, to determine when cases should be brought to trial; and that a delay of more than twenty-four hours in causing an offender to appear before the court is not pleadable in defence by the accused, though if such delay be protracted, the fact may well be put in evidence as ground for mitigation of punishment.[56]

It is further declared, in the same connection, as follows—"Summary courts should be opened at a stated hour every morning, except Sunday, for the trial of such cases, if any, as may properly be brought before them. Trials should be had on Sunday only when the exigencies of the service make it necessary."[57]

In G. O. 47 of 1894, it is directed that—"When charges are preferred against an enlisted man for offences cognizable by inferior courts-martial, they will be laid before the post commander, who, if he thinks that the accused should be tried, will cause him to be brought before the summary court. Here he will be arraigned and allowed to plead, according to the practice of courts-martial." Unless he pleads guilty, "witnesses will be sworn and evidence received, the accused being permitted to testify in his own behalf and make a statement; but the evidence and statement will not be recorded." The officer acting as the court "shall," to cite from the Act of 1890, "have power to administer oaths and to hear and determine the case, and when satisfied of the guilt of the accused party, adjudge the punishment to be inflicted." The oaths here referred to are those of the witnesses: though the trial officer is not himself sworn, the witnesses must be.

By further decisions of the Secretary of War, it is held to be "the duty of the officer who brings charges before a summary court for trial to submit evidence of previous convictions, or to cite them when the convictions have been by the same court."[58] In G. O. 47 of 1894, it is declared that "the proper evidence of previous convictions by summary court is the copy of the summary court record furnished to company and other commanders, or a copy of the summary court record specially furnished for the purpose

[56] Circ. No. 2, (H. A.,) 1891; Do. of 1892.
[57] Circ. No. 2, (H. A.,) 1891.
[58] Circ. No. 2, (H. A.,) 1892.

762 and certified to be a true copy by the post commander or adjutant."[59]

But, as remarked in the Circular cited of 1892, the officer acting as the court "may take judicial notice of what appears upon the record of his own court."

**PUNISHMENT.** The power of punishment of the summary court is the same as that of the other inferior courts, and is thus subject to the limitations prescribed by Art. 83. So, in view of the provision on the subject contained in Art. 4, it cannot adjudge dishonorable discharge. The authority which the Act of 1890 vests in the President "to prescribe specific penalties for such minor offences as are now brought to trial before garrison and regimental courts-martial," has not been exercised further than by the fixing of *maximum* punishments, by G. O. 21 of 1891, (amended by G. O. 16 of 1895,) made pursuant to the Act of September 27, 1890.

**ACTION.** It is further provided in the Act establishing this court that—"No sentence adjudged by said summary court shall be executed until it shall have been approved by the post or other commander"—a provision substantially equivalent to that of the 104th Article of War. The power of disapproval includes of course *disapproval;* and we have seen that the commanders authorized to approve the sentences of such courts may now also "*remit or mitigate*" the same. In G. O. 47 of 1894, it is announced that—"When a post commander sits as a summary court, no approval of the sentence is required by law, but he should sign the sentence as post commander and date his signature."

**RECORD.** A form for the record of a summary court is prescribed in G. O. 47 of 1894, for which blanks are furnished from the Adjutant General's Office.[60] It sets forth in each case the name, &c., of the accused, the charge or charges with a synopsis of the specifications, the finding, the sentence authenticated by the signature of the trial officer, and the "action of commanding officer with date and signature." The testimony, as we have seen, is not recorded.

763 The trial officer keeps his own record, but may be assisted by a clerk from the Post Adjutant's Office when requisite.[61]

**DISCRETION IN THE USE OF THE SUMMARY COURT.** While the institution of this court provides a ready and effective means of trial and punishment for minor offences, it is yet not essential that it should be resorted to in any case, and it is discretionary with the proper commanding officer to determine what cases shall be referred for trial thereby, and what ones shall be disposed of by the exercise of the disciplinary power of "admonition or the withholding of privileges and indulgences."[62] But, as it is remarked by the Major General Commanding, in an Order of 1892[63]—"The increasing number of trials by summary court and the trivial character of many of the offences tried indicate that commanding officers frequently fail to make use of this power. They are therefore reminded that it is their duty to use all reasonable means to prevent the occurrence of delinquencies rather than to punish them. In the discharge of this duty they may not only deprive unworthy soldiers of privileges, but take such steps as may be necessary to enforce their orders. It is believed that the proper use of this power will make it unnecessary to bring before the summary court many of the trifling delinquencies which are

[59] In G. O. 16 of 1895, it is directed that—"in the cases of conviction by summary court, * * a duly authenticated copy of the record of said court shall be deemed sufficient proof."

[60] Circ. No. 9, (H. A.,) 1894.

[61] Circ. No. 1, (H. A.,) 1891.

[62] Circ. No. 13, (H. A.,) 1891.

[63] G. O. 73.

now made the subject of trial; indeed, that such trifling delinquencies will in great measure be prevented. Department commanders will see that their subordinate commanding officers fulfill their duties in this regard."

## MILITARY BOARDS.

764 Beside the Boards of government, examination, inspection, investigation, &c.,[64] constituted by law or convened from time to time by the President or military superiors in the exercise of their commands, and not calling for special notice in this treatise, there are two more important species of Boards, one authorized by statute and one by army regulation, of which brief mention should here be made. These are Retiring Boards and Boards of Survey.

### Retiring Boards.

**The law on the subject.** The matter of retirement in the army, which is a form of compensation for public service, is, like the matter of pay, regulated by positive enactment.[65] Retiring Boards are bodies constituted and empowered, and whose duties are prescribed, under and by Sections 1246 to 1253 of the Revised Statutes.[66] These statutes provide—that the Secretary of War, under the direction of the President, shall, from time to time, assemble such boards, of from five to nine officers, two-fifths of whom shall be medical officers; the members other than medical to be, "as far as may be, *seniors in rank* to the officer whose disability is inquired of;"—that "the members of the board shall be *sworn* in every case to discharge their duties honestly and impartially;"—that the board, for the purposes of the investigation of the matter of the disability and incapacity of officers, "shall have such *powers* of a court-martial and of a court of inquiry as may be necessary;"—that the board shall *find* upon the questions of the incapacity for active service of the officer, the cause of his incapacity, and whether or not such cause was an incident of the service;—that the *approval* of the President shall be necessary to give effect to the finding of the board;—that the President, in approving, shall *retire* the officer 765 *from active service* merely, (if found to have been incapacited by an incident of the service,) or, (if not so found,) may, in his discretion, "*wholly retire*" him, *i. e.* drop him from the army, and remit him to the status of a civilian;[67]—that no officer whose case is inquired into by a retiring board

[64] As, for example, the boards authorized or recognized in the Rev. Sts., Secs. 1160, 1172, 1196, 1206, 1208, 1214, 1325, (Academic Board of the Military Academy,) 1327, (Board of Visitors to the Academy,) 1345, (Board of Commissioners of the Military Prison;) and in the Acts of June 23, 1874, June 18, 1878, &c.; also the Board of Ordnance and Fortification, established by the Act of Sept. 22, 1888; the Boards for the examination of officers for promotion, authorized by the Act of Oct. 1, 1890; the Boards for the examination of enlisted men for appointment as officers, authorized by the Act of July 30, 1892, and regulated by G. O. 79 of 1892; the Board for the inspection of recruits, provided by par. 928 A. R., as amended by G. O. 42 of 1893; and sundry lesser boards. With these also are to be classed the Post and Regimental Councils of Administration, (Art. XXXIII, A. R.) As to these last see Kautz, Customs of the Service, 158–169.

[65] See McBlair *v.* U. S., 19 Ct. Cl., 528.

[66] Similar provisions as to *naval* retiring boards are contained in Secs. 1448 to 1453, Rev. Sts.

It may be noted that retirement on account of *age* or *duration of service* is a proceeding wholly distinct from retirement for disability as ascertained by a board: for the former no inquiry is necessary other than a reference to the officer's military record.

[67] As to the effect of "wholly retiring," as a form of summary dismissal, see Miller *v.* U. S., 19 Ct. Cl., 353, also *post*, Chapter XXV—"Ninety-Ninth Article."

shall be retired "without a *full and fair hearing*" before the board, if he demand it.

**Composition.** The provision, above cited, of Sec. 1246, that the members, other than medical, "shall, as far as may be," be "seniors in rank to the officer whose disability is inquired of," is analogous to the provision of the 75th Article of war in regard to the rank of the members of a court-martial, and is to be similarly construed.[68] As in that case it is to be considered that the statute is directory only upon the convening authority; that it is for him to determine the matter of the rank of the members; and that his detail of officers for the board, as shown by his order, is conclusive evidence that, so far as the interests and exigencies of the service have permitted, seniors in rank have been selected.

**Swearing of members.** The statute,—Sec. 1247,—though requiring that the members shall be sworn, does not specify how or by whom. No provision is made for a judge advocate or recorder, nor is the senior or the junior member empowered to qualify the others. *In practice*, however, a recorder is detailed with the board; and inasmuch as, by Sec. 1248, the board is invested with the "powers" of a military court, the swearing is in general proceeded with as indicated in the 117th Article of war. Following, however, the terms of Sec. 1247, the members need but to be simply sworn "to discharge their duties honestly and impartially."

**Powers.** The provision that the board "shall have such powers of a court-martial and of a court of inquiry as may be necessary," &c., is indefinite, but has given rise to but little question in practice. Construing it in connection with the other provisions cited, its evident intention is seen to be that the
766 board shall have and exercise such powers of a "court" as may be requisite to insure a full investigation, to afford a fair hearing, and to enable it satisfactorily to determine the questions referred. Thus it is properly authorized and empowered to call for and entertain such testimony of witnesses, depositions, documents or papers, as may be material to establish or illustrate the nature or extent of the disability,[69] to pass upon questions of admissibility of evidence, to grant continuances, to give the officer ordered before it a reasonable opportunity of defence if desired, to find and report in his absence if he fail to appear; and further to determine the relevancy and validity of challenges to its members and punish acts in the nature of contempt, according to Arts. 86 and 88, if necessary to an impartial and complete inquiry. But the board cannot entertain a charge of a military offence as such, nor assume to *try*. The disability which it is to inquire into is an existing physical or mental incapacity, not a moral defect or a criminal amenability. If the case be one calling for trial and punishment, it should be referred to a court-martial.[70]

**The hearing.** In view of the provision of Sec. 1253, in regard to the "full and fair hearing" to be afforded, the board will properly give every officer ordered before it such a hearing if he desire one,[71]—allowing him to introduce all reasonably material evidence as to the causes and circumstances of the alleged disability and his acts and record in the service, to cross-examine witnesses and interpose objections to testimony offered on the part of the military authorities, to be assisted by counsel, and to make argument or statement. There will, rarely, however, be an *issue* before a retiring board where the officer is ordered before it upon his own application; otherwise perhaps

[68] See Chapter VII—"Composition of General Courts Martial."

[69] The investigation is not affected by the statute of limitations—Art. 103.

[70] Compare Sec. 1450, Rev. Sta., as to the *Navy*.

[71] As to importance of such hearing, see 16 Opins. At. Gen., 20. It may be remarked that the law of this opinion is somewhat questionable, in the light of later opinions and rulings. See *post*.

where the proceeding is *in invitum*.[72] In the latter case, if upon due notice the officer fails to appear, he will be held to have waived his right to a hearing," and he cannot take exception to a conclusion arrived at in his absence.

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**The finding.** Though Sec. 1250, Rev. Sts., refers to the finding as the "*decision* of the board," and Sec. 1248 authorizes the board to "*determine* the facts," it is clear, from these sections and Sec. 1249, that the finding is but in the nature of a recommendation, without force or effect unless approved by the President and acted upon by him accordingly. Like a court-martial, the board may reconsider and modify its finding at any time before transmitting its "proceedings and decision" to the Secretary of War, under Sec. 1250.[73]

**Action.** The action of the President is prescribed by Secs. 1251 and 1252, as above indicated. In any case in which, in his judgment, the investigation has not been complete, or the finding is not justified by the facts, he may, before acting thereon,[74] return the proceedings to the board for a further inquiry or hearing, or a correction of its conclusions, as in a case of a court-martial. But not being a court, and the inquiry not being a *trial*, the board, upon such revision, may, and should if so directed, reexamine former witnesses or take new testimony.

It is now fully settled that where the President has finally approved the finding of a retiring board, and has acted thereupon by making his order retiring the officer in one of the forms authorized by the statute, his power is exhausted. He cannot then reopen the case, nor, though the order made was mistaken or unjust, can he revoke it and substitute another otherwise retiring the officer. If he does so, the second order will be void and inoperative. The action of the President, whose authority in such a case is, in the language of the Supreme Court, "wholly dependent upon the letter of positive enactment," is "equivalent to the judgment of an appropriate tribunal upon the facts as found, and cannot be disturbed." If injustice has been done, relief can be afforded by Congress alone.[75]

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[72] "When the president approves and acts upon the report of a retiring board," and makes his order retiring the officer, "he thereby determines that the officer has had 'a full and fair hearing.' * * * Such determination must be assumed as the basis of his order." Miller *v.* U. S., 19 Ct. Cl., 339, 349.

[73] That the board is not empowered to modify its finding after it has been completed and the board has thereupon adjourned—as held, in a naval case in 16 Opins. At. Gen., 104—is not regarded as an accurate statement of the law. A court-martial of the army may modify at discretion, and reverse, its finding, after completing it, provided the report is still with it, and not transmitted to the reviewing authority; and the same rule should apply here. Sec. 1452, Rev. Sts., relating to the disposition of the proceedings of retiring boards of the navy, corresponds to Sec. 1250 of the law governing retiring boards of the army.

[74] He cannot of course do so *after* he has approved and acted on the report. Miller *v.* U. S., 19 Ct. Cl., 338.

[75] U. S. *v.* Burchard, 125 U. S. 179–180; Id., 19 Ct. Cl., 138; Potts *v.* U. S., 125 U. S., 175; Miller *v.* U. S., 19 Ct. Cl., 338; McBlair *v.* U. S., Id., 529; 19 Opins. At. Gen., 203. "The finding of the retiring board, approved by the President, is the judgment of the tribunal created under the law to determine such questions." Potts *v.* U. S. "The finding, approved by the President, fixes the fact that an officer's incapacity was or was not caused by the service, and the fact once fixed cannot be reviewed." Burchard *v.* U. S., 19 Ct. Cl., 138. "Upon the report of the Board the President had the right to adopt one of three courses with the claimant; he could disapprove the finding, and thereby retain the claimant in the active service, retire him from active service, or *wholly* retire him from the Army, as he might determine. He had a power to exercise in the disposition of the report, and his action thereon made in law the complete exercise of the full measure of authority provided by the statute. It is not a *continuing* power, but is performed to the extent of its existence by the *one* act of the President." McBlair *v.* U. S., p. 538. And compare *Ex parte* Randolph, 2 Brock., 473; People *v.* Waynesville, 88 Ills., 470, cited in 19 Opins., 209

### Boards of Survey.

These are advisory boards, composed generally of three officers, authorized by the Army Regulations to be convened by commanding officers, for the purpose of investigating the cause and fixing the responsibility in cases of deficiency or damage of public property entrusted to officers or soldiers, or furnished for military use; of fixing and recommending amounts of stoppages or debits therefor; of verifying discrepancies, if any, where such property is transferred from one officer to another; of making inventories of such property when required to be abandoned or when the officer in charge has deceased, and for other purposes indicated in the Regulations.

The regulations on the subject are mainly contained in Title LX of the Army Regulations of 1889.[76] These regulations are so specific as to call for but little comment.

769 **Province and duty in general.** The main object and use of a board of survey is to decide whether a certain officer, soldier or other person, shall be charged with the amount, (fixing it,) of a particular loss, deficiency, or damage to public property, or relieved from liability therefor,[77] or to determine a question of responsibility for property as between two or more officers, soldiers, or other persons. While such a board is not a court and cannot try, convict, or acquit, but can advise or recommend only,[78] it may, like a court of inquiry, report facts and conclusions which will properly form the basis for a military charge or a civil prosecution. It is important, therefore, that it should investigate,[79] as thoroughly as its want of power to swear witnesses will permit,[80] and report, the full testimony bearing upon the question at issue. Thus where public stores received at a military station are found to be deficient or damaged, the board of survey, (which should be convened without delay,) should make so extended and complete an investigation as that it shall, if practicable, satisfactorily be made to appear from its report what party,—whether original sender, intermediate forwarding officer, contractor for supplies or transportation, common carrier or other agent, or consignee or actual receiver,—is the person really accountable for the loss, damage, or demurrage.[81] To facilitate the solution of the question, the board should annex to their report all material bills of lading, invoices, and receipts, specify the routes and modes of transportation, state the names and marks on the packages, &c.[82]

770 If the loss was the fault of no person, but was incurred through the

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[76] And see also pars. 117, 751–753, 781, 782, 787; G. O. 11, 37, and Circ. No. 9, (H. A.,) of 1890; G. O. 6 of 1891; Circ. No. 22, (H. A.,) 1893; G. O. 10 of 1894.

[77] See pars. 117, 751, 781, 782, 787, 788, 893.

[78] See pars. 793, 797.

[79] "They will rigidly scrutinize the evidence especially in those cases wherein property is alleged to have been stolen or embezzled," (par. 790.)

[80] The ruling of the Judge Advocate General, that boards of survey are not empowered to swear either themselves or witnesses, as published in G. O. 68 of 1873, is now incorporated in the Regulations, par 792.

[81] Circ. 6, Dept. of Texas, 1865; G. O. 15, Id., 1871; G. O. 32, 52, Dept. of Dakota, 1867; Do. 12, Id., 1870; Do. 87, Id., 1873.

A *contractor* cannot be *bound*, without his consent, by the report of a board of survey. See Heathfield *v.* U. S., 8 Ct. Cl., 213. Otherwise where he has stipulated in the contract to be so bound. And in such case, the report, if not objected to by the contractor when a copy is furnished him, will subsequently be supported as sufficient by the courts, though it merely consist of a conclusion without statement of evidence or reasons. U. S. *v.* Shrewsbury, 23 Wallace, 508.

[82] Circ. 6, Dept. of Texas, 1865; G. O. 24, Div. of the Pacific, 1866.

In addition to the Orders above cited, see further—as containing instructions, &c., in regard to these boards—G. O. 33, Dept. of the Columbia, 1868; Do. 21, Dept. of Texas, 1875; Circ. 2, Fifth Mil. District, 1868; Circ., Dept. of Cal., March 20, 1872; Do., Id., Jan. 2, 1875; Kautz, Customs of the Service, 131–140.

violence of the elements or the operations incident to a state of war, or some contingency of the service,"[83] this fact should be made fully to appear.

**The hearing.** Where the investigation involves an inquiry into the acts or proceedings of a particular officer, or soldier, or a question of his accountability, he should be allowed to appear before the board and be fully heard in defence or explanation. While the board may receive in evidence affidavits where no better form of evidence is attainable, its investigation should, if practicable, be in no respect *ex parte*;[84] the person or persons interested being afforded a reasonable opportunity to file counter affidavits or introduce oral or written evidence.

**Action.** Provision is made in the Regulations for the approval or disapproval of the proceedings of the board by the post commander who has convened it, subject to revision by higher authority.[85] The approving officer will properly endorse upon, or state in connection with, the report, what action he may himself have taken in the case.[86] Thus it is specifically directed in several of the General Orders that he should cause carriers or contractors to be charged with the money value of property for which they are found by the board to be accountable, on the bills of lading before they are signed.[87] When the value, or amount of loss, of property involved, exceeds a certain specified sum, the proceedings are required to be acted upon by the department commander,
771 to whom also they are in any case to be submitted for completion, if requested by "an officer pecuniarily interested." If found, on examination, "to exhibit serious error or defect," they are further required to be submitted to the Secretary of War.[88]

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[83] Par. 793, A. R.

[84] Compare Brannen *v.* U. S., 20 Ct. Cl., 219.

[85] Par. 794, 795. A. R.

[86] G. O. 12, Dept. of Cal., 1869.

[87] G. O. 12, Dept. of Dakota, 1879; Do. 12, Dept. of Cal., 1869. In the last Order it is said—"A failure to do so will throw the responsibility on the officer who may have signed the bill of lading without having first called for the board of survey, to examine into losses and fix responsibility thereof."

[88] See pars. 795, 797, 798.

# CHAPTER XXIII.

## THE RECORD.

772 **THE LAW RELATING TO THE SUBJECT.** Though courts-martial are, as we have seen,[1] not *courts of record* in any such sense as that in which the term is employed in the civil practice, it is yet the uniform usage of our service for all such courts, whether general or inferior, to make and render formal records of the proceedings of all cases tried by them. They are not in terms required by any statute to keep records, but that they will properly do so is clearly contemplated by the code in Arts. 104, 110, 111, 113, and 114,[2] which refer to the approving, forwarding, and preserving and furnishing copies, of the "proceedings" of military courts,—by Sec. 1199, Rev. Sts., which makes it the duty of the Judge Advocate General to receive, &c., such "proceedings,"—by Sec. 1203, Rev. Sts., which requires that the "reporter," thereby authorized to be appointed, "shall record" such proceedings,—by the Act of March 3, 1877, which provides for the disposition of the "records" of inferior courts,—and by the Act of October 1, 1890, in its provision for "a summary court record-book, or docket," &c.

The Army Regulations indeed are more explicit in their references to the record. Par. 1037 enjoins that—"Every court-martial shall keep a complete and accurate record of its proceedings," &c., and goes on to direct as to the authentication of "the record," and to indicate certain particulars which "the record must show." Par. 1038 directs that the record "shall be clearly and legibly written," &c. Par. 1039 directs as to the form in which "the
773 record of the proceedings" shall be "endorsed," &c. Pars. 1041 and 1042 direct as to the transmittal of the "proceedings" to the proper official. Par. 1043 refers to the revision and correction of the "record."

The custom of the service, however, to a much greater extent than regulation, must be the guide as to the form and substance of the statements and recitals in a record of a court-martial.

**GENERAL DUTY OF THE COURT AS TO THE RECORD.** The record is the act and record of the *court*, not of the judge advocate. The latter is, here, but the ministerial officer who notes the proceedings under the court's direction. The record is not the history of a prosecution, but of an impartial investigation conducted by a body of officers in pursuance of the order of a competent superior and of an oath which requires them to conduct it faithfully. It is thus the court that makes the record and is responsible for it;[3] its responsibility consisting in the rendering of a full and accurate report of the facts and law developed on the hearing, completed by a final judgment in due form.[4]

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[1] In Chapter V.

[2] Compare Arts. 120, 121, as to the "proceedings" of Courts of Inquiry.

[3] G. C. M. O. 22, Dept. of the Colorado, 1893.

[4] See G. O. 3, Dept. of the Pacific, 1863; Do. 23, Dept. of the South, 1870. Courts-martial, (with their judge advocates,) have been not unfrequently censured by Review-

**FUNDAMENTAL RULES FOR THE MAKING UP OF THE RECORD.** Two general rules properly governing the framing of the record may be specified at the outset, namely:—

1. **The record must fully set forth all the proceedings had in the particular case.** Thus it must include the original assembling under the Order or Orders convening and composing the court: the preliminary challenging,
774 if any, and the action thereupon; the organization for the trial; the appointment of reporter or employment of clerk, if any, and introduction of counsel; the arraignment and pleas, with special pleas, if any, and disposition of same; the sworn testimony and written evidence, with the objections to its admission and rulings thereon; the closing arguments or statements; the finding and sentence; together with all motions, adjournments, continuances, proceedings for contempt if any,[5] proceedings upon revision if any, &c.; in short every material act, proposition, or occurrence, essential to perfect the history of the investigation as such, and to advise the reviewing authority as to all the questions of fact and law involved in the case.[6] The only act of the court or members not properly embraced in the minutes are the discussions, votes, &c., had or given in secret session where the court is closed for deliberation upon its judgment or some interlocutory question. Such discussions are no part of the formal record;[7] and, as to the votes and opinions of members, the stating of these is precluded by Arts. 84 and 85. It is in fact only the *result* of a deliberation in secret session that it is to be entered upon the record.

2. **Each record must be an entirety.** In other words, when several cases are tried by the same court, each and every record must be entire and perfect within itself; *i. e.* both in form and substance wholly distinct and separate from the record of every other case. Each record must be an original official document, finished and complete in all its details, with no particular left to be supplied by a reference to any previous or other record or paper, and as single and individual as if it were the record of the only case tried by the court.[8] This rule is illustrated by par. 888 of the Regulations, which directs that "the
775 proceedings in each case will be made up separately;" that is to say that the records of the different cases tried shall not be consolidated or attached together as parts of a continuous report of the court, but prepared and transmitted as successive and independent communications.[9]

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ing Commanders, on account of material omissions and other errors appearing in their records. See, for example, G. O. 23, Dept. of the Mo., 1861, Do. 120, Id., 1867; Do. 23, Army of the Potomac, 1863; Do. 62, 76, Dept. of the Gulf, 1863; Do. 54, Dept. of the South, 1863; Do. 25, 38, 41, Northern Dept., 1864; Do. 16, Id., 1865; Do. 49, Dept. of the Susquehanna, 1864; Do. 10, Dept. of Pa., 1865; Do. 37, Middle Mil. Dept., 1865; Do. 41, Dept. of Fla., 1865; Do. 25, Dept. of So. Ca., 1866; Do. 54, Dept. of Dak., 1867; Do. 25, Id., 1868; Do. 5, Dept. of La., 1868; Do. 4, Dept. of the Lakes, 1867; Do. 5, Id., 1869; Do. 14, Dept. of Texas, 1876; Do. 29, Id., 1884; G. C. M. O. 2, Dept. of Arizona, 1883; Do. 31, Dept. of the Mo., 1885; Do. 26, Dept. of the Platte, 1894.

In general, however, the commander should first, where practicable, afford the court an opportunity to correct its errors, by the return to it of the record for *revision*. See Chapter XXI.

[5] As to the form of the record of proceedings had for contempt, see Chapter XVII.

[6] See G. O. 11, Dept. of the Platte, 1868; Do. 51, Id., 1871; Do. 8, First Mil. Dist., 1868; Do. 3, Dept. of the Pacific, 1863; G. C. M. O. 45, Dept. of the East, 1893.

[7] O'Brien, 283.

[8] See G. O. 292 of 1863; Do. 2, Dept. of the Pacific, 1863; Do. 12, Dept. of the Gulf, 1866; Do. 120, Dept. of the Mo., 1867; Do. 5, 21, Fifth Mil. Dist., 1868; Do. 176, Id., 1869; Do. 7, Dept. of the South, 1869; Do. 74, Dept. of Dakota, 1869; Do. 29, Dept. of the Platte, 1869; Do. 51, Id., 1871; G. C. M. O. 70, Dept. of Texas, 1886. "The record in each case will be complete in itself." Par. 1037, A. R.

[9] Compare 8 Opins. At. Gen., 836, 340.

**DETAILS OF THE RECORD.** Premising with the remark that the record, as indeed directed by the Army Regulations,[10] should be legibly and neatly written, we proceed to indicate the form and manner of exhibiting the several details of the same in their order.

**Prefixing of copies of Orders.** The original Order convening the court, constituting as it does the initial authority for its existence and action, and the foundation for all the subsequent proceedings, is the logical starting point of the record, which should therefore properly be prefaced by a copy of the same. Par. 1037 of the Regulations directs that the record "will set out a copy" in each case. It is not *necessary* indeed that it be prefixed, since it may be appended at the end; the best, however, and now uniform practice is to prefix it. In addition to specifying the detail of members, time and place of assembling, &c., it should show, by its heading and subscription, by what commander,—whether Commander-in-chief (President,) General of the Army, commander of a separate army, department, division, separate brigade, regiment, garrison, &c.,—it has been issued, thus testing at the outset the legality of the entire proceedings.

776 If, as is the more usual course, a series of cases are brought to trial before the court, a separate copy of the convening Order is to be prefixed to the record of each case. Merely to prefix a copy to the record of the first case tried is to render each record after the first incomplete, thus disregarding the above-stated general rule—that each record should be complete and perfect of itself.

Where, subsequently to the issue of the original Order, there are issued supplementary Orders relieving or adding members, detailing a new judge advocate, changing the place or time of session, or otherwise modifying the first Order, copies of all such Orders should in general be prefixed, in the proper succession, to each record made up after their dates, not only as belonging to the history of the proceedings, but as indicating perhaps the authority for the appearing and acting of a member or members or the judge advocate, which otherwise would not be exhibited on the face of the record.[11] In this class of Orders are included those in the form of telegrams:[12] copies of these, where affecting the *personnel* of the court, &c., should be prefixed until Orders of a more formal character be substituted therefor. Where, after arraignment, or pending a session of the court, a new Order or telegram of the class under consideration is communicated to the court, the same should properly be entered in the body of the proceedings, at the point at which it was received, and prefixed to the subsequent records of trials by the same court. Where an Order ceases to have force,—as where it is wholly superseded by a subsequent Order,—it may be omitted from further records. If any considerable number of Orders modifying

[10] Par. 1038 prescribes—"The record shall be clearly and legibly written, as far as practicable, without erasures or interlineations." Imperfect legibility is noticed as a defect in G. O. 23, Army of the Potomac, 1863; Do. 3, Dept. of the Pacific, 1863; G. C. M. O. 5, 6, Dept. of Mo., 1875. Erasures and interlineations occurring in records are animadverted upon in the two first of these G. O.; also in Do. 76, Dept. of the Gulf, 1863.

Though the regulation contemplates that the record will be written, there is no *legal* objection to *type-writing* or otherwise *printing* it in whole or in part, except of course the signatures of the president and judge advocate. Such printing, however, generally necessitates frequent corrections, and has not been found to be a very material improvement upon the written form. In Circular, No. 12, Hdqrs. of Army, of 1883, "the use of a 'type-writer' in writing out *sentences* of courts-martial is disapproved." And see G. C. M. O. 27, Dept. of the Colorado, 1893.

[11] In G. O. 3 and 7, Dept. of the Mo., 1863, the proceedings were disapproved as incomplete on account of the omission of copies of such Orders.

[12] See G. O. 3, Dept. of the Mo., 1863.

the original detail, &c., have been issued, and are properly required to be prefixed to each record, it may be found convenient to have them *printed.*

**Statement of original assembling of the court.** The record of the actual proceedings of the court begins with a statement of the first assembling of members at the proper place and time in accordance with the terms of
777 the convening Order. If the full detail makes its appearance, a statement in the record that *all the members were present* will be legally sufficient: the preferable form, however, is to specify the several members by name, in the order of their rank, with their official designations. A statement to the effect that *the same members* were present as at a previous trial by the same court is irregular and insufficient, as contravening the fundamental rule that the proceedings of each case should be complete *in se* and not required to be supplemented from the record of any other case.[13]

If some of the members detailed are absent, the record should state by name who are present and who are absent, with the cause of absence in each case, if known;[14] if not known, an entry of—"cause of absence unknown," or words to that effect, should be added.[15] If less than five are present, it is usual and proper to add a statement that—"no quorum being present, the members thereupon adjourned."

The presence of the judge advocate and of the accused, if present in fact, should also be specified. If absent, the cause of absence should be stated when known. If an adjournment is taken on account of the absence of either, it should be so noted. If the judge advocate is not present at the first assembling, the senior member will properly retain a memorandum of the same, to be furnished the judge advocate for incorporation into the formal record.

At this, or at a later, stage, the record should show that the accused had an opportunity to introduce counsel, and should give the name of the counsel if any be introduced.

**Statement of subsequent assemblings.** The statement of the assem-
778 bling of the court on the second and subsequent days[16] of a trial should be headed with the proper place and date[17] and should recite that the court met pursuant to adjournment, naming the members present as in the record of the original session. To state—where such is the fact—that "the same members were present as yesterday," or "as at the last session," is a form sometimes adopted,[18] but it is always better to specify the actual members present on each day though they may be always the same.[19] Their rank should

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[13] So, statements simply to the effect that "the Court being in session," after a certain completed trial, "proceeded to the trial of," &c.; or that "the Court met pursuant to adjournment," from a previous trial—without adding who were present, are faulty as not showing, without a reference to some other distinct proceeding, what and how many members attended at the particular trial. See G. O. 292 of 1863; Do. 64, Dept. of Ark., 1865; Do. 120, Dept. of the Mo., 1867; Do. 51, Dept. of the Platte, 1871.

[14] Circ. No. 5, (H. A.,) 1891.

[15] See G. O. 3, 14, Dept. of the Mo., 1862; Do. 4, Dept. of N. Mexico, 1864; Do. 97, Dept. of Dakota, 1871; G. C. M. O. 54, Dept. of the Platte, 1876.

[16] It is not unusual to head the proceedings of the successive days of a trial—"First Day"—"Second Day," &c. So, the records of cases successively tried by the same court are sometimes endorsed as—"First Case"—"Second Case," &c.

[17] "In every case the particular *date* of the first and each subsequent meeting should be stated in the record." G. C. M. O. 54, Dept. of the Platte, 1875, (Gen. Crook.)

[18] Where *all* are present, it is indeed sufficient to state—"Present all the members of the Court, and the Judge Advocate." Circ. No. 5, (H. A.,) 1891.

[19] See G. O. 3, Dept. of the Pacific, 1863; Do. 5, Dept. of La., 1868. In G. O. 37, Middle Mil. Dept., 1865, Gen. Hancock comments on an exceptional record as follows:—"Upon one day 'all' are recorded as present; upon another 'all but one;' upon another 'all but two;' no one is individualized, and the presumption is that certain members absent one day when testimony was received were permitted to act and take

of course be given, but a variance in the designation of the rank of a member in any day's proceedings from the designation of the same in the convening Order occasioned by the promotion or new appointment meanwhile of the member, will not affect the validity of the proceedings, the member being otherwise sufficiently identified.[20] Where, however, a member has been so promoted, &c., the fact should properly be noted in the proceedings of the day on which he first takes his seat with his new rank. Other changes in the *personnel* of the members, as the relieving of old members or detailing of new ones, should be entered in the record of the session at which the same are officially communicated to the court.

779 The presence of the judge advocate,[21] and of the accused, (with that of the counsel, if any,) should also be particularized. Where a new judge advocate has been detailed, this fact and that of his attendance should be specified. On all days and occasions of the trial on which any material proceeding is had or business is done, the accused,—unless he has wilfully absented himself, as by escaping from military custody or deserting the service, or has been obliged to be removed on account of drunkenness or disorderly conduct,[22]—is entitled to be present and his presence is essential to the legality of the proceedings and sentence.[23] When present, therefore, the fact of his presence should be affirmatively stated at the commencement of the record of the day's session, and not left to presumption.[24] If absent, his absence should be similarly accounted for.

If on the second or subsequent day, a quorum does not attend, or the judge advocate or accused is prevented by sickness or otherwise from being present, the record will properly specify who is absent, and will in general add that the members present adjourned on account of such absence. Members who first appear on a day subsequent to that of the original assembling will properly render some explanation of their previous absence, which will be entered in the proceedings for the information of the reviewing authority,[25] and if sickness has been the cause a medical certificate will properly be furnished:[26] under similar circumstances, a similar excuse should be offered by the judge advocate, and recorded. Unless the court has been authorized, by the

780 convening of a subsequent Order, to "*sit without regard to hours*," the record will properly state the hour of assembling as well as of adjournment on each day, so that it may appear that Art. 94 has been complied with: such statement, however, is not an *essential*, since, in the absence of evidence to the contrary, it will be *presumed* that the legal hours were observed.

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part in the deliberations of the court on subsequent days. This is inexcusable negligence." Upon each day's record, all members of the court, both present and absent, should be duly accounted for. G. C. M. O. 96, 99, 100, Dept. of the Platte, 1886. In Circ. No. 5, (H. A.,) 1891, it is added—"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."

[20] See G. O. 40, Dept. of Ark., 1864.

[21] The presence of this official should not be left to be inferred from the fact stated of his being sworn, or of his putting questions to the witnesses, but should be specifically declared. G. C. M. O. 45, Dept. of Texas, 1874.

[22] See Prendergast, 208.

[23] G. O. 185, Dept. of the Ohio, 1863; Do. 81, Northern Dept., 1864; Do. 65, Dept. of Ark., 1865; DIGEST, 642; Simmons § 470; Clode, M. L., 139. And compare Long *v.* State, 52 Miss., 23; Graham *v.* State, 40 Ala., 659; Witt *v.* State, 5 Cold., 11.

[24] See authorities cited in last note.

[25] See G. O. 4, Dept. of N. Mexico, 1864; Do. 106, Dept of Dakota, 1871.

[26] If a member be detained from the court by illness, he will properly, if practicable, forward such a certificate to the president of the court. See G. C. M. O. 96, Dept. of the Platte, 1886.

Where *adjournments* are taken or *continuances* granted, their periods should be specified, and it should appear from the record that the court reassembled on the day thus fixed.[27] A statement of an adjournment to the next or a succeeding day should be noted at the end of each day's session. Where a continuance is formally applied for under Art. 97, the written application, (see par. 1013, A. R.,) should be appended (or incorporated) and properly referred to; and if an issue is made upon the application, the particulars should be fully stated.

Further the record of each day's session, after the first, will—if such was the fact—properly state at the opening, (though this is not an essential,) that the proceedings of the previous day's session were read and approved; any corrections made upon such reading being specifically noted.

**STATEMENT AS TO CHALLENGES.** Art. 88 entitles the accused to challenge the members separately "for cause stated to the court." Par. 1037 of the Army Regulations directs that—"the record must show" that the accused "was asked if he wished to object to any member and his answer to such question."[28] It should thus appear from the record that the Order or Orders convening the court and detailing the members present were read to the accused or communicated to him and that he was afforded a full opportunity of challenge. If he responds that he has no objection to any member, the record should so state. If in answer he presents any specific objection or objections, the same, whether oral or in writing, should be given as made, and the proceedings
781 thereupon had as to each member objected to, (as already indicated in Chapter XIV,) including the personal declaration, if any be made, of the member, and if issue be joined on the challenge, the argument or remarks of the judge advocate and of the accused or his counsel, with the evidence adduced if any, and finally the decision of the court in each case,—should be fully set forth. If a member be added to the court, subsequently to the organization, the record should similarly show that the opportunity to object to such member was formally afforded the accused, with the proceedings had in case of challenge.

The absence of an express declaration in the record to the effect that the accused was afforded an opportunity of challenge has, in some instances, been held fatal to the validity of the sentence; in others, has been treated as ground merely for the disapproval of the proceedings. In the opinion of the author, such omission, though certainly a serious irregularity, does not—being an omission to comply not with a positive statute but with a directory regulation only—amount to a fatal defect.[29] Of course, if it is the *fact* that an accused was not afforded an opportunity of challenge, such fact, when ascertained, would constitute good ground for disapproval of the proceedings or sentence, or for a remission of the sentence if already approved.

If, after opportunity for challenge has been duly afforded the accused, the judge advocate should object to a member or members on the part of the prosecution, record will be similarly made of such objection and of the proceedings thereupon had.

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[27] In a case in G. O. 180, Fifth Mil. Dist., 1869, one of the grounds upon which the sentence was disapproved was that the court on one occasion reassembled on a day different from that to which it had specifically adjourned on a previous day. And see, to a similar effect, G. O. 5, Dept. of La., 1868.

[28] When a challenge interposed by the accused has been acted upon, the record will properly show that he was asked whether he had any "further" objections to the members, and his answer: See G. C. M. O. 67, Dept. of Dakota, 1882.

[29] In 3 Opins. At. Gen., 397, the opinion is expressed by Attorney General Grundy that "its not appearing on the record that the prisoner was asked if he had any objection to the members of the court would not be sufficient cause for setting aside the proceedings."

**Statement as to the qualifying of the members and judge advocate, and organization for trial.** Par. 1037, Army Regulations, directs that the record shall "show that the court and judge advocate were duly sworn in the presence of the prisoner." The record should therefore so state, and a statement to this effect is sufficient without any recital of or reference to the form of the oath as prescribed by Arts. 84 and 85. The statement is to be made in each separate record, since the court and judge advocate are required to be sworn anew for each case tried.[20] If an absent member is admitted,

782 or a new member added, or new judge advocate detailed after the original swearing of the court and judge advocate, the record should similarly show that such member or judge advocate, before acting, was properly separately sworn.[21]

The form of statement as to the administering of the oaths, most commonly adopted, is substantially that proposed by Judge Advocate General Holt, as follows: "*The members of the court were then severally duly sworn by the judge advocate, and the judge advocate was then duly sworn by the president of the court; all of which oaths were administered in the presence of the accused.*" This is a suitable form for inferior equally as for general courts. Where several persons are to be jointly arraigned and tried, the record should specify that the oaths were administered in the presence of *all* the accused.

But while the above form is to be recommended, any statement will properly be deemed sufficient from which it can be ascertained or fairly presumed by the reviewing authority that the members and judge advocate were in fact qualified as required by the Articles of war prior to the arraignment. The omission of the term "duly," or of the words "in the presence of the accused," has in some cases been held to vitiate the proceedings and sentence, in others has been treated as ground merely for the disapproval of the same. In the opinion of the author, neither of these terms is *essential.* But to omit either would be to reject a form established by regulation and usage, and would induce an uncertain and unsafe mode of statement of a material and important particular.

It is upon the due and formal swearing of a quorum of members that the court is, properly speaking, *organized* for the particular trial.[22] After setting forth, therefore, the qualifying of the members and judge advocate, the record may well add a statement to the effect that—*The court being duly organized then proceeded to the trial of the accused,* (naming him,) *upon the following charges and specifications.*

783 **Statement of charges, arraignment and pleas.** The charges and specifications—originals or copies—including "additional" charges, if any, should then follow or be specifically referred to as annexed to the proceedings. The preferable form, and that almost invariably practiced, is to insert them in the body of the record at this point. Where—as is more usual—a copy is given, the name of the officer by whom the originals were signed should appear at the foot. This is not indeed essential, but as a material part of the history of the prosecution, should not be omitted in a case of any importance. If a copy be thus incorporated, the originals need not be appended.

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[20] G. O. 60 of 1873. Compare Coffin *v.* Wilbour, 7 Pick., 150.

[21] See G. O. 68 of 1863; G. C. M. O. 259 of 1865; G. O. 46, Dept. of the East, 1864; Do. 41, Dept. of Ark., 1864; Do. 5, Fourth Mil. Dist., 1868; G. C. M. O. 6, Dept. of Miss., 1865; G. O. 42, Dept. of the Tenn., 1863.

[22] Par. 1037, Army Regs., directs:—"The record must show that the court was organized as the law requires." That is to say, that at least five members, accepted by the parties or held competent on challenge, were duly sworn for the trial.

The record will then proceed to state the fact of the arraignment of the accused upon the charges and specifications, and his pleas of Guilty or Not Guilty to the same respectively. Where the plea is identical to all, it may be recited that—"to all of which charges," &c., the accused pleaded "Guilty" or "Not Guilty," or in terms to such effect. The approved form of statement, however, is to enter the pleas separately as made to each several charge or specification in its order.

If a special plea is interposed at this stage,—as a plea to the jurisdiction, or a plea of the statute of limitations, of pardon, or of former trial,—the same should be specified with the grounds upon which it is based. If expressed in writing, the written plea will properly be incorporated in the record, or referred to as annexed. The issue, if any, raised upon the plea, with the evidence, if any,[33] argument, and ruling of the court, will follow. If the plea be sustained, and the same has covered all the charges, the record will terminate with a statement of adjournment. If it be overruled, the next statement will regularly be that the accused was then called upon to plead to the merits, and pleaded accordingly, with a recital of the pleas as made. Should a *motion*—as a motion to strike out—be made at this point, the proceedings will be similarly set forth. If, upon arraignment, the accused *stand mute*, this fact, with the action thereupon taken as required by Art. 89, should be particularized.

784 **Statement of the testimony.** The record must set forth fully and independently the testimony of each witness,[34] specifying by which side—prosecution or defence—he is introduced, and that he is first duly sworn or affirmed as the case may be.

The testimony should be given, not in mass, but in the form of separate answers to specific questions.[35] The answers as recorded should be as nearly as practicable in the exact words of the witness, no matter how indefinite, disconnected, ungrammatical or inelegant the same may be.[36] If the answers as rendered are liable to be misunderstood, the accused should be called upon in further questions to explain the obscure portions.[37] For the judge advocate to assume to translate the testimony into what he considers elegant or correct English, or to substitute his own language for that of the witness, or to record only such testimony as he may deem material, or to abbreviate or summarize the testimony,—would constitute not merely a serious dereliction of duty on his part, but a very grave irregularity on the part of the court permitting it.[38] Another grave irregularity would be to introduce into the record as evidence any oral statement other than the sworn testimony of witnesses present in

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[33] See 3 Opins. At. Gen., 545.

[34] A mere reference to the testimony of such witness, as taken in a similar case previously tried by the same court, is of course wholly insufficient. See G. O. 2, Dept. of the Pacific, 1863; Do. 29, Dept. of the Platte, 1869. (Remarks of Gen. Augur.)

[35] G. O. 77, Dept. of the East, 1870. In G. O. 11, Dept. of the Platte, 1868, it was noticed as a serious irregularity that in the proceedings in several cases there was "an omission to record the questions propounded." Similarly in G. O. 8, First Mil. Dist., 1868.

[36] Hough, (A.) 79, writes—"But to record at all times barrack phraseology is not expected." And Coppée, (p. 74,)—"In case the witness is a foreigner, his idiomatic mistakes may be corrected in the record." But the only safe and accurate mode is to record the testimony *precisely as given*, calling upon the witness afterward to explain it, if necessary, or elucidating it by other evidence.

[37] See last note.

[38] An irregularity of this class, which has properly been pointedly condemned in several cases, is the omission to record in whole or in part the testimony of a witness on the ground that such testimony is merely *corroborative* of that of a previous witness. In a case in G. O. 192, Dept. of the Ohio, 1863, the proceedings were disapproved on account of such an omission. And see Griffiths, 109.

court—as a statement of, or reference to, anything said or done, by the accused or other person, *out of court*.[39]

785 Where any considerable amount of testimony has been given by a witness, especially where it has been taken down in shorthand, the record should show that it was read over to the witness, opportunity being afforded him to make corrections, and pronounced by him to be correctly recorded.

Where a deposition, or other written or documentary evidence, whether original or copy, is introduced, the same will in general preferably be marked and attached to the record as an exhibit, proper reference being made thereto in the body of the proceedings.[40] A brief writing, however—as a simple post or field Order, short letter, &c.—may well be copied into the record of the day's session, the original, if such be introduced, being annexed at the end and so indicated.

Wherever the admission of evidence is objected to, the nature of the objection should be stated, with the discussion, if any, had, and the ruling of the court upon the issue. The character of evidence which is ruled out should appear as fully as that of evidence which is admitted.[41] A clearing of the court for deliberation upon an objection to testimony, with the subsequent reopening, should be specifically noted.[42]

It is naturally in the admission and exclusion of evidence that a court-martial should be most frequently led into error; and, upon extended trials,

786 the proceedings are not unfrequently encumbered with a mass of matter, admitted especially on behalf of the accused, from which a careful consideration of the rules of evidence would have relieved the record without prejudicing defence or prosecution.[43]

It is usual and convenient to specify in the record the fact of the closing of the testimony on the part of the prosecution, and its opening on the part of the defence.

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[39] See G. C. M. O. 41, Div. Atlantic, 1886.

[40] As to the making up of Exhibits with the record, see par. 1038 Army Regs.; also G. C. M. O. 80 of 1875, which directs as follows:—"All papers received in evidence, and other exhibits, should be securely attached to the record, but in such a way that they can be freely read, in the order in which they are received, and distinctly numbered so as to facilitate reference to them." Failure to attach writings introduced in evidence has been frequently remarked upon in Gen. Orders. The omission seems to have more frequently occurred where the writing was an extract from a book—as a Morning Report Book, Clothing Book, &c. In such cases, an abstract of so much as relates to the offence charged, and is actually put in evidence, should be entered in the body of the record or attached as an Exhibit. G. O. 63, Dept. of the East, 1864; G. C. M. O. 49, Dept. of the Mo., 1875. The rule applies equally to writings introduced in proof of good character—as testimonials, honorable discharges, &c. Copies of such should properly be appended at the end of the record. G. C. M. O. 1, Dept. of the Platte, 1880; Do. 64, Div. of Pacific & Dept. of Cal., 1881.

[41] See Lieut. Col. Fremont's Trial, p. 240. The court has of course no power to *expunge* as inadmissible or improper any evidence duly recorded. Capt. Barron's Trial, p. 47.

[42] And so of the clearing and reopening wherever deliberation is had upon any interlocutory question whatever.

[43] "The 171 pages of record in this case are replete with errors. The ruling out of legitimate testimony and the ruling in of matter wholly irrelevant occurs again and again. The court seems to have lost sight at times of the specific charges committed to it for investigation; the consequence is a record overburdened with many pages of matter foreign to the case. The latitude of investigation and comment by the defense permitted by the court is deemed to exceed anything justified by the custom of the service or the demands of justice. For these and other reasons not necessary to enumerate, the proceedings, findings and sentence are disapproved." G. C. M. O. 78, Dept. of Dakota, 1892. (Gen. Merritt.)

Where no evidence is introduced by the accused, it should appear that he was afforded an opportunity to make a defence by being called upon to offer testimony, and that he declined to do so. Where also the accused or the judge advocate declines to cross-examine a witness examined in chief by the other, this fact will properly be noted.[44]

Where the accused himself takes the stand, his testimony should be taken and recorded as fully, and in the same manner and form, as that of any other witness, and it should properly be stated in the record, in view of the provision of the Act of March 16, 1878, c. 37, that he is introduced as a witness for the defence *at his own request.*[45]

If a witness is examined through an *interpreter*, the record should state the occasion therefor—as that the witness is a foreigner who does not speak English or speaks it but imperfectly, specifying also the fact of the swearing of the interpreter.[46]

787 **Statement as to closing arguments or addresses.** The record will, in general, next set forth the written or verbal statement, address, or argument of the accused, if any is made, as well as that of the judge advocate if he adds one. Written statements are almost uniformly appended at the end of the proceedings; verbal ones are more commonly inserted in the body of the record. If the accused elect not to make a statement, the record will properly so specify.

**Statement of the clearing of the court for deliberation.** Where the court is thus cleared, whether upon an interlocutory issue—as the sufficiency of a special plea or motion, the admissibility of testimony, the granting of a continuance, &c., or upon the finding or sentence—the fact and the occasion of the clearing should be specified, and, in view of the enactment of July 27, 1892, it should be added in terms that *the judge advocate withdrew.*

—In a Circular of 1892[47] are given convenient forms for recording the closing and reopening of a court-martial, adapted to the requirement of the statute. An omission of such formal statements, however, will not affect the validity of the proceedings. "When the record shows that the court was *'closed,'* the presumption of law is that it was closed in accordance with the requirements of law."[48]

**Statement of finding and sentence.** The statement of the Finding will preferably set forth the findings on all the charges and specifications separately in order, although the finding upon each may be identical. The findings, where other than simple verdicts of Guilty or Not Guilty, should be given with their qualifications, exceptions and substitutions, if any.[49]

The statement of the sentence is the part of the record in which a failure to be accurate may most easily defeat the intention of the court.[50] Care should

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[44] G. O. 18, 31, Dept. of Cal., 1872.

[45] G. C. M. O. 13, Dept. of Texas, 1882; Do. 3 Id., 1886; Do. 41, Div. Atlantic, 1886.

[46] A form of oath to be administered to an interpreter is given in Circ. No. 12, (H. A.,) 1893. The proper statement in the record would be that he was *duly sworn to truly interpret in the case now in hearing.*

[47] No. 12, (H. A.)

[48] Circ. No. 13, (H. A.,) 1892.

[49] Omissions to state or fully state findings have in some cases induced a disapproval of the proceedings; in others a ruling that the proceedings were thus rendered invalid in law. In G. O. 292 of 1863 the sentence was disapproved, and, in Do. 297, Id., held inoperative, because of inconsistency between the findings on the charges and those on the specifications.

[50] See cases, in G. O. 25 and 42, Dept. of Dakota, 1868, of sentences disapproved as inoperative because failing to specify, the one the term of an imprisonment imposed by the court, and the other the period for a forfeiture of pay.

788 especially be taken that there be no material variance in the name of the accused between the sentence and the specifications.[51]

Except in the single instance of a death sentence, where, in view of the terms of Art. 96, it may be, and in practice is, added in the sentence that two-thirds of the members concurred therein, no reference whatever to the vote of the members by which the finding or sentence was determined upon is to be made in the record. A statement that the finding or sentence was "unanimous" would be a gross, and now most exceptional, irregularity. Where the vote on a charge or specification is a tie, this fact of course is not to be stated, but an entry simply of Not Guilty is to be recorded.[52]

As has already been noticed, the findings and sentence must be entered in the handwriting of the judge advocate as the official recorder. They cannot properly be printed with a typewriter.[53]

It need hardly be added that nothing in the nature of a *protest* by a member or members, against a finding or the sentence of any action of the court, can properly be entered upon or attached to the proceedings.[54]

**Statement of previous convictions.** Where, in the case of an enlisted man, there has been a conviction of an offence "admitting of the introduction of previous convictions," the fact of the opening of the court "for the purpose of ascertaining whether there is such evidence, and, if so, of hearing it,"[55] should clearly appear from the record, and the presence of the accused and the judge advocate should be noted. If such evidence be introduced, the records of trial, or orders of promulgation presented, should be appended as exhibits with the proper reference thereto in the body of this part of the proceedings. If the evidence is excepted to by the accused,

789 the nature of the objection and particulars of the issue should be fully stated. At the end of this stage, the re-closing of the court—the judge advocate and accused withdrawing—should be duly minuted.

**Authentication of the record.** It is directed by par. 1037, Army Regulations, that—"The record will be authenticated by the signatures of the president and judge advocate in each case;" and the mere affixing, at the conclusion, of these signatures will be a sufficient authentication. More artificially, the record is well authenticated by adding to the same, at the end of the final proceedings had, some such form as—*A true and complete record. Attest:* A. B., *President;* C. D., *Judge Advocate.*[56] Where the president or judge advocate has been changed pending the trial, it is of course the one officiating at the time of the authentication who is to subscribe the same.[57] The authentication should, regularly, be executed in the presence of the court before the final adjournment, and as a part of the proceedings.

Where the proceedings have been formally duly authenticated, and the record is subsequently returned for correction, and additional proceedings are thereupon had, it will be regular and proper to repeat the form of authentication at the end of such additional proceedings.[58]

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[51] G. O. 6, Dept. of La., 1868; G. C. M. O. 45, Dept. of Texas, 1874; DIGEST, 645.

[52] G. C. M. O. 17 of 1871; Do. 1 of 1872.

[53] Circ. No. 12, (H. A.,) 1883; G. C. M. O. 11, Dept. of the Columbia, 1892; Do. 27, Dept. of the Colorado, 1893.

[54] See Chapter XIX—"Protest."

[55] G. O. 64 of 1892, set forth in Chapter XIX—"Receiving of evidence of Previous Convictions."

[56] A similar form has been adopted in the Dept. of California. See Circular of that Dept., of May 20, 1885. A statement of a final *adjournment*, signed by these two officers, has sometimes been employed as a form of authentication, but is clearly not properly such. That such statement is itself without legal significance in the record, see *post*.

[57] See DIGEST, 645; G. C. M. O. 22, Dept. of the Columbia, 1880.

[58] See G. O. 7, Dept. of the South, 1869.

**Statement of final adjournment.** It has been not unusual to add a statement of this character at the end of the record, but the same is not required by law or regulation, and is quite unnecessary. The formal *authentication* of the record is the legal and proper final proceeding of the court.

**The recommendation.** This, as indicated in Chapter XX, is no part of the legal record. When made, however, it is usually entered upon a blank page after the final authentication or upon an appended paper. The body of it may be written by one of the signing members, or by the judge advocate or a clerk at the member's dictation.

790 **Statement of proceedings upon revision.** Where, as he is authorized to do, the reviewing authority returns the record to the court for the correction of error, the proceedings thereupon had should, as indicated in Chapter XXI, constitute a separate record in themselves, which, though properly attached at the end of the original record, should be quite independent of and distinct from the same. This, (which may well be headed—*Proceedings on Revision*,) will regularly recite that the court assembled at a certain time and place,—certain members named, and constituting a quorum of those who took part in the trial, being present,—in pursuance of the following Order or communication, or in terms to such effect. The Order directing the reassembling of the court, and indicating the reason therefor, with accompanying papers if any, will then be inserted or referred to as appended.

The action taken by the court in making the correction, or otherwise, will follow, and the whole supplementary record be authenticated by the signatures of the president and judge advocate. As set forth in Chapter XXI, the conclusion and action of the court in making and declaring the correction must wholly appear in the separate record of the revision. The portion of the original record to which the correction applies will be designated of course by the proper reference, but such portion is to be left as it stands, without erasure, interlineation, rewriting, note, or any other addition or modification whatever.[59]

**Statement of action of reviewing authority.** This, while no part of the record of the court, completes the history of the case tried, and is accordingly, as a general rule, written in or upon the record after the last proceeding of the court—most properly after the formal authentication. The Army Regulations (par. 1041) indeed direct in regard to it that the confirming authority—"shall state at the end of the proceedings in each case his decision and orders thereon." A similar rule properly applies to records of cases which fail of being regularly completed by trial, being disposed of upon an interlocutory issue.

The statement consists usually, as has already been indicated,[60] of an announcement, headed by a designation of the place, (headquarters of the
791 command,) and date, and signed by the reviewing officer in his official capacity, to the effect that the proceedings, findings and sentence are approved, or disapproved, in whole or in part, as the case may be, with such modification of the sentence by remission, commutation, or mitigation, if any, as may be deemed just and proper. Such directions, in regard to the manner and form of executing the sentence or a punishment as may be necessary, are added; and if the punishment adjudged is a reprimand, to be administered by the reviewing officer, it is administered in terms accordingly. The approval, disapproval, &c., may be stated without reasons or remarks, or may be accompanied by such comments or animadversions upon the facts of the case, proceedings of the courts, &c., as may be deemed to be called for.

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[59] See Chapter XXI—"Return of the Proceedings for correction."
[60] Chapter XXI—"Formulating of action."

Where the sentence adjudged is one requiring, for its execution, the confirmation of the President, (or other superior authority,) under Art. 106, &c., or where the execution of the sentence is suspended under Art. 111, the action will in general consist simply of an approval of the proceedings and sentence, and a declaration that the proceedings are forwarded, (the execution of the sentence being stated—where such is the fact—to be suspended,) for the action of the President, &c. The record having reached the latter, his action, confirming, disapproving, remitting, commuting, or mitigating the sentence, with remarks if any, is written upon the record under or after that of the original reviewing authority, and the formal action is complete.

It is to be added that the action taken should be written in or upon each and every separate case tried by the court, though it may be identical in each; and further that to append to a record a copy of the written or printed Order promulgating the proceedings, *in lieu* of a written approval or other action over the signature of the reviewing officer, is irregular and insufficient, since this would be a substitution of a copy for the original. A copy indeed of such Order should accompany the record when "forwarded to the Judge Advocate General" for file in his office.[61]

**Endorsement of the record.** This, which is placed upon the record before the transmittal of the proceedings to the reviewing authority and his action thereon, should properly be in the form prescribed in par. 1039 of the Regulations.

792 **EFFECT OF LOSS OR DESTRUCTION OF RECORD OF TRIAL.**

Where, by casualty of war, accident, or otherwise, a record, duly completed and finally acted upon by the reviewing authority, has been lost or destroyed, the judgment of the court is not thereby affected, and the sentence, if any, may legally be executed as in any other case. If the record be lost *before* the proceedings have been completed or been acted upon, they are necessarily vacated unless the record be made up again from reports or notes in the possession of the judge advocate or reporter, or a member.[62] In such a case indeed, the trial may be had *de novo*, unless,—an acquittal or conviction having been reached on the original hearing,—the accused interposes a plea of "former trial." It will always be a prudent course for the judge advocate, in forwarding the formal record, to retain for a reasonable time his original draft or notes of the proceedings, for use or reference in case of accident. In a recent case in the Department of Texas, it is observed by Gen. Wheaton, as follows—"The original record of proceedings in this case was lost in transit through the mails. Fortunately, the judge advocate retained his original notes and was thus enabled to furnish the court with another copy. The action of the judge advocate, * * * in keeping his notes until the publication of the general court-martial order in this case, is an exercise of due care and a commendable action."

**PRESUMPTION OF LAW AS TO REGULARITY OF PROCEEDINGS STATED IN RECORDS—Defects of form not material.** Where it appears on the face of a record of court-martial that the court was legally constituted and composed and had jurisdiction of the case tried, reasonable presumption will be made by the law in favor of the sufficiency of the proceedings, which, provided that no mandatory statutory requirement has been disregarded, will in general, irregular though they may be in form, properly be held to be

[61] Par. 985, A. R.

[62] See Simmons § 743–4; Gorham, 69; also Rules of Procedure, 94, 98.

regular in substance and legal in fact.[63] As to any action indeed pro-
793 vided by *statute* to be taken by the court, the record should clearly indicate that such provision has been complied with, but that it does so in bald and imperfect terms will not in general affect the validity of the proceedings or judgment, since the law will presume that what is stated to have been done was *duly* done. And the presumption will be stronger as to a particular called for by a directory regulation or by usage only. Thus where—as more frequently occurs in the hurry of time of war—the statements and recitals of a record of a legal court-martial are incomplete or otherwise defective, it will not necessarily result that the validity of the sentence adjudged is to be held to be fatally affected. If only the acts and functions *required* of the court by the Articles of war or other *statute* are found to have been substantially observed and performed, the law will in general presume that the details of the proceedings were due and sufficient, and a failure of justice thus be obviated.

Thus, if a record, in the statement of the swearing of the court, &c., omits to specify that it, (or the judge advocate,) was sworn "in the presence of the accused," as it is directed by the Army Regulations that the record shall "show," and merely states that it was "duly sworn" or simply "sworn," the legal validity of the proceedings will not, in the author's opinion, be affected, but it will be presumed that the swearing was according to law and sufficient. Otherwise,[64] however, where there is an entire absence of statement as to the fact of swearing; since the *statute*—Arts. 84 and 85—certainly contemplates that the court and judge advocate shall be qualified by a formal oath.[65]

Defects, though occurring in material parts of the proceedings, if amounting, when taken into consideration with the entire record, to defects of *form* merely, will properly be regarded as only irregularities, not affecting
794 the legal validity of the recorded proceedings. In a leading case on this subject before a U. S. Circuit Court, where the record failed to show any arraignment or plea, but the issue of guilt was fully made before the jury and a fair trial had, such defect was held, under the circumstances of the case, to be one of *form* merely, not entitling the accused to a new trial.[66]

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[63] As to this presumption of "*omnia rite acta*," in civil cases, see Slade *v.* Minor, 2 Cranch C., 139; Hutton *v.* Blaine, 2 S. & R., 75, 79; Moore *v.* Houston, 3 Id., 197; Trinity Church *v.* Higgins, 4 Robt., 1; Edwards *v.* State, 47 Miss., 581. As to military cases, see Rex *v.* Suddis, 1 East, 315; Porret's Case, Perry, 419; DIGEST, 648–9, note; Chapter V, p. 50, *ante*.

[64] Thus it has been held in civil cases that, where the record simply showed that the jury had been *sworn*, it was to be *presumed* that the swearing was in legal form, or "according to law." Edwards *v.* State, *ante;* Dyson *v.* State, 26 Miss., 362; Trinity Church *v.* Higgins, 4 Robt.; 1 Hough, (P.,) 759.

[65] Here the maxim of the law will apply, that what does not appear at all will be considered as not having existed or been done. See 3 Opins. At. Gen., 396. That an absence from the record of any statement or indication that the court or judge advocate has been sworn at all, will invalidate the sentence, unless the omission can be supplied upon the revision, has been repeatedly held. 3 Opins. At. Gen., 396, 544; G. O. 32 of 1863; G. C. M. O. 21, Dept. of the Columbia, 1880.

[66] U. S. *v.* Molloy, 31 Fed., 20. And see Sec. 1025, Rev. Sts.

# CHAPTER XXIV.

## COURTS OF INQUIRY.

795 THE subject of this Chapter will be considered under the following heads:—I. The Law relating to the Court of Inquiry; II. Its Nature, in general; III. Its Constitution; IV. Its Composition; V. Its Function; VI. The Recorder; VII. Procedure; VIII. Action on the Proceedings; IX. The Proceedings as Evidence.

### I. THE LAW ON THE SUBJECT.

**ARTICLES OF WAR.** The law relating to Courts of Inquiry—as derived with but slight modification from the provisions of the Articles of 1786[1]—is almost entirely contained in the seven Articles of the existing code, from the 115th to the 121st, as follows:

"ART. 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.*

"ART. 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.*

796 "ART. 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.'*

"ART. 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 be permitted to examine and cross-examine them, so as fully to investigate the circumstances in question.*

"ART. 119. *A court of inquiry shall not give an opinion on the merits of the case inquired of unless specially ordered to do so.*

"ART. 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.*

[1] Prior to this date, Courts of Inquiry in the army were sometimes ordered by Commanders under their general authority as such, and on a few occasions were directed to be convened by Resolutions of Congress. See, for example, the case of the Inquiry directed by Congress to be ordered by General Washington into the conduct of officers "in the Canada Department" and other instances, in 1 Jour. Cong., 384, 427–8; 4 Do., 625..

"ART. 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.*"

**OTHER STATUTES.** The Act of March 16, 1878, c. 37, which enables "the person charged" to testify as a witness before "courts-martial and courts of inquiry," is the only existing statute, (other than the Articles of war,) relating in terms to these courts. The provision of Sec. 1203, Rev. Sts., empowering "the judge advocate of a *military court*" to "appoint a reporter who shall record the proceedings of and testimony taken before such court," though not in terms applying to cases before courts of inquiry, has, in practice, been viewed as authorizing recorders of such courts to make such appointment. Sec. 1202, Rev. Sts., by which "every judge advocate of *a court-martial*" is empowered to issue process to compel the attendance of witnesses, applies in its terms still less than Sec. 1203 to recorders of courts of inquiry, and cannot, in
797 the opinion of the author, legally be extended to the latter.[2] A statute authorizing a restraint of the liberty of the citizen is to be strictly construed.

**THE BRITISH LAW.** The law in regard to the British court of inquiry—a body of inferior scope and powers as compared with the same court under our code—is mainly contained in the 123d of the Rules of Procedure.[3]

## II. THE NATURE OF THE COURT.

**AS DISTINGUISHED FROM A COURT-MARTIAL.** The court of inquiry, so called, is really not a court at all. No criminal issue is formed before it, it arraigns no prisoner, receives no plea, makes no finding of guilt or innocence, awards no punishment. Its proceedings are not a trial, nor is its opinion, (when it expresses one,) a judgment. It does not administer justice, and is not sworn to do so, but simply to "examine and inquire."[4] It is thus not a Court but rather a Board[5]—a board of investigation with the in-
798 cidental authority, (when expressly conferred upon it,) of pronouncing a conclusion upon the facts. But, as it is a sworn body, and as the wit-

[2] The original statute,—a provision of the Act of March 3, 1863, c. 75,—read: "Every judge advocate of a court-martial or court of inquiry." The words "or court of inquiry" were omitted by Congress in enacting the Revised Statutes. See Chapter XIII.

[3] See also (in Appendix) Army Act § 72, and Rule of Procedure 124, as to the special court of inquiry for the investigation of cases of unauthorized absence.

[4] As to its nature, compare Adye, 83; Delafons, 46; Tytler, 343–346; Simmons § 334; Hough, 28; Harcourt, 173–4; Hughes, 160; Fonblanque, 220; Maltby, 137; De Hart, 273–4; 3 Greenl. Ev. § 475; DIGEST, 135–6 and note; Trial of Capt. D. Porter, (Navy,) p. 10. In the British Rules of Procedure, 123 (D,) it is said:—"A court of inquiry has no judicial power, and is in strictness not a court at all, but an assembly of persons directed by a commanding officer to collect evidence with respect to a transaction into which he cannot conveniently himself make inquiry." In U. S. *v.* Clarke, 3 Fed., 710, it was held that a report of a military court of inquiry, exonerating an enlisted man from liability in connection with an act subsequently charged before a civil tribunal as murder, (not being a finding of a trial court,) could not be pleaded in bar as an acquittal before such tribunal. The ruling of the court in this case, however, is placed upon a different ground, elsewhere considered.

[5] Kennedy, 239; Coppée, 95; DIGEST, 135, note. In Simmons § 334; Harcourt, 174, and Griffiths, 133, it is styled a "*council.*" In the late case of The W. B. Chester's Owners *v.* U. S., 19 Ct. Cl., 683, the court say:—"A naval or military court of inquiry is not a judicial tribunal. It is instituted solely for the purpose of investigation, as an assistance to the President, the head of the Department, or the commanding officer, in determining whether or not any further proceeding, executive or judicial, ought to be taken in relation to the subject-matter of the inquiry. There is no issue joined between parties, and its proceedings are not judicial."

nesses before it are sworn and examined and cross-examined as before courts-martial, it is a Board of a higher sort in the nature of a court, and has thus come to be termed a court in the law military.

**ITS CHARACTER AND SIGNIFICANCE ILLUSTRATED.** But the court of inquiry, though only a *quasi* judicial body, is an instrumentality of no little scope and importance; its investigations are frequently much more extended and its conclusions more comprehensive than would be those of a court-martial in a similar case; and, in individual instances, its results may be scarcely less final than if it had the power to convict and sentence.[6] It is mainly, however, as contributions to history or to the annals of the Army, that the researches of the courts under consideration are significant and valuable. Thus among the courts of inquiry held in our army of which the reports have proved to be important State papers, may be cited the following:—

That convened in the case of Major John André, Adjutant General to the British Army, by General Washington as Commander-in-chief, on September 29, 1780, under the name of a "Board," and consisting of six Major Generals, [Greene, (the president,) Lord Sterling, St. Clair, the Marquis de la Fayette, Howe, and the Baron de Steuben,] and eight Brigadier Generals, [Parsons, Clinton, Knox, Glover, Patterson, Hand, Huntington, and Starke,] with John Lawrence, Judge Advocate General, as recorder, and directed "to report a precise state of the case," with an "opinion of the light in which he (André) ought to be considered and the punishment that ought to be inflicted." The Court, after considering the evidence, reported a statement of the 799 facts found, with an opinion that the accused "ought to be considered as a spy from the enemy, and that, agreeable to the law and usage of nations, he ought to suffer death:"[7]

That convened in 1791, by direction of the President, in the case of Brig. Gen. Harmar, to inquire into his conduct as commanding officer on the expedition against the Miami Indians in 1790:[8]

That convened by President Jefferson in 1808, in the case of Brig. Gen. Jas. Wilkinson, to investigate the charge of his having coöperated with the Spanish government of Louisiana adversely to the United States. A trial by court-martial followed in 1811, at which he was fully acquitted:[9]

That convened by an order of President Madison of January 21, 1815, in the case of Brig. Gen. W. H. Winder, to inquire into his conduct as commanding officer of the U. S. forces during the British attack on Washington in August, 1814:

That convened by President Jackson, at Frederick, Maryland, in November, 1836, to inquire into "the causes of the failure of the campaigns in Florida against the Seminole Indians, under the command of Gens. Gaines and Scott," and also into the campaign against the hostile Creeks:[10]

That convened by President Van Buren, at Knoxville, Tenn., in September, 1837, "to examine into the transactions of Bvt. Brig. Gen. Wool, and others

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[6] As where the report of the court has served as the ground and occasion for the summary dismissal of an officer. Tytler, 345–6; Prendergast, 211. And see cases in G. O. 15 of 1835; Do. of Nov. 23, 1844; Do. 183 of 1862; Do. 12, Dept. of the Tenn., 1863, (case of eight officers of the 109th Ills. Vols.) Compare also the result in the case of André (*post*,) who was hung as a spy on the fourth day after the conclusion of the proceedings of the court of inquiry.

[7] Proceedings published, Philadelphia, 1780; reprinted, Albany, 1865.

[8] American State Papers, Military Affairs, vol. I, pp. 20–36.

[9] G. O. of Feb. 14, 1812.

[10] G. O. 13, of March 21, 1837; Doc. 224, Senate, 24th Congress, 2d Session. And see American State Papers, Military Affairs, vol. VII, pp. 125–465.

of his command, in reference to his and their conduct in the Cherokee country:"[11]

That convened in Mexico, by G. O. 186, Hdqrs. of the Army, 1847, at the instance of Brig. Gen. Worth, to inquire into certain matters connected with the capituiation of Puebla, in which he conceived himself injured by Gen. Scott.

That convened in 1848, in the City of Mexico, in the case of Maj. Gen.
800 Pillow, which investigated charges preferred against that officer by Maj. Gen. Scott, in regard to official reports made by the former of the battles of Contreras, Churubusco, &c.:"[12]

That convened by the President at Washington, in September, 1862, "to investigate the circumstances of the abandonment of Maryland Heights and the surrender of Harper's Ferry:"[13]

That convened by the President, by Special Orders No. 356, of November 20, 1862, at Cincinnati, Ohio, "to investigate and report upon the operations of the army under the command of Maj. Gen. D. C. Buell, U. S. Vols., in Kentucky and Tennessee:"[14]

That convened by Special Orders No. 350, Headquarters of the Army, 1862, to inquire into the conduct of Maj. Gen. McDowell as a general officer during the first year of the late war:[15]

That ordered by the President, by S. O. 217 of 1868, in the case of Brig. Gen. Dyer, Chief of Ordnance, which was charged especially with the duty of examining into certain accusations made against that officer in a report of a Committee of Congress:[16]

That ordered by the President, by S. O. 35 of 1874, in the case of Brig. Gen. Howard, under the provisions of a Joint Resolution of Congress of Feb. 13, 1874, and directed, as required by the Resolution, "to fully investigate" certain indicated charges against said officer, "and to report their opinion, as well upon moral as upon technical and legal responsibility for such offences, if any, as may be discovered:"[17]

That ordered by the President, by S. O. 277 of 1879, in the case of Lieut. Col. Warren, Corps of Engineers, "for the purpose of inquiring into his conduct as major general commanding the 5th Army Corps, at the battle of Five Forks, Virginia, on April 1, 1865, and into the operations of his command on that day and the day previous:"[18]

801 That convened by direction of the President, by S. O. 241, of October 31, 1883, "to investigate the organization and fitting out of the Greely relief expedition party, transported by the steamer Proteus:"[19]

That convened by direction of the President, by S. O. 93, of 1884, to investigate certain charges, preferred by a civilian, A. E. Bateman, against Brig. Gen. D. G. Swaim, Judge Advocate General of the Army, the report of which

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[11] G. O. 63, of Oct. 2, 1837; American State Papers, Military Affairs, vol. VII, pp. 532–571.

[12] G. O. 40, of July 2, 1848.

[13] G. O. 183, of Nov. 8, 1862. This court was designated a "Military Commission."

[14] The proceedings were never promulgated in Orders.

[15] Rebellion Record, Series I, Vol. XII, Part I, pp. 36 to 332.

[16] G. O. 51, of May 15, 1869. Proceedings printed at Govt. Printing Office, 1869.

[17] G. O. 75 of 1874; Proceedings printed at Govt. Printing Office, 1874.

[18] G. O. 132 of 1882; Proceedings printed at Govt. Printing Office, 1883.

[19] "Proceedings of the 'Proteus' Court of Inquiry on the Greely Relief Expedition." Govt. Printing Office, 1884.

formed the basis of the subsequent court-martial proceedings published in G. C. M. O. 19 of 1885.[20]

802 III. ITS CONSTITUTION.

**AUTHORITY OF COMMANDING OFFICER AND PRESIDENT RESPECTIVELY.** It is provided, as has been seen, in Art. 115 that—"*A court of inquiry may be ordered by the President or by any commanding officer*," but, for a certain reason stated,[21] "*shall never be ordered by a commanding officer except upon a demand by the officer or soldier whose conduct is to be inquired of.*"

The comprehensive designation—"any commanding officer"[22] indicates that the authority to constitute courts of inquiry is not necessarily restricted, as has sometimes been supposed,[23] to commanders who would be authorized to convene courts-martial in the same cases, but properly includes any and every "commanding officer," as the term is understood in the service;[24] the power conferred being thus made incident to distinctive command as such. Thus the commander of a district, post, regiment, or independent company or detach-

[20] The proceedings of the court of inquiry are contained in a volume published at the Govt. Printing Office, 1884.

Among other important courts of inquiry in the army may be mentioned those in the following cases:—Case of Lieut. Lane, charged with assaulting a member of Congress. (G. O. 15 of 1835.) Case of Private Delap, involving a construction of the present Thirtieth Article. (G. O. 13 of 1843.) Case of Capt. P. S. Cooke, relating to protection given to traders in Texas. (G. O. 6 of 1844.) Case of Asst. Surg. Byrne, relating to a collision between him and Surgeon General Lawson. (G. O. 42 of 1849.) Case of Col. D. S. Miles, charged with misconduct at the battle of Bull Run. (G. O. 42, Army of the Potomac, 1861.) Cases of a Colonel and a Captain of Vols., charged with misconduct at the same battle. (G. O. 30, Dept. of N. E. Va., 1861.) Case of Brig. Gen. Martindale—inquiry into a charge preferred against him by Maj. Gen. Porter. (G. O. 178 of 1862.) Case of the burning of the steamer Ruth. (G. O. 344 of 1863.) Cases of certain corps, &c., commanders, as to their conduct in the battles of Sept. 19th and 20th, 1863. (Court ordered in G. O. 322 of 1863. Result not promulgated.) Case of members of the 109th Ills. Infy., charged with disloyalty. (G. O. 12, Dept. of Tenn., 1863.) Cases of Col. A. A. Gibson, 2d Pa. Arty., and Col. C. M. Alexander, 2d Dist. Col. Vols., as to details of the command and discipline of their regiments, &c. (G. O. 22, 139, Dept. of Washington, 1864.) Case of an inquiry into the transactions of the commanding officer in charge of the Hualpai Indians in Arizona in 1874–5. (G. O. 6 of 1876.) Case of Lt. Col. Eddy and Capt. Martin, Quartermaster Dept., as to the administration of the Q. M. Depôt at San Francisco, and certain frauds committed therein. (G. O. 10 of 1877.) Case of Major Reno—as to his conduct at the battle of Little Big Horn River, on June 25th and 26th, 1876. (G. O. 17 of 1879.) Case of an inquiry instituted on the application of Col. E. A. Carr, as to a hostile expedition against Apache Indians in August, 1881. (G. O. 125 of 1882.) Case of an inquiry into the administration of the post of Fort Coeur d' Alene, between 1879 and 1886. (G. O. 47 of 1887.) Case of an inquiry into matters connected with the administration of the affairs of the 11th Light House District, by Major William Ludlow, Corps of Engineers. (S. O. 302 of 1892.) Also courts of inquiry held in the cases of officers charged with the shooting, &c., and killing of mutinous or insubordinate inferiors, mostly in time of war, and of which conclusions are published in the following Orders:—G. O. 29, Dept. of N. E. Va., 1861; Do. 46, Army of the Potomac, 1862; Do. 30, Banks' Division, 1862; Do. 5, Dept. of N. Mexico, 1863; Do. 76, Dept. of W. Va., 1864; Do. 20, Dept. of the Platte, 1871. With which see O'Brien, 76, as to case of Col. Parrish, Florida, 1836. Other courts of inquiry than those here specified will be noticed in the course of the Chapter. Proceedings of important Courts of Inquiry in the Confederate States army are published in G. O. 19, A. & I. G. O., Richmond, 1861; Do. 28, 108, Id., 1862; Do. 81, 152, Id., 1863.

[21] In 8 Opins., 342, Atty. Gen. Cushing comments forcibly on this part of the Article, concluding with the expression of opinion that "the reflection on officers of the army" contained in it is "unjust and out of place."

[22] A similar designation is employed in the British law. Rules of Procedure, 123.

[23] G. O. 78 of 1880.

[24] For a definition of this term, see Chapter IX—"By whom arrest is to be imposed."

ment, may order this court with the same legality as may the commander of a department or army. The exercise, however, of such authority on the part of an inferior commander, or in a case of a soldier, is of rare occurrence in our service.[25]

803 The authority, however, of the commanding officer is not unqualified, but subject to the limitation prescribed in the last clause of the Article; it can be exercised only conditionally upon the court being "demanded" by the interested party. It is the President alone whose authority under the Article is absolute, and he may avail himself of this authority either by himself convening the court in Orders from the War Department, or by directing the same to be convened by a military commander.

**DISCRETION OF CONVENING OFFICIAL.** But the exercise of the authority, whether absolute or conditional, is discretionary. Neither the President nor a commanding officer is *obliged* to order the court under any circumstances; the question whether or not a court shall be ordered in a particular case being one to be determined, not merely by the wishes of the aggrieved party, but also and mainly by such considerations of expediency or justice as may address themselves to the superior. The word "demand," as employed in the Article, does not imply a right on the part of the officer or soldier, but is to be construed as synonymous with *requested or applied for.* It is optional, therefore, with a commanding officer to refuse the application; but, in the event of such refusal, the party, if not satisfied, may appeal to higher authority, as in any other case of an official request not granted by an immediate commander. Applications for courts of inquiry are in fact not unfrequently refused, on the ground that to order the same would be opposed to the interests of the service.

**THE CONVENING ORDER, &c.** The *form* of constituting a court of inquiry is by a General or Special Order, similar to that employed for ordering a court-martial and detailing the members; the only difference being that, in lieu of a reference to a trial or trials to be had, the Order specifies a charge, subject, or question to be investigated, and further directs either that the court shall report the facts alone, or the facts with its opinion thereon,—with such additional orders or instructions, if any, as it may be deemed proper to subjoin. At any subsequent state of the inquiry, a supplemental Order may be issued by the convening authority, relieving a member, detailing a new mem-

804 ber or recorder,[26] adding to or modifying the instructions originally given,[27] changing the time or place of meeting, &c.

## IV. ITS COMPOSITION.

**ART. 116.** This Article provides that: "*A court of inquiry shall consist of one or more officers, not exceeding three.*" As to the word "officers"—what has been said in the Chapter on the Composition of General Courts-martial, in construing the same word as employed in Art. 75, will be for the most part applicable here.

**NUMBER OF MEMBERS.** A detail for the court of *less* than three commissioned officers has been of the rarest occurrence in our service.[28] In a few

[25] The proceedings of a court of inquiry in the case of an enlisted man, charged with killing a public horse by hard riding, are published in G. O. 27, Dept. of Cal., 1867.

[26] "It is not absolutely necessary that the same members should go through the whole of the inquiry." Harcourt, 174. And see Simmons § 333; De Hart, 277, note; Hardwood, 161.

[27] See Coppee, 98.

[28] A court of inquiry with but *one* member is convened by G. O. 36 of 1837.

cases indeed—as in the case of the court convened upon the application of Gen. Warren—a court originally composed of three members has been reduced to two in the course of its investigation, and has gone on and concluded with that number. In the case of André, the court, (convened before the enactment of the Article fixing the number,) was, as has been seen, composed of fourteen members. In the recent case of Gen. Howard, above noticed, it was specially provided in the Joint Resolution that the court should "consist of not less than five officers," and it was in fact constituted with seven members.[30]

**RANK OF MEMBERS.** On this point the law is silent. Art. 79, in providing that "no officer shall, when it can be avoided, be *tried* by officers inferior to him in rank," applies of course only to courts-martial. Its injunction, however, will naturally and properly be observed in composing courts of inquiry, so far as the exigencies of the service will permit.

## V. ITS FUNCTION.

**IN WHAT IT CONSISTS.** The function of the court of inquiry
805 in our service appears from Arts. 115 and 119. In the former its general purpose is indicated to be—"*to examine into the nature of any transaction of, or accusation or imputation against, any officer or soldier.*" By the latter, it is required to "*give an opinion on the merits of the case,*" when "*specially ordered to do so.*"

**THE INVESTIGATION.** The subjects of investigation contemplated by the Article are of two general descriptions:—*transactions* of officers or soldiers, a comprehensive term which may include any acts whatever, though commonly confined to acts of a supposed questionable or exceptional character; and *accusations or imputations*, that is to say charges of crime or misconduct, either direct and specific, or indirect and informal, and proceeding from any competent or respectable source. More particularly, however, there are three[30] principal uses and purposes for which investigations by courts of inquiry are resorted to in practice, as follows:—

1. For determining whether there should be a trial by court-martial in a particular instance. As where accusations have been made, or circumstances of a criminating character have been reported, against a certain military person;[31] or where, a crime or disorder having apparently been committed by several military persons, it may be doubtful what particular individual or individuals may be implicated or punishable;—in such cases a court of inquiry may often profitably be convened with directions to report all the facts, and, (as is generally required,) to express also an opinion whether or not a court-martial should be ordered for the trial of the person or persons accused or found chargeable. The court of inquiry, when acting in this capacity, has been frequently compared to a grand jury;[32] but, as the party whose conduct is

[30] The British law simply provides that the court "may consist of any number" of officers, (Rules of Procedure, 123;) but the number has generally been three or five. In the Inquiry upon the Cintra Convention, in 1808, and also in the case of Col. Home, (Home *v.* Bentinck, 2 Brod. & Bing., 131,) the number was seven.

[30] See 6 Opins. At. Gen., 239.

[31] The ground of complaint may be advanced by *civilians*. See an old case in G. O., Hdqrs., Newbury, June 19, 1782, of a court of inquiry ordered "to inquire into the causes of a complaint exhibited by citizens of the State of Pennsylvania," against certain officers and soldiers. And see case of Gen. Swaim, *ante*, p. 519; also case in G. O. 47 of 1887.

[32] See Adye, 54, 172; 1 McArthur, 108; Tytler, 223, 340; Hough, 711; Prendergast, 208, 211; Clode, M. L., 196–198; Maltby, 136; De Hart, 120; 8 Opins. At. Gen., 347.

under investigation may be present with counsel, and be heard in his
806 defence, at its sessions, and its proceedings may be and generally are public, the analogy indicated is by no means complete.[33]

**2. For the purpose simply of informing and advising the convening official.** These courts are also employed to investigate cases, which appear to call, not for trial by court-martial, but for some other military or administrative action, and in which the testimony is so multifarious, complicated, or conflicting that a formal inquiry is needed for the purpose of ascertaining and reporting what are the actual facts, and thus reliably informing the President or Commander, and assisting his judgment. This, with or without an opinion—as he may direct—as to the bearing of the facts upon the discipline of the service, the rights or liabilities of individuals, &c.[34] In cases indeed where but a brief investigation will be sufficient, the same is not unfrequently made through an ordinary board detailed for the purpose, or through the judge advocate or inspector general of the command. It is only for such important investigations of this class as will involve the taking of a mass of testimony and the giving of a full hearing to the officer, (or soldier,) whose acts have given rise to the proceeding, that a court of inquiry is, in general, ordered.[35]

**3. For the vindication of character or conduct.** This instrumentality is also not unfrequently resorted to, as a species of *court of honor*, for the exculpation or justification of an officer, (or soldier,) whose reputation or action has been seriously aspersed or injuriously criticized in some official report or authoritative publication, or who has been severely rebuked or censured by a military superior, or who deems himself to have been otherwise aggrieved in his military capacity. In such cases the court is usually applied for by the party himself according to the provision of Art. 115.[36] Though the primary object of the inquiry is vindication, the result may indeed be quite the reverse.

807 It is to be remarked that the several objects above indicated are not necessarily kept distinct and separate in practice, but may, where the circumstances make it proper, be combined in the investigation ordered.

**The investigation not to be diverted to foreign matter.** Though considerable latitude is to be conceded to the court in its inquiry, it will not be warranted in examining a subject quite distinct from that which it has been directed to investigate. Still less where it has been ordered to investigate certain charges, will it be justified in taking into consideration *other* charges against the same person, or any charges against a *different* person.[37]

**To be confined to cases of persons in the army.** The term "*officer or soldier*," employed in the Article, clearly means one who is an officer or soldier

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[33] DIGEST, 136; McNaghten, 176–7.

[34] See Tytler, 343; Simmons § 334; Kennedy, 239; 6 Opins. At. Gen., 242; 8 Id., 341.

[35] "Thus a court of inquiry may have in charge a comprehensive subject, such as the cause of the loss of a battle, the conduct of a particular corps or ship in a combat or engagement, the general condition of some administrative branch of the service, and other matters of that nature." 8 Opins. At. Gen., 341. And see 6 Id., 242; Simmons § 334.

[36] Instances may occur where two officers who have become involved in controversy may each apply for a court of inquiry in regard to the same transaction. In such cases the court, if convened, will practically in the words of Williamson, (2 Mil. Ar., 132,) "sit as a court of arbitration between the contending parties, the decision of which they have consented to abide by."

[37] See Benét, 230.

of the army at the time the court is ordered.[38] Transaction of or accusations against persons who have been members of the army, but who have left it and become civilians, while the same may be indirectly involved in an investigation, are not *per se* legitimate subjects for direct inquiry by this court, even though the inquiry be limited to their acts and conduct while in the army. For such an inquiry would be futile so far as concerned *action* by the military authorities.

Not to be affected by the statute of limitations. The military statute of limitations—Art. 103—applies only to proceedings before courts-martial. There is no legal obstacle, therefore, to a court of inquiry taking cognizance of a particular transaction or matter of accusation dating back more than
808 two years prior to the ordering of such court, and it may accordingly extend its examination to acts and occurrences of the past without regard to the period which has since elapsed.[39] A peculiar advantage indeed of these courts over courts-martial is that they are empowered to investigate a series of acts or course of conduct—such as the administration of an office, the execution of a special trust, the management of an expedition or a campaign, the keeping of a continued account of receipts and disbursements, &c., embracing, in their relations, a considerable number of years, or any indefinite period. While in practice these courts will rarely be called upon to go into transactions remote in time, it is yet the fact that some of the most conspicuous instances in which courts of inquiry have been resorted to in this country have been cases in which a trial by court-martial was held to be barred by the lapse of the statutory period, and a court of inquiry remained the only means by which the facts could be satisfactorily investigated or the person vindicated or the reverse.[40]

THE OPINION—Art. 119. In view of the positive terms of this Article, the court, unless expressly required to give an opinion, could scarcely properly make even a recommendation or suggestion as to the merits of the case, since the same would in general involve a certain measure of opinion.

As required and rendered. The opinion required of a court of inquiry is, in general, as already indicated, an opinion whether, upon the facts as developed by the investigation, a particular officer or soldier, or any officer or soldier, should properly be brought to trial by court-martial; or whether any *other*, and if any what, action is called for by the interests of the service, or is otherwise desirable to be taken. The court may be directed to furnish
809 separate opinions upon several different points involved in the case,[41] and also to give its *reasons* for its opinions.[42] Where ordered to render an opinion upon a specific subject, or to a certain particular effect, it should

[38] Thus a court of inquiry could not legally be ordered to investigate charges against a contract surgeon. DIGEST, 136.

In G. O. 50, Mil. Div. of West Miss., 1864, are published the proceedings of a body, in form a court of inquiry, but designated a "*council of war*," by which was investigated the question whether a brigadier general commanding the enemy's forces at Fort Morgan, Ala., had violated the laws of war in connection with the surrender of that post.

[39] G. O. 24 of 1829; 6 Opins. At. Gen., 239; 8 Id., 349; Macomb, 94; Harwood, 168; Benét, 183–5. And see Debate in Senate on case of Gen. Howard, Cong. Rec., 1874, No. 40, pp. 36–8. De Hart, (p. 281–3,) misapprehends the law on this point; as did also the court of inquiry in Ast. Surg. Byrne's Case, (G. O. 42 of 1849,) and in Col. Alexander's Case, (G. O. 139, Dept. of Washington, 1864.)

[40] In the cases both of Gen. Dyer and Gen. Howard, the charges and transactions dated back beyond the period of the statutory limitation.

[41] See instances of opinions thus dispersed, in G. O. 13 of 1837; Do. 40 of 1848; Do. 42 of 1849.

[42] As in the case of the Inquiry in regard to the Proteus expedition. S. O. 241 of 1883.

confine itself strictly to the same: it cannot assume to express an opinion upon a different matter or to a different effect without transcending its authority and becoming liable to censure.[43]

**Dissenting opinions.** Though it is *the court* which is called upon to give an opinion; *i. e.*, though it is contemplated that the opinion given shall be the opinion of the court; yet as the opinion of a court of inquiry is not a *judgment*, it is not deemed to be necessary that the same, as rendered, should be unanimous or single, nor is the fact that the majority concur in a certain opinion regarded as precluding, (as in a case of a court-martial,) the expression of their dissent by the minority. When a joint opinion cannot be united in by all the members, dissenting opinions must be given or none at all; and in a case of dissent, it is not only proper, but desirable for the instruction of the reviewing officer, that the different conclusions arrived at by the different members be formally reported in the record.[44] But dissent of course is to be avoided where practicable, and the members will always preferably concur when they can do so without a sacrifice of just and reasonable views.

810 **Incidental remarks.** Though the court may not volunteer opinions not called for, it may, in connection with its opinion or report of facts, *remark* upon matters extraneous to the subject of investigation, but legitimately within its observation, for the purpose of bringing the same to the attention of the reviewing officer,—such, for example, as disrespectful or otherwise irregular conduct on the part of the accused or accuser, or on the part of counsel or a witness.[45]

## VI. THE RECORDER.

**HIS PROVINCE AND DUTIES.** Although it is provided in Art. 116 that—"*A court of inquiry shall consist of*" certain officers "*and a recorder*,"[46] the special use and purpose of this latter officer is added as follows, *viz.*: "*to reduce the proceedings and evidence to writing.*" So, in Art. 117, while it is provided that the members of the court shall be sworn to "*examine and inquire*," the recorder is required to be separately sworn to "*accurately and impartially record the proceedings of the court and the evidence.*" Thus, like the judge advocate of a court-martial, the recorder is clearly distinguished from the members, and the provision cited of Art. 116 has never been construed in practice as making him a part of the court.

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[43] Hough, (A.) 8; Harcourt, 174; Macomb, 93; O'Brien, 291; De Hart, 277; Coppée, 98.

[44] "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 case." DIGEST, 138.

In the Inquiry on the Cintra Convention, in 1808, the members who were "of a different opinion from the majority" were *required* "to record upon the proceedings their reasons for such dissent," and three of the members accordingly did so. Simmons § 339, and note; Hough, (A.) 4. The last author, (Precedents, 642,) cites another case in which two of the five members of a court of inquiry gave dissenting opinions. *Contra*, O'Brien, 291, in holding dissenting opinions not permissible, proceeds upon a supposed analogy between the judgment of a court-martial and the conclusion of a court of inquiry, which does not exist in fact or in law.

[45] Hough, 29. And see G. O. 13 of 1837, as to the animadversions of the court of inquiry upon the reprehensible language used in regard to each other by Gens. Gaines and Scott, the two officers concerned, the one in his address to the court, and the other in his official communications which were put in evidence.

[46] The Articles of the late code of 1806, (in force prior to June 22, 1874,) termed this officer "judge advocate," and "judge advocate or recorder." The "judge advocate" of the court of inquiry in Gen. Dyer's case, (convened in 1868,) was authorized, in a Special Order from the War Department, to appoint an "assistant judge advocate." Published Record, p. 1.

He is further assimilated to the judge advocate in that he is empowered and required by Art. 117 to qualify the members by administering to them the prescribed form of oath; that by Art. 118, he is authorized to summon and examine witnesses; and that, by Art. 120, he is required to authenticate, with the president, the completed proceedings.

The principal regular *duties* of the recorder are to secure the attendance of the witnesses, and to swear them and conduct their examination, (cross-
811 examining also, if desirable, those introduced by the other party, if there be one,) and to prepare the record of the court. He also assists the court in procuring such documentary or written evidence as may be required; but as Art. 91, relating to *depositions*, evidently contemplates the taking of the same mainly at least for use on trials by courts-martial, he will comparatively rarely be called upon to obtain testimony in this form.

**NOT A PROSECUTOR OR LAW-OFFICER.** The recorder, however, unlike the judge advocate, is not a prosecuting officer, since the investigation is not a trial, nor will he properly assume the *rôle* or manner of a prosecutor. Further, he is not invested, like the judge advocate, with the capacity of adviser to the court. A court of inquiry, having confidence in the legal ability of its recorder, may indeed properly call upon him to assist it in examining the law applicable to the case before it, but this is no *duty* of a recorder; moreover it will not often come within the province of a court of inqliry to pass upon questions of law of a difficult or unfamiliar character.[47]

## VII. THE PROCEDURE.

**THE MEETING OF THE COURT—ATTENDANCE OF PARTIES.** The court assembles at the place and time named in the Order convening it. If all the members do not attend on the first day, it is customary for the others to adjourn from day to day till all are present, with the recorder.

The "party accused" is entitled, by Art. 118, to be present so far as to take part in the examination of the witnesses, and in practice he is permitted to be, and generally is, present from the beginning and throughout the proceedings,[48] though his presence is not at any stage obligatory or essential. He is sometimes indeed, though rarely, *ordered* to be present,[49] and in such case must
812 attend, though his absence may not affect the authority of the court to proceed.

To place the accused party in *arrest* prior to the convening of the court, or pending its continuance, would be opposed to the present usage of the service, and scarcely justified except in an extreme case.[50]

The party accused, or "whose conduct is inquired of," is entitled to be *present* (with *counsel*, if desired[51]), and to examine and cross-examine the witnesses

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[47] In the exceptional case, however, of Gen. Howard, already noticed, the court was specifically required to express an opinion not only upon the "moral" but upon the "technical and legal responsibility" of the officer.

[48] He should properly be furnished with copies of the convening Order, and other Orders, if any, fixing or changing the time or place of the meeting of the court.

[49] Simmons § 335; Hough, 25, 437; James, 317; De Hart, 275. The court has no power to command his obedience, but the commanding officer only. Simmons § 334; Griffiths, 133.

[50] Hough, (A.) 8; Griffiths, 134; De Hart, 279; Lee, 83. So, in the navy, the officer need not be put under suspension. Harwood, 163. The case of André was of course an exception: at the end of the proceedings the record states that he was "remanded into custody." In the early case of Major Wyllys, of our own army, Congress, in providing for a court of inquiry, expressly directed that he be "arrested and remain in arrest" till it should further order, and, at the end of the proceedings, it directed that he be "released from his arrest." 4 Journals, 625, 676.

[51] See De Hart, 276; Benét, 182; Coppée, 99; Harwood, 163.

similarly as before a court-martial; and, under the existing law, he may himself take the stand as a witness. He may also present an argument or statement at the close. The inquiry, however, not being a trial, his presence thereat is not essential. The *accuser*, where there is one, has also generally been allowed to be present,[52] and with his counsel;[53] and a similar privilege is properly extended to an officer whose conduct will be materially *involved* in the inquiry.[54]

**CHALLENGE OF MEMBERS.** The full court being in attendance, the convening Order is read, and the accused or interested party, is afforded the same opportunity of challenge as upon a trial by court-martial. To this privilege indeed he is not legally entitled, since, by the terms of Art. 88, it is only "members of a court-martial" who "may be challenged by a prisoner."

813 In strict justice, however, to the party, and with a view to an impartial inquiry, such privilege is now always extended in our service.[55]

In the special case of Gen. Howard, it was, as has been seen, expressly provided by Congress that the accused should "*be allowed the same right of challenge as allowed by law in trials by court-martial;*" but this provision was only declaratory of the existing practice as established by usage, and was unnecessary to secure the privilege to the party.[56]

Wherever the opportunity of challenge is availed of, the proceedings had will be similar to those before courts-martial in like cases, as fully set forth in Chapter XIV. If a challenge to one of a court of three members is allowed, it will in general be better to adjourn and await the action of the convening authority, since a court of two members, though legal, does not permit of a majority vote in a case of disagreement.

**ORGANIZATION, SITTINGS, &c.—Administering of the oath.** Such objections to members as have been made, (if any,) being disposed of, the members and recorder are sworn according to the form and in the manner set forth in Art. 117.

**Obligation of secrecy.** The oath, it may be remarked, imposes upon neither members nor recorder any obligation of secrecy similar to that enjoined by their oath upon the members and judge advocate of a court-martial; so that the opinion of the court may be divulged without any violation of the oath as prescribed. But, in law, the opinion of a court of inquiry is assimilated to the judgment of a court-martial in that it is a confidential and privileged official communication addressed to the convening authority and intended as a basis for his action alone, and it is readily perceived that a disclosure of such opinion before such action was taken might, (especially in a case where the court had been sitting with closed doors,) seriously embarrass the commander or the President in his disposition of the case, and perhaps materially prejudice

814 the interests of the accused party in the event of a trial being ordered.[57] It has therefore been held both by English and American writers[58] to

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[52] De Hart, 276. Bénet, 181–2; Coppée, 98. In Gen. Dyer's Case, as also in Gen. Swaim's, the counsel of the accusers constantly attended, and took upon themselves the *onus* of making good the charges.

[53] Kennedy, 240; Hough, (A.) 8; De Hart, 276; Benet, 181. Gen. Scott, as accuser, attended the court of inquiry in the case of Gen. Pillow, in Mexico, in 1848.

[54] Proteus Court of Inquiry, pp. 2, 3.

[55] See Macomb, 94; O'Brien, 292; De Hart, 278; Benét, 181; Coppée, 98; Harwood, 163. The privilege was recognized as far back as at the inquiry in the case of Gens. Scott and Gaines in 1837.

[56] This was admitted in the debate in both Houses of Congress. Cong. Rec., Nos. 38 and 40, 1874.

[57] Home *v.* Bentinck, 2 Brod. & Bing., 130, 164; Hough, 26; Clode, M. L., 199; De Hart, 280; Benét, 182; Harwood, 168.

[58] See authorities cited in last note; also Hough. (P.) 653; Hughes, 163; O'Brien, 291.

be highly unmilitary and indecorous for a member or the recorder of a court of inquiry to discover, either to the accused or other person, the opinion or recommendation of the court, without the authority of the convening official or before the same is published in orders.

The oaths having been administered, the court is organized for the *inquiry*.

**Whether session to be open or closed.** Before, however, entering upon the investigation, a question generally to be determined is, whether the court shall sit with open or closed doors. Courts of inquiry, instituted as they are to assist by their researches the judgment of the President or the military commander, and making reports addressed as confidential communications to his discretion, would appear from their very nature and purpose to be properly close courts.[59] Admission to them, in the absence of statutory regulation on the subject, is declared to be, strictly, not of right.[60] But from an early period these courts, even in England, have sometimes been open;[61] and, in *our* law, Art. 118 provides for the admission of the accused and the witnesses, while, by custom, the accuser, the counsel of both parties, and the necessary clerks are permitted to be present. From this it is but a short step to admit the public, and the result is that, with us, courts of inquiry, unless otherwise instructed in Orders, are in general held as open courts.[62] It is indeed always competent and
815 proper for the convening authority to direct, in the convening or a supplemental Order, whether the court shall be open or closed.[63] But if—as is usually the case—the Orders are silent on the subject, the court is empowered to decide the point for itself by vote, or, without raising the question, to go on sitting with open doors from the beginning.[64] In a case where the result of the inquiry, as it is developed in the course of the testimony, is such as to make it improper or impolitic that the court, originally open, should continue to be so, the doors will properly be closed during the rest of the investigation,[65] all persons being excluded except those entitled or privileged by law or usage to be present, and the witnesses being admitted separately.[66] Of course, upon the final deliberation, or where it is desired to consider without publicity some interlocutory question, the court, if open, is cleared, and the doors are closed, in the same manner as in the case of a court-martial.[67]

**Hours of session.** A court of inquiry, (in the absence of special instructions on the subject,) may sit "without regard to hours," beginning and ending its daily sessions at such hours as may be convenient for itself and the

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[59] "These courts being held for the purpose of obtaining information, upon which an ulterior decision is to depend, are necessarily close courts." Kennedy, 240. "All courts of inquiry are inherently close courts." Hough, (P.) 645. And see Simmons § 337; Clode, M. L., 196; Benét, 182; 8 Opins. At. Gen., 346.

[60] "Defendants generally, and auditors and spectators occasionally, have access by grace and not of right." Hough, (P.) 645. And see other authorities cited in the last note.

[61] The Inquiry on the Cintra Convention was closed for the first two days. On the third day it was opened, a minute being made in the proceedings that—"the guard being withdrawn, strangers are allowed to enter." See Hough, (A.) 11.

[62] Macomb, 92; O'Brien, 291; De Hart, 276; Harwood, 163; 8 Opins. At. Gen., 346; Lee, 82; DIGEST, 136. In the recent case of Gen. Swaim, the court, (p. 27,) voted to sit with open doors.

[63] Hough, (A.) 11; Do., (P.) 639; Simmons § 339. Griffiths, 132; De Hart, 276; 8 Opins. At. Gen., 229.

[64] See De Hart, 276; Benét, 182; Coppée, 99; Harwood, 163.

[65] See Hough, 26; Macomb, 92; De Hart, 276; Harwood, 163; 8 Opins. At. Gen., 347.

[66] Hough, (P.) 640.

[67] "Generally the court sits with open doors, except when deliberating and voting." O'Brien, 291.

parties interested.[68] The provision of Art. 94 prescribing certain fixed hours applies only to "proceedings of *trials*."

**Adjournments.** The granting of "*continuances*," as such, is, by Art. 93, in substance restricted to occasions of trials before courts-martial. A court of inquiry, however, may, from time to time during an investigation, grant or take such adjournments as may be expedient and reasonable.[69]

816 **Keeping of order—Contempt.** The presiding officer acts as the organ of the court, and keeps order as in the case of a court-martial. But a court of inquiry, having no original judicial authority, and not being embraced within the description of Art. 86, which applies in terms only to courts-martial and cannot, as a penal statute, be enlarged by implication, is not empowered to punish, as for a contempt, persons guilty of disrespect, disorder, or violence in its presence.[70] Where, therefore, witnesses or others misbehave at a session of a court of inquiry, while the court may cause them to be removed if desirable, it can procure them to be punished only by reporting the case to the convening authority or local commander, or to the civil authorities as the case may be.[71] In the event of a trial of the offender, the members and recorder, or any of them, will properly testify as prosecuting witnesses.[72]

**THE INVESTIGATION AND EVIDENCE—Entertaining of charges, reports, &c.** Upon its organization, the court commonly proceeds at once to the matter of the inquiry, which it has been sworn to make truly and impartially "according to the evidence." Not unfrequently, as a starting point of the investigation, reports, correspondence, books, &c., or charges—which will properly be specific, but need not be in a technical form[73]—are laid before the court, either as referred to it directly by the convening authority, or furnished to and introduced by the recorder. Even though formal charges be offered, there is made, as already indicated, no *plea*. The accused, however, may take occasion to state—if such be the fact—that he admits certain allegations, thus simplifying the investigation.[74]

817 **Taking of testimony.** The evidence is now entered upon, and, before courts of inquiry, the documentary evidence especially is often very considerable. The examination of the witnesses is conducted substantially as before courts-martial;—the accused availing himself, so far as desired, of the right recognized by Art. 118 to examine and cross-examine, by introducing witnesses of his own, and interrogating, impeaching, or objecting to the witnesses and testimony offered by the recorder; and the members of the court putting such questions as may be deemed desirable for the eliciting of the facts. Under the

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[68] De Hart, 279; Benét, 182; Coppée, 99. In this connection, Hough, (Practice,) 137, observes—"Though Sunday is not a day for sitting, still there may arise cases requiring a court to sit on Sunday."

[69] In the Order convening the court of inquiry in the case of Gen. Buell, the court was specially authorized to "adjourn from place to place as may be desirable, for the convenience of taking testimony."

[70] See DIGEST, 137 and note. The law on this point is misapprehended by De Hart, (p. 279,) and Benét, p. 182.

[71] As to witnesses, Clode, (M. L., 198,) correctly says: "the court has no power to punish them for contumacy or silence."

[72] See Delafons, 53–4; Hough, (A.) 6.

[73] See Hough, (A.) 8; Maltby, 137; De Hart, 280; also G. O. 42 of 1849, (case of Ast. Surg. Byrne,) where there were ten specific charges preferred in the form of statements of fact. It is observed by Maltby:—"A complainant is not bound to exhibit the same charges before a court-martial which he produced to the court of inquiry. Formal charges have sometimes been preferred as the basis of the investigation." See cases in G. O. 65, 88, Fifth Mil. Dist., 1869.

[74] See O'Brien, 291.

Act of March 16, 1878, c. 37, the accused, if he so elects, may take the stand as a witness, subject to cross-examination. The inquiry not being a judicial proceeding, the court is not called upon to enforce the rules of the law of evidence so strictly as would be, in general, a court-martial,[75] but founded as such rules commonly are upon justice as well as logic, it will ordinarily be safest and most equitable to observe them.[76]

Independently of his examination as a witness, the accused—it need hardly be remarked—is not now subject, as formerly,[77] to be interrogated by the court, or called upon for an explanation.

**Closing argument.** Upon the conclusion, however, of the testimony, the accused, (after reasonable time for preparation, if desired,) may make, in his defence, such closing statement or argument as he may deem for his advantage.[78] The recorder, with the assent of the court, (for, not being prosecutor, he is, strictly, without *right* in the matter,) may thereupon present a summary of the evidence with such remarks and arguments as the facts may properly suggest. Except, however, in cases of unusual importance, while the accused or interested party commonly submits a written address, the recorder, unlike the judge advocate, does not in general formally reply.

818 **Making up of report, &c., and record.** The arguments, if any, having been delivered, the court, if open, clears for deliberation in the same manner as a court-martial. The recorder alone remains with it, to assist it in recurring to the testimony and preparing its report. After such discussion as may be found profitable, the report is drawn up; the court, where elaboration is called for, taking such adjournments as may be found necessary before their work can be completed. Although the court has been simply required to examine into and communicate the facts, this duty—it has well been remarked—is not duly performed by merely returning the proceedings with the testimony as taken from day to day, but a formal *summary* at least of the material evidence should properly be prepared and entered of record.[79] Such summary indeed the court may be directed, in the Order convening it, to present with its reports.[80]

An *opinion*, if one has been required, will be added, and in such form and with such detail as may most fully and succinctly convey to the convening authority the conclusions of the court.[81] As already indicated,—while a majority vote will properly govern in determining questions previously arising in the course of the proceedings, the minority are not obliged to yield to the majority in the expression of the *opinion*. Thus where the members are unable to unite in a single joint opinion, their dissenting or different opinions, duly subscribed, will be spread upon the record.

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[75] Hough, (A.) 9; Kennedy, 240; Hughes, 162.

[76] See D'Aguilar, 88; O'Brien, 291; De Hart, 332.

[77] See Hough, (A.) 5; as to the procedure in the Inquiry on the Cintra Convention; also Inquiry in case of André. This practice, however, has long been discontinued, as liable to criminate and unjust. See Tytler, 344; Adye, 81–2; Hughes, 162; Hough, (P.) 640; Simmons § 335; Coppée, 98.

[78] Subject of course to the authority of the court to restrict a statement containing disrespectful or otherwise improper expressions. See Chapter XVII.

[79] See Macomb, 92; O'Brien, 290–1; De Hart, 277–8. In the Scott-Gaines Court of Inquiry, (1836,) the court was ordered to report the *facts* with its opinion. It returned its opinion, accompanied only by the testimony as taken. Gen. Jackson returned the proceedings to have a summary of the evidence furnished, remarking that the facts had been "left to be gathered from the mass of oral and documentary evidence contained in the proceedings; and thus a most important part of the duty assigned to the court remained unexecuted." Am. S. P., Mil. Af., vol. 7, p. 179–80.

[80] As was done in Major Ludlow's case—S. O. 302 of 1892.

[81] Where formal charges have been investigated, formal *findings* have sometimes been made. See case in G. O. 65, Fifth Mil. Dist., 1869. Such a proceeding, however, is quite unsuitable and is now most rare.

The completed record will then be authenticated, in the same form as the record of a court-martial, and as prescribed by Art. 120,[82] and thereupon transmitted to the commanding officer or the President.

819 VIII. ACTION ON THE PROCEEDINGS.

**DISCRETION OF THE REVIEWING AUTHORITY.** This official, upon the receipt of the record from the court, may, in the absence of any statutory direction, take action thereon at his discretion. If an opinion be given, it is in no respect binding upon him, being in law merely a recommendation, to be approved or not as he may determine. If, for instance, it is to the effect that sufficient grounds exist for ordering a court-martial in the case, he may either proceed to order one, or may decide that no further proceedings are required.[83] So, where any other measure is suggested, he may adopt the view of the court, or may resort to action quite different, or may take none whatever. If action be taken, it need not be confined to strictly military means or methods. Civil or criminal liabilities may be disclosed by the testimony which should properly become the subject of an official communication on the part of the reviewing officer, addressed, through the Secretary of War, to the Attorney General, or more directly to the local authorities, with a view to suit or prosecution.

**REVISION BY THE COURT.** If not satisfied with the investigation, or with the report or opinion, the reviewing official may re-assemble the court, in the same manner as a court-martial, and return the proceedings with directions, either to have the investigation pursued further and completed, or the report of the facts made more detailed and comprehensive, or the opinion expressed in terms more definite and unequivocal or more responsive to the original instructions, or to correct or supply some other error or defect.[84]

820 The inquiry not being a trial but an investigation merely, the court may properly be required, upon revision, to rehear witnesses or to take entirely new testimony, or it may do so of its own motion without orders in connection with the revision.

A court of inquiry would be chargeable with dereliction of duty which should refuse to pursue an investigation or complete a report of facts, thus ordered to be perfected. Such a court, however, though it might be censured or severely criticized, could scarcely be otherwise called to account for declining to modify an *opinion*—provided it were expressed in temperate and proper language

**PROMULGATION.** The reviewing authority, having taken final action upon the report or opinion, proceeds, regularly, to publish, in a General Order, in whole or in part, or in substance, the report of the court upon the subject of the inquiry, with the opinion, (if any,) and the determination had or action taken thereon. Upon considerations, however, of policy or justice, the President or commander may, in his discretion, delay to publish, or omit altogether

[82] A proper form similar to that recommended for the record of a court-martial, is:—A true and complete Record. Attest: A. B., President: C. D., Recorder. Compare Chapter XXIII—"Authentication of Record." Formerly, all the members appear to have signed the record. In the case of André it was subscribed by all the fourteen members.

In connection with the subject of the making up of the record of a court of inquiry, the student is referred to Chapter XXIII on the subject of the Record of Courts-martial.

[83] Or, though the court of inquiry may exculpate the accused, the Reviewing Authority may still decide to have him brought to trial; as was done by the President in Gen. Wilkinson's case, in 1811.

[84] It may here be noted that the class of errors affecting the *legal validity* of the proceedings, which may occur in records of courts-martial, are not known as such to records of courts of inquiry.

to publish,[85] the report, &c., or may publish the result alone—as, for example, that it is determined that no further proceedings are called for in the case.[86]

## IX. THE PROCEEDINGS AS EVIDENCE.

**BEFORE A COURT-MARTIAL.** It is provided by Art. 121 that—"*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.*" By the term "proceedings" is evidently had in view chiefly the testimony;[87]

821 and the occasion contemplated doubtless was that of a trial by court-martial of a case which had previously been investigated by a court of inquiry. In such a case it could not prejudice the interests of justice, but the reverse, to admit in evidence the sworn testimony of witnesses who had recently testified before the court of inquiry but whose personal attendance at the court-martial could not by reasonable diligence be secured. Indeed a resort to such testimony might be the only means of avoiding a failure of justice. The admission of such evidence might also be advantageous on certain other occasions—as where, for example, an officer or soldier was brought to trial by court-martial on a charge of false swearing as a witness before a previous court of inquiry, and it was desirable to prove his testimony at the latter precisely as given.

As to the cases *excepted* from the application of the Article, *i. e.* "capital" cases and cases "extending to the dismissal of an officer," it is to be said that by the former are meant cases of alleged offences which, by the Articles of war, would be capitally punishable[88] if found by the court, and, by the latter, cases of alleged offences of officers for which the penalty of dismissal is made mandatory upon conviction.

It is to be remarked that the admission of evidence referred to in the Article is an admission of evidence *on the merits* of the case, *i. e.* in proof of the offence charged.[89] Thus it has been held by the Judge Advocate General that the proceedings of a court of inquiry would be admissible in evidence, irrespective of the Article and in the cases excepted as well as in any other, where the object was, not to prove or disprove a charge, but to impeach the evidence of a witness on the trial by showing that he had made a different statement on oath before the court of inquiry.[90]

The proceedings of the court of inquiry will properly be *proved* before the court-martial either by the original record of the inquiry, or by a copy of the same certified by the Judge Advocate General, or other official in whose custody the original may temporarily be.

822 **BEFORE A CIVIL COURT.** The question of the admissibility in evidence of the record of a court of inquiry at a trial before a *civil* court was determined in the negative in England by the well-known case of

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[85] As was done with regard to the proceedings in the case of Gen. Buell, which, as noted *ante*, were never promulgated in Orders.

[86] As in the case of the charges against Gen. Martindale. See G. O. 178 of 1862.

[87] It was held in a naval case, under the naval Art. 60, almost identical with our Art. 121, that the "finding" of a previous court of inquiry in the case of an officer could not be put in evidence before a court-martial in the same case. "The findings of the court of inquiry," it is observed by the Secretary of the Navy, "were not, and could not be, in evidence before the court-martial—could not, in any manner, legally or officially influence its proceedings." G. C. M. O. 41, Navy Dept., 1888.

[88] As to the definition of the term "capital" as used in the Articles of War, see Chapter XX—"Death."

[89] G. O. 33, Dept. of Arizona, 1871.

[90] This opinion is published as approved by the President in G. C. M. O. 40 of 1880.

Home *v.* Lord Bentinck.[91] This was an action brought in the Court of King's Bench by a Lieut. Colonel of the British army, whose alleged misconduct had been investigated by a court of inquiry, against the president of the court, for a libel claimed to be contained in the opinion. The plaintiff presented as evidence the original record of the court, which, upon objection by the defendant, was ruled out as inadmissible: a copy of the record was then offered with a similar result. Upon an appeal to the Court of Exchequer Chamber, these rulings were sustained on the ground that the opinion of the court constituted a privileged communication. Dallas, C. J., observed:—"What was the report in its very nature but a confidential communication, in consequence of a direction by the Commander-in-chief, for the information of his own conscience in the exercise of his public duty?" And he holds that—"upon the broad principle of state policy and public convenience, * * * these matters, secret in their natures and involving delicate inquiry and the names of persons, stand protected."[92]

This ruling would be applicable to a similar case at American law. But in our military practice the results of the investigations of courts of inquiry are in the majority of cases promulgated in Orders, and in a case in which such a publication had been made the report or opinion published could not be held to be a privileged communication, though the testimony or proceedings not published might still be so considered.

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[91] 2 Brod. & Bing., 130.

[92] The Chief Justice further holds, (p. 162,) that it would have been the duty of the court, considering that the document was a secret communication, not the property of the party holding it but of which he was a trustee on behalf of the public, to interpose and prevent its admission, even if no objection had been raised,—in the same manner, he adds, as witnesses "are not to be asked the names of those from whom they receive information as to frauds on the revenue." And in this case, see Dawkins *v.* Lord Rokeby, 8 Q. B. 255; Manual, 174, 176; also—generally—PART III, *post.*

# CHAPTER XXV.

## THE ARTICLES OF WAR SEPARATELY CONSIDERED.

823 THE history and authority of our Code of Articles of War have been reviewed in a previous Chapter. Certain specific Articles, to wit Arts. 63, 65 to 98, and 100 to 121, as also certain of the other statutes properly classed with the Articles, *viz.* Secs. 1202, 1203, 1230, 1326, 1361, 4824 and 4825, of the Revised Statutes, together with the provisions of the Act of October 1, 1890, c. 1259, (relating to summary courts,) and of the Act of July 27, 1892, c. 272, (except Sec. 3, yet to be noticed under the Sixty-Second Article,)—have been sufficiently construed in connection with the various subjects already examined in this treatise. We now proceed to consider such of the remaining Articles (and kindred enactments) as are deemed to call for construction and remark.

Forms of CHARGES of the offences made punishable by the several Articles will be given in the Appendix. It need only here be said in general that the specification under any charge should not merely consist in a bald repetition of the phraseology of the charge or of the name of the offence, but should set forth in full the particulars—words, acts and circumstances—in which the offence is alleged to have consisted.[1]

It may also here be observed that the discretion as to the punishments of *enlisted men*, given in the Articles making punishable military offences, is to be viewed as subject to such restrictions with regard to *maximum* penalties
824 as are imposed in the Orders issued under the Act of September 27, 1890, and heretofore remarked upon.

### I. THE INTRODUCTORY SECTION.

The Code of Articles is prefaced, in the Revised Statutes, by the following general provision:

"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 commisisoned 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.*"

**EFFECT.** Of this Section, the *first clause* is substantially identical with that which introduced the Articles of 1806; its original being found in the preliminary declaration of the two earlier codes of 1775 and 1776. The *second clause* is new, and was designed to set at rest the question, (which had been considerably discussed,) whether under the term "officer," as employed in the Articles, and particularly in the old 9th, (now 21st,) Article, non-commissioned officers could properly be held to be included.

[1] See Chapter X—"THE CHARGE."

It may be remarked that within the terms "officer" and "soldier," as here defined, are embraced all the purely military persons who are subject to the Articles of War and the jurisdiction of courts-martial, except only *Cadets*. This class, however, as a part of the "Army of the United States," (as defined in Sec. 1094, Rev. Sts.,) are directly so subjected by the first and general clause of the Section, and indirectly by the operation of Sec. 1320, Rev. Sts., prescribing their oath.

## II. THE FIRST ARTICLE.

[Subscribing of Articles.]

"ART. 1. *Every officer now in the Army of the United States shall, within six months from the passage of this Act, and every officer hereafter appointed shall, before he enters upon the duties of his office, subscribe these rules and articles.*"

**AN OBSOLETE PROVISION.** This provision, derived from a similar
825 Article of the code of 1775, is now practically a dead letter, officers of the army being never required manually at least to "subscribe" the Articles of war. This Article may indeed be regarded as superseded in the existing law by Sec. 1757, Rev. Sts., which,—as enlarged by the Act of May 13, 1884,—prescribes an *oath of office*, to be taken alike by the civil, military and naval officers of the United States, in which the party swears, among other things, that he will "well and faithfully discharge the duties of his office."[1]

## III. THE SECOND AND THIRD ARTICLES.

[Enlistment.]

"ART. 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.*

"ART. 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 offence, shall, upon conviction, be dismissed from the service, or suffer such other punishment as a court-martial may direct.*"

SECOND ARTICLE.

**EFFECT OF THE ARTICLE—THE OATH.** This Article is an incorporation of the old Art. 10 of 1806, (derived from Art. 1, Sec. III, of 1776,) with s. 11 of the Act of Aug. 3, 1861, c. 42.

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[1] Formerly the officer's oath, as prescribed by the Act of Jan. 29, 1813, c. 16, s. 13, was the same as that administered to enlisted men. Forms of an oath of *allegiance* required to be taken by officers during the Revolutionary War are found in 1 Jour. Cong., 525; 2 Id., 427–8.

826 The oath here required or directed to be taken, while not absolutely essential to a legal enlistment, constitutes indeed the most material evidence that the contract has been entered into, and is the invariable form by which it is completed. Art. 4 so refers to it in providing that "no enlisted man *duly sworn* shall be discharged from the service, without," &c. In practice, it is incorporated in the formal enlistment paper or certificate in use in our service, as prescribed by the Army Regulations, (p. 917,) and is subscribed by the party enlisting; and the date of the oath is treated as the date of the actual enlistment.[5] In the case of *In re* Grimley,[4] it is declared by the U. S. Supreme Court—"Obviously the oath is the final act in the matter of enlistment. * * * The taking of the oath of allegiance is the pivotal fact which changes the status from that of civilian to that of soldier." Of its *contents*, O'Brien[5] well says—"It contains a brief synopsis of the whole duty of a soldier."

**THE READING OF THE ARTICLES OF WAR.** This is clearly not a formal or necessary part of the legal enlistment. The Article contemplates indeed that the reading may come "*after*" the enlistment. In the case of *In re* Grimley, above cited, the court say—"The reading of the one hundred and twenty-eight articles, many of which do not concern the duty of a soldier, is not essential to his enlistment."[6] The army regulation of 1881, cited by the court as requiring the reading only of the 47th and 103d Articles, is not repeated in the Regulations of 1889—those now in force. But as the party is made, in the form of the prescribed oath, to swear that he will "obey orders according to the Articles of War," it will in the opinion of the author be desirable and sufficient to read to *recruits* the following Articles, viz.—Nos. 16, 17, 19, 20, 21, 22, 23, 30, 31, 32, 33, 35, 36, 38, 39, 47, 48, 50, (first clause,) 51, 55, 81, 82, 83, 103, and the substance of the Act establishing the summary court. They should also be informed of the substance of G. O. 16 of 1895 fixing *maximum* punishments, or referred to it so that it can be consulted by
827 them.[7] The article not indicating by whom the reading is to be done, the duty will properly devolve upon the recruiting officer, who should either perform it himself, accompanying the reading with suitable explanations, or cause it to be performed by an intelligent non-commissioned officer.

Failure to comply with the injunction in regard to the reading of the Articles, (required also by Art. 128 to be repeated "once in every six months,") as constituting a ground for the mitigation of a sentence, has been noticed in Chapter XXI.

### THIAD ARTICLE.

**ORIGIN.** This provision, which first appears as a separate Article of war in the code of 1874, is a compact condensation of the Acts of March 2, 1833, c. 68, s. 6, and March 3, 1863, c. 75, s. 1, (prohibiting the enlistment and service of persons convicted of felony or crime,) and the Acts of July 4, 1864, c. 237, s. 5, March 3, 1865, c. 79, s. 18, and May 15, 1872, c. 162, (prohibiting the enlist-

[5] "The enlistment papers of recruits who are accepted and duly sworn will bear the date on which the enlistment is completed by administering the oath." G. O. 87 of 1891.

[4] 137 U. S., 156–7.

[5] Page 86.

[6] 137 U. S., 156.

[7] In all cases of *original* enlistment, the fact might well be specified, in the certificate of the recruiting officer on the enlistment paper, that the Articles of war had been read to and understood by the recruit—where such was the fact.

ing, &c., of persons of the other classes specified in the Article.) The same provisions appear in more extended form in Secs. 1116 to 1118 of the Revised Statutes.

**CONSTRUCTION—"Knowingly."** As has been held by the Judge Advocate General, it is not essential, to render an officer amenable under this Article, that it should be shown that, in enlisting a person, he has positive and absolute knowledge that he belonged to one of the designated classes. If from the appearance, manner, or statements of the party, or other facts previously communicated to the officer or developed in connection with the enlistment, it is reasonably inferable that the party is within one of the descriptions, the officer will in general properly be charged with the knowledge requisite to constitute him an offender.

**"Musters into," &c.** The term "*muster-in*," though sometimes confounded with *enlistment*, is only properly employed to designate the formal admission, (upon inspection, administration of the oath, &c.,) into the U. S. service, of militia or other State troops, or troops raised under State authority.[8] The term is, strictly, without application to the army proper, into which persons are admitted only by enlistment and separately.

828 **"Insane person."** Insanity, unless exceptionally patent, is not a condition to be readily detected by a recruiting officer. The question of the mental soundness of a person offering himself for enlistment is rather one for the medical examining officer, and where he certifies, according to the form on the enlistment paper, that the party is "free from all mental infirmity," the recruiting officer will be safe in treating with him as sane.

**"Intoxicated."** This term properly includes a person so far under the influence of an intoxicating drink *or drug* as not to be able *fully* to comprehend the nature of his act or the obligation thereby assumed.

**"Deserter."** This term signifies a person in the status of a deserter at the time, *i. e.* one who is either a deserter at large, or who, if in military custody, is unpunished or unpardoned, at the time of the enlistment. Soldiers who, having deserted, have been tried, sentenced, and fully punished for their offence, or whose sentences have been remitted, are no longer deserters in law or fact, and may legally be, and, in practice, not unfrequently are, enlisted into the army. So, a deserter whose offence has been practically condoned, and who has been constructively pardoned, by his being restored to duty without trial by competent authority under par. 128, Army Regulations, may be enlisted without a violation of the present Article.

**"Any infamous criminal offence."** An "infamous" crime has generally been held to be one which will, by law, subject the person committing it to an infamous punishment, or will disqualify him from being a witness. But as disqualification of witnesses on account of infamy is in a great measure done away with,[8] the term "infamous crime," as here used, may properly be regarded as practically synonymous with *felony*,[9] or as a crime which legally subjects the offender, upon conviction, to the punishment of death or of confinement in a penitentiary. The word "*any*" is deemed to include a conviction by any State as well as United States court. It may also be held to include a conviction, by a court-martial, of a crime which, if committed by a civilian, would have subjected him to an infamous punishment—in other words a crime such as is designated by Art. 97.

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[8] See Chapter XVIII—"Infamy;" Wharton, Cr. Ev. § 363, note.

[9] "Felony" is the term employed in Sec. 1118, Rev. Sts.

829 ENLISTMENT IN GENERAL.

In this connection it will be convenient briefly to review the law pertaining to the general subject of enlistments in our army.[10]

**Enlistment—what it is.** Enlistment is a voluntary contract for military service for a certain term entered into by a civil person with the United States. The statute law not having defined in what enlistment shall consist, or what shall constitute evidence of enlistment in general, it follows that the existence of a contract of enlistment in any case may be proved in the same manner as any other contract for service. Art. 47 provides in substance that in the special case of a deserter the receipt of pay shall be equivalent to, *i. e.* evidence of, an enlistment, so far as to estop the offender from denying that he is duly in the army. So, in any other case, the fact that the party has accepted pay or a pecuniary allowance as a soldier, has been provided as such with arms, clothing, rations, &c., by the military authorities, or has voluntarily performed military service under the orders of a superior for any considerable period,—would ordinarily constitute *prima facie* evidence that he has entered into a contract of enlistment with the United States.[11] But though there is no *essential* form for the contract, an enlistment, in our present practice, is evidenced by a formal *acknowledgment* in writing and under seal to the effect that the party has "voluntarily enlisted as a soldier in the Army of the United States of America for the period of five years," incorporated with the oath of allegiance, service and obedience prescribed by the above Second Article; the full form being signed and sworn to by the party.[12] Enlistment is thus not only a contract, but a contract of a formal and solemn character.[13]

830 **Peculiarity of the contract.** But, as will be illustrated as we proceed, the contract of enlistment is peculiar in that it is a contract made with the State, under the specific authority of the Constitution, and thus governed by those principles or considerations of expediency and economy, expressed in the term "public policy." Thus, while the necessities of military discipline require that the soldier should be strictly obliged by the compact, the State, on the other hand, is not bound by the conditions though imposed by itself. Thus it may put an end to the term of enlistment at any time before it has regularly expired and discharge the soldier against his consent.[14] So, pending the engagement, it may reduce the pay, or curtail any allowance, which

[10] Upon the history of enlistment in the British Army, see Clode, 2 M. L., ch. XV; Manual, ch. IX; Tyler *v.* Pomeroy, 8 Allen, 486–491.

[11] 3 Greenl. Ev., § 483; Lebanon *v.* Heath, 47 N. H., 359; *Ex parte* Anderson, 16 Iowa, 599; Simmons § 872; G. O. 36, Dept. of Va., 1863; Do. 38, Dept. of the Platte, 1871; Do. 7, Dept. of Cal., 1872.

[12] The *enlistment paper* contains also—a "declaration of recruit," to be signed before enlistment, with a form of "consent in case of minor;" as also certificates of due inspection, acceptance, &c., to be signed by the medical examining officer and the recruiting officer, upon enlistment. For our early "Form of Inlistment," of 1775, see 1 Jour. Cong., 83.

[13] "Enlistments into the army, made under the inducements held out by the laws of the United States, are contracts, and * * * ought to be construed according to those well-established principles which regulate contracts generally." 6 Opins. At. Gen., 190. And see Johnson *v.* Dodd, 56 N. Y., 81; Reed *v.* Reed, 53 Maine, 530; *In re* Kimball, 9 L. R., 502; *In re* Ross, 1 N. Y. L. Obs., 341. In Com. *v.* Cushing, 11 Mass., 70, the obligation of an enlistment in the army is contrasted with militia duty as follows:—"Enlistment is a contract: service in the militia is merely obedience to a requisition of the laws to which all are subject without discrimination."

[14] See Clode, 2 M. F., 40; U. S. *v.* Cottingham, 1 Rob., 630; U. S. *v.* Blakeney, 3 Grat., 409. And compare the language of the Act of March 3, 1795, in which a general authority to discharge at discretion is "expressly reserved to the Government."

formed a part of the original consideration.[15] The contract of enlistment is thus a transaction in which private right is subordinated to the public interest. In law, it is entered into with the understanding that it may be modified in any of its terms, or wholly rescinded, at the discretion of the State. But this discretion can be exercised only by the legislative body, or under an authority which that body has conferred.[16]

**CONSTITUTIONAL PROVISION—POWER OF CONGRESS.** The
831 original authority for the enlisting of persons in the military service is to be found in the clause of the Constitution[17] by which Congress is empowered "to raise armies." The Constitution does not indicate the manner in which the power shall be exerted,[18] but leaves the whole subject without limitation to the discretion of Congress.[19] No power whatever over the same is conferred upon the Executive, who thus comes to exercise in the matter only such functions as may be devolved upon him by the Legislative body.[20] To this branch of the Government it thus belongs in the first instance to determine how the army shall be raised,[21] of what persons and number of persons it shall be composed,[22] and what shall be the terms and conditions of the contract or obligation of military service.[23]

1. **MODE OF RAISING ARMIES.** Congress, as held by the Supreme
832 Court in Tarble's Case,[24] "can determine how the armies shall be raised, whether by voluntary enlistment or forced draft." Except, however, upon one occasion in our constitutional history, the former mode is the only one which has in fact been resorted to. Such were the proportions of the late war of the rebellion, and so urgent was the need of troops, that Congress was induced to exercise in the Act of March 3, 1863, c. 75, the power of raising a military force by an enrolment and draft of citizens, &c., between the ages of

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[15] Compare Wilkes *v.* Dinsman, 7 Howard, 1.

[16] The peculiarity of this contract is further illustrated by the ruling of the U. S. Supreme Court in *In re* Grimley, where it is observed by Brewer, J., as follows—"In this transaction something more is involved than the making of a contract, whose breach exposes to an action for damages. Enlistment is a contract; but it is one of those contracts which changes the status; and where that is changed, no breach of the contract destroys the new status or relieves from the obligations which its existence imposes." 137 U. S., 151. And see further Id., pp. 152–4.

[17] Art. 1, Sec. 8, par. 12.

[18] Kerr *v.* Jones, 19 Ind., 354.

[19] "Its control over the subject is plenary and exclusive." Tarble's Case, 13 Wallace, 408. And see *In re* Disinger, 12 Ohio St., 260. The Constitution, in conferring upon Congress the power to raise armies, authorized it "of course to pass laws necessary for that purpose." Com. *v.* Barker, 5 Bin., 428. And see Phelan's Case, 9 Ab. Pr., 287–8.

[20] "By the Constitution, the power to raise armies is vested exclusively in Congress; and the executive department, in carrying the will of Congress into effect, must conform its action to the authority conferred on it." 4 Opins. At. Gen., 537. "The President has not, by the Constitution, power to raise a single soldier. Congress, the legislative power, can alone empower him to do so." Kerr *v.* Jones, 19 Ind., 354.

[21] Tarble's Case, 13 Wallace, 408. And see Kerr *v.* Jones, *ante*.

[22] "It is in the power of Congress to declare who may be enlisted; * * * to say who shall serve in the army." Reilly's Case, 2 Ab. Pr. (N. S.) 335, 337. Congress may designate persons of "any age, class, or condition," as those "who shall constitute the army." *In re* Disinger, 12 Ohio St., 261. "The *number* of men in the Army and Navy is dependent entirely on the will of Congress, and in the legislation incident to that question the highest rights of sovereignty are exercised by the Government." Harmon *v.* U. S., 23 Ct. Cl., 140. And see *In re* Riley, 1 Benedict, 409; Tyler *v.* Pomeroy, 8 Allen, 493; *In re* Beswick, 25 How. Pr., 151.

[23] "It is quite clear that Congress may declare what shall constitute a valid contract of enlistment." Phelan's Case, 9 Ab. Pr., 288. And see Tarble's Case, 13 Wallace, 408.

[24] 13 Wallace, 408. The power to raise armies must of course not be confounded with the power to call out the militia. As to the point that the two powers are altogether distinct, see 6 Opins. At. Gen., 484; Kerr *v.* Jones, 19 Ind., 354.

20 and 45; and under this Act and the statutes additional thereto, a mild system of conscription went on *pari passu* with voluntary enlistments during the last two years of the war. But further than to observe that its constitutionality has been fully affirmed by the Courts,[26] this mode of raising armies need not here be remarked upon.

**2. THEIR COMPOSITION.** In declaring what persons shall constitute the army, Congress—as already indicated—is alone authorized to determine all such details as nationality, race, age, physical and moral qualifications, &c.[26]

**Nationality.** The legality of the enlistment of aliens is recognized by the common law and the law of nations,[27] and the employment in their armies of foreign mercenaries has been resorted to by all the European powers.[28] With us, it is settled law that Congress may, and does, by not in terms restricting to *citizens* the persons eligible to enlistment, authorize the enlistment of
833 aliens or inhabitants who have not been naturalized.[29] In Sec. 2166, Rev. Sts., indeed, the legality of the enlistment of aliens is expressly recognized by a provision "*that any alien of the age of twenty-one years and upwards, who has enlisted or shall enlist*" in our armies, may, upon being honorably discharged therefrom, be admitted to become a citizen without the performance of certain conditions required in other cases of aliens.

**Race—Indians.** Although Indians are not, in general, citizens,[30] the authority to employ them in the military service seems not to have been doubted, and they have accordingly been so employed from time to time during our wars. In March, 1776, they were authorized to be enlisted, with the consent of their tribes and the "express approbation of Congress."[31] Congress indeed did not hesitate to avail itself of their military service during the war of the Revolution;[32] and by the Act of March 5, 1792, "for the protection of the frontiers," the President was authorized to employ, (in connection with the army,) such number of Indians as he might think proper. In 1846, during the war with Mexico, a "spy company of Indian mounted volunteers," consisting of Shawnees and Delawares, was raised and held in service for three months.[33] In the recent war three regiments, designated as the First, Second and Third Indian Regiments,[34] (or "Indian Home Guard, Kansas Infantry,") were recruited and organized in 1862, under the general authority of the Act of Congress of July 22, 1861—"to authorize the employment of Volunteers," &c. Indians were also

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[25] Kneedler *v.* Lane, 45 Pa. St., 238; Booth *v.* Woodbury, 32 Conn., 126; Tarble's Case, 13 Wallace, 408. And see U. S. *v.* Scott, 3 Wallace, 642; U. S. *v.* Murray, Id., 649; Allen *v.* Colby, 47 N. H., 544; Harvey *v.* Peacham, 42 Vt., 291; Reed *v.* Sharon, 35 Conn., 191. In Sheffield *v.* Otis, 107 Mass., 284, it is observed by the court, that the term "enlisted" or "duly enlisted," as employed in the Articles of war, "necessarily includes soldiers who have been drafted as well as those who have entered the service as volunteers."

[26] *In re* Riley, 1 Benedict, 410; *In re* Disinger, 12 Ohio St., 261; *In re* Beswick, 25 How. Pr., 151. Details omitted to be prescribed by Congress may, (where not of the nature of legislation,) be supplied by regulation. See Art. LXXI, A. R.

[27] 3 Opins. At. Gen., 671; 6 Id., 476.

[28] See U. S. *v.* Wyngall, 5 Hill, 22–25; U. S. *v.* Cottingham, 1 Rob., 635.

[29] U. S. *v.* Wyngall, *ante*, 16; U. S. *v.* Cottingham, *ante*, 615; 6 Opins. At. Gen., 474, 607; 4 Id., 350; O'Brien, 86. By the conscription laws, (Acts of March 3, 1863, c. 75, s. 1, and July 4, 1864, c. 246, s. 3,) foreigners, who had only declared their intention to become citizens under the naturalization laws, were authorized and required to be enrolled and made subject to draft.

[30] "Indians are not citizens of the United States, but domestic subjects." They may, however, be naturalized as citizens under a special Act of Congress or a treaty. 7 Opins. At. Gen., 746.

[31] 1 Jour. Cong., 281.

[32] See 2 Jour. Cong., 465, 468–9.

[33] See Act of Sept. 28, 1850, c. 83.

[34] Volunteer Register, Part VII, p. 364–8.

enlisted into other regiments of State troops, as the 6th, 9th, and 14th regiments of Kansas Volunteers.[35]

834 In the Act of July 28, 1866, c. 299—"to fix the military peace establishment," at the end of the war, the President was authorized by Congress "to enlist and employ in the Territories and Indian country a force of Indians, not to exceed one thousand, to act as *scouts*, who shall receive the pay and allowances of cavalry soldiers, and be discharged whenever the necessity for their further employment is abated, or at the discretion of the department commander." Under this provision[36] such scouts are now employed in our service, as a force indispensable to the successful prosecution of warfare with hostile Indians.

By a General Order, No. 28, of March 9, 1892, it was directed by the Secretary of War that certain troops and companies of the cavalry and infantry of the army "will be recruited by the enlistment of Indians to the number of fifty-five for each troop and company." Instructions as to the details of such enlistments are added, and it is specified that the same are to be "carefully distinguished from enlistments of Indian scouts." This is believed to be the first instance in which the enlistment of Indians in our military service has been effected by executive order only, and without authority of Congress. In the opinion of the author, such enlistments must be held to be without legal sanction unless Congress by appropriate legislation shall ratify the same.[37]

835 **Persons of African descent.** No Act of Congress, as observed by Attorney General Bates,[38 39] has ever "prohibited the enlistment of free colored men into the national military service." In point of fact this class of persons were enlisted and served as soldiers both in the Revolutionary war[40] and the war of 1812.[41] After the adoption of the Constitution, however, it was not till the period of the recent rebellion, that their employment as soldiers came to be expressly authorized. Then, under the Acts of July 17, 1862, c. 195, s. 11; July 17, 1862, c. 201, s. 12; and of March 3, 1863, c. 78, s. 10, they were employed, first as laborers, teamsters, and cooks, and presently as enlisted soldiers, until, by the close of the war, there had been organized and added to the army about one hundred and forty regiments of colored troops.[42]

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[35] See 12 Opins. At. Gen., 246, where it was held that the soldiers of these regiments were entitled to bounty in the same manner as other volunteers. [Of these Indian troops Atty. Gen. Stanbery observes in this opinion that "it abundantly appears," from the testimony of the general and other officers who had commanded them, that they "served in various States, did good service, took part in many battles, and were excellent soldiers."] The other Indian regiments, the "Fourth" and "Fifth," were partly recruited but not completed. See Joint Resolution of June 30, 1864. The Indians enlisted during the war appear to have consisted mostly of Cherokees, Creeks, Seminoles, Osages, Delawares, Shawnees, Uchees and Pottawattomies.

[36] Incorporated in the Revised Statutes as Sec. 1112. And see the Act of Aug. 12, 1876, c. 263, continuing this section in force, and providing further for "a proportionate number of non-commissioned officers" for the scouts employed.

[37] Since the above was written, an indirect ratification of the enlistment of Indians has been expressed in the recent Act of Aug. 1, 1894, "to regulate enlistments in the Army," by the provision, in Sec. 2, that hereafter, "in time of peace, no person, (*except an Indian,*) who is not a citizen," &c., "shall be enlisted for the first enlistment in the Army."

[38 39] 11 Opins., 57. The Act of December 10, 1814, uses the term "free" in the description of the class of persons made eligible to enlistment, but the word "white" is not to be found in any statute on the subject. Its insertion in the Army Regulations from 1821 to 1861 was a striking instance of *legislation* by an executive department.

[40] 1 Jour. Cong., 238; Sparks' Writings of Washington, vol. III, p. 219.

[41] See 11 Opins. At. Gen., 58; 1 Id., 603.

[42] Volunteer Register, Part VIII. Even the Confederate States Government authorized, near the end of the war, the raising of "companies of negro soldiers." Official communication of Confederate Secretary of War, to Major Pegram and others, A. & I. G. O., March 15, 1865.

A large proportion of these men had but lately been slaves, but by a provision of one of the Acts cited, (s. 13 of July 17, 1862, c. 201,) it was declared that every slave, upon being received into the public service, should "forever thereafter be free." The President's emancipation proclamation followed on January 1, 1863, with a general application to all slaves.

At the end of the war, in the peace establishment as fixed by the Act of July 28, 1866, two cavalry and four infantry regiments of colored soldiers were provided as a part of the permanent military force: the four infantry regiments have since been consolidated into two.[45]

**Age.** Under its Constitutional power to determine what persons shall compose the Army, Congress may fix, and has heretofore fixed, the *age* at which soldiers shall be enlisted. By the existing law—Sec. 1116, Rev. Sts., 836 (as amended by the recent Act of August 1, 1894, "to regulate enlistments in the Army of the United States,")—recruits, or persons enlisting for their first enlistment, must be *between the ages of sixteen and thirty* at the time of the enlistment; but—it is added—"this limitation as to age shall not apply to soldiers re-enlisting."[46] The power having thus been exercised, no executive order or regulation can avail to exceed or modify the limits established by the statute.[48]

**ENLISTMENT OF MINORS.** That Congress, in fixing the age of enlistment, may permit the enlistment of *minors* has been repeatedly adjudged by the courts.[48] "The age," observes the Supreme Court,[47] "at which an infant shall be competent to do any acts or perform any duties, military or civil, depends wholly upon the legislature;" and Congress has from an early period authorized, in its legislation, the enlistment of persons under 21 years of age.[48]

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[45] By the Act of March 3, 1869, c. 124. (Sec. 1108, Rev. Sts.)

[46] See the provisions as to re-enlistment in the Act of August 1, 1894.

[46] The direction in Circ. No. 10, (H. A.,) of September 4, 1894, that, "in view of the small number of vacancies in the Army and consequent restrictions upon recruiting, no person under the age of twenty-one years will be enlisted until further orders, boys as musicians or to learn music excepted"—is believed to be of doubtful authority.

[48] "It cannot be doubted that the power to enlist minors into the service is included within the powers delegated to Congress by the Constitution." U. S. *v.* Bainbridge, 1 Mason, 80. And see *In re* Davison, 21 Fed., 618; *In re* Cosenow, 81 Fed., 670; U. S. *v.* Stewart, Crabbe, 266; *In re* Riley, 1 Benedict, 409; Lanahan *v.* Birge, 30 Conn., 438; Com. *v.* Barker, 5 Bin., 426; *In re* Disinger, 12 Ohio St., 261–2; U. S. *v.* Blakeney, 3 Grat., 416; Com. *v.* Morris, 1 Philad., 381; 4 Opins. At. Gen., 607; 6 Id., 474, 484.

A minor's contract of enlistment is held valid at common law. King *v.* Rotherfield Greys, 1 B. & C., 345; Com. *v.* Gamble, 11 S. & R., 93; U. S. *v.* Blakeney, 3 Grat., 411; U. S. *v.* Lipscomb, 4 Grat., 41.

[47] *In re* Morrissey, 137 U S., 159.

[48] See Acts of April 30, 1790; March 3, 1795; March 16, 1802; Jany. 11, 1812; Jany. 20, 1813; Jany. 29, 1813; Dec. 10, 1814; Feb. 13, 1862; July 4, 1864. In all these statutes, except the last, the *minimum* age for enlistment is fixed at 18 years; in the last, enlistments, (with consent,) of persons as young as 16, are legalized. (The latter age was also established as the minimum early in the war of the Revolution, by Resolution of Congress of Jan. 17, 1776. See 1 Jour. Cong., 239, U. S. *v.* Blakeney, 3 Grat., 441.) In the Acts cited the *maximum* age is variously fixed at thirty-five, (March 16, 1802;) forty-five (Jan. 11, 1812, Jan. 20, 1813, and Jan. 29, 1813;) forty-six, (April 30, 1790, March 3, 1795, and May 30, 1796;) and fifty, (Dec. 10, 1814.) The Commissioners for the Revision of the Statutes decided that the provision of the Act of 1802, fixing the maximum at 35 years, was still unrepealed; and, upon this provision, and that of the Act of July 4, 1864, as establishing a minimum, they stated it as the existing law that recruits, at enlisting, must be "*between the ages of sixteen and thirty-five years*," and it was so *enacted* in Sec. 1116 of the Revised Statutes. [As has been seen, *thirty* was substituted for *thirty-five* by the Act of August 1, 1894.]

837 It has further been adjudged, and is settled law, that Congress may authorize the enlistment of minors *without the consent* of the parent or other person who may be entitled to their custody or control and the benefit of their services.[49] In general, indeed, in time of peace, Congress has allowed to the parent or guardian, if any, of an unemancipated minor, the right to withhold consent to, and thus prevent, his enlistment.[50]

838 At certain periods, however, when the public interests have appeared to require it, such consent has been in express terms or by implication dispensed with, and enlistments without it thus legalized.[51]

It is thus perceived that the rules of the common law governing the contracts of infants, *viz.*—that the same, (except when "beneficial," as where made for supplying the necessaries of life,) are voidable upon the infant's coming of age and may then be confirmed or repudiated by him at pleasure; and further that such contracts, when for personal services, cannot be entered into without the concurrence of the parent, or person *in loco parentis*, if there be one, to whom such services are originally due,—have no necessary application to a contract of enlistment in the military service; the former having no application in any event, and the latter only where recognized by existing legis-

[49] "Congress may constitutionally authorize the enlistment into the service of any minors, independent of the private consent of their parents." Story, J., in U. S. *v.* Bainbridge, 1 Mason, 81. Congress "may require consent or omit to require it." *In re* Riley, 1 Benedict, 410. "It may make the consent of parents or guardians necessary for a valid enlistment, or may altogether dispense with such consent." *In re* Beswick, 25 How. Pr., 151. And see U. S. *v.* Stewart, Crabbe, 266; *In re* McLave, 8 Blatchford, 72; Lanahan *v.* Birge, 30 Conn., 444; Com. *v.* Downes, 24 Pick., 227; *In re* Disinger, 12 Ohio St., 256; *In re* Gregg, 15 Wis., 479; *In re* Higgins, 16 Id., 351.

[50] Consent is expressly required for the enlistment of minors by the Acts of March 16, 1802, Jany. 11, 1812, Jany. 20, 1813, Jany. 29, 1813, Sept. 28, 1850, and by the existing law—Act of May 15, 1872, incorporated in Sec. 1117 of the Revised Statutes.

In the earlier Acts the consent of the "*master*" was required to the enlistment of an "*apprentice.*" Acts of March 16, 1802; Jany. 11, 1812; Jany. 20, 1813; Jany. 29, 1813. And see the Act of Dec. 10, 1814; Resolution of Congress of Jany. 30, 1776. See also the early cases of Com. *v.* Barker, 5 Bin., 423; State *v.* Brearly, 2 South., 555; Com. *v.* Harrison, 11 Mass., 63, which were cases of applications for the discharge of apprentices enlisted without the consent of their masters. A more recent instance is Reilly's Case, 2 Ab. Pr. (N. S.) 334.

Where the statute, as in the case of the existing law, requires the consent of the "*parents*" of the minor, the consent alone of the father, if he has the legal custody of the child, will be sufficient, though the mother be living. Where the father is deceased, and there is a mother entitled to the legal custody, her consent is essential and sufficient. *Ex parte* Mason, 1 Murph., 336; Com. *v.* Callan, 6 Bin., 255. In Com. *v.* Camac, 1 S. & R., 88, it was held that a consent given in writing five or six days *after* the enlistment was sufficient, as duly *ratifying* the engagement of the minor. Consent is "a virtual emancipation" of the minor during the term of his enlistment, and entitles him to "receive and control' such pay, &c., as may accrue to him from the government under his contract. Baker *v.* Baker, 4 Vt., 57.

While the consent of the parent or guardian of an *alien* is required in the same manner as that of any other enlisted minor, provided he has a parent, &c., resident in this country, (Com. *v.* Harrison, 11 Mass., 63,) it is otherwise if his parent, &c., is not domiciled in the United States. In the words of Attorney General Cushing, to make the consent essential to the contract, the alien "must have a parent or guardian whose authority, as such, over the person of the enlisted minor, is known and recognized as valid by the law of the place where the enlistment is made." 6 Opins., 610.

[51] See the Acts of Dec. 1814, Feb. 13, 1862, Feb. 24, 1864, and July 4, 1864, as construed and remarked upon in Phelan's Case, 9 Ab. Pr. 286; Lanahan *v.* Birge, 30 Conn., 445; 12 Opins. At. Gen., 265; and also in *In re* McDonald, Lowell, 100; *In re* Kimball, 9 Law Rep., 500. And see further, in this connection,—*In re* Riley, 1 Benedict, 408; *In re* Beswick, 25 How. Pr., 152; Reilly's Case, 2 Ab. Pr., 337; *In re* Gregg, 15 Wisc., 479; *In re* Higgins, 16 Id., 351; 14 Opins. At. Gen., 210.

lation.[52] For this is not like an ordinary contract between private parties: it is, as has been noted, an engagement to serve the State, which is entitled to avail itself of the personal military service of any of its able-bodied citizens of whatever age, when needed for the public defence and welfare.[53] This
839 right, being exercised for the common good, must be paramount to all individual claims. Public policy requires that neither the rights at common law of the minor contractor, nor those of his parent, guardian, or master, shall be asserted against the United States, except in so far as they may have been expressly recognized and conceded by existing statute.[54]

Thus, as it has frequently been held, a minor, enlisted without consent of parent or guardian, is not himself entitled to receive a discharge from the service by reason of such minority, nor—if the United States elected to hold him—would the parent, &c., be entitled to have him discharged in the absence of some such express authority as that of Sec. 1118, Rev. Sts.[55]

**PERSONAL QUALIFICATIONS.** It cannot be doubted that Congress is exclusively empowered, under its Constitutional authority "to raise and support armies," to prescribe what shall be the *personal* qualifications—physical, moral, intellectual, &c.—of persons admitted into the military service. It has
840 heretofore done so by specifying in several of the earlier statutes that such persons shall be "at least five feet, six inches, in height,"[56] and that they shall be "effective and able-bodied men."[57] The former condition, however, was done away with by the Act of July 5, 1838,[58] since which date

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[52] *In re* Gregg, 15 Wis., 481; U. S. *v.* Bainbridge, 1 Mason, 84; U. S. *v.* Blakeney, 3 Grat., 409; U. S. *v.* Cottingham, 1 Rob., 635. And see Lanahan *v.* Birge, 30 Conn., 444; Robert's Case, 2 Hall, Am. L. J., 195.

The doctrine that the enlisted minor may avoid his contract, on his coming of age while still in the service, has indeed been maintained in a few cases. See State *v.* Dimick, 12 N. H., 194; *In re* Dew, 25 Law Rep., 540; 4 Opins. At. Gen., 350. But these rulings are opposed by the great mass of authority.

[53] See *In re* Grimley, 137 U. S., 153.

[54] "By the general policy of the law of England, the parental authority continues until the child attains the age of 21 years; but the same policy also requires that a minor shall be at liberty to contract an engagement to serve the State. When such an engagement is contracted, it becomes inconsistent with the duty which he owes to the public that the parental authority should continue, and it is, therefore, suspended." King *v.* Rotherfield Greys, 1 B. & C., 349–50. "The Government of the United States has the right, whenever it thinks the exigencies of the country require it, to command the services of any of its citizens, and it is the sole judge of that necessity. If it so determine, it may enforce its right to command such service," (through legislation of Congress,) "and thus *override* the usual and legal claims of parents and guardians." In the matter of Beswick, 25 How. Pr., 151. Especially in time of *war* is the claim of the parent, &c., to the services of the minor to be subordinated to that of the Government. See *In re* Disinger, *In re* Kimball, *In re* McDonald—*ante*.

Some of the authorities take occasion to suggest that a minor's contract of enlistment may be sustained on the ground that it is a "beneficial" contract, or one for necessaries,—part of the consideration being certain rations, clothing, fuel, quarters, medical attendance, &c. See U. S. *v.* Bainbridge, 1 Mason, 84; *In re* Gregg, 15 Wis., 480; Com. *v.* Camac, 1 S. & R., 90; State *v.* Brearly, 2 South, 562; also Com. *v.* Gamble, 11 S. & R., 93; U. S. *v.* Blakeney, 3 Grat., 416; *In re* Disinger, *ante;* U. S. *v.* Jones, 18 Howard, 95. But in general it has been preferred to support the contract upon the *"broader ground of public policy."* (Com. *v.* Gamble.)

[55] See *post*, FOURTH ARTICLE—"Discharge of Minors."

[56] By the Acts of April 30, 1790; March 3, 1795; March 16, 1802. It was added in the first Act—"without shoes."

[57] By the Acts of March 3, 1799; March 16, 1802; Dec. 24, 1811; Jan. 11, 1812; Jan. 20, 1813, Dec. 10, 1814.

[58] Expressly repealing in this respect the provision of March 16, 1802.

there has been no statutory requirement as to height;[59] the latter qualification, as to physical efficiency, still subsists as a part of the existing law on the subject.[60]

Congress has also prescribed further qualifications, both *mental* and *moral*, for persons entering the army, which are now collected in Section 1118 of the Revised Statutes.[61]

**EFFECT OF STATUTORY PROVISIONS AS TO QUALIFICATIONS FOR ENLISTMENT.** Here may properly be examined the question whether the enlistment of a person not possessing one of the qualifications, or possessing one of the disqualifications, specified in Secs. 1116 to 1118 of the Revised Statutes, would be absolutely void, or would be only unauthorized and so capable of being ratified by the waiver and act of the government. In 1843 this question was considered by the Supreme Courts of New York and Virginia, in the cases of U. S. *v.* Wyngall[62] and U. S. *v.* Cottingham,[63] with reference to the terms of the Act of May 16, 1802, and it was held that this statute, which, among other things, indicated "citizens" as the class of persons to be enlisted, was *directory*, or one of "restrictory direction" only, and that an enlistment of an alien was not illegal but that the objection might lawfully be waived and the enlistment adopted and ratified by the government. Similarly, *the existing law*, as contained in the Revised Statutes, relating to the personal qualifications of individuals for enlistment, is regarded as *directory* only,[64]

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or—as has been repeatedly held in the later cases—as rendering enlistments of the classes of persons designated not void but merely *voidable* at the option of the government.[65] In this view—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*, or is too young to properly perform military service, the government may elect to hold the soldier to service, subject to such application for discharge as may be made to the Secretary of War under Art. 4, or to a United States court on *habeas corpus*.[66] That the United States should be held to be precluded from ratifying an irregular enlistment where the disqualification did not impair, or had ceased to impair, the value of the soldier, who meanwhile had performed service, received pay, &c.;[67] or

[59] The subsequent fixing of the height, (at five feet, three inches,) by Army Regulation, (see par. 929 of 1863,) was subject to the objection that it entrenched upon legislation. This matter is now regulated by "instructions issued from time to time." Par. 913, A. R.

[60] In Sec. 1116, Rev. Sts.

[61] And see the Third Article of War, and the corresponding law as to the Navy—Sec. 1420, Rev. Sts.

[62] 5 Hill, 16.

[63] 1 Rob., 631—a very instructive case. And see the analogous case of Com. *v.* Barker, 5 Bin., 427, *per* Tilghman, C. J.

[64] In their original form, (see, especially, Acts of July 4, 1864, s. 5, and of March 3, 1865, s. 18,) Secs. 1116–1118 were in effect mostly *directions to recruiting officers*, &c., a non-compliance with which—it was provided—should subject them to military trial and punishment,—as now specifically enjoined in Article 3.

[65] DIGEST, 385–6. And see *In re* Graham, 8 Jones' Law, 416; Cox *v.* Gee, Winst. L. & E., 131; *In re* Grimley, 137 U. S., 152; *In re* Cosenow, 37 Fed., 670; *In re* Davison, 21 Fed., 618; *In re* Zimmerman, 30 Fed., 176; *In re* Dohrendorf, 40 Fed., 148; *In re* Spencer, Id., 149.

[66] *In re* Cosenow, 37 Fed., 670. In the recent case of *In re* Davison, 21 Fed. Rep., 618, the court expresses the opinion, *incidentally*, that enlistments of persons under 16 are "void."

[67] Compare Holbrow *v.* Cotton, 9 Quebec Law Reports, 105, where it is held that—"An informality in the enlistment of a soldier cannot be invoked by him as relieving him from military discipline while voluntarily serving with his corps."

where the soldier had committed a military offence and his trial by court-martial and punishment were called for by the interests of discipline,—would be an unfortunate contingency and against public policy.

**ENLISTMENTS IN CONTRAVENTION OF ARMY REGULATIONS.** As to army regulations, these, when full force is given them, can be nothing more than executive directions;[68] and where a regulation prescribing a formality or condition to be observed upon enlistments is not complied with in making a particular enlistment, it is clear that the validity of the same is not
842 so affected as to entitle the party, because of such error or omission, to a discharge, against the consent of the government. This was indeed specifically so ruled by Wayne, J., of the U. S. Supreme Court, in a case on circuit in 1861;[69] and more recently it has been held in a U. S. Court that an enlistment of a *married* man, in derogation of a regulation requiring, generally, that recruits should be unmarried, was not illegal, and that the party had no claim to be discharged on *habeas corpus*.[70] In a further case in a State court,[71] the court, in holding an enlistment to be valid though it did not comply with certain instructions to recruiting officers issued by the War Department, adds—"We cannot in cases of this kind look beyond *the laws of Congress*."[72]

This class of rulings might indeed be sustained upon another and a superior ground, *viz.* that the regulation of enlistments is a matter for the most part quite beyond the province of army regulations. As already indicated, it belongs exclusively to Congress to determine what descriptions of persons shall be employed in our armies and upon what conditions, and for the executive department to prescribe rules on the subject would amount to a transcending of legitimate authority and assumption of legislative power.[73]

3. **THE TERMS OF THE CONTRACT** or engagement of military
843 service[74] are also clearly within the constitutional authority of Congress. Thus it is that department of the government alone that can fix, on the one hand, the *period* of enlistment, and, on the other, the *consideration* which the soldier shall receive for his service, that is to say the pecuniary compensation that is to be paid him and the rations, clothing, &c., that are to be furnished him. All these matters have, from time to time, been regulated by the legisla-

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[68] See *ante*, Chapter III—"Army Regulations."

[69] *In re* Stevens, 24 Law Rep., 205.

[70] *Ex parte* Schmeld, 1 Dillon, 587. And see Ferren's Case, 3 Benedict, 442, where it is observed by Blatchford, J., in regard to the requirement in question, that it is "a mere regulation made by the War Department, directory to its subordinates, and *not a statutory enactment*."

[71] *In re* Disinger, 12 Ohio St., 262–3.

[72] See also O'Brien, 86.

[73] See McCall's Case, 5 Philad., 259; Lanahan *v.* Birge, 30 Conn., 438, and other cases heretofore referred to on the subject of the exclusive power of Congress, under the Constitution, over the subject of enlistments; also citations last made from Ferren's and Disinger's cases. And compare instances, previously noted, of legislation by regulation, in prescribing the color and height of recruits. See also *ante*, Chapter III, "Army Regulations—They must not legislate."

[74] The engagement is of course to perform military service as a soldier: an enlistment entered into with the understanding that the party was to serve in other than a military capacity—as a laborer or clerk, for example—would be unauthorized and illegal. The illegality of employing a commissioned officer of the army on purely civil duty in the absence of express authority of Congress, has been remarked upon in several cases by the Judge Advocate General. See DIGEST, 164–5, 241, note, 542, 575.

tion of Congress.[75] That, where Congress has fixed the term of enlistment at five years, the President is not empowered to authorize an enlistment for a shorter term, was noticed in an early opinion of the Attorney General;[76] and it was added—"The executive department has discretionary authority 844 to *discharge*," (expressly conferred by Congress in the 4th Article of war,) "before the term of service has expired, but has no power to vary the contract of enlistment." As to the *consideration*, this—as has been repeatedly done in the case of the pay both of officers and soldiers—may be modified by Congress at discretion; the change affecting soldiers under pending enlistments equally with those enlisted subsequently.

## IV. FOURTH ARTICLE.

### [Discharge of Soldiers.]

"ART. 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.*"

This Article, which first appeared in our law in Art. 2 of Sec. III of the code of 1776,[77] consists of two separate provisions, and will be considered accordingly under the heads of—I. Requirements as to discharge in general; II. Discharge before expiration of term of service.

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[75] *Term.* Enlistments have been authorized by statute for various terms, from 100 days, (Act of May 6, 1864,) to five years, the term commonly prescribed for time of peace. Also—in time of war—for "during the war;" or for a certain period, as three or five years, "or during the war." (See J. R. of Jan. 23, 1779, Oct. 21, 1780, and June 21, 1862; and Acts of Jan. 12 and Feb. 11, 1847.) As to the extent of this term, (so many years, &c., "or during the war,") see Breitenbach *v.* Bush, 44 Pa. St., 317; Clark *v.* Martin, 3 Grant, 393; 4 Opins. At. Gen., 539; G. O. 101, Dept. of Va., 1865. The present term is fixed at *three* years, by the Act of August 1, 1894.

*Compensation.* The pay of enlisted men as fixed by Congress, has varied from $6⅔ per month, "the soldier to find his own arms and clothes," (Resolution of June 14, 1775,) to $16 per month, with $18 for first-class privates of the engineer and ordnance corps. (Act of June 20, 1864.) The present pay is mainly fixed by Secs. 1280–1284, Rev. Sts. But see a full statement of the existing pay of the various grades in G. O. 56 of 1893.

*Subsistence.* The soldier's ration, as added to and modified by a series of statutes, is now established by Sec. 1146, Rev. Sts., by which also the President is expressly authorized to "make such alterations in the component parts of the ration as a due regard to the health and comfort of the Army and economy may require." Alterations have from time to time been made accordingly. The full army ration set forth in par. 1367, A. R., has been increased by the "one pound of vegetables" added by the Act of June 16, 1890.

*Clothing.* Congress, by the Act of April 24, 1816 (Sec. 1296, Rev. Sts.,) has devolved upon the President the authority and duty of prescribing the "quantity and kind of clothing which shall be issued annually to the troops."

*Quarters and Fuel.* These are matters provided for by Congress in the annual appropriations for the Quartermaster Department. The proportionate allowances are fixed by par. 1098, A. R.

[76] 4 Opins., 537–8. And see 15 Opins., 362; G. O. 82, Dept. of Dakota, 1869.

[77] The concluding provision of the corresponding Article of the code of 1806 has been transferred, in the present code, to Art. 99.

I. REQUIREMENTS AS TO DISCHARGE IN GENERAL.

**EFFECT AND APPLICATION OF THE PROVISION.** The first clause of the Article is a general provision to the effect that all soldiers, when discharged from the military service, shall receive an instrument of discharge in writing, signed by a commanding or other specified officer, as the legal evidence that they have been discharged in fact.[78] This requirement applies equally to all discharges of the three kinds known to the law, *viz.* (1) the ordinary discharge given at the expiration of the term of enlistment; (2) the
845 summary discharge before expiration of term, authorized by the second clause of the Article—these two sorts being "honorable" discharges; and (3) the dishonorable discharge adjudged by, and given in pursuance of, a sentence of general court-martial.

In specifying the two classes of military discharge, the Article is not of course intended to cover or apply to discharge by *judicial* authority.[79] But a discharge by the granting of a writ of *habeas corpus* is simply an order of court directing a discharge, which, (where the discharge is from the military service,) will then properly be given as prescribed in this Article.

**FORM OF THE DISCHARGE.** This is a printed declaration or certificate of fact of discharge, describing the party by his rank, regiment, &c. Being, except as to the details specified in the Article, matter of form, it may be and is completed, as to its contents, by army regulation[80] and the practice of the service. As directed in par. 143 of the Army Regulations,[81] the cause of the discharge must be set forth in the body of the certificate—*viz.* expiration of term of service, order, or sentence.[82]

**DELIVERY OF DISCHARGE.** It is clearly inferable from the Article that there should be a *delivery* to the soldier of the written form in order to give effect to the discharge, and that the discharge will not properly take effect without or till delivery. The delivery, however, is not necessarily personal; it may be *constructive*. Thus, where a soldier, while held in military custody, is discharged by reason of a sentence imposing dishonorable discharge to be followed (or preceded,) by a term of confinement, the delivery of the written discharge to the officer in command, *for* the prisoner, to be retained by the officer and rendered to the prisoner at the end of his term of confinement, being a delivery to the use and for the benefit of the prisoner, may properly be regarded as a delivery to him in law, and is so treated in practice.[83]

846 **SELF-DISCHARGE.** The discharge is the act of the United States through its official representative. It results from the terms of the Article,—as it would indeed result from the principles governing military enlistments independently of statute,—that a soldier, legally in service, can-

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[78] That the formal discharge is *evidence* not only of the fact of discharge but of the circumstances—when the same are stated—under which the discharge was given, see Board of Comrs. *v.* Mertz, 27 Ind., 103; Hanson *v.* S. Scituate, 115 Mass. 336; U. S. *v.* Wright, 5 Phila., 296.

[79] See the reference to judicial discharge in par. 138, A. R.

[80] The regulations on the subject are mostly contained in Art. XXI, A. R.

[81] Amended by G. O. 38 of 1890.

[82] That the certificate is not the discharge, but only the "*evidence*" of it, see 13 Opins. At. Gen., 18.

[83] See Chapter XX—"Dishonorable discharge." Where the sentence of confinement is to be executed at a post other than that of the company, &c., of the prisoner, the discharge should be forwarded to the commanding officer at the place of execution. Regulations in regard to the retaining of such discharges till the release of the prisoner from confinement, exist at the Prisons at Fort Leavenworth and Alcatraz Island.

not discharge himself.[84] So strictly is this rule applied that a soldier leaving his regiment without a regular discharge, though he immediately re-enlist in another regiment, is punishable under the 50th Article of war as a deserter.

**DISCHARGE AS A RIGHT.** But a soldier, though he may not discharge himself, is entitled, at the expiration of his term of enlistment,—except possibly in the presence of some extreme emergency justifying the government in temporarily retaining his services for the public defence,—to be forthwith discharged according to the Article.[85] His contract has been performed and completed, and a new and independent contract is necessary in order to hold him for a further term.

### II. Discharge Before Expiration of Term of Service.

**THE TWO KINDS DISTINGUISHED.** Two kinds of this discharge are authorized and recognized by the Article,—discharge by the order of certain executive or military officials designated, and discharge by sentence of general court-martial. The two are clearly distinguished by the fact that, while the latter is a *punishment* imposed upon a trial and conviction of a military offence, the former is a mere terminating or rescinding of a contract.[86] The latter is thus known as a "*dishonorable*," while the former is generally designated, and is in a legal sense—*i. e.*, in that it does not subject the party to any forfeiture or disability attaching to discharge by sentence[87]—an "*honorable*" discharge.

847 The punishment of dishonorable discharge has already been considered in Chapter XX.

**DISCHARGE BY ORDER.** In its provision on this subject the Article illustrates the general principle of public law, heretofore noticed,[88] that a contract of enlistment is subject, pending its continuance, to be modified by the authority of Congress, irrespective of the will of the individual, the public interest being in such a case paramount to the private. Here Congress has exercised such authority by vesting alike in the President, the Secretary of War and department commanders, the power to discontinue the contract at any time at discretion. Strictly—it may be remarked—these commanders cannot, in the exercise of such authority, legally be restrained by their superiors. In practice, however, it is commonly from the War Department that discharges have been ordered under this Article, and the principal grounds and occasions for the same have been—the termination of a state of war or hostilities rendering certain troops no longer necessary; inefficiency, unfaithfulness, sickness or disability on the part of the individual soldier; and minority.

The power thus restricted cannot of course legally be exercised by any official other than those specified. In a case in which the right to discharge was claimed by a commander not indicated in the Article, Attorney General Berrien, in remarking that such right could not be asserted as attaching to command *as such*, observed as follows—"The authority to rescind a contract between the United States and the individual—which is the effect of the discharge—is a power which can exist only by virtue of an express grant; it is not dependent on rank, but simply on the provisions of the law. Under the Article which we

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[84] Wilbur *v.* Grace, 12 Johns., 71.

[85] U. S. *v.* Travers, 2 Wheeler Cr. C., 509, (Brunner, 486,)—Charge to the jury by Story, J.; Prendergast, 42; Digest, 20.

[86] 2 Opins. At. Gen., 353.

[87] See *post*—"Its legal effect."

[88] *Ante*, pp. 830, 838–9—"Third Article."

are now considering, the general commanding the army of the United States cannot grant a discharge which may be granted by his inferior officer who chances to be in command of a department." [89]

**Its legal effect.** The legal effect of this discharge, like that of an ordinary discharge at the expiration of the term of enlistment, is to separate the soldier honorably and finally from the service under his contract. In law such
848 discharge is "honorable," whatever may have been its grounds or the circumstances under which it was given.[90] Though its subject be a deserter,[91] an offender in arrest or on trial,[92] or a convict under sentence of imprisonment,[93] he leaves the service in good standing *legally*, being entitled to all pay due and to the enjoyment of all the other rights of an honorably discharged soldier. Such discharge is also *final* in detaching the recipient absolutely from the army under the enlistment to which it relates, and, so far, from military jurisdiction and control,[94] and, (thus far also,) remanding him to the status and capacity of a civilian. While an order for such a discharge may be recalled before it is executed, the discharge once duly delivered cannot be cancelled or revoked, except where obtained by falsehood or fraud.[95]

While a discharge of this class cannot, strictly, be other than "honorable" in law, its cause or occasion, though not creditable to the party, may be stated as a fact in the body of the certificate, and its true history thus be officially declared: further, where the party is discharged for inefficiency or the like, the "character," so called, at the foot of the discharge, may, being properly no part of the discharge, be cut off or left blank.

**DISCHARGE "WITHOUT HONOR."** This is a species of discharge recently introduced into our practice, as supposed to be warranted by the Fourth Article, and proper to be given where the circumstances which have induced the discharge are discreditable to the soldier.[96] But the distinction between a discharge "with honor" and a "dishonorable" discharge is fanciful
849 and unreal, and, in the opinion of the author, it is open to discussion whether this newly invented form is legally authorized under this Article. In all cases, as above indicated, the cause or occasion of a summary discharge may properly be set forth in the body of the certificate, and the material thus be furnished for any future adjudication in the event of a legal question being raised upon the effect of the discharge. The so-called discharge "without honor" is thus believed to be as unnecessary as it is of doubtful authority.

**DISCHARGE OF MINORS, BY THE SECRETARY OF WAR OR ON HABEAS CORPUS.** Where it is established to his satisfaction by the testimony of parents, or the affidavits of other credible persons, that an un-

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[89] 2 Opins. At Gen., 353.

[90] See case of a soldier tried for mutiny, cited in DIGEST, 356.

[91] In which case the discharge operates as a remission of the unexpired portion of the confinement. See *ante*, Chapter XXI—"Constructive Pardon."

[92] See White *v.* McDonough, 3 Sawyer, 311.

[93] That a discharge obtained by falsehood and perjury could be treated as a nullity and cancelled was held by the Attorney General in Coleman's case. 16 Opins., 352.

[94] See 14 Opins. At. Gen., 583.

[95] U. S. *v.* Kelly, 15 Wallace, 36.

[96] In Circ. No. 15, (H. A.) 1893, it is directed as follows—"The blanks for discharge 'without honor' 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 general court-martial which does not provide for dishonorable discharge."

emancipated minor has been enlisted without his parents' consent, the Secretary of War may order a discharge under the authority given him by the Fourth Article of War. As this is now the only enactment on the subject, he is not, as formerly, restricted by any provision of law in his inquiry as to the true age of the party.[97] If the enlisted minor be, at the time of the application for his discharge, held in arrest with a view to trial for desertion or other military offence, or under sentence adjudged upon conviction of such offence, the Secretary of War will properly refuse to grant the application, though made by a parent and in good faith. In such an instance the claims of the private individual—the parent—are deemed to be subordinated to the interest of the public in the due administration of justice and maintenance of military discipline, and the minor soldier is therefore required to abide and undergo the legitimate consequences of his own wrong before any petition for his discharge from his contract can be entertained.

850 To this effect have also been the rulings, on *habeas corpus*, of the civil courts, which have repeatedly refused to discharge minors under the circumstances indicated. A succession of such rulings on the part of the United States courts, (for a State court would of course be wholly without jurisdiction in such a case,[98]) have fully established the following points—

1. That a minor soldier cannot avoid his contract of enlistment either before or after minority; that his enlistment is in no case void, but is *voidable* only at the pleasure or option of the United States, which, if it see fit, may hold him to service, subject only to the claim of the parent or guardian:

2. That an application by the recruit himself for discharge on account of minority will not be entertained; that an application by the parent or guardian only, made during the minority, will be entertained and favorably considered:

3. That where the minor, otherwise dischargeable, is duly held for trial for desertion (or other military offence,) or under sentence on conviction of such, he cannot legally be discharged even at the suit of the parent.[99]

The principle of these adjudications has been recently applied by the Supreme Court to the case of a person enlisting when *over age*, (*i. e.* when over 35 years of age, the then limit,) in which it was decided that the soldier was not entitled to discharge on *habeas corpus*, not merely because he was held under sentence for desertion, but because he could himself no more avoid his contract than could a person enlisting when a minor.[100]

**DISCHARGE BY PURCHASE.** By a recent enactment of June 16, 1890, (c. 426, s. 4,) it is provided—"That, in time of peace, the President may, in his discretion and under such rules and upon such conditions as he shall 851 prescribe, permit any enlisted man to purchase his discharge from the Army." The rules, &c., several times amended, are, in their last form, published in G. O. 17 of 1893. It is here declared that this discharge, which, it is remarked, "is not an inherent right but a privilege to be granted entirely

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[97] See 14 Opins. At. Gen., 210; Seavey *v.* Seymour, 3 Clifford, 440, 447. An Act of Feb. 13, 1862, provided that the oath of enlistment of the recruit should be "conclusive as to his age." This provision has been in effect repealed by enactments of 1864 and 1872. And see G. O. 22 of 1892, amending par. 910, A. R.

[98] Tarble's Case, 13 Wallace, 397, affirmed in Robb *v.* Connolly, 111 U. S., 632.

[99] *In re* Wall,, 8 Fed., 85; *In re* Davison, 21 Id., 618, U. S. *v.* Gibbon, 24 Id., 135, *In re* Zimmermao, 30 Id., 176; *In re* Hearn, 32 Id., 141; *In re* Cosenow, 37 Id., 668; *In re* Dohrendorf, 40 Id., 148; *In re* Spencer, Id., 149; *In re* Kaufman, 41 Id., 876; *In re* Morrissey, 137 U. S., 157; Com. *v.* Gamble, 11 S. & R., 93; McConologue's Case, 107 Mass., 170; In matter of Beswick, 25 How. Pr., 149; *Ex parte* Anderson, 16 Iowa, 599. *Contra*, the rulings in *In re* Von Diese'skie, 5 Mackey, 485; *In re* Chapman, 37 Fed., 327; *In re* Baker, 23 Id. 30, must be rejected as bad law.

[100] *In re* Grimley, 137 U. S., 147.

in the discretion of the President, * * * shall be confined to the second year, and the first half of the third year, of the first enlistment." The prices to be paid are fixed, and it is directed that a soldier's application to be allowed to purchase his discharge will not be entertained in the absence of a certificate of his commanding officer that the amount which shall be due him on his final statements will be "sufficient to admit of collection of the whole purchase price," &c.

## V. THE FIFTH, SIXTH, AND FOURTEENTH ARTICLES.

### [False Muster, &c.]

"ART. 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.*

"ART. 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.*

"ART. 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 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.*"

The natural order of these Articles, and that in which they have appeared in all previous codes, commencing with that of 1775,[1] is—14, 5, 6. Art. 14, which has been misplaced in the present code and should be numbered 5, (the two others being properly numbered 6 and 7,) will, as being the most important, and in fact including Art. 5, be first considered. In the Appendix, the *charges* for false muster, &c., will follow the order of the code.

852 FOURTEENTH ARTICLE.

**CONSTRUCTION AND EFFECT—"False muster."** The proceeding of *muster* may be defined as the assembling, inspecting, entering upon the formal rolls, and officially reporting as a component part of the command, of persons or public animals. Forms of the offence of "false muster" were made punishable in the old British Articles, (particularly in those of Charles I and of the Parliamentary Army,) and in Art. 121 of the Code of Gustavus Adolphus. Of the acts which may constitute a false muster, Samuel[2] mentions the following, which embrace all or nearly all forms of the offence as now understood:—"the substitution, on the muster-roll, of one man or horse for another;[3] the presenting of either a second time, under a different description, at the same muster; the mustering of any person by a wrong name; the mustering of a

[1] "The corresponding provisions of this first code were Arts. 59, 60 and 61; of the code of 1806—Arts. 15, 16 and 17.

[2] The British articles of war in force from 1765 to about the beginning of the present century are those which most nearly resemble our own, which in fact were in great part taken from them. Of these articles SAMUEL, whose work—"An historical account of the British Army and of the Law Military"—was published in 1816, is the clearest and best exponent.

[3] In G. O. 103, Dept. of the Ohio, 1864, is a case of a conviction of a false muster in violation of this Article in mustering for pay a certain private as first sergeant, when another soldier of the command was the person entitled to be noted and paid as such on the roll.

person as a soldier who is not a soldier," (the kind of false muster specially made punishable by our Art. 5;) "the including of officers or men as present when they are in reality absent from their regiment, &c.; the including of them as members of the corps or company after they are deceased or have been discharged; the representing of persons as effective who, because of some disability, are really ineffective in the sense of the law or regulations.[4]

853 **"Knowingly"—"Knowing."** The guilty knowledge, which is the gist of the offences specified,[5] may be proved by direct evidence, but, more generally, will be established inferentially from circumstances indicating that the accused must, in all reasonable probability, have made the muster, or signed, &c., the roll, with knowledge that it was in fact, wholly or in some material part or parts, untrue or deceptive. An officer will in general properly be charged with the knowledge of what it is his office to know, or what he is bound to know in the performance of the particular duty devolved upon him.[6]

Where it appears that the accused had knowledge of the false statement or entry, his motive or object in making the muster, or signing, &c., the roll, is of no consequence in law.[7] Whether he aimed to defraud the United States, to secure some personal advantage, or to injure some individual, or whether his act was merely one of gross carelessness, without fraudulent or interested purpose, are questions quite immaterial to the issue of guilt or innocence:[8] they are immaterial also to the consideration of the punishment, this being made mandatory by the Article upon conviction.

**"Two witnesses."** This measure of proof is similar to that enjoined by the common-law rule in the case of perjury, and for a similar reason. Were there but one witness as to the allegation of guilty knowledge, it might with fairness be claimed that his testimony was counterbalanced by the official act or statement of the officer in the muster or roll: at least one other witness is therefore properly required to a conviction, beyond a reasonable doubt, of the accused.

### Fifth Article.

**ITS EFFECT.** As this provision merely makes punishable a particular description of the crime of false muster, it might well be omitted from the 854 code as embraced within the general description of Art. 14. Judging from its terms in the earlier forms,[9] it was originally aimed mainly at the offence of causing retainers or officers' servants to take the place of soldiers

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[4] Samuel, 301. And see Hough, 119; O'Brien, 88–9. The offence is equally committed whether the false muster, (if in writing,) be made upon one of the regular "Muster-and-Pay" rolls, upon which our soldiers are paid every two months, or upon one of the so-called "muster-in" or "muster-out" rolls, especially familiar to our practice during the late war, by which State troops were formally admitted into or detached from the military service of the United States.

[5] See Samuel, 305.

[6] "The proof must show either actual knowledge of the falsehood, or that by ordinary care and attention to his duty the accused would have known the falsehood." Samuel, 303.

[7] Samuel, 305; Hough, 119–120; O'Brien, 89.

[8] "The mischief intended to be prevented by the law is a false statement of the numbers or circumstances of the forces, which is, or may be, alike detrimental to the public purse and the service; and this mischief would be the same whether it were occasioned by negligence or inattention, or open or concealed fraud." Hough, 119. And see Samuel, 305.

[9] The original form of 1775 and 1776 was:—"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."

and answer as such upon the muster. As at present worded, it is immaterial what sort of persons are thus substituted.[10] The direction—"shall be punished accordingly," means of course shall suffer the punishment prescribed by the principal (misplaced[11]) Article—the 14th.

SIXTH ARTICLE.

**CONSTRUCTION AND EFFECT.** This Article makes it an offence for an officer to accept or receive, directly or indirectly, a pecuniary or other compensation in connection with, and in relation to, the making of an official muster or the execution of a muster-roll.[12] Samuel,[13] in remarking, with regard to the corresponding British article, that "the taking of the gratuity is the act prohibited and is of itself the sole offence," adds that, if the same "be *received*, no matter with what view on the part of the person receiving it, or what effect it may afterwards have on the muster or on the signing of the rolls, the offence will be complete." O'Brien's comment is—"The Article is explicit and makes no distinction whether the muster-rolls were true or false."[14]

**THE PUNISHMENT PRESCRIBED IN THE FOREGOING ARTICLES.** These articles are peculiar in being the only ones in the code which prescribe, with dismissal, the penalty of disability or *disqualification for office*
855 *or employment under the United States.* The severity of the punishment is traced by Samuel to the period of the reign of Henry V, when the British armies were raised and equipped "on the private contract of individuals," whom it was considered necessary to compel, at the peril of the severest penalties—in some instances even of death—to the mustering or exhibiting upon rolls, of genuine troops, and the furnishing of the actual complements required.[15] Subsequently, when, as the same author observes, the army came to consist "no longer of private supplies but of national levies," the previous severity was relaxed, and the penalty of disqualification discontinued.

It is to be regretted that a similar change has not been made in our own Articles. The offences which they denounce are grave, but no more so than are sundry other military crimes for which less severe penalties are provided. The peculiar appropriateness of disqualification for public employment as a punishment for false musters is not perceived; and for reserving this punishment for this class of offences alone no sufficient reason is believed now to exist. It would be an improvement of the code to limit the penalty directed by these Articles to dismissal alone or leave it discretionary with the court.

As has been remarked in Chapter XX, the disability to hold office, &c., here prescribed, attaches as a legal consequence to the conviction and punishment

[10] See case in G. O. 23, Mid. Mil. Dept., 1865, of an officer convicted of falsely mustering, on a muster-out roll, "four persons who were not soldiers."

[11] See *ante*, p. 552.

[12] Compare Hough, 131–2.

[13] Pages 312–313.

[14] Page 89. In S. O. 419 of 1864, an officer in command of a recruiting rendezvous is summarily dismissed for accepting money from a State recruiting agent, "in consideration of certain certified copies of muster-in rolls, to be furnished said agent; such acceptance of money being in violation of the 16th" (now 6th) "Article of war."

[15] Samuel, 294. So, Atty. Gen. Legare, (3 Opins., 694–5,) observes: "The extreme jealousy of the law upon the subject of actual presence in camp and corps of every man liable to duty as a soldier is clearly shown by the severity with which it punishes officers guilty of imposing upon their superiors in the slightest degree in the matter of muster certificates. * * * The strictness with which any attempt to foist into the ranks or in the place of a soldier one who is not in fact doing duty as such," (is punished?) "is remarkable."

of dismissal from the service, and need not be specifically adjudged in the sentence.

## VI. THE SEVENTH AND EIGHTH ARTICLES.

[Official returns.]

"ART. 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*
856 *who, through neglect or design, omits to send such returns, shall, on conviction thereof, be punished as a court-martial may direct.*

"ART. 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.*"

### SEVENTH ARTICLE.

**PURPOSE OF THE PROVISION.** The object of this Article, (which, with Art. 8, has been brought down from the code of 1775 without material change,) is to keep the President, through the Secretary of War, advised as to the available strength of the army, by means of frequent and accurate reports of the numbers and condition of its minor component parts. The Army Regulations, Art. LXVII, specify particularly as to the time and mode of forwarding these monthly returns, their form, &c.

**THE OFFENCE MADE PUNISHABLE.** This consists in the omission, either deliberately or through remissness, to send a return, or an "exact" return, in the manner directed. If such an omission be caused by personal disability, by the neglect of another person for whom the commanding officer cannot be held responsible, by an exigency of war, or by other cause beyond the officer's control, he cannot properly be held amenable under the Article. In general, however, the mere fact that no return has been sent for a certain month or months will be ground for presuming at least neglect on the part of the officer, and devolve upon him the burden of rebutting such presumption. To sustain a charge under the Article, it must of course appear that the accused, at the time of the alleged omission, was exercising one of the commands specifically designated. The omission contemplated—it may be noted—will subject the commander, not only to military trial, but also to criminal prosecution, and fine if convicted, under Sec. 1780, Rev. Sts.

### EIGHTH ARTICLE.

857 **ITS OBJECT.** "The object," observes Hough,[10] of making the returns here indicated as to the state of the *command*, is to enable superior officers authorized to call for such returns to become acquainted with the strength and efficiency of regiments, &c., and therefore a false return may be attended with very serious consequences." Of the returns of *arms, &c.*, he adds:—"The object of such returns is to check the issues and receipts of arms, &c., furnished to regiments from the magazines, &c., as well as to ascertain the state and condition of the equipments in use."

[10] Pages 132, 133.

**THE OFFENCE.** To render an officer making a false return amenable to justice under this Article, he must be a *commanding officer*, and must exercise the command of a regiment, company, or garrison. The false return to his superior of a staff officer, or acting staff officer, not exercising a command, would properly be charged, not as a violation of this Article, but of the 62d, or perhaps 61st. Thus the conviction, under this Article, of an Acting Commissary of Subsistence, of making false returns to the Commissary General in the form of false abstracts of purchases was disapproved by the Secretary of War in a General Order;[17] and in a further Order[18] the same action was taken upon a similar finding in a case of an Assistant Quartermaster, charged with a breach of this Article in rendering false accounts current to the Chief Quartermaster of the military department.

The "superior," other than the Secretary of War, "authorized to call for" the return, will generally be the department, or regimental, commander, according to circumstances; or, in the case of ordnance stores, or clothing and "camp and garrison equippage,"[19] the Chief of Ordnance or Quartermaster General.

To constitute therefore the offence, it must be shown that the accused held at the date of the return one of the commands designated; that the return was of one of the classes contemplated, and was made by the commander either to the Secretary of War or to a superior authorized by statute,
858 regulation, or usage to require it;[20] that it was false and that the accused knew it to be so. The return itself or a certified copy should be put in evidence. As to the character and extent of the falsity essential to be established, it is held by Samuel[21] that the return need not be false throughout,—that it is sufficient if it be false in any one material particular. As to the matter of knowledge, the same author observes[22] that—"an officer will always be 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; otherwise the returns might as well have been signed in blank."

**THE PUNISHMENT.** That the term "*cashiered*" employed in this Article has no peculiar significance but is equivalent to *dismissed*, has been noticed in Chapter XX.

## VII. THE NINTH, TENTH, FIFTEENTH, SIXTEENTH AND SEVENTEENTH ARTICLES.

[Responsibility for Public Property.]

"ART. 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.*

"ART. 10. *Every officer commanding a troop, battery, or company, is charged with the arms, accoutrements, ammunition, clothing, or other military stores*

[17] G. C. M. O. 12 of 1872.

[18] G. C. M. O. 19 of 1872.

[19] Stores "thereunto belonging" means of course belonging to, or issued to and held by, the regiment, company, or garrison. That the returns contemplated in the Article are returns of the *personnel* or *matériel* of the command, and do not include returns of *funds*,—see DIGEST, 22.

[20] See Simmons § 161; O'Brien, 303.

[21] Page 320. And see Hough, 134, DIGEST, 4.

[22] Pages 320–1. And see Fourteenth Article—"Knowingly," &c.

*belonging to his command, and is accountable to his colonel in case of their being lost, spoiled, or damaged otherwise than by unavoidable accident, or on actual service.*

"ART. 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.*

"ART. 16. *Any enlisted man who sells, or wilfully or through neglect wastes the ammunition delivered out to him, shall be punished as a court-martial may direct.*

859 "ART. 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.*"

NINTH ARTICLE.

**THE PRINCIPLE OF THE ARTICLE.** This Article, of which the original in our law[25] is Art. 29 of 1775, is, in its first clause, but an application of the principle of the law of modern war and of nations, that enemy's property 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.[34] Congress, which, by the Constitution, is exclusively vested with power to dispose of the property of the United States, as well as to make rules concerning captures on land and water, has applied the above principle strictly to the Army by this Article. It has not only provided for the army no allowance from the proceeds of captured stores corresponding to the prize money made payable to the navy, but, by Art. 9, has made the neglect to secure such stores to the use of the United States a military offence.[35]

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[25] Compare with it the 25th Article of the Code of James II, in Appendix.

[34] Decatur *v.* U. S., Devereux, 110; U. S. *v.* Klein, 13 Wallace, 136; White *v.* Red Chief, 1 Woods, 40; Branner *v.* Felkner, 1 Heisk., 232; Huff *v.* Odom, 49 Ga., 39. "Private persons cannot capture for their own benefit." Worthy *v.* Kinamon, 44 Ga., 299. And see 13 Opins. At. Gen., 105; G. O. 54, Hdqrs. of Army, Mexico, 1848; Do. 21, War Dept., 1848; Do. 64, 107, Id., 1862; Do. 160, Id., 1865. The same principle was recognized by Congress in the "Captured and Abandoned Property Act," of March 12, 1863. See Lamar *v.* Browne, 92 U. S., 195. By Sec. 5313, Rev. Sts., officers and soldiers are required to turn over all captured property to the proper authority, and are made punishable by fine and imprisonment for selling or "in any way dealing in" such property. See further on this subject the prohibition of "plunder" and "pillage" in Art. 42; also Part II—THE LAW OF WAR, *"Disposition of Property."*

[35] In G. O., Hdqrs., Totoway, October 31, 1780, is published the case of Col. Elisha Sheldon, 2d Light Dragoons, tried (and acquitted) for—"Defrauding the officers and soldiers of plunder taken in action, and converting the avails to his own use." In G. O. 27 of 1863, two officers are summarily dismissed for appropriating property taken from the enemy.

The cases in which Congress has authorized captured property or its proceeds to be appropriated to the use of the troops have been most rare. Art. 12 of November, 1775, appears to recognize a right, on the part of officers and soldiers in good standing, to "share" in "plunder taken from the enemy." Upon the capture of Stoney Point, in July, 1779, it was Resolved, (3 Jour. Cong., 329,) "that Congress approve the promises of reward made by Brig. Gen. Wayne, with the concurrence of the commander-in-chief, to the troops under his command;" and "that the value of the military stores taken be ascertained and divided among the gallant troops by whom it (Stoney Point) was reduced, in such manner and proportion as the commander-in-chief shall prescribe.

In a peculiar order issued during the late war—G. O. 216, Dept. of the Mo., 1864—in consideration of the services of certain militia, in dispersing a band of "bushwackers," it is directed that, "the horse ridden by the leader, and the watches and arms taken will be given to the several officers of the command to be retained as honorable trophies," and that the money captured be distributed to the wounded and the families of those killed.

860 **CONSTRUCTION—"The commanding officer."** In the Articles of 1775 the responsibility for a non-observance of the like provision was imposed upon "the commander-in-chief." The term "commanding officer," now employed, is regarded as meaning the officer in command of the separate and distinct organization in which the capture is made—as a "separate brigade," division, or army, or a regiment or detachment when operating separately.[26]

"Answerable." By this term is understood—responsible and liable to be called to account, and, in a proper case, subject to military trial and punishment.

### Tenth Article.

**CONSTRUCTION AND EFFECT.** This provision appeared first in our law, and in substantially the same form, in Art. 5 of Sec. XII of the code of 1776. The obligation which it devolves upon company commanders is one of the fundamental principles of our military system, where the company is the unit of organization. The details of the proper performance of this duty are indicated in the Army Regulations.[27]

861 The Article is directory only. It has, however, as its penal complement, Art. 15, under which an officer who fails wilfully or through neglect to properly care for the public stores in his charge may be tried and punished. And any improper disposition of such stores otherwise than as specified in that Article would be chargeable as an offence under Art. 60 or 62. Moreover, for a failure duly to *account* as contemplated in the present Article, the officer would be subject to a stoppage of his pay till the pecuniary value of the stores not accounted for was made good.[28]

The declaration that the officer is "accountable to his colonel" is deemed to intend that it is devolved upon colonels of regiments to enforce the obligation enjoined in the Article, by causing the proper stoppages to be made, (or reporting the facts to the War Department for such or other action,) or by preferring charges in cases of dereliction on the part of their company commanders of such gravity as to call for trial and punishment.

Samuel,[29] in construing the concluding clause of the Article, observes that—"by '*unavoidable*' is intended what could not have been prevented by common and ordinary prudence, and not what might have been avoided by possible or extraordinary exertions."

### Fifteenth Article.

**THE ORIGINAL ENACTMENT.** The original Article—No. 1 of Sec. XII of 1776, and No. 36 of 1806—of which the present provision was a part, denounced also the offences of unauthorized selling, embezzlement and misapplication of military stores. But, as to this portion, the Article was practically superseded by the subsequent Act, "to prevent and punish frauds upon the

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[26] G. O. 64, of 1862, requires that the captured property of the sort indicated in the Article, "be turned over to the chiefs of the staff departments, to which said property would appertain, on duty with the troops," to be "accounted for by them as captured property and used for the public service," unless otherwise ordered in special cases.

[27] See pars. 778–787. Prior to the enactment of July 15, 1870, a special allowance (similar to that made in the British service—see Samuel, 538,) of $10 per month was made to company commanders "for responsibility of arms and clothing."

[28] See, in this connection, the provision of the Act of May 18, 1826, as incorporated in Sec. 1304, Rev. Sts.

[29] Page 538.

Government of the United States," of March 2, 1863, c. 67, which is now, by the Revision of 1874, incorporated with the code as Article 60.

**CONSTRUCTION—"Through neglect."** In view of the fact that so severe a penalty as dismissal is made mandatory in all cases by this
862 Article, it would seem that the "neglect" here contemplated was a special neglect, and of a positive and gross character, and not merely such a neglect, to the prejudice of order or discipline, as is indicated in the general—62d—Article. Such is indeed the conclusion, in substance, of Samuel, in construing the corresponding British Article.[30] Thus while any neglect, resulting in a loss, &c., of stores, would, strictly, be cognizable under Art. 15, it would ordinarily be preferable not to resort to it for the punishment of slight or negative neglects of duty, but to charge thereunder only such neglects as in their gravity were assimilated to the *wilful* act also constituted an offence thereby.[31]

**"Suffers to be lost, &c."** The wilful or neglectful sufferance specified by the Article may consist in a deliberate violation or positive disregard of some specific injunction of law, regulations, or orders; or it may be evidenced by such circumstances as a reckless or unwarranted personal use of the property; causing or allowing it to remain exposed to the weather, insecurely housed or not guarded; permitting it to be consumed, wasted or injured by other persons; loaning it to an irresponsible person by whom it is damaged,[32] &c.

**"Shall make good the loss or damage."** This provision is regarded as imposing a general pecuniary liability which may be enforced independently of the sentence.[33] Thus, while it would not be irregular for the court, in connection with dismissal, to impose a forfeiture of an amount of pay sufficient to reimburse the United States for the loss involved, and *specified* to be forfeited for that purpose, it would be legal and regular, in the absence of any such forfeiture in the sentence, to *stop* the proper sum against the pay of the officer till fully satisfied. Strictly, the most correct form of a judgment, under this Article, would, it is believed, be—to add, in the sentence, to the imposition of the dismissal, (with other penalty if awarded,) as the *punishment*, a
863 statement that the court estimates the value of the stores lost, &c., to be a certain amount specified.[34] The stoppage when ordered would properly concur with this estimate.

SIXTEENTH ARTICLE.

**CONSTRUCTION AND EFFECT.** The original[35] of this Article, in the codes of 1776 and 1806, made offenders triable only by a regimental court. The present form is a more effectual provision for the punishment of the soldier, whether for selling his ammunition, or for any neglect, grave or slight, resulting in its waste; a general court being resorted to where the offence, or loss entailed, is a serious one, and an inferior court where the dereliction is of less importance.

The "waste" contemplated by the Article is evidently such as may consist in not taking proper care of the ammunition issued and thus allowing it to be

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[30] Pages 516–517.

[31] See Samuel, 517.

[32] See Hough, 259; also case of violation of this Article in G. C. M. O. 85 of 1882.

[33] See Samuel, 516; O'Brien, 131.

[34] As in the sentence adjudged upon a conviction under this Article, published in G. O. 341 of 1863. See remarks in regard to a similar provision of Art. 17, *post*.

[35] The true original is Art. 42 of the code of James II, where the offences denounced are made punishable with death. And compare Art. 80 of Gustavus Adolphus.

lost or damaged, in recklessly expending it in firings, giving it away, &c. The "casting away" of ammunition, made punishable by Art. 42, is a distinct offence.

SEVENTEENTH ARTICLE.[36]

**ORIGIN.** The origin of this Article in our law—Art. 3 of Sec. XII of 1776—which was taken directly from a provision of the British Articles in force prior to the Revolutionary War,[37] may be said to be derived from the "Assize of Arms, as settled in the reign of Henry II, A. D. 1181," by which it was declared that no one, required or entitled to be furnished with arms or armor, "could either sell, pawn, lend, or part with them out of his custody."[38] Subsequent provisions to a similar effect are to be found in the Code of Gustavus Adolphus and in the Articles of Charles I and James II.

The recent amendment of this Article by the Act of July 27, 1892, has
864 swept away all the difficulties previously encountered in the interpretation of that part of it which related to the punishment of the offender and the other legal consequences of his act.

**CONSTRUCTION.**—"Sells, or through neglect loses or spoils." These words of description define and restrict the classes of offences cognizable under this Article. An unauthorized conversion or application, other than selling or neglectful losing or spoiling, is not chargeable here, but must be laid under some other provision of the code, as Art. 60 or 62. Thus it has been held that *pawning*, which is not strictly selling, should properly be charged under the Sixty-second Article;[39] and so of the offence of the *gambling away* of his clothing by a soldier.[40]

The *neglect* specified may be of any degree—from wilful positive neglect to the negligence involved in an omission to take due care of the thing, or a mere carelessness in the use of it.[41]

The *spoiling* indicated is deemed to consist in the doing to the thing such injury or damage as to render it wholly or in any material part unserviceable, or unfit for the use for which it was designed.[42]

A specification under a charge of a violation of this Article should set forth one of the specific offences enumerated and not some other similar act of offence or offence expressed in general terms. Thus a specification which alleges that the accused did unlawfully "dispose of" his horse, &c.,
865 is defective and insufficient. And so is a specification which avers the commission of two or more offences in the *alternative*;—as that the

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[36] With this Article note the prohibition repeated in Secs. 1242 and 3748, Rev. Sts.

[37] See Appendix.

[38] Tytler, 373–4.

[39] G. C. M. O. 17, Dept. of the Mo., 1874.

[40] G. C. M. O. 41, Dept. of Texas, 1873.

[41] In a case in G. C. M. O. 120, Dept. of Cal., 1882, Gen. Schofield observes as follows:—"In cases of this class it should be clearly understood that where clothing duly issued to a soldier disappears without apparent cause, the soldier, entrusted as he is with the safe keeping and proper care of the property, is in general to be presumed to be chargeable with neglect in the care or keeping of the same, and will in general properly be held liable for such neglect by a Court-Martial under the 17th Article of War, unless by reasonably satisfactory evidence he shall duly account for the loss and acquit himself of fault. If the soldier at the time of the loss is absent without leave, or under the influence of liquor, or otherwise improperly conducting himself, the presumption against him of neglect will of course be stronger than where he is not thus culpable."

[42] See case in G. C. M. O. 26, Dept. of Colorado, 1893, of a charge of "spoiling his horse," by causing it, through neglect in riding, to break its leg, thus necessitating its being shot.

accused "did sell, lose or spoil through neglect," or "did sell, lose through neglect, or otherwise dispose of."[42]

"His horse, arms, clothing," &c. Clothing issued and charged to a soldier becomes his property, but in the qualified sense that his use of it in the service is, by the requirements of discipline, restricted to legitimate military purposes. In the horse, arms, and most of the accoutrements, however, which are furnished him, he has no property whatever, but the same are supplied merely for his use as a soldier, a use for which he is responsible to the United States as the owner. It is quite clear therefore, and is agreed by the authorities,[43] that the term "*his*," employed as it is indifferently in regard to all the things specified, is not here intended to convey an idea of *absolute* property or ownership, but rather one, as between him and the United States, of possession only.[44] All such things indeed, whatever their tenure, when issued to the soldier, are issued with a view to use in the service, and with the understanding that they shall not otherwise be disposed of, and shall be reasonably cared for and safely kept. The Article, in making penal such a disposition, (by selling,) and an absence of such care, holds the party to the same accountability with regard to clothing as with regard to the other objects mentioned. Thus, as apposite to the description "his," it is not necessary to prove anything more than that the thing, animal, &c., was duly issued to the soldier as a part of his military equipment.

"Accoutrements." This term refers to the minor articles of a soldier's outfit or horse-furniture, such as the belts, cartridge box, saddle, bridle, &c. Where it is doubtful whether an implement or instrument, required to be carried or used by the soldier, and which is not an *arm*, is an accoutrement, a spoiling, &c., of the same should properly be charged, not under this, but under the 62d Article. Thus the breaking and rendering unserviceable of his bugle, by a bugler, has been properly so charged.[45]

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"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." By these concluding words, (added in the amendment of 1892,) the Article has evidently in view the limitation as to *maximum* punishments authorized, by the Act of September 27, 1890, to be prescribed by the President where, as here, the sentence is discretionary with the court. The words after "*adjudge*" are indeed surplusage, since the Act of 1890 would of course have effect independently of such proviso.

In regard to the punishment, it may be remarked that, in a case of the selling of property of the United States issued to the soldier, as a horse or musket,—an act which would constitute embezzlement in law,—confinement in a *penitentiary* would, in view of the provisions of Art. 97, be a legal punishment if imposable in a like case under the existing local law.

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[42] G. C. M. O. 109 of 1886. This form is allowed in the British practice. See Story, 57.

[43] G. O. 35, Dept. of the East, 1869; Do. 31, Dept. of the South, 1877; G. C. M. O. 1, Id., 1882; Do. 15, Dept. of Texas, 1880; Do. 84, Div. of Pacific and Dept. of Cal., 1881; Do. 5, Dept. of the Columbia, 1883; Do. 42, Div. Atlantic, 1888; DIGEST, 23, 24. And compare U. S. *v.* Brown, 1 Mason, 151. In G. O. 22, Dept. of the South, 1873, it was held *not* a violation of this Article that the accused had sold a coat, not issued to himself, but purchased by him from a discharged soldier.

[44] As to a similar use of the same word in Art. 42, see that Article, *post*.

[45] G. C. M. O. 36 of 1876.

## VIII. THE ELEVENTH, TWELFTH AND THIRTEENTH ARTICLES.

[Furloughs—Certificates of Absence—False Certificates.]

"ART. 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*
867 *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.*

"ART. 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 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.*

"ART. 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.*"

### ELEVENTH ARTICLE.

**ITS EFFECT.** This Article, which is a consolidation of the original provision derived from Art. 56 of 1775, with s. 32 of the Act of March 3, 1863, does not call for special construction. It applies to formal written leaves of absence for soldiers,[47] in contradistinction to the informal passes which are given in all commands for a few hours or brief periods. The authority conferred of granting furloughs properly includes the authority to grant *extensions* of the same, which indeed are practically new furloughs.

**FORM AND OPERATION OF FURLOUGH.** The subject of "Furloughs of Soldiers" is quite fully treated in the Army Regulation, Art. XVII,
868 where the form of a furlough is indicated.[48] At the end of the form it is declared that the soldier shall rejoin his regiment, &c., at the completion of the authorized period, "or be considered a deserter." This is to be regarded, however, as meaning, not that he will thus *necessarily* become or be treated as a deserter, but that he will be *presumed* to be such in the absence of a satisfactory explanation of his failure or delay to return at the proper date, the *onus*

[47] The subject, it may be remarked, of leaves of absence to *officers* is not embraced in the Code, but is regulated by other statutes, and by regulations and orders. See Sec. 1265, Rev. Sts.; Act of May 8, 1874, c. 154; Act of July 29, 1876, c. 239; Army Regs., Art. IX; G. O. 38, 82, of 1890; Do. 55 of 1891.

[48] Par. 108. See the early form of furlough prescribed by Congress in June, 1781. 8 Jour., 633.

of promptly making such explanation devolving upon himself. The status of a soldier on furlough is in most respects the opposite of that of a soldier on duty. While subject to be recalled before his leave has expired if, in view of an exigency, his services are required, and liable to be treated as a deserter if he takes advantage of the occasion to abandon the army, he is otherwise, in his legal relations, practically a civilian; the military command and jurisdiction being suspended in his case.[49]

### Twelfth Article.

**ITS EFFECT.** This provision, scarcely modified since 1775, is, in prescribing as to the form of certifying the absences of officers and soldiers on the muster-rolls, &c., directory merely, and not penal. It is indeed rather introductory to the Article which follows, by which the signing of false certificates (as to absence, &c.,) is made a specific military offence.

### Thirteenth Article.

**EFFECT AND CONSTRUCTION.** This Article which, originally, (in Art. 58 of 1775,) referred only to certificates of *absence*, was made, in the code of 1806, to include certificates of *pay* also.[50] In our present practice, it applies to the certificate appended to the Muster-and-Pay Roll, which covers remarks in regard to absence, pay, and other matters. It will be observed that it is distinguished from Arts. 5 and 14, relating to false muster, in that it does not require, to constitute the offence, that the officer shall *knowingly* sign
869 the false certificate, but only that the certificate shall be false *in fact*.

The Article evidently views it as a duty of a commanding officer to be informed, (especially upon occasions of muster,) as to the presence or absence of, and the payment rendered or due to, the officers and men under his immediate command, and contemplates that, in signing the certificates, he will, if he has done his duty in this regard, necessarily have personal knowledge of the facts to which he subscribes. It will therefore be no sufficient defence to a charge under this Article, that the accused *believed* the certificate signed by him to be true, if it was *in fact* false. Upon this point it is observed by Samuel,[51] that the Article proceeds "upon the presumption that the party certifying is bound to inform himself fully of all that he is in duty called upon to certify; and if he be negligent in informing himself, or take anything on trust, he cannot find any lawful excuse in his ignorance or misplaced confidence, being both in opposition to a plain and manifest duty."

The mere signing of an officer's pay-roll or voucher before the day on which the pay becomes due has been held not to constitute a violation of this Article;[52] the certificate signed not being a "false" one in the sense in which the term is here employed: further, the Article is regarded as contemplating false entries or statements made in regard to third persons, such as the soldiers and subordinates of the command of the officer signing, and not as embracing such statements in regard to himself. For the latter reason, the offence of fraudulently duplicating his personal pay-rolls, by an officer, is, in the opinion of the

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[49] See Chapter VIII—"Jurisdiction during absence on leave," &c.; also *post* under "Fifty-Ninth Article."

[50] As apposite here, (and to Arts. 12 and 14,) see the remarks of Atty. Gen. Legaré, in 3 Opins., 694–5.

[51] Page 298. And see O'Brien, 302.

[52] Digest, 23; G. C. M. O. 28 of 1872.

author, not strictly a violation of this Article and therefore not properly chargeable under it.[53]

## IX. THE EIGHTEENTH ARTICLE.

[Taxing, or being Interested in, the Sale of Provisions, &c.]

"ART. 18.—*Any officer commanding in any garrison, fort, or barracks*
870 *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.*"

**ITS OBJECT AND EFFECT.** This provision, dating from Art. 66 of 1775,[54] is the only portion remaining in force of the three Articles of the code of 1806 relating to the business of *sutlers*—a class of camp followers dispensed with at the end of the late war.[55] Its main *object* evidently is,—on the one hand to prevent officers from profiting themselves, to the oppression of venders of provisions and to the injury of the soldiers for whom the same are mainly intended; and, on the other hand, to prohibit combinations between officers and venders, by which undue facilities are furnished to the latter, to the exclusion of other parties and to the probable detriment and defrauding of the soldier. In its *spirit*, the Article may be regarded as declaring that either relation, however slight be the interest or profit, is wholly incompatible with the character and province of an officer of the army, especially when commanding troops.

As to the *interest* referred to—this, as is noticed by Samuel,[56] need not be a direct interest such as that attaching to a partnership, or part ownership of the articles introduced for sale, but may be one of an indirect or contingent character, as for instance an interest arising from an agreement or mutual understanding between the officer and the owner of the supplies that the former shall receive a percentage on the sales, or a commission on all profits above a certain sum, or some present of money or goods in return for his sanction of the speculation or promotion of the business.

**CASES UNDER THE ARTICLE.** Instances of trials for violations of this Article have been of rare occurrence. In one General Order it has been held that it was no defence to a charge, against an officer, of having exacted a sum of money from a citizen as a consideration for a license to sell
871 liquors at the station, that before the trial he had returned a portion of the sum extorted and given his promissory note for the balance.[57]

Sutlers in our law were done away with by the Act of July 28, 1866, and were succeeded by *Post Traders*,[58] a class of which, in turn, the gradual discontinuance has been provided for by an Act of January 28, 1893. Meanwhile *Canteens* had been established at military posts,[59] and these have more lately

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[53] It is so charged, indeed, in a recent case in G. C. M. O. 20 of 1885, where, however, the court found not guilty of the charge but guilty of "conduct to the prejudice of good order and military discipline." And see another instance in G. C. M. O. 52 of 1887.

[54] With this Article and the corresponding Art. 4 of Sec. VIII of 1776, see the Resolution of Congress of June 17, 1776, *in pari materia*. 1 Jour. Cong., 377.

[55] See *post*.

[56] Pages 445–6. And see O'Brien, 113.

[57] G. O. 19, Dept. of So. Ca., 1866. See a case in G. O. 7, Dept. of West Va., 1864, where an officer was convicted of "Sutlering," in establishing a sutler's shop in his battery, and realizing profits from the same "for his own private advantage."

[58] See the legislation in regard to Post Traders, as set forth in DIGEST, 598–9.

[59] G. O. 10 of 1889; Army Regs., Art. XXXIX.

been superseded by the *Post Exchange*.[60] A commanding officer who should become interested in the sale of "victuals," &c., intended for the trade of the post exchange, would probably be amenable to a charge under this Article.

## X. THE NINETEENTH, TWENTIETH, AND TWENTY-FIRST ARTICLES.

[Offences against Superiors.]

"ART. 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.*

"ART. 20. *Any officer or soldier who behaves himself with disrespect toward his commanding officer shall be punished as a court-martial may direct.*

"ART. 21. *Any officer or soldier who, on any pretence 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.*"

NINETEENTH ARTICLE.

872 **EARLIER FORMS.** This Article first appears in the code of 1776, where it was provided that an officer or soldier who should "presume to use traitorous or disrespectful words against the authority of the United States in Congress assembled," (the then Government,) "or the Legislature of any of the United States in which he may be quartered"—should be punished in the same manner as prescribed in the present form, except that cashiering was made mandatory in the case of an officer.[61] This Article was derived from the British code where the offence consisted in the use of "traitorous or disrespectful words against the Sacred Person of his Majesty or any of the Royal Family."[62] In the American Articles of 1806, the word *contemptuous* was substituted for "traitorous," and the provision in other respects assumed substantially the form in which it now appears.

**PRACTICE UNDER THE ARTICLE.** The acts in violation of this Article which have formed the subject of military trials in the United States have been almost exclusively of a political character. The great majority of the cases were those of denunciatory language used in regard to the President or his administration during the late war of the rebellion.[63] No instance has been found of a trial upon a charge of disrespectful words used against Congress

[60] G. O. 11 of 1892. And see the recent G. O. 46 of July 25, 1895, publishing "Post Exchange Regulations."

[61] Compare the early civil statute, not now in force, of July 14, 1798, s. 2, making punishable by fine and imprisonment the offence of "writing, printing, uttering, or publishing, &c., any false, scandalous, or malicious matter against the Government of the United States, or either House of Congress, or the President, with intent to defame or to bring into contempt or disrepute," &c.

[62] Art. 1, Sec. 2, of the British Articles in force at the beginning of our Revolutionary War.

[63] See cases in G. O. 377 of 1863; Do. 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. Ca., 1865.

alone or the Vice-President alone, although in some examples the language complained of has included Congress *with* the President.[64] Only one case
873 is known of an arraignment upon a charge of speaking disrespectfully of a Governor of a State,[65] (and in that the accused was acquitted,) and none of an alleged violation of the Article in assailing a State legislature.

**NATURE AND PROOF OF THE OFFENCE.** The "words," (which need not, of course, be addressed to the President, &c., or uttered in his presence,) may be either spoken, or written—as in a letter, or published—as in a newspaper. They may consist in abusive epithets, denunciatory or contumelious expressions, intemperate or malevolent comments upon official acts, &c. Although the mere fact that no disrespect was *intended* will not constitute a defence to a charge under the Article, yet in a case where the words are not in themselves necessarily disrespectful, the *animus* of the accused in using them will be a circumstance material to the inquiry whether any offence, or what degree of offence, has been committed. Thus an adverse criticism of the Executive expressed in emphatic language in the heat of a political discussion, but not apparently intended to be personally disrespectful, should not in general be made the occasion of a charge under this Article.[66] In a case of spoken words, it will also be a material question whether they were uttered in a private conversation or in the presence of officers or enlisted men. Opinions for which, if privately indulged in, an officer or soldier would not be answerable, may constitute, if publicly declared, the offence under consideration. And any disrespect will be aggravated by being manifested before inferiors in rank in the service.[67]

To constitute the offence of speaking, &c., disrespectfully of the President, the official referred to must be the acting President at the time. Maligning a deceased President would not be within this Article. Thus the public exulting over or justifying of the assassination of President Lincoln—an offence which was in several instances, toward the end of the late rebellion,
874 made the subject of trial by court-martial,[68] was properly charged as a violation of Art. 99.

It would not constitute a *defence* to a charge under this Article, to show that the person was spoken of, &c., not in his official but in his individual capacity; or to show that what was said or written of him was true. If the words are contemptuous or disrespectful *in se*, the offence is complete.

### Twentieth Article.

**CONSTRUCTION—"Who behaves himself."** The original Article of 1775 made punishable a behaving with disrespect toward a commander, and a speaking of false and injurious words in regard to him. Because specific ref-

[64] G. O. 23, Army of the Potomac, 1863; Do. 119, Dept. of the Ohio, 1863. In 1890 General Castex of the French army was tried by court-martial for attacking M. de Freycinet, the Minister of War, in a speech to the Cavalry at Meaux, and sentenced to be placed on half pay.

[65] G. C. M. O. 567 of 1865. In the proceedings of Congress of April 3, 1779, it was *Resolved* that any disrespectful or indecent behavior by any officer to the civil authority of any State in the Union would be "discountenanced and discouraged." 3 Jour. Cong., 243.

[66] "To seek indeed for ground of offence in such discussions would ordinarily be inquisitorial and beneath the dignity of the government." Judge Advocate General Holt, Digest, 26. It would, ordinarily, be still more inquisitorial to look for the same in a private conversation.

[67] See G. O. 171, Army of the Potomac, 1862; Do. 29, Dept. of No. Ca., 1865.

[68] See cases in G. O. 88, Dept. of Pa., 1865; Do. 105, Dept. of the Mo., 1865; Do. 50, Northern Dept., 1865.

erence to the *use of words* is omitted from the present form, it is not to be inferred that this mode of showing disrespect is no longer recognized. On the contrary, the term retained—"who behaves himself with disrespect," &c., is sufficiently general and comprehensive to include all kinds of personal disrespect, whether by acts or words. As it is said of the Article in a General Order:[69]—"It contains no qualifications as to manner, time, or place, and is understood to cover," not merely "all actions," but also "language spoken or written." This construction is confirmed in practice: indeed prosecutions under this Article are more frequently based upon the use of unbecoming language than upon any other form of misconduct.

"With disrespect." As expressed in the Order last cited, the disrespectful behaviour contemplated is such as "detracts from the respect due to the authority and person of the commanding officer." Disrespect by *words* may be conveyed by opprobrious epithets or other contumelious or denunciatory language applied to, or in regard to, the commander;[70] by an open declara-
875 tion of an intention not to obey his orders; by making unwarranted imputations against him or attributing to him improper motives; by misrepresenting or aspersing him in a communication addressed to his superior or other officer in authority, or in a circular, newspaper, or other form of publication,[71] &c. Disrespect toward a commander by *acts* may be exhibited in a variety of modes—as by neglecting the customary salute,[72] by a marked disdain, indifference, insolence, impertinence, undue familiarity, or other rudeness in his presence, by a systematic or habitual disregard of, or delay to comply with, his orders or directions or by issuing counter orders, by an assault upon him not amounting to breach of the 21st Article,[73] &c.

The words or facts constituting the alleged disrespect, (and which should be specifically set forth in the charge,) need not necessarily consist in acts or language directed at the commander in his *official* or *military* character, but may be applied to him *personally* as well.[74] As indicated under Art. 19, it is no defence that the superior was assailed in his private or civil capacity; the law of military discipline cannot safely recognize such distinctions.

It is also not essential that the disrespect be *intentional:* a failure to show a proper respect to the commander, through ignorance, carelessness, bad manners, or no manners, may, equally with a deliberate act, constitute an offence under the Article. Where, however, it is douhtful whether an act, or language, not necessarily disrespectful *in se*, may properly he treated as amounting to disrespect, the *animus* of the party becomes a material inquiry.[75] Where an impropriety of manner or expression, after being animadverted upon by the commander, has been *repeated*, an intention to be disrespectful will be the
876 more readily inferred. An intentional disrespect is of course much more aggravated than one which is unintentional: a disrespect is also aggra-

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[69] G. O. 44, Dept. of Dakota, 1872.

[70] In a case in G. C. M. O. 41 of 1889, the offence consisted in the sending back by the accused of a message, expressed in disrespectful and insubordinate language, to his commanding officer, upon the latter conveying to him an order to leave a drinking saloon and return to the post.

[71] See Hough, (P.) 125–127; also cases reported by James, (p. 357,) and Samuel, (p. 248,) of Capt. Brown and Lieut. Zouch, dismissed for being concerned in a publication "having for its effect to excite public opinion against their commanding officer." And see cases of violation of this Article in G. C. M. O. 28 of 1875; G. O. 47, Dept. of the Platte, 1870.

[72] Hough, (P.) 125.

[73] See G. O. 53, Dept. of Dakota, 1871.

[74] Hough, (P.) 126; O'Brien, 68; Capt. Chamberlayne's Case, reported in James, (p. 307,) and Samuel, (p. 246;) G. O. 44, Dept. of Dakota, 1872.

[75] See O'Brien, 68.

vated where it is *publicly* committed; and so of disrespectful language conveying *false* imputations. It is no defence, however, to a charge for using such language, that the same only stated *facts*,[76] or that what was said was no more than *deserved* by the superior. If an officer or soldier has been aggrieved by his commander, he should, instead of inveighing against him, properly seek redress under the 29th or 30th Article of war, or otherwise through regular military channels.[77] Further it is no defence, or even palliation, that the person guilty of the disrespect was an officer of high rank and long service. Indeed this circumstance is viewed by Hough[78] as a "strong aggravation, inasmuch as the effect of such conduct upon others must produce an influence pernicious in proportion to the deference and respect paid to the character of the individual who offends."[79]

The punishment being made discretionary by the Article will be measured by the nature and circumstances of the disrespect in the particular case; a severer penalty being called for where the disrespectful behaviour was unprovoked, undeserved, false, deliberate, violent, or public—as in the presence of officers or soldiers, than where it was the reverse.[80]

"Toward." As already indicated, it is not essential to the offence that the language should be addressed to the commander in person, or that the words or acts should be said or done in his presence. "Toward" thus includes not only *to*, but *at*, *against*, or *in reference to*. Disrespectful language
877 used in regard to a commander, in his absence, has been expressly held in Orders,[81] to be within the Article. But where the language was employed in the course of a private conversation, it will in general be inquisitorial, inexpedient, and quite unworthy the Government, to make it the occasion of a charge, unless the disrespect was of an extreme character, and manifested under such circumstances as to set a pernicious example to inferiors or otherwise gravely prejudice decency or discipline.[82]

"His commanding officer." The Article, in its present form, is not, as in the early codes, confined to cases of disrespect shown to the General of the army or other chief commander, but includes offences of this class committed against all commanding officers of whatever degree, whether of a post, company, regiment, brigade, division, department, or other command. But comprehensive as is the term "his commanding officer," it can apply only to an officer who is the actual commander of the accused at the time of the offence. The commanding officer of an officer or soldier, in the sense of the Article, is properly the superior who, in the exercise of his command, is authorized to require obedience to his orders from such officer or soldier.[83] This is not necessarily an officer of the line but may be a staff officer—as an engineer officer in command of an

[76] "But if the accused can clearly show not merely that his allegations are *true*, but that *it was his duty to express them*, it might be different." O'Brien, 69.

[77] O'Brien, 69. And see G. O. 47, Dept. of the Platte, 1870.

[78] Precedents, 130.

[79] It is also held an aggravation of the offence that the *commander* is an officer of especially high rank and station. Samuel, 245; O'Brien, 69.

[80] It may be noted that this is one of the few Articles under which the sentence to make an *apology*, or to *ask pardon* has been found appropriate in practice; the matter which has given rise to the charge being not unfrequently a *personal* one between the parties. See Col. Debbeigg's case, in Samuel, 244–5, and 2 McArthur, 358–360; cases of Surgeon Dalzell and Capt. Brown, in James, 56, 59; O'Brien, 68; also *ante*, Chapter XX, p. 416, and notes.

[81] G. O. 44, Dept of Dakota, 1872; Do. 47, Dept. of the Platte, 1870. In the case in the former of these Orders, the disrespectful language was used in public at the Trader's store.

[82] See G. O. 29 of 1844.

[83] G. C. M. O. 37, Dept. of Texas, 1884.

engineer station, or an ordnance officer in command at an arsenal. Or it may be a medical officer in command at a hospital.[84] The offence of showing disrespect to an officer, who, while the *superior*, was not the commander of the offender, would not be cognizable under this Article, but should be
878 charged under some other, as the 62d.[85] And so of the offence of using disrespectful language toward the usual commander of the accused—as the commander of his company or regiment—committed by the accused when *on detached service or duty* under a quite different, though temporary commanding officer; such offence too should be charged under an article other than the Twentieth.

TWENTY-FIRST ARTICLE.

**ORIGIN.** This important Article has come down to the present time from Art. 1 of Sec. III of Charles I, and Art. 15 of James II.[86] Since its first appearance in our law as Art. 7 of 1775, it has undergone but slight modifications: these, so far as material, will be noticed as we proceed.

**CONSTRUCTION—"On any pretence whatsoever."** These words, while emphasizing the description of the grave offences made punishable by this Article, do not add to its legal effect, or preclude the possibility of a defence to a charge under the same. Like the same words which appeared in the original of Art. 22, but were omitted in the form of 1806 and have since been disused, they might also be omitted from the present Article without modifying its purport or operation.

**"Strikes."** A *battery* is evidently here intended. The person of the officer must be reached by the blow: to strike *at* him without touching him is not the offence indicated, but a mere assault only.[87] If indeed there is an assault offered, (with a weapon,) it is punishable under the next description. Upon the word "strikes" Hough[88] observes: "The act of striking is sufficient; it does not signify whether it be with the fist, or with a stick, or any other weapon, or whether it be a gentle or a hard blow; the mere striking constitutes the crime." The striking must however be intentional; an accidental blow or contact would not constitute the offence contemplated.
879 It is not unfrequently said by writers and in Orders that the striking of a military superior by an inferior cannot be justified under any circumstances or by any provocation whatever. The person of an officer should indeed be sacred to the soldier; in an extreme case, however, a soldier may be warranted in using force against his officer, as when acting in self-defence against illegal violence, or in quelling a disorder under Art. 24; and in any case the fact of a resort to undue force by a superior against an inferior will be admissible in evidence as going to palliate the offence of the latter in employing force in return.[89]

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[84] "An Assistant Surgeon in charge of a post hospital is the commanding officer of all members of the hospital corps therein, as, by virtue of that position, he is entitled to command obedience and respectful behaviour on their part." G. C. M. O. 4, Dept. of Texas, 1891. A subordinate at a hospital may indeed have two commanding officers, the medical officer in immediate charge of the hospital and the post commander.

[85] In G. O. 53, Dept. of Dakota, 1871, a conviction is disapproved because it was neither alleged nor shown that the officer offended against "was the commanding officer of the prisoner at the time of the commission of the offence." And see O'Brien, 68, 69.

[86] See Appendix. The several provisions of the Article are also to be traced in Arts. 18, 19, 21, 22, 24, 25, 26, 29 and 30, of the Code of Gustavus Adolphus.

[87] See the definition of Assault and Battery under the "Fifty-Eight Article," *post*.

[88] Page 84: Id., (P.) 79.

[89] See G. C. M. O. 45, Dept. of Dakota, 1880.

"**Draws or lifts up any weapon against.**" Here, however, are intended simple *assaults;* the offence consisting either in a mere threatening of violence without anything further being proposed, or in an attempt to do violence which is not effectuated. The weapon chiefly had in view by the word "draw" is no doubt the sword; the term however might apply to a bayonet in a sheath, or to a pistol; and the drawing of either in an aggressive manner, or the raising or brandishing of the same minaciously in the presence of the superior and *at* him, is the sort of act contemplated. The raising in a threatening manner of a fire-arm, (whether or not loaded,) or of a club, or any implement or thing by which a serious blow could be given, would be within the description—"lifts up." An assault without a weapon would be punishable not under this but under the next description.

"**Offers any violence against him.**" Samuel[90] construes "offer" as synonymous with the same word in the term, formerly employed in our own Article as well as the British, "offer to draw," and therefore as referring only to an attempt to do violence, or a mere exhibition of violence, without the consummation of an overt violent act, *i. e.* as an *assault* simply. O'Brien[91] apparently considers the term "offer violence" as indicating actual violence, and offer as meaning do or commit. It is deemed the preferable view to regard the phrase, as employed in our Article, as a general and comprehensive one, including violence proposed as well as violence committed—assault as well as battery, as indeed comprising any form of battery or of mere assault
880 not embraced in the preceding more specific terms, "strike" and "draw or lift up." But the violence, where not executed, must be physically attempted or menaced. A mere threatening in *words* would not be an offering of violence in the sense of the Article.[92] A striking or offering of violence by shooting, &c., which has resulted fatally, has sometimes been charged under this Article, and the death sentence been imposed upon conviction.[93]

"**His superior officer.**" By the term "superior," as used in this part of the Article, is clearly meant an officer of rank superior to that of the offender—or, where an enlisted man is the offender, any commissioned officer whatever—whether or not such officer be, properly speaking, a *commanding* officer.[94] The Article, as remarked in the DIGEST,[95] is thus "broader than Art. 20," which relates to offences against commanding officers only.

"Officer"—it need hardly be observed—means here, as elsewhere in the code, commissioned officer.[96] An assault or battery upon a non-commissioned officer, (or disobedience of the orders of one,) by a soldier, is properly charged under Art. 62.

To warrant a conviction, it should appear that the accused was *aware* that the person assailed by him was his superior officer.[97] If the latter was an officer of the same company, regiment, or garrison, or if he wore a uniform indicating his rank, the accused may in general be presumed to have known or believed that he was such superior. If the officer was not thus readily recognizable, as where he wore no distinctive uniform, or where the offence was committed in the night time, it will depend upon all the circumstances, as they

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[90] Pages 275, 277.
[91] Page 81.
[92] Bombay R., 131, note.
[93] See G. O. 104, Army of the Potomac, 1862; Do. 58, 89, Dept. of the Gulf, 1863; Do. 34, Dept. of Va., 1863.
[94] G. C. M. O. 8, Dept. of Texas, 1891.
[95] Page 27 § 4.
[96] See the provision on this subject of Sec. 1342, Rev. Sts.
[97] Simmons § 175; O'Brien, 85.

appear in the testimony, whether the accused shall be deemed to have had the knowledge or belief requisite. In an encounter with an aggressive subordinate at night, or under circumstances in which he is not likely to be recognized, the superior will properly at once announce who he is, with his rank, &c., and the fact that he did so will be material evidence, as
881 part of the *res gestæ*, upon the trial of the subordinate for an offence under this Article.[98] The officer will of course be presumably a *commissioned* officer from the fact of his acting as such, in connection with the further fact that all the officers of our army are equally and alike commissioned officers.

**"In the execution of his office."** This term has sometimes been defined by the more familiar expression "on duty." But an officer may be in the execution of his office without being on duty in the strictly military sense, and a more accurate definition of the phrase is believed to be—in the performance of an act or duty either pertaining or incident to his office, or legal and appropriate for an officer of his rank and office to perform. An officer is deemed to be in the execution of his office when engaged in any act or service required or authorized to be done by him, by statute, regulation, the order of a superior, or military usage.[99] It is not *essential* that the act should be one pertaining to his special branch of duty: thus any officer engaged in quelling a fray or disorder under the provisions of Art. 24 would properly be regarded as "in the execution of his office." There are certain officers especially charged by their commissions with the executive authority of a command, with whom to be on duty and in the execution of office is the general rule of the military status—as post, regimental or company commanders. But any officer, however special his function, when called upon in an emergency to act the part of a military superior, will be "in the execution of his office" in the sense of the present Article.

**"Disobeys any lawful command of his superior officer"—Obedience to orders in general.** The importance of Art. 21 is owing mainly to the fact that it makes punishable the specific and capital offence of Disobedience of Orders.

Obedience to orders is the vital principle of the military life[100]—the
882 fundamental rule, in peace and in war, for all inferiors through all the

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[98] In G. O. 34, Dept. of Va., 1863, a conviction of a soldier upon a charge of offering violence to his superior officer was disapproved by Gen. Dix, upon the ground, (in part,) that the officer assailed "did not belong to the same regiment with the accused, was not in uniform, nor did he wear any badge of office;" and because it was "not shown that the accused knew him to be an officer, or that he declared himself to be so."

[99] Simmons § 174; Hough, 83; Id., (P.) 79; O'Brien, 81–2; Benét, 207.

[100] "Obedience to command is the chief military virtue, in relation to which all others are secondary and subordinate;" it is, for the soldier, "the first great bond or charter of his service." Samuel, 266, 283. "The first and last virtue of a soldier." Harcourt, 16. "The first, second, and third part of a soldier is obedience." Sutton *v.* Johnstone, 1 Term, 546. "The first duty of a soldier is obedience, and without this there can be neither discipline nor efficiency in an army." McCall *v.* McDowell, Deady, 244. "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 offences 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 offence." U. S. *v.* Clarke, 3 Fed., 713, (Brown, J.) And see Trammell *v.* Bassett, 24 Ark., 499. "No other obligation must be put in competition with this; neither parental authority, nor religious scruples, nor personal safety, nor pecuniary advantages from other services. All the duties of his" (the soldier's) "life are, according to the theory of military obedience, absorbed in that one duty of obeying the command of the officer set over him." Clode, 2 M. F., 37. And see remarks of Secretary of the Navy in G. C. M. O. 1, Navy Dept., 1882.

grades from the general of the army to the newest recruit.[1] This rule the officer finds recited in the commission which he accepts, and the soldier, in his oath of enlistment, swears to observe it. As in the British system all military authority and discipline are derived from one source—the Sovereign,[2] so in our army every superior, in giving a lawful command, acts for and represents the President, as the Commander-in-chief and Executive power of the Nation, and the source from which his appointment and authority pro-
883 ceed.[3] Hence the dignity and significance of a formal military order, and hence the gravity of the obligation which it imposes upon the inferior to whom it is addressed. The obligation to obey is one to be fulfilled without hesitation, with alacrity, and to the full;[4] nothing short of a physical impossibility ordinarily excusing a complete performance.[5] While a certain discretion in the execution of an order may sometimes be permitted to officers high in rank or command, or officers charged with expert or peculiarly responsible duties,[6] the inferior cannot, as a general rule, be permitted to raise a question as to the propriety, expediency, or feasibility of a command given him, or to vary in any degree from its terms.[7] Even where the order is

[1] "The inferior in place, whether standing one or more hundred steps below his superior, is bound to show implicit obedience to the commands of the latter." Harcourt, 13–14.

[2] Clode, M. L., 107.

[3] The following extract from Samuel, (p. 283,) is equally applicable to our military system:—"The Constitution has submitted the actions of the army to be directed and controlled in everything by one supreme commander, from whom, by a number of communicating branches, in a continued, uninterrupted and unabated stream, all orders are made to flow to the individuals, near or remote, attached to the military state; which orders, as they partake all alike of the essence of supreme command, every officer or soldier is obliged implicitly to obey." To which may be added from Clode, (M. L., 74,)—"All orders of subordinates must be consistent with supreme authority, and, in case of conflict, that must be obeyed which is imposed by the higher authority."

[4] "A military subordinate is compelled to an unhesitating obedience to the very letter of the command received or order issued." Harcourt, 21. "A subordinate, on receiving an order, must obey promptly and implicitly. * * * must at once comply. * * * In presence of the enemy, more particularly, is this mechanical obedience due." O'Brien, 83. And see case of Lieut. Dawson, "charged with *hesitating* and declining" to execute orders. Simmons § 595, note; also De Hart, 165. The obedience must be "complete and undeviating." Samuel, 287. In the military service, "a prompt and unhesitating obedience to orders is indispensable to a complete attainment of the object. * * * Every delay and every obstacle to an efficient and immediate compliance tends to jeopard the public interests." Martin *v.* Mott, 12 Wheaton, 30.

[5] Sutton *v.* Johnstone, 1 Term, 546.

[6] See Hough, 88, (note 47.) 633. But where a discretion is taken to depart materially from the terms of an order, the officer makes himself amenable to charges, in case the result does not justify his action. Thus, of Lord Nelson's proceeding at Copenhagen, in not complying with his superior's signal to return and not engage the enemy, which resulted in a victory, Hough observes that, "if he had *failed,* he would have been brought to trial by court-martial."

[7] "If it were open to a soldier to be the judge of the propriety of the orders given him, there would at once be an end of all military discipline." Harcourt, 14. "In military affairs it would be intolerable." Clode, M. L., 75. "A subordinat officer must not judge of the danger, propriety, expediency, or consequence of the order he receives." Sutton *v.* Johnstone, 1 Term, 546. "While subordinates are pausing to consider whether they ought to obey, or are scrupulously weighing the evidence of the facts upon which the commander-in-chief exercises the right to demand their services, the hostile enterprise may be accomplished without the means of resistance." Martin *v.* Mott, 12 Wheaton, 30. Soldiers should obey "without cavil or inquiry;" they "have no right to inquire of their superior officer as to the object of a detail upon which they are ordered by him." Riggs *v.* State, 3 Cold, 90. And see McCall *v.* McDowell, Deady, 244–5; Dinsman *v.* Wilkes, 12 Howard, 403; Trammell *v.* Bassett, 24 Ark., 499; 2 Opins. At. Gen., 713.

884 arbitrary or unwise, and its effect must be injurious to the subordinate, he should first obey, postponing till after compliance his complaint and application for redress.[8]

**The disobedience contemplated by the Article.** It is agreed by the authorities that the offence specified in this part of the Article is a disobedience of a positive and deliberate character. However it may be exhibited,—whether in the form of an open and express refusal to do what is ordered, or in a simple not doing it, or in a doing of the opposite, or in a doing of something which has been expressly forbidden to be done,—the disobedience must be wilful and intentional. A mere *neglect* to comply with an order, through heedlessness, remissness, or forgetfulness, is an offense chargeable, not in general under this Article, but under the 62d.[9] And so of a neglect on the part of a subordinate when in a condition of drunkenness: the person ordered must be in a status of duty.[10]

885 **The command or order.** It is also agreed by military writers that the "command" contemplated by the Article is an express and personal one, that is to say an order of a specific character, addressed or given to the accused in person, in contradistinction to one of a general scope, as one issued to the command of which the accused is a member and applying to him no more than the rest.[11] Thus a failure to comply with the general or standing orders of a department, district, post, &c., or with the Army Regulations, is not an offence under this Article, but under the 62d.[12] And so of a non-performance by a subordinate of any mere routine duty.[13]

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[8] "Soldiers may complain of the command of a superior, but they are bound in the first instance to obey." Samuel, 265. "The orderly and proper course in all cases is to obey orders and afterwards, if any hardship or oppression is practiced, appeal to superior authority for redress." G. O. 40, Army of the Potomac, 1862. And see Harcourt, 16; O'Brien, 82; G. C. M. O. 28, 87, Dept. of the East, 1871.

Where indeed there is ample time for the purpose—the time being peace, and the order not calling for present action but relating to something to be done in the future—the subordinate, if he apprehends that its execution will seriously impair his rights or privileges, may, at his own risk, respectfully *remonstrate*, setting forth his grounds.

[9] "To support this charge, it is essential that there should be shown such an intentional disregard of authority as is evinced by a wilful refusal or omission to comply with the specific command of a superior officer." G. C. M. O. 26 of 1872. And see Do. 78, Dept. of the Platte, 1891; Do. 4, Dept. of Cal., 1891. "There must be an intentional disobedience or defiance of authority. * * * The capital offence is not complete by mere neglect or forgetfulness." Simmons § 178. And see Samuel, 286; Hough, 89; Id., (P.) 105; Harcourt, 21; Bombay R., 132, 155; Manual, 19; O'Brien, 84; G. C. M. O. 80, Dept. of the East, 1871; Do. 51 Id., 1872; Do. 112, Dept. of the Mo., 1872; Do. 12, 61, Id., 1873; G. O. 85, Dept. of the South, 1873; Do. 61, Id., 1874; Do. 13, Dept. of Cal., 1873; Do. 24, 35, Fifth Mil. Dist., 1868. To be wilfully disobeyed, the order must of course be *understood*; "and if there is doubt in the mind of the court on this point, the prisoner should have the benefit of it." G. O. 68, Div. of the Atlantic, 1875.

[10] G. C. M. O. 62, Dept. of the Platte, 1890. That express orders should never be given to a soldier when under the influence of intoxicating drink, has been repeatedly insisted upon in Orders. See G. O. 58, 63, Dept. of the South, 1873.

[11] Simmons § 178; Bombay R., 132; O'Brien, 84; G. O. 61, Dept. of the South, 1874. Other persons may indeed be included in the order, provided it contains a distinct and direct mandate upon the individual who afterwards becomes the accused. See G. C. M. O. 35, Dept. of the Platte, 1892. It has been held an offence under this Article for an officer to refuse or omit, of his own will, to act as a member of a court-martial for which he has, with others, been specifically detailed. G. O. 43 of 1833.

[12] G. C. M. O. 26 of 1872; Do. 7, Dept. of Texas, 1874; Do. 62, 70, 76, Dept. of the Platte, 1890; Do. 4, 68, Id., 1891; G. O. 24, 35, Fifth Mil. Dist., 1868; Simmons § 178. A mere failure by a soldier in confinement awaiting trial, or serving sentence, to comply with a rule of prison discipline, or the like, would not constitute this offence. G. C. M. O. 62, Dept. of the Platte, 1890.

[13] G. O. 24, Fifth Mil. Dist., 1868; O'Brien, 84.

As to the *form* of the order,—this is immaterial[14] provided that the substance amounts to a positive mandate.[15] Mere instructions would not in general fulfill the definition of an order or "command," in the sense of the present Article; nor would a mere statement of his wishes and views by a superior, however pointedly impressed upon the inferior in his entering upon the duty.[16]

886 The order may be oral or written;[17] it may be communicated or delivered to the subordinate by the superior in person, or through a third party—as a staff officer; or—provided of course it is personal, referring specifically or clearly to the individual imposing upon him an express duty—it may be conveyed through the medium of the General or Special Orders of the command or War Department.

As to orders *conveyed through a third person*,—it is to be remarked that, as several times observed in the course of this treatise, all orders issued by the Secretary of War are presumed to be issued by the direction of the President and are his in law. So, orders emanating from the War Department, Headquarters of the Army, or Headquarters of a Division or Department, subscribed by the Adjutant General, an Assistant Adjutant General, or other staff officer, are to be presumed to be the orders of the Secretary of War, (representing the President,) the General of the Army, or the Division or Department commander, as the case may be. But wherever orders are thus vicariously issued through a *military* representative, it should properly be expressly stated in the body of the communication that they are issued by the *direction* of the proper superior, or the words—"*By order of*" the proper commander, (naming him and his command,) should be prefixed to the signature.[18]

It may happen that an order is transmitted through several intermediate commanders, or other officers, to the individual intended to be reached: in such a case a failure to comply is a disobedience of the command of the superior from whom the mandate originally proceeded.[19]

Where an order is conveyed and personally delivered by a staff officer, aide-de-camp, or other medium,—to render the recipient liable under the present Article if he fail to obey it, it is essential that he should be apprized that the bearer in fact represents the superior whose the order purports to be.[20] Where not previously informed upon this point, the declaration to him of the

887 emissary that he is the staff officer, aid, &c., of the superior, or that he delivers the order by the direction of such superior, is to be presumed to state the fact, and the recipient will not only be justified in complying with the order thus conveyed, but will be liable to a charge under the present Article, if he does not comply.[21]

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[14] O'Brien, 84; Pollard *v.* Baldwin, 22 Iowa, 333; Cowell *v.* Hopkinton, 45 N. H., 14; State *v.* Small, Smith's Reports of Militia Cases, 57.

[15] See O'Brien, 84.

[16] But if an order be actually given, it is no less to be obeyed though expressed in a courteous instead of a peremptory form. G. C. M. O. 46 of 1883.

[17] Samuel, 285; O'Brien, 84. The order may be contained in a telegram. Though a written order be informal, or do not contain the name of the person, or address him by a wrong name, yet if such that it cannot reasonably be misunderstood as an order to himself, it will be within the contemplation of the Article. Compare State *v.* Small and State *v.* Hill, Smith's Militia Cases, 57, 83.

[18] See par. 859, Army Regs. Assuming to give an order as the order of a superior, who has not in fact directed it to be given, is—it need hardly be remarked—a grave military offence.

[19] The omission of an intermediate commander in the course of the transmittal will not affect the force of the order. See G. O. 166, Dept. of the South, 1864.

[20] See O'Brien, 85.

[21] See O'Brien, 85. The transmission of an order to an officer through a non-commissioned officer does not impair its obligation. See G. O. 91, Dept. of Ark., 1864.

As to an order *published*,—the same, if announced in the manner usual at the post or station, as by being read at parade or other public occasion,[23] is ordinarily presumed to have become known to the accused and thus binding upon him. If he seek to avoid the obligation on the ground that he was not notified of the order, the burden of proof will commonly be upon him to show that, by reason of authorized absence or other sufficient cause, he failed to be advised of such order before the expiration of the time within which it was required to be executed.

"**Lawful command.**" The word "lawful" is indeed surplusage, and would have been implied from the word "command" alone, but, being used, it goes to point the conclusion affirmed by all the authorities that a command *not* lawful may be disobeyed,[24] no matter from what source it proceeds.[24] But to justify an inferior in disobeying an order as illegal, the case must be an extreme one and the illegality not doubtful.[25] The order must be clearly
888 repugnant to some specific statute, to the law or usage of the military service, or to the general law of the land.[26] The unlawfulness of the command must thus be a *fact*, and, in view of the general presumption of law in favor of the authority of military orders emanating from official superiors,[27]

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[23] Compare the old custom of publishing orders "by sound of drum and trumpet, that no man may pretend ignorance." Article 41 of Gustavus Adolphus; Do. 63 of James II.

[24] Samuel, 284; Simmons § 595; Prendergast, 54; Harcourt, 50; O'Dowd, 48; O'Brien, 82, 267; De Hart, 166; DIGEST, 28; Sutton *v.* Johnstone, 1 Term, 501; U. S. v. Carr, 1 Woods, 480; Olmstead's Case, Brightly, 28; People *v.* McLeod, 1 Hill, 426; Riggs *v.* State, 3 Cold., 85; State *v.* Sparks, 27 Texas, 632.

[24] State *v.* Sparks. That an illegal order emanating from the President or Secretary of War can confer no authority, see Little *v.* Barreme, 2 Cranch, 179; Eifort *v.* Bevins, 1 Bush, 460; Com. *v.* Palmer, 2 Bush, 570. "In time of peace at least an officer is not obliged to obey an illegal order." Ide *v.* U. S., 25 Ct. Cl., 407.

[25] Samuel, 287; Hough, (P.) 104; Prendergast, 54; Harcourt, 20; O'Brien, 83; De Hart, 166; 2 Opins. At. Gen., 713; DIGEST, 28; Riggs *v.* State, 3 Cold., 86.

[26] Samuel, 284; Hough, (P.) 104; Simmons § 595; Harcourt, 20; Prendergast, 54; O'Brien, 267; De Hart, 166; G. C. M. O. 86, Dept. of Va., 1865, Riggs *v.* State, 3 Cold, 85; Terrill *v.* Rankin, 2 Bush., 453.

The following orders have been held to be *not* "lawful" in the sense of the Article:—An order given by a company commander to a soldier to have his washing done by a particular laundress. G. C. M. O. 87, Dept. of the East, 1871: An order requiring a soldier to assist in building a private stable for an officer. G. C. M. O. 130, Dept. of Dakota, 1879: An order requiring a soldier to act as an officer's servant. DIGEST, 28: An order forbidding a soldier to contract marriage. ID.: An order requiring a post band to play in a neighboring town for the pleasure of the citizens. ID.: An order directing a soldier to go within Mexican territory, to make the arrest of a deserter from our army. ID., 29. An order, in contravention of par. 999 A. R., given to a prisoner in the guard-house awaiting trial. G. C. M. O. 2, Dept. of Arizona, 1890. "A superior officer has no right to take advantage of his military rank, to give a command which does not relate to military duty or usages, or which has for its sole object the attainment of some private end. Such a command is not such a lawful command as will make disobedience to it criminal." Manual 19. In an early case in our service, that of Col. Thos. Butler, (New Orleans, 1804,) the officer refused to obey, as illegal, an order to *crop his hair*. He was tried and sentenced to be reprimanded; and, on again disobeying, was rearrested. Some seventy-five persons, civil and military, headed by Maj. Gen Jackson, addressed to Congress a formal protest against his treatment, and asked that he be relieved from "persecution." This appears to have been the end of the matter. Am. S. P., Mil. Af., vol. 1, p. 173–4. For late cases of orders of which the legality was disputed, but which were held legal under the circumstances—see G. C. M. O. 31, Dept. of Dakota, 1887; Do. 8, Dept. of Cal., 1888; Do. 47, Id., 1889.

Interesting *naval* cases involving the legality of orders given to officers are published in G. O. 140, Navy Dept., 1869, (Ast. Surgeon Green's case,) and Do. 182, Id., 1873.

The code of Gustavus Adolphus makes punishable, as a specific military offence, the giving of an unlawful command. See his Arts. 27 and 46, and compare his Art. 45, in Appendix.

[27] See De Hart, 297; O'Brien, 302; G. O. 34 of 1852.

the *onus* of establishing this fact will, in all cases—except where the order is palpably illegal upon its face—devolve upon the defence, and clear and convincing evidence will be required to rebut the presumption.[28]

889 The legality of the order may depend upon the period, whether one of peace or war, (or other emergency,) at which it is issued. An order which would be unlawful in peace or in the absence of any public exigency, may be perfectly lawful in war as being justified by the usages of civilized warfare.[29] Thus an order for the seizure of citizens' property for the subsistence or transportation of the troops, the construction of defences, &c., or for its destruction to facilitate the operations of the army in the field, or to prevent its falling into the hands of the enemy, would be not only authorized, but to disobey it would be a grave military crime. But, in general, in time of peace an order similarly in disregard of private right would be repugnant to the first principles of law, and to fail to obey it would constitute no violation of the present Article.[30]

But while a military inferior may be justified in not obeying an order as being unlawful, he will always assume to do so on his own personal responsibility and at his own risk.[31] Even where there may *seem* to be ample warrant for his act, he will, in justifying, commonly be at a very considerable disadvantage, the presumption being, as a rule, in favor of the legality of the order as an executive mandate, and the facts of the case and reasons for the action being often unknown in part at least to himself and in the possession only of the superior. In the great majority of cases therefore it is found both safer and wiser for the inferior, instead of resisting an apparently arbitrary authority, to accept the alternative of obeying even to his own detriment, thus also placing himself in the most favorable position for obtaining redress in the future.[32] On the other hand, should injury to a third person, or damage to the United States, result from the execution of an order by a subordinate, the plea that he acted simply in obedience to the mandate of his proper superior will be favored at military law, and a court-martial will almost invariably justify

890 and protect an accused who has been exposed to prosecution by reason of his unquestioning fidelity to duty, holding the superior alone responsible. How far he will be protected by the civil tribunals, if sued or prosecuted on account of a cause of action or offence involved in his proceeding, will be considered in PART III of this treatise.

**Unjust or objectionable commands.** That the order was merely unjust or unreasonable would, it need hardly be added, constitute no defence to a charge of disobedience of orders under this Article.[33] The plea that the order was opposed to the religious scruples of the accused, and that he was therefore warranted in disregarding it, is one which has been considerably discussed in

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[28] Samuel, 284; O'Brien, 82; De Hart, 297.

[29] O'Brien, 83; Olmstead's Case, Brightly, 9.

[30] Compare Mitchell *v.* Harmony, 13 Howard, 115, and 1 Blatchford, 549; Koonce *v.* Davis, 72 No. Ca., 218; Yost *v.* Stout, 4 Cold., 205, Christian Co. Ct. *v.* Rankin, 2 Duv., 502; Keighley *v.* Bell., 4 Fost. & Fin., 790, and other cases cited in PART III.

[31] 2 Clode, M. F., 37; G. O. 28 of 1851; Do. 34 of 1852; DIGEST, 28; State *v.* Sparks, 27 Texas, 633.

[32] O'Brien, 82; G. O. 40, Army of the Potomac, 1862. And compare People *v.* Gaul, 44 Barb., 107–8.

[33] In the *militia* case of State *v.* Woodman, Smith, 25, 31, it was held that to entitle a superior to obedience from a subordinate, "his command must be lawful *and reasonable.*" It need hardly be said that no such theory of military obligation could be allowed to prevail in the army. In a recent case it was held to be no excuse for not obeying the orders of a superior on drill, that such orders, in the opinion of the inferior, were improper and incorrect as not being in compliance with the established tactics. G. C. M. O. 134, Dept. of Dakota, 1884.

England, where it was held wholly insufficient as a defence.[34] It would of course be held equally untenable in our practice.

"His superior officer." This is a less comprehensive term as here employed than where first occuring in the Article. The "superior officer" here intended must be one authorized to give the *order;* else indeed his command would not be a "lawful" one. Thus an officer of the general staff of
891 the army may rank very considerably a certain other officer of such staff or a certain line officer, without being authorized under ordinary circumstances to give an order to either. A staff officer, however, may not unfrequently be in a position in which he is authorized to make and give orders as a "superior," and in which a disobedience of his order will constitute an offence under this Article. As in the instance of an ordnance officer in charge of an arsenal, or a medical officer in charge of a hospital.[35] The "superior officer" contemplated by the Article will indeed in general also be a commanding officer; but he need not be the regular commander of the regiment, post, department, &c.: it is sufficient if he be an officer upon whom the command has temporarily devolved.

To constitute the specific offence of disobedience of orders in violation of Art. 21, the "superior officer" must of course be *known to be such* by the accused, at the time of his giving the order which is not obeyed.

## XI. THE TWENTY-SECOND, TWENTY-THIRD AND TWENTY-FOURTH ARTICLES.

### [Mutiny, Sedition and Affray.]

"ART. 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.*

"ART. 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.*

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[34] See Capt. Atchison's case, Clode, 2 M. F., 37, 66–7; Hough, (P.) 113–117. In the debate upon this case in Parliament, the Duke of Wellington said: "If an officer or any other member of the army is to be allowed to get rid of the discharge of a disagreeable duty upon such a plea, there is an end of all discipline in the army." Hough, (P. 118,) in citing a further case of an officer in India who had declined to go into the trenches on Sunday, expresses himself as follows:—"Every one must admit that if an officer will refuse to obey orders, because they may be contrary to his religious belief regarding the Holy Scriptures, he is unfit to remain in the army. The real Christian is that person who does his duty to his sovereign and to his country without demur. If his conscience be unsettled, he should quit the army at once, and not unsettle the affairs military." And he adds—"Many battles have been fought on a Sunday." See also Manual, 20; Pratt, 125. And compare in this connection Reynolds *v.* U. S., 98 U. S., 145, to the effect that a person's religious belief cannot be accepted as a justification of his overt violation of the criminal law of the land.

[35] See G. C. M. O. 8, Dept. of Texas, 1891. There can be no question as to the authority of the medical officer under these circumstances, provided of course his order relates to a matter within his province.

Where there is doubt whether the officer giving the order is the "superior" officer of the accused in the sense of this Article, the offence will of course properly be charged under Art. 62.

"ART. 24. *All officers, of what condition soever, have power to part and quell all quarrels, frays, and disorders, whether among persons belonging to*
892 *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.*"

TWENTY-SECOND ARTICLE.

**ORIGIN.** This and the following Article may be traced to Art. 5, Sec. II of Charles I, Art. 8 of the Parliamentary Code of the Earl of Essex, and Art. 13 of James II; various forms of the offence of mutiny were also made capitally punishable by Arts. 54, 65, 75, 78 and 120, of Gustavus Adolphus.

**ITS PRINCIPAL SUBJECT.** The form of this Article, as of the two which follow it, has undergone no considerable change since 1775.[36] Of the acts which it makes punishable, the principal, *Mutiny*, has commonly been characterized as the gravest and most criminal of the offences known to the military code.[37] It has also an historical significance; the well-known mutiny of Jacobite troops in 1689[38] having given rise to the Mutiny Act, which for nearly two hundred years constituted the statutory military law of Great Britain.

**MUTINY DEFINED.** Mutiny has been variously described, but in general not in such terms as fully to distinguish it from some other military crimes, the characterizing *intent* not being sufficiently recognized.[39] It may, it is believed, properly be defined as consisting in an unlawful opposition or resistance to, or defiance of superior military authority, with a deliberate purpose to usurp, subvert, or override the same, or to eject with authority from office.

893 It is this intent which distinguishes it from the other offences with which, to the embarrassment of the student, it has often been confused both in treatises and General Orders. Thus, disrespect toward a commanding officer, the offence which is the subject of Art. 20, has sometimes been charged as mutiny.[40] More frequently the doing or offering of violence to a superior officer, and disobedience of orders,—offences specifically made punishable by Art. 21,—have been so charged or considered.[41] Still more frequently has the designation of "mutiny" been erroneously attached to disorders of the class known as "mutinous conduct"—such as defiant behaviour or threatening

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[36] The omission in 1806 of the words "on any pretence whatsoever" has already been noticed under Art. 21.

[37] "It stands conspicuously in front of the line of military crimes." Samuel, 249. "The most heinous known to military law." O'Brien, 70. It can however scarcely be regarded as a graver offence than Misbehaviour before the enemy.

[38] Referred to *ante*, in Chapter II, p. 19.

[39] See the definitions of Samuel, (p. 253; but see Id., 608;) Simmons, (§ 170;) Thring, (p. 175;) O'Brien, (p. 71, taken from Bombay R., p. 128;) and in G. O. 77 of 1837.

[40] See Hough, 107; Id. (P.) 120.

[41] Convictions, however, of such offences under the name of "mutiny" have been in some cases expressly disapproved. As in G. O. 10, Dept. of the Mo., 1863, where the offence consisted mainly in the striking of an officer by a soldier. In Lieut. Col. Fremont's case, (G. O. 7 of 1848,) a finding of guilty of "mutiny" was disapproved by the President upon the ground apparently that the acts alleged under this charge constituted rather instances of disobedience of orders. Of course the offences specified in Art. 21, if committed in the deliberate purpose of subverting superior authority, would properly be chargeable as mutiny.

language toward superiors, muttering or murmuring against the restraints of military discipline,[43] combinations of soldiers with a view to acts of violence or lawlessness which however are not committed,[44] intemperate and exciting discussions at meetings held for the purpose of protesting against orders, declining to perform service in the honest belief that the term of enlist-
894 ment has expired,[45] &c. Such disorders, stopping short of overt acts of resistance, or not characterized by a deliberate intent to overthrow superior authority, do not constitute in general the legal offence of mutiny, but are commonly to be treated as "conduct to the prejudice of good order and military discipline" in violation of Art. 62.[46] And the same is to be said of disorderly conduct under the influence of intoxication, which, though accompaned by resistance to a superior, is without the *animus* peculiar to mutiny in law.[46]

The definition of mutiny at military law is indeed best illustrated by a reference to the adjudged cases treating of that offence as understood *at maritime law*. Thus, in regard to mutiny or revolt on American merchant vessels, it has been expressly held that an intention to overthrow for the time at least the lawful authority of the master is an essential element of the crime,[47] that simple violence against the officer, without proof of intent to override his authority, is not sufficient to constitute revolt or mutiny,[48] that mere disobedience of

[43] This "muttering or murmuring" is classed as mutiny by some of the earlier writers. See Samuel, 254 and note; Hough, 71.

[44] See the case of Cadets Fairfax, Vining, Ragland, Loring and Holmes, a committee representing an unauthorized combination of cadets of the Military Academy, formed with a view to induce the redress of alleged grievances. Am. S. P., Mil. Af., vol. 2, pp. 5–30. (November, 1818.)

[45] As in the case of the Tennessee militia, treated and brought to punishment as mutineers by Gen. Jackson, in 1814. See *post*. And see the case in DIGEST, 31, of a body of volunteers which, having enlisted "for the war," (*i. e.*, the war of the late rebellion,) refused, after active hostilities had terminated, to serve against Indians. Other instances occurred, during the late war, of volunteers, who, honestly believing that their contract had expired or that they could not otherwise legally be required to render further service, joined in refusing to serve and demanded their discharge. Such were in general cases of mutinous conduct, or disorder in violation of Art. 62, rather than mutiny, the true *animus* of mutiny not being present. See G. C. M. O. 521 of 1865; G. O. 32, Dept. of N. E. Va., 1861; G. O. 108, Army of the Potomac, 1862. A combination, however, to refuse to perform military service, legally and properly required of the parties, if persisted in after due warning, &c., may certainly be treated as mutiny. See text *post*.

[46] Simmons, (§ 171,) referring to the "distinction between mutinous conduct and mutiny," observes—"Mutinous conduct implies behavior tending to mutiny: * * * a soldier whose conduct is evidently of a mutinous character may yet be clear of the completion or commission of that offence." And see, as to the same distinction, Hough, 71; Id., (P.) 58; O'Brien, 79–80; DIGEST, 30. In G. O. 115, Dept. of Washington, 1865, Gen. Augur says: "The conduct of the prisoners, though disorderly and riotous, does not constitute mutiny."

[46] In G. C. M. O. 73, Dept. of the Mo., 1873, Gen. Pope disapproves a conviction of mutiny for the reason that the evidence showed that the accused was only "intoxicated, disorderly and disobedient." And see a similar case in G. O. 10, A. & I. G. O., Richmond, 1861.

[47] U. S. *v.* Kelly, 4 Washington, 530; U. S. *v.* Smith, 3 Id., 78; U. S. *v.* Haines, 5 Mason, 277; U. S. *v.* Hemmer, 4 Id., 107, U. S. *v.* Thompson, 1 Sumner, 171; U. S. *v.* Forbes, Crabbe, 560. And see 14 Opins. At. Gen., 589. In U. S. *v.* Haines, Story, J., specifically compares the situation of a ship's company to that of a military command. In the recent case of Thompson *v.* The Stacey Clarke, 54 Fed., 533, mutiny is defined as consisting in "attempts to usurp the command from the master, or to deprive him of it for any purpose by violence, or in resisting him in the free and lawful exercise of his authority, the overthrowing of the legal authority of the master with an intent to remove him against his will, and the like." (Toulmin, J.)

[48] U. S. *v.* Kelly, *ante;* U. S. *v.* Lawrence, 1 Cranch C., 94; U. S. *v.* Morrison, 1 Sumner, 448; U. S. *v.* Almeida, Whart. Prec., 1061.

895 orders, unaccompanied by such intent, does not amount to mutiny;[49] and that insolent language or disorderly behaviour is *per se* insufficient to establish it.[50]

**PROOF OF THE INTENT.** The intent may be openly declared in words, or it may be implied from the act or acts done,—as, for example, from the actual subversion or suppression of the superior authority,[51] from an assumption of the command which belongs to the superior,[52] a rescue or attempt to rescue a prisoner,[53] a stacking of arms and refusal to march or do duty,[54] a taking up arms and assuming a menacing attitude,[55] &c.; or it may be
896 gathered from a variety of circumstances no one of which perhaps would of itself alone have justified the inference. But the fact of *combination*—

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[49] U. S. *v.* Smith; U. S. *v.* Halnes; U. S. *v.* Thompson; U. S. *v.* Morrison—*ante;* also U. S. *v.* Barker, 5 Mason, 407.

[50] U. S. *v.* Kelly; U. S. *v.* Thompson—*ante.*

[51] As in the case of Lt. Col. Johnston, (James, 373; Hough, 72,) where the accused, putting himself at the head of his command, seized and imprisoned the military governor of New South Wales. And see the case, published in G. O. 15, Dept. of the Mo., 1864, of certain officers dismissed for mutiny in unlawfully arresting and dispossessing of his command the commander of the post. In the case of the mutiny of the crew of the "Bounty," (1789,) the captain and officers were seized, forced into a boat and abandoned in mid-ocean.

[52] See cases in last note. Sec. 5360, Rev. Sts., expressly designates as constituting revolt and mutiny at maritime law the act of "any one of the crew" who "usurps the command of such vessels from the master or other lawful officer in command thereof, or deprives him of authority and command on board."

[53] G. C. M. O. 513 of 1865; Do. 104, Dept. of Ky., 1865; Do. 4, Id., 1866; G. O. 87, Army of the Potomac 1862. And see Do. 29, Dept of the South, 1864; Do 16. Dept. of Ala., 1866; G. C. M. O. 1, Div. of the South, 1865; Hough (P.) 66; U. S. *v.* Morrison, 1 Sumner, 450.

[54] See cases, published in G. O. 43 of 1864, of four sergeants and four corporals, tried for stacking arms with other soldiers, and refusing to obey orders or do any military duty; also G. O. 29, Dept. of the South, 1864; Do. 20, Dept. and Army of the Tenn., 1866.

[55] See case in G. C. M. O. 227 of 1864, (where an officer was severely wounded in the course of the mutiny;) Do. 50 of 1867, (where one officer was killed and two other officers were wounded by the alleged mutineers;) G. O. 131, Sixteenth Army Corps, 1863, (where the accused did, in company with other comrades, and as one of their leaders, take his arms and by force pass out of the camp of the regiment, and attempt to disperse an assembly of officers of the brigade, being held by proper authority at a dwelling house near the camp;) G. C. M. O. 1, Div. of the South West, 1865; G. O. 16, Dept. of Ala., 1866, (where the accused, a first sergeant, fully armed and in violation of orders, left the camp, with a mob of soldiers, and formed with them "a line of battle" before the camp of another regiment, for the purpose of forcing the surrender into their custody of a soldier of their own regiment, who had been arrested by a guard from the other regiment for attempted violence to one of its officers;) G. C. M. O. 104, Dept. of Ky., 1865, and Do. 4, Id., 1866, (where the mutineers assembled with loaded muskets, threatened the lives of their officers and offered violence to one of them, and, beside releasing a prisoner, "attempted to take possession of the artillery of the fort where they were on duty;") G. C. M. O. 61 of 1865, (where an officer with a body of soldiers charged the jail, and, over-powering the guard, assumed control of it, and further resisted the provost-marshal and ordered the soldiers to shoot him.) G. C. M. O. 69, Dept. of Arizona, 1887, where five enlisted Indian scouts, at the San Carlos Agency, "having been disarmed and ordered to the guard house by the commanding officer, did disobey said order, and did, in connection with others, resist arrest, seize arms, open fire upon the commanding officer and others connected with the military service, and escape." All were convicted.) And see cases in G. O. 104, 243, of 1863; Do. 115, Dept. of Washington, 1865; G. C. M. O. 142, 147, 154, Dept. of the Mo., 1868.

In the historical case of the mutiny in the "Pennsylvania Line," in June, 1783, the mutineers, (assembled in force,) menaced Congress itself with their demands for pay; so that that body was induced to change its place of session to Princeton. 4 Jour. Cong., 231–236, 267–268; Hildreth, v. III, p. 436.

that the opposition or resistance is the proceeding of a number of individuals acting together apparently with a common purpose[55]—is, though not conclusive,[57] the most significant, and most usual evidence of the existence of the intent in question.

**INTENT ALONE NOT SUFFICIENT.** While the intent indicated is
897 essential to the offence,[58] the same is not completed unless the opposition or resistance be manifested by some overt act or acts, or specific conduct. Mere intention however deliberate and fixed, or conspiracy however unanimous, will fail to constitute mutiny.[59] Words alone, unaccompanied by acts, will not suffice.[60]

**A VIOLENT ACT NOT NECESSARY.** The opposition or resistance need not be active or violent.[61] It thus may consist simply in a persistent refusal or omission, (with the *intent* above specified,) to obey orders or do duty.

**THE RESISTANCE, &c., MUST BE TO LAWFUL AUTHORITY.** If the superior when resisted is attempting to execute an illegal order,[62] or to enforce his authority by illegal means,[63] it will not be mutiny to resist him. But the unlawfulness of his act must be manifest and unquestionable to justify the inferior in resistance, and what has been said under Art. 21, as to the responsibility assumed in disobeying a command on the ground that it is not lawful, is even with greater force applicable here.

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[55] In addition to the cases already cited, see instances of combinations of soldiers to resist superior authority or not comply with orders—in G. O. 136, Dept. of Washington, 1865, (where six soldiers jointly refused to do guard duty;) G. C. M. O. 521 of 1865, (where thirty-four non-commissioned officers and privates of a regiment jointly refused to fall in for drill or obey orders;) G. O. 32, Dept. of N. E. Va., 1861, (where sixty-two non-commissioned officers and privates of the same regiment "formally and positively, in the presence of their regiment, refused to do any further duty whatever," on the pretext that they were no longer in the service;) G. C. M. O. 130 of 1865; (where there was a combination of officers "to compel their commanding officer into a course of action not in accordance with his judgment.") In the case of the Tennessee militia, in 1814, over two hundred, including, some officers, abandoned the service and proceeded to their homes. See *post*.

[57] O'Dowd, 35.

[58] That there can be no mutiny in the *absence* of the specific intent, is strikingly illustrated in the case published in G. C. M. O. 50 of 1867, where, notwithstanding extreme acts of violence committed by the alleged mutineers, it was held by the reviewing authority that their conduct did not proceed from a mutinous disposition, but was induced by "outrageous treatment" on the part of one of their officers, and the sentence imposed by the court was therefore remitted. And see case described in DIGEST, 32.

Excuses, however, for conduct in the nature of mutiny are to be accepted with great caution, since actual mutiny, while it may be extenuated by circumstances, admits of no legal *defence*. See "Punishment," *post*.

[59] U. S. *v.* Kelly, 4 Washington, 530; O'Brien, 72.

[60] Simmons § 170; Griffiths, 22; Benét, 258.

[61] Simmons § 170; O'Brien, 70, 71. And see case of Col. Louis Bache, Printed Trial, (1814,) where the accused, with other officers, simply declared, in the presence of their superiors, a determination not to obey their orders, or submit to their authority, or to the laws of the United States; also U. S *v.* Haines, 5 Mason, 278; G. O. 42 of 1864. At maritime law, it has been held that a *single* instance of refusal or non-compliance, (with the intent essential to the offence,) is sufficient to constitute mutiny. U. S. *v.* Smith, 1 Mason, 148; U. S. *v.* Hemmer, 4 Id., 107; also U. S. *v.* Nye, 2 Curtis, 225; U. S. *v.* Borden, 1 Sprague, 376.

[62] See U. S. *v.* Smith, 3 Washington, 525; U. S. *v.* Borden, *ants*.

[63] As where, at maritime law, the superior attempts to compel obedience to orders by the use of a deadly weapon in such a manner as to endanger life, when in fact no necessity existed for such extreme measures. See U. S. *v.* Sharp; 1 Peters C., 127; U. S. *v.* Peterson, 1 Wood. & Minot, 311; U. S. *v.* Smith, *ante*.

898 **A COMBINATION NOT ESSENTIAL, THOUGH USUAL.** To constitute mutiny it is not necessary that there should be a concert of several persons: a single individual may entertain the intent and commit, or, in the words of the Article, "*begin*," an act of mutiny.[64] As already indicated, however, a combination is usual and indeed almost invariable; the causes which actuate mutiny being commonly matters of joint grievance or complaint with a greater or less number of persons. The concert, where it exists, need not necessarily be *preconcert;*[65] but, as mutinies naturally grow out of previous consultations and conspirings, it will generally be such.[66]

**SEDITION.** This offence, which, as designated in the present Article, is by the earlier writers[67] nearly identified with mutiny, is, in the more recent treatises, distinguished as being a resistance to the *civil power*, demonstrated by riot or aggravated disorder. Thus Simmons says:—"Sedition is supposed to apply to acts of a treasonable or riotous nature, directed rather against the public peace and the civil authority than military superiors, though necessarily involving or resulting in insubordination to the latter."[68] No instance of a trial, under this Article, for sedition, as thus defined, is known to have ever occurred in our military history.[69]

899 **THE SPECIFIC ACTS MADE PUNISHABLE BY THE ARTICLE.**—"Who begins, excites, causes, or joins in, any mutiny," &c. Samuel[70] distinguishes in general terms the two classes of persons contemplated by the Article as those who *lead* and those who *follow*. And the simplest view to take of the words quoted is, to treat *begin, excite* and *cause* as different names for the same thing, to wit the offence of the officer or soldier who originates or is instrumental in originating a mutiny, and *join in* as referring especially to the offence of one who participates in a mutiny when once inaugurated.

Strictly, however—though the terms are not necessarily so closely construed—the *beginning* of a mutiny would embrace only cases in which the offender himself personally takes the initiative in the overt act or proceeding of opposition or resistance;[71] while the *exciting* or *causing* of a mutiny would include instances in which the offender takes no personal part in the riotous demonstration, but confines himself to the stimulating of others to the resistance, &c.,

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[64] "It is not necessarily an agregate offence, committed by many individuals, for it may originate and conclude with a single person. * * * It may be as complete with one actor in it as one thousand." Samuel, 254, 257. And see Hough, 68; Id., (P.) 54; Harcourt, 15; De Hart, 348, Benét, 206; Harwood, 195; G. O. 77 of 1837; DIGEST, 30. *Contra*—O'Brien, (pp. 70, 71,) who dissents, through not taking into consideration the *intent* distinguishing the offence. That one person may be guilty of mutiny at *maritime law*, see Sec. 5360, Rev. Sts.; U. S. *v.* Kelly, 4 Washington, 530, and 11 Wheaton, 418.

[65] "It is by no means necessary that there should be any previous deliberate combination for mutual aid and encouragement, or any preconcerted plan of operations to effect the illegal object." U. S. *v.* Morrison, 1 Sumner, 450. And see U. S. *v.* Kelly, *ante*.

[66] "The grand feature generally to be found in the crime of mutiny." Samuel, 274.

[67] Samuel, 249–50; Hough, 68.

[68] Simmons § 170. And see Samuel, 250, note; Griffiths, 21; Bombay R., 128; O'Brien, 71; Benét, 206. O'Brien writes—"Any act which, if aimed against the military authorities, would be mutiny, constitutes, if directed against the civil authorities, the crime of sedition."

[69] The instances of so-called "sedition" and "seditious combination" in G. O. 6 of 1863 and 47 of 1864, were clearly not sedition in law, but ill-pleaded cases of mutinous or disorderly conduct.

[70] Page 258.

[71] "The act of beginning any mutiny is an overt act, and the direct employment of force against authority. * * * A party so acting becomes a ringleader." Hough, 70. And see O'Brien, 70.

actually resorted to. Thus a mutiny may be excited and caused by an inflammatory harangue addressed to soldiers by one having influence or authority over them, as—especially—by an officer or non-commissioned officer; by his using, in their presence, defiant language, or behaving otherwise defiantly, toward a common superior; by his openly setting at naught the orders of the commander or issuing orders counter to his; by his falsely representing to his inferiors that they are being or about to be oppressed by a superior, &c.[73]

900 Joining in a mutiny is the offence of one who takes part in a mutiny at any stage of its progress,[74] whether he engages in actively executing its purposes, or, being present, stimulates and encourages those who do.[74] The joining in a mutiny constitutes a *conspiracy* and the doctrines of the common law thus become applicable to the status—*viz.* that all the participators are principals and each is alike guilty of the offence; that the act or declaration of any one in pursuance of the common design is the act or declaration of every other, and that, the common design being established, all things done to promote it are admissible in evidence against each individual concerned.[75]

None of the offences complete unless a mutiny actually occurs. The Article, in designating as offences the beginning, &c., and joining in, a mutiny, evidently contemplates that a mutiny shall have been consummated.[76] A mutiny complete in law must actually have existed to authorize the bringing to trial of an accused for an offence of this class. Thus an *attempt* to begin or create a mutiny, which has proved abortive, is not chargeable under this Article,[77] but must be laid under the 62d.

**PROCEDURE UNDER THE ARTICLE.**—The charge. The form sometimes given to the charge—"Mutiny," or "Mutiny in violation of the 22d Article of War," is loose and inaccurate; no such specific offence as "mutiny" being designated in the Article. The charge should be either—"Beginning a mutiny," "Exciting a mutiny," "Causing a mutiny," "Joining in a mutiny," or simply "Violation of the Twenty-Second Article of War." Or the two forms may be combined, as—"Joining in a mutiny, in violation of the Twenty-Second Article of War." The specification should set forth the facts relied upon

901 as constituting the offence, with an allegation of the proper intent. Where, as is usual, the mutiny is a concerted act, the charge is frequently

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[73] See Hough, 71; also the case in G. O. 10, Dept. of the Mo., 1863, of a captain charged with "exciting mutiny" in causing the soldiers of a regiment to believe that their colonel had refused to furnish them with rations and otherwise injured them. O'Brien, (p. 298,) says—"It is enough to prove that the conduct of the prisoner was *one* of the exciting causes of the mutiny."

It is considered by Hough, (p. 70; and, to a similar effect, see O'Brien, 72,) that a superior who induces a mutiny in his own command by arbitrary treatment of his inferiors, or by failing to exercise proper discipline, or other misconduct, is chargeable with the offence of exciting or causing a mutiny. It is deemed doubtful, however, whether such acts were contemplated by the Article.

[74] "In its incipient state or when it shall be complete." Samuel, 258.

[74] "It is not necessary that they should be proved individually to have used any force. * * * It is sufficient if they joined in the general confederacy, and by their presence countenanced the acts of violence" committed. U. S. *v.* Sharp, Peters C., 126. "Those who take part, whether by words or by deeds, by direct acts of aid or assistance, or by encouragement or incitement, are, in contemplation of law, guilty of the offence." U. S. *v.* Morrison, 1 Sumner, 449.

[75] See Hough, 71; Simmons § 821; Pipon & Col., 146; O'Brien, 72, 298; De Hart, 349; U. S. *v.* Sharp, *ante*.

[76] O'Brien, 71; G. C. M. O. 73, Dept. of the Mo., 1873.

[77] See G. O. 36, 38, of 1864.

*joint;* all or the principal of the offenders being accused together and tried together accordingly.[78]

**The evidence.** It need only be added here that, as a foundation for establishiug the criminality of the accused in any case, the fact that a mutiny actually took place—*i. e.* the *corpus delicti*—should *first* be shown.[79]

**The finding.** Where only mutinous or disorderly conduct, without the necessary intent, is made out by the testimony, or where it appears that the accused attempted or endeavored to initiate or induce a mutiny without succeeding, a finding of not guilty of the offence charged, but guilty of "conduct to the prejudice of good order and military discipline," will properly be resorted to.

**The sentence.** This will ordinarily be more severe in time of war than in peace: in the late war the *death* sentence was repeatedly adjudged upon
902 conviction.[80] The punishment being left discretionary, the court will naturally and properly adjudge a severer penalty to ringleaders, especially of superior rank,[81] than to those who are merely their followers or instruments, and, where two or more grades are associated in the crime will in general properly punish superiors more heavily than inferiors. Such facts exhibited in evidence, as that the mutiny was provoked or aggravated by a tyrannical or oppressive policy, by some undue violence or severity, by an unwarranted deprivation of a right or neglect to redress a wrong, by protracted delay to

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[78] See G. C. M. O. 104, Dept. of Ky., 1865; G. O. 20, D. & A. of the Tenn., 1864; G. C. M. O. 521, War Dept., of 1865—for cases, respectively, of fifteen, twenty-one, and thirty-four enlisted men, jointly charged and tried as mutineers.

[79] 3 Greenl. Ev. § 92.

[80] See cases in G. O. 104, 243, of 1863; Do. 42, 43, of 1864; G. C. M. O. 227 of 1864; Do. 318, 513, of 1865; Do. 21 of 1866; Do. 50 of 1867; Do. 40 of 1873; Do. 1, Div. of the South West, 1865; Do. 104, Dept. of Ky., 1865; Do. 4, Id., 1866; G. O. 87, Army of the Potomac, 1862; Do. 20, Dept. & Army of the Tenn., 1864; Do. 19, Dept. of the South, 1864. In several of these cases the mutiny was aggravated by the killing of an officer or non-commissioned officer.

In an early case in G. O., Hdqrs., Newburgh, May 12, 1782, one Lud Gaylord was convicted of "endeavoring to excite a mutiny in the Connecticut line," and of "not discovering an intended mutiny to his officers," and was sentenced to death; Gen. Washington as Commander-in-chief, approving the sentence, and ordering its execution "on the next day."

Other early cases are those in G. O. of Dec. 9, 1820; Do. 17 of 1855 In the former the court, in sentencing the mutineer to be hung, add—"and that his body be offered to the surgeon of the post for dissection." In the still earlier case (1814) of the Tennessee militia, heretofore referred to, a sergeant and five privates were sentenced to death and their sentences were approved by Gen. Jackson and executed; one hundred and ninty-seven received lesser punishments; a captain and a lieutenant were sentenced to be dimissed, and the latter also to have his sword "broken over his head" and to be disqualified to hold a commission in the army. The ground for treating the offense of these men as a capital crime was their abandoning the service at the end of three months, under the claim that they could legally be retained only for that period, instead of six months the term for which they were held to be bound by the military authorities. American State Papers, Military Affairs, vol. III, pp. 693–793; also published in G. O., Hdqrs., Seventh Mil. Dist., New Orleans, Jany. 22, 1815. In the case of the mutiny in the Pennsylvania line, (*ante,*) two sergeants, sentenced to death, were formally pardoned by Congress, they not appearing to have been "principals" in the mutiny, "and no lives having been lost, nor any destruction of property committed." 4 Jour. Cong., 267. And see case of mutiny in the New Jersey line, *post.*

In the case, in G. C. M. O. 12 of 1882, of the mutiny by Indian scouts, under the command of Col. E. A. Carr in Arizona, in which a captain and six soldiers of the army were killed, three of the leaders—two sergeants and a corporal—were sentenced to be hung. In the case of the five Apache scouts convicted of mutiny at San Carlos in 1887, each was sentenced to be imprisoned at hard labor for life. This punishment, however, was mitigated to confinement for a term of years. G. C. M. O. 69, Dept. of Arizona, 1887.

[81] In connection with cases already cited, see case of a Captain, sentenced to be dismissed in G. O. 14, A. & I. G. O., Richmond, 1861.

settle a claim for pay over-due or for a legal allowance,[83] or by drunkenness or other misconduct on the part of the commander, or a failure by him to maintain discipline in the command—will properly be taken into consideration as going to extenuate the offence and reduce the measure of punishment.[84]

903 That death is not a *legally excessive* punishment for this offence is indicated by the fact that, in a clear case of existing or impending mutiny in the army, a mutineer may, if necessary, be repressed by the use of a deadly weapon without a resort to a trial.[85] So, at maritime law the master "may use a deadly weapon when necessary to suppress a mutiny," where the same "actually exists or is threatened."[86]

### Twenty-third Article.

**1. SUPPRESSION OF MUTINY.** This Article is naturally considered under the two heads of the Suppression of existing mutiny and the Giving information of intended mutiny.[87] As to *suppression*—the Article, as is observed by Samuel,[87] makes it a crime to simply "stand by" while a mutiny is being committed. "It is," he adds, "declared the positive and bidden duty of every officer or soldier, under the pain, in case of neglect, of the severest possible punishment, to aid, to the utmost of his ability, in quelling this dangerous and contagious crime." O'Brien, as apposite to the injunction that the party shall use "his utmost endeavor," &c., holds that "every officer is armed" by the Article "with dictatorial and unlimited powers," and that "if his measures are stronger than necessary he cannot be punished; the law justifies him."[88] But this, as a general proposition, cannot be accepted. While, in extreme cases, as above noted, an officer is warranted in employing the most rigorous

904 means—in using a deadly weapon and taking life[89]—for the suppression of a mutiny, he will not ordinarily thus be warranted in a case of mutiny

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[83] See Thacher, Military Journal, pp. 193, 240, 244, 300, 337, as to mutinies in the Connecticut, Pennsylvania and New Jersey lines, in the Revolutionary War; also the later case of certain New York militia regiments which mutinied in 1812 for want of pay and clothing. Am. S. P., Mil. Af., vol. 1, p. 497.

[84] See G. O. 12 of 1855; Do. 104 of 1863: G. C. M. O. 50 of 1867; also Samuel, 266; Harcourt, 17; Digest, 31, 32. So, while it is no *defence*, it may be considered, in mitigation of sentence, that the accused was not regularly enlisted (G. O. 32, Dept. of N. E. Va., 1861;) or that the recruiting officer made misrepresentations to him upon enlistment, (Do. 71, Dept. of N. Mex., 1862;) or that he had been paid less than the stipulated amount of monthly pay. (Do. 29, Dept. of the South, 1864.) While, as remarked by Gen. Canby, "nothing can *justify* the attempt to redress any real or fancied wrongs by the commission of one of the gravest military crimes." (G. O. 71, N. Mex., above cited,) justice to the accused requires that if wrongs really existed, his punishment should be reduced in proportion. Compare, herewith, the case of the "Mutiny at the Nore," (1797), originally incited by the fact that the seamen of the navy had suffered from low pay, insufficient provisions, &c., and that their petitions for relief had not been duly considered.

[85] Chapter XVII—"Requirements of Military Discipline."

[86] Thompson *v.* The Stacey Clarke, 54 Fed., 534.

[87] It is to be understood that what is said under this Article as to mutiny applies substantially to "sedition"—a crime already defined under Art. 22.

[87] Pages 258–9. And see Tytler, 187; Harcourt, 14.

[88] Pages 73, 77.

[89] Compare the naval case of the mutinous conspiracy on the U. S. Brig "Somers," in 1842, when three persons—Midshipman Spencer, (son of the then Secretary of War,) and a warrant officer and a seaman—were hung on the ship by order of Commander Mackenzie, after an investigation and recommendation by a council of officers. For this summary action Com. Mackenzie was brought to trial, in 1843, upon charges of abuse of authority and murder, and acquitted. 1 New York Legal Observer, 371; Printed Trial, with Review by Jas. Fenimore Cooper, New York, 1844. As to the authority of the master, in cases of mutiny, at maritime law, see Roberts *v.* Eldridge, 1 Sprague, 54.

unaccompanied by violence or where less vehement methods will be entirely effectual.[90] The measures adopted, and especially the amount of force employed, should properly depend upon the circumstances of the case, and particularly upon the existing status, whether of war or peace. Means which, in war and before the enemy, would be not only justified but laudable, might in peace be without warrant and criminal, and commanding officers, in employing them, might become liable, for abuse of authority, not only to trial by court-martial but to indictment in a civil tribunal.

905 The term "utmost endeavor,' 'as employed in the Article, is to be construed as having a relative bearing, the word "utmost" thus meaning the utmost that may properly be called for by the circumstances of the situation, and in view of the rank, command and abilities of the individual.[91]

It is also to be observed that the authority, as well as the duty, devolved by the Article, *ends with the suppression.* The mutiny having been effectually put down, no punishment can legally be inflicted upon the offenders except through the regular course of justice and the sentence of a court-martial.[92]

**REFORM AND REDRESS.** It may here incidentally be remarked that in connection with the suppression of a mutiny, it will be no more than just for the commander to remove as far as may be practicable the causes which led to the outbreak. Thus, where it has been occasioned either by defective discipline, oppressive treatment, the deprivation of a right, or the existence of any other real grievance, the commander, after first effectually suppressing the mutiny according to the injunction of the Article, may and properly should proceed to put an end to the abuse or to redress the wrong, either by his own orders or by making the necessary official representations to superior authority.[93] In this relation the fact may well be recalled that a large proportion of the extended mutinies that have occurred among bodies of troops have had some color of reason in their inception, and might generally have been obviated had the proper authorities but appreciated the duty devolving upon military superiors of protecting soldiers in the enjoyment of their rights and privileges, of

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[90] See G. O. 53 of 1842, in regard to the treatment of private soldiers by their superiors, where it is enjoined by Gen. Scott that in a case of mutiny the proper course, if practicable to pursue it, is not to cut down even the ringleaders, but to seize and confine them. Also G. O. 32, Dept. of N. E. Va., 1861, in which it is declared that sixty-two mutineers—enlisted men of the same regiment—"are with the approval of the General-in-Chief, hereby transferred in arrest from their regiment, as no longer worthy to serve with it, and will be sent to the Dry Tortugas, there to perform such fatigue service as the officer commanding may assign them, until they shall, by their future conduct, show themselves worthy to bear arms." [Gen. McDowell.] Upon the subject of summary proceedings, involving the taking of life, in the suppression of mutiny, Samuel, (p. 268,) writes:—"When they are resorted to, it is requisite in every case, in order to justify the departure from legal forms, that it be clearly mada out that the mutiny was flagrant, and that it called for strong and instant measures to put it down; and that the means used were not more violent than needful, and that it was not safe to wait for the trial and execution of the offenders by the ordinary course of military justice." In the case of the mutiny of the New Jersey Brigade, in January, 1781, where Washington, in his orders to Maj. Gen. Howe, directed: "If you succeed in compelling the revolted troops to a surrender, you will instantly execute a few of the most active and most incendiary leaders,"—two of the ringleaders were in fact executed, but not till after a "field court-martial" had been held, and they had "received sentence of death by the unanimous decree of the court." Sparks' Writings of Washington, vol. VII, pp. 381, 382, 386, 564.

[91] See O'Brien, 78; G. O. 4 of 1843.

[92] See Samuel, 260, 261, 267; Hough, 80, 81; Harcourt, 15; O'Brien, 77, 78.

[93] "Having punished guilt and supported authority, it now becomes proper to do justice." Gen. Washington, referring to the mutiny in the New Jersey line. Sparks' Writings of Washington, vol. VII, p. 136.

seeing that a hearing was given them and justice done them when aggrieved, and of duly considering their feelings when natural and reasonable.[94]

906. **2. GIVING INFORMATION.** The Article further requires that officers or soldiers "having knowledge of any intended mutiny," &c., shall, "without delay, give information thereof" to the "commanding officer;"—thus, in the words of Samuel,[95] "to prevent an impending mutiny by crushing it in the bud, and before it burst forth in its bitter and unwholesome fruit."

While the *suppression* of mutiny will in most cases be incumbent more especially upon officers, the duty of *giving information* of the same will perhaps oftener devolve in the first instance upon inferiors in rank. Thus Hough[96] observes that an intended mutiny "is more likely to be known to the non-commissioned officers of the regiment than to any other persons in it, from their living in the same barracks with the men."

In view of the imperative injunction to act without delay, an officer or soldier cannot be permitted to exercise his own judgment as to whether he will or not impart the intelligence contemplated.[97]

**PROOF.** To sustain a charge of a violation of the Article under consideration, the following particulars should be averred and proved, *viz.*—the existence of an actual mutiny, or of a purpose to commit mutiny; the presence of the accused at the mutiny,[98] or the fact of his having come to the knowledge that one was intended; the neglect or failure to use the proper efforts to suppress, or the neglect or failure to give the information, (or to give it without unreasonable delay,) to the commander.

It may be noted that officers or non-commissioned officers who "join in" a mutiny, in violation of Art. 22, will in general be also chargeable with the offence of not endeavoring to suppress a mutiny, in violation of Art. 23.

907 TWENTY-FOURTH ARTICLE.

**ITS GENERAL EFFECT.** This Article, (which dates from the British codes of 1642 and 1688,[99]) practically adopts the doctrine of the common law in regard to the suppression of affrays, extends it to cases of "quarrels" and "disorders," and applies it, under certain conditions, to the military state. Placed as the Article is in immediate connection with the provisions relating to mutiny and duelling, it may well be inferred that one of its main purposes was, by the summary proceeding which it authorizes, to put a stop to those contentions and irregularities, which, if not suppressed at the outset, might readily lead to these formidable crimes.

**THE COMMON LAW AS TO AFFRAYS.** At common law, a "fray" or "affray" is a fighting or hostile contention of two or more parties in public,

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[94] Hough, (P.) 36–53, details a series of mutinies which occurred chiefly in India, and arose in great part from neglect to make regular payments, insufficiency of rations, variations from the terms of the contract of service, and even disregard of the religious principles and customs of the native troops. The most marked was the general mutiny and rebellion of 1857, when, to cite from Chambers, (Encyclopædia—"India,") "the Enfield rifle and its greased cartridge were put into the hands of the Sepoys without explanation and precaution, and Gen. Anson, the commander-in-chief, snubbed caste, and was against all concession to the 'beastly prejudices' of the natives."

[95] Page 259. And see Tytler, 187.

[96] Page 81. And see cases of non-commissioned officers convicted of a violation of this Article, in not giving such information, &c.,—in G. O. 16, Dept. of Ala., 1866; G. C. M. O. 81, 142, 147, Dept. of the Mo., 1868.

[97] See Hough, (P.) 77.

[98] See case of Lud Gaylord, *ante*.

[99] See under "Twenty-Fifth Article"—*post*.

to the terror of the citizens. Derived from the French *affrayer*, to frighten, the element of being fear-causing, and so threatening to the peace and security of law-abiding persons, is the gist of the definition. It is distinguished from an assault, or assault and battery, in that, besides being necessarily public, it is a mutual contention on the part of the actors, and not a mere violence or attempted violence committed against another, *in invitum*. Mere words or personal abuse cannot alone amount to this offence; to constitute an affray the words must be accompanied by acts. At the same time it is held not absolutely necessary to the offence that actual violence, as by wounding, blows, or other battery, should be inflicted upon the person, provided dangerous weapons are exhibited and sought or threatened to be used by one or more of the parties against the other or others.[100] All persons present engaged in aiding and abetting an affray are principals.[1]

908 An affray being a disturbance of the public peace, and it being the right as well as the duty of the citizen to quell or aid in quelling all breaches of the peace, the authority of private individuals to part and restrain persons engaged in an affray is fully recognized at law.[2]

**APPLICATION OF THE PRINCIPLE IN THE MILITARY SERVICE.** An officer of the army is still a citizen and has the same summary power as any citizen forcibly to repress frays[3]—a power which it is especially his right and duty to exercise in cases occurring in the army. Recognizing this, the Article, in its zeal for the order and discipline of the service, extends the power to the suppression of "quarrels" and "disorders."[4] By these designations, which are more general and colloquial in their use than the more technical term "frays," are evidently intended any unruly contentions or disturbances in public among or by officers or soldiers, whether or not accompanied by violence employed or threatened.[5] They may thus consist of mere wars of words, provided they are such as, if not presently quieted, would be likely to lead to blows or other overt acts of force.

**BY WHOM THE POWER MAY BE EXERCISED.** Construing the words—"*All officers of what condition soever*" with the words in the

909 last clause—"*such officer or non-commissioned officer*," it is clear that not only commissioned officers but sergeants and corpoorals are vested

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[100] On the definition and nature of affray, see Coke, 3 Inst., 158; 1 Hawkins, c. 63, s. 1, 4; 4 Black. Com., 145; 1 Russell, Cr. 291; 2 Wharton, C. L. §. 1551; 2 Bishop, C. L. §. 1; Simpson *v.* State, 5 Yerg., 356; State *v.* Heflin, 8 Humph., 84; Duncan *v.* Com., 6 Dana, 295; Com. *v.* Simmons, 6 J. J. M., 615; Hawkins *v.* State, 13 Ga., 322; O'Neill *v.* State, 16 Ala., 65; Child *v.* State, 15 Ark., 205; Samuel, 399; Hough, 202.

[1] Carlin *v.* State, 4 Yerg., 143.

[2] 1 Hawkins, c. 63, s. 11; 4 Black Com., 145; 1 Bishop, C. P. § 166; Timothy *v.* Sampson, 1 C., M. & R., 762; Price *v.* Seeley, 10 Cl. & Fin., 28; Phillips *v.* Trull, 11 Johns., 387.

[3] See Simmons § 1096–1100; Harcourt, 178; Pipon & Col., 190; Bowyer, Com. on Eng. Const., 499; Burdett *v.* Abbott, 4 Taunt., 499; G. O. 52, Dept. of the South, 1871.

[4] As to the duty of an officer to use due diligence to prevent riot and disorder in his command, see remarks of Gen. Schofield in G. O. 104, Dept. of the Mo., 1863. In G. O. 63, Dept. of the Tenn., 1863, Gen. Hurlbut, in remarking that by Art. 24 officers are not only empowered but "required" to quell affrays, adds that the accused officer, in the case under review, was enabled to take the life of his commander, through the neglect of those who should have acted to interpose and put a stop to the contention. In G. O. 92, Dept. of the South, 1872, Gen. Terry properly holds that "an officer *under arrest* is not deprived of the authority conferred by this Article to quell frays or disorders."

[5] See Samuel, 400; O'Brien, 107. A *riot* or tumultuous assemblage of persons who engage in acts of violence, will, if taken part in by officers or soldiers, be an aggravated "*disorder*" within the meaning of the Article.

with the power to part, quell and arrest, without regard to the superiority in rank of the persons whom they may thus regulate and restrain.[6] An inferior, however, would not properly assume to exercise the authority to arrest a superior in the presence of a senior officer, unless indeed the latter was either himself concerned in the offence or conspicuously recreant in his duty on the occasion, or was incapacitated to act—as by drunkenness.

It is further clear from the terms of the Article that the power conferred is one not attached to *command* but quite independent of it, since it may be exercised without regard to the regiment, company, &c., to which the persons offending may belong.

**MODE OF EXERCISE OF THE POWER.** To part affrayers and quell a fray or disorder, the officer may employ such means as may be requisite, resorting even to the use of a deadly weapon if other means fail or are inadequate. The action of an officer in repressing a disturbance which, if not at once subdued, may result in a mutiny or riot, should not be too strictly criticized; at the same time he is in no case authorized to use more force than may be reasonable under the circumstances, or to resort to blows or other violence where the object may be attained by summoning a guard and causing the arrest or confinement of at least the leaders of the outbreak.[7] Where such arrest, &c., has been ordered by an inferior officer or a non-commissioned officer, it will be, further, his duty, according to the terms of the Article, to report forthwith his action to the commanding officer of the person or persons arrested.

910 **PROOF—DEFENCE.** In proving either of the two specific offences, it should properly be made to appear that the accused heard and understood the order, and knew that the person giving it was a commissioned, (or a non-commissioned,) officer of the army. A defence, interposed by the accused, that he had not such understanding or knowledge may receive support from the fact, if such be the case, that the officer was not in uniform, and belonged to another regiment, &c., of the command. As indicated by Hough,[8] it is no sufficient defence that the accused finally did comply with the order given, provided he first refused to obey it or resisted the officer.

**PUNISHMENT.** The fact, however, of the ultimate compliance with the order will, if voluntary, properly be admissible in evidence as going to the measure of the punishment, this being left discretionary with the court. So will any other fact tending to extenuate the culpability of the accused,—as that, in defying or resisting the order, he was only acting in combination with or at the instigation of his superiors in rank.

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[6] Samuel, 400; Hough, 203; Simmons § 357; Griffiths, 25; O'Brien, 107. And see Chapter IX, pp. 160–161. The leading English case under this Article is that of Lieut. Col. Hog, who was placed in arrest by a Captain of his regiment for disorderly conduct on duty resulting from drunkenness. James, 839; Simmons § 357; Hough, (P.) 123.

It may be noted that the *power* implies a *duty*. Thus Tytler, (p. 196,) observes that an officer who stands by and witnesses an affray or disorder without exerting the authority conveyed by the Article, "must be considered as aiding and abetting the principal offenders."

[7] The force to be employed in quelling an affray or maintaining the peace is that only which is necessary to secure and subdue the offenders. It * * * must be such force as is preventive in its character, and must not exceed the strict necessity of the case requiring such acts of prevention. G. O. 4 of 1843. [J. C. Spencer, Sec. of War.]

[8] Page 204.

## XII. THE TWENTY-FIFTH, TWENTY-SIXTH, TWENTY-SEVENTH, AND TWENTY-EIGHTH ARTICLES.

[Challenges to Duels, &c.]

"ART. 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.*

"ART. 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 punishment as a court-martial may direct.*

"ART. 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*
911 *carriers of challenges to fight duels, shall be deemed principals, and punished accordingly. It shall be 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.*

"ART. 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.*"

### TWENTY-FIFTH ARTICLE.

**ORIGIN.** The proper original of this Article, as also of Arts. 24, 26, 27 and 28, is the comprehensive and important Art. 34 of the Code of James II, of which some of the provisions were clearly derived from Art. 84 of Gustavus Adolphus, through intermediate Articles of 1639 and 1642.

**ITS PURPOSE AND EFFECT.** The 11th Article of the code of 1775, in prohibiting the sending of challenges and fighting of duels, is prefaced with the brief injunction that—"*no officer or soldier shall use any reproachful or provoking speeches or gestures to another.*" The succeeding code of 1776 formed this injunction into a separate Article substantially as it has since remained.[9] Its main object, as indicated by its origin, evidently is to check such manifestations of a hostile temper as, by inducing retaliation, might lead to duels or other disorders. The Article does not contemplate a judicial investigation, but is a rule of discipline confined to measures of prevention and
912 restraint.[10] In practice, however, the provision enjoining the *asking of pardon* by soldiers is rarely, if ever, resorted to;[11] the course pursued with regard either to officers or soldiers, who may be culpable as indi-

[9] The Committee on Military Affairs of the House of Representatives, having considered a resolution directing them to inquire into the expediency of providing by law for the more effectual preventing of duelling in the army, reported, April 11, 1820, that it considered "the existing law," (reciting the substance of these Articles,) "as amply sufficient, if executed, to repress duelling in the army."

[10] See, as to the legal significance of this Article, Samuel, 351–2, 372–6; Hough, 175–7; O'Brien, 100.

[11] Samuel, (p. 373,) refers to it as "an inoperative letter."

cated in the first clause, being to place them in arrest and prefer charges with a view to trial—as in any other case of offence.

If indeed the proceeding specified in the Article is pursued, and the offender, having been afforded a *locus pœnitentiæ* by being placed in arrest, presently tenders an apology or makes other suitable amends, and is thereupon released, without further action, by the commanding officer, he cannot in general properly be brought to trial at a subsequent period. Samuel [13] cites the case of Capt. Burdett, in which the accused was acquitted because it "appeared in the course of the evidence" that his offence had been previously thus atoned for under the corresponding British article.

### Twenty-sixth Article.

**PURPOSE OF ARTS. 26–28.** This Article and the two following aim at preventing duelling in the army, by rendering liable to immediate arrest, trial and severe punishment, all military persons without distinction, who send or accept challenges, act as seconds, knowingly carry challenges or acceptances, or otherwise promote duels, as well as commanders of guards who neglect to stop parties going out to fight duels, and even persons who upbraid others with refusing to accept challenges.[13]

913 **THE COMMON LAW ON THE SUBJECT OF DUELS AND CHALLENGES.** The practice of duelling, "grounded," as Lord Bacon expresses it,[14] "upon a false conceit of honor," or, as described by Tytler, [15] "upon mistaken sentiments of honor, and supported by false shame," is, with the

[13] Page 376.

[13] It is noticeable that the specific offence of *fighting a duel* is not in terms mentioned in our code, and could in general therefore only be charged as a disorder or breach of discipline under the 62d Article.

But this offence, and those specifically made punishable in Arts. 26–28, are now of rare occurrence, though once not unfrequent in the army. The author of the "Military Law of England," published in 1810, in referring to the practice of duelling in the British army, writes:—"There are cases in which, notwithstanding the explicit declarations of the writtten law, the custom of the service would seen to demand a reference to arms." So lately also as in 1828, McNaghten, while condemning duelling on principle, adds, (p. 237,) that he "must pronounce it an indispensable custom, things being constituted as they are at present." And he refers to "three of the first officers" then in the army—"the Duke of York, the Marquis of Hastings and the Marquis of Londonderry"—as having "been concerned as principals or seconds in duels and allowed to go unscathed." In the next year the Duke of Wellington added himself to this list by his duel with the Earl of Winchelsea. In James' Precedents there are reported fifty cases of officers of the army tried for engaging in duels, sending challenges, or otherwise promoting such proceedings. And see cases in Millingen's History of Duelling, vol. II. The instances in our military service have been much less numerous. The principal duels fought during the Revolutionary War were those between General Gates and Colonel Wilkins and between General Cadwalader and Thos. Conroy—in 1778. Other cases are recorded by Thacher, (Military Journal,) pp. 145, 156, 162, 204, 298; Heath, (Memoirs,) p. 331. In the "History of the Post of Madison Barracks, New York," several duels are mentioned as having been fought between officers, mostly of the 2d Infantry, in 1816–1832. Of cases brought to trial by court-martial, in our army, nearly all will be found published in the following Orders—G. O. of May 22, 1814; Do. of Sept. 29, 1817; Do. 39, 41, of 1835; Do. 2 of 1858; Do. 330 of 1863; Do. 11, Army of the Potomac, 1861; Do. 46, Dept. of the Gulf, 1863; Do. 223, Dept. of the Mo., 1864; Do. 48, Id., 1870; Do. 130, Id., 1872; Do. 33, Dept. and Army of the Tenn., 1864; Do. 13, Northern Dept., 1865. In a more recent case, in G. C. M. O. 22 of 1879, of an alleged challenging, the accused was acquitted. See, further, case of three Lieutenants of the Confederate army, convicted of sending, carrying and accepting a challenge, in G. O. 139, A. & I. G. O., Richmond, 1863.

[14] 2 Howell, S. T., 1037.

[15] Page 192.

incidental offences of sending a challenge, acting as second, &c., denounced as criminal, alike by the common law and by statute.[16] By the common law, the taking of life in a duel is murder in the killer,[17] whatever may have been the occasion or provocation of the fight and notwithstanding the absence of
914 actual homicidal intent.[18] So is it also murder in the seconds of both parties,[19] and others who are present abetting the act;[20] all such persons being treated as principals equally with the one who fires the fatal shot.[21]

At common law also the mere challenging of a person to fight a duel, though none be fought, is held to be a high misdemeanor as an act tending to a serious breach of the peace.[22] So carriers of challenges, (knowingly such,) and other promoters of duels as well as provokers of the same, are held indictable for misdemeanor at common law.[23]

**CIVIL STATUTE LAW.** In this country, the offences of killing in a duel, of fighting duels, of sending, conveying and accepting challenges, and of seconding, promoting, or prompting challenges, are denounced by special statute in a considerable proportion of the States, and "specific and graduated punishments" assigned to the guilty parties.[24]

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[16] See 2 Wharton, C. L. § 1767, 1768, as to the origin of duelling and the growth of the law on the subject.

[17] "Wherever two persons in cool blood meet and fight on a precedent quarrel and one of them is killed, the other is guilty of murder." 1 Hawkins, c. 31, s. 21. "Deliberate duelling, if death ensueth, is, in the eye of the law, murder." Foster. 297. And see 1 Hale, 452; 4 Black. Com., 199; Taverner's Case, 3 Bulst., 171; Regina *v.* Young, 8 C. & P., 644; Wharton, C. L. 482, 1768; 2 Bishop, C. L. § 311; State *v.* Underwood, 57 Mo., 40.

[18] It is no defense that the party killed was the challenger, or the aggressor; or that the party indicted "meant not to kill but only to disarm his adversary." 1 Hawkins, c. 31, s. 21; 1 Hale, 443; 1 Russell, 527; Taverner's Case, *ante;* King *v.* Rice, 3 East, 581; Com. *v.* Hooper, Thach., 404.

[19] "The seconds also are equally guilty." Regina *v.* Young, *ante.* And see 1 Hawkins, c. 31, s. 31; 1 Russell, 529; Wharton, C. L. § 1768; 2 Bishop, C. L. § 311; Regina *v.* Cuddy, 1 C. & K., 210; Do. *v.* Barronet, Dears., 51. In the last case it was held to be no defence that the duel was a "fair" one. The criminal liability of the second of the deceased is no less than that of the second of the other party. Regina *v.* Young; Do. *v.* Cuddy.

[20] "With respect to others" (than the seconds,) "shown to be present, the question is, did they give their aid and assistance by their countenance and encouragement of the principals in the contest? Mere presence will not be sufficient, but if they sustain the principals either by advice or assistance, or go to the ground for the purpose of encouraging and forwarding the unlawful conflict, although they do not say or do anthing, yet if they are present, assisting and encouraging by their presence at the moment when the fatal shot is fired, they are in law guilty of the crime of murder." Regina *v.* Young. "This extends even to the surgeon." 2 Bishop, C. L. § 311.

[21] Wharton, C. L. § 1768; 2 Bishop, C. L. § 311; Hough, 198; Smith *v.* State, 1 Yerg., 232. And see Regina *v.* Cuddy, *ante;* also case of Ensign McGuire and three other officers convicted of murder for taking part in a fatal duel. James, 545; Hough, (P.) 260.

[22] See case, (in James, p. 47,) of Major Armstrong, indicted for challenging Maj. Gen. Sir Eyre Coote.

[23] Hawkins, c. 63, s. 3; 4 Black. Com., 150; 1 Russell, 297; Wharton, C. L. § 1768, 1773; 2 Bishop, C. L. § 312.

[24] Wharton, C. L. § 1769. The laws of Ohio contain an especially clear and comprehensive statute on the subject of this class of offences. (1 R. S., 412.) The statute for the District of Columbia, (R. S., Dist. of Col., Secs. 1164, 1165,) by which the crime of killing in a duel is made punishable only by imprisonment in a penitentiary for a term not exceeding ten years, is but an illustration of the inadequate criminal code of that locality.

In Massachusetts, a *surgeon* present at the fighting of a duel, is expressly made punishable by fine and imprisonment, and disqualification for office under the State for five years. (Gen. Stats., c. 160 § 13.) So, in New York, (3 R. S., 962,) surgeons present at duels are punishable by imprisonment in the State Prison.

915 Military offenders will thus in general be amenable both to military charges and to criminal indictment.[25]

**OFFENCES MADE PUNISHABLE BY ART. 26.** This Article makes punishable the two specific offences of Sending a challenge and Accepting a challenge.

**SENDING A CHALLENGE—What constitutes a challenge.** Wharton[26] defines a *duel* to be—"a concerted fight between two persons, with deadly weapons, the object of which is claimed to be the satisfaction of wounded honor." Its elements thus are, that it must be premeditated and deliberate, as distinguished from a sudden rencontre in warm blood;[27] must contemplate the employment of weapons from the use of which homicide may be expected as a natural and probable consequence;[28] and must be resorted to, ostensibly at least, with a view to obtaining amends for some affront which has or is conceived to have injuriously affected the character or offended the sensibility of the person concerned as a man of honor.[29] A *challenge* is a written or verbal[30] demand, request, or invitation to another to unite in such a combat.[31]

916 No particular form of words is necessary to constitute a challenge in law.[32] The *intention* of the language employed is the material point. Mere bullying or defiant language does not amount to a challenge;[33] nor do words conveying only a willingness to fight or a readiness to accept a challenge from the other party.[34] The communication, taking the whole together, must import an intention to invite to a duel the person to whom it is addressed; if it does so, it is a challenge, whatever be the expressions used. The invitation indeed need not be tendered in direct and express terms; it is sufficient if it be conveyed indirectly and by implication.[35] Written challenges are indeed often phrased in

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[25] See Samuel, 403; also King *v.* Rice, 3 East, 581, and other cases, (mentioned in 2 McArthur, 176, 181; Kennedy, 267; James, 47, 545; and Simmons § 835, note,) of military and naval officers subjected to trial before criminal courts, for taking part in duels as principals or seconds.

[26] Wharton, C. L. § 1767.

[27] Id., § 1770.

[28] See Id. § 1771; Com. *v.* Hooper, Thach., 405.

[29] See Wharton, C. L. § 1772.

[30] Coke, 3 Inst., 158; 1 Hawkins, c. 63, s. 3; 4 Black. Com., 150; 2 Bishop, C. L. § 314; Samuel, 384; Hough, 183. In State *v.* Strickland, 2 N. & McC., 181, the court observes that a challenge *may* be given in an open, public manner, but that this is "very unusual indeed."

[31] "The offence consists in the invitation to fight." State *v.* Taylor, 1 So. Ca., 108. And see 2 Bishop, C. L. § 314.

[32] Wharton, C. L. § 1771, 1777, 2 Bishop, C. L. § 314, Samuel, 384; O'Brien, 104, G. O. 2 of 1858.

[33] Com. *v.* Hart, 6 J. J. Marsh., 119; Ivey *v.* State, 12 Ala., 277.

[34] See Com. *v.* Tibbs, 1 Dana, 524, Aulger *v.* People, 34 Ills., 486. Of this character are such expressions as—"I am responsible for my words:" "You know where to find me," &c.

[35] It is not necessary that the writing should expressly state that a meeting is requested with a view to fight, or describe the weapons proposed to be employed. Com. *v.* Hart, *ante*. Nor need it refer to the origin of the difficulty between the parties, or the matter of the supposed grievance of the challenger. Hough, 183. Nor need it indicate the place where the duel is proposed to be fought. 2 Bishop, C. P. § 306.

The most common form of challenge commences with a reference to some ground of difference or complaint, demands satisfaction therefor of the party addressed, and refers him to a "friend," (often the bearer of the challenge,) who is declared to be authorized to arrange the usual preliminaries. See the forms in the following cases:—State *v.* Cunningham, 2 Speers, 249; Com. *v.* Rowan, 3 Dana, 395; Com. *v.* Pope, Id., 418; State *v.* Gibbons, 1 South, 41; State *v.* Dupont, 2 McC., 334; Com, *v.* Levy, 2 Wheeler, C. C., 245; G. O. 330 of 1863. In G. O 11, Army of the Potomac, 1861, the invitation is expressed in the form of a *daring* to fight. In G. O. 33, Dept. & Army of the Tenn., 1864, the demand for satisfaction, which is, in terms, "to fight a duel," is accompanied with a threat to "brand" the party if he does not accept.

language designed to be ambiguous, and to disguise the meaning of the writer so that he may be enabled to evade the criminal liability attaching to his act.[36] In such cases the construction given to the supposed challenge by the party to whom it is addressed, and the response made or action taken by him upon receiving it, are especially significant as interpreting the true meaning of the communication.[37] But the stilted and affected verbiage in which challenges are usually expressed is quite familiar to the courts and the public, and their true object is generally entirely transparent.[38] Where, however, ambiguously or obscurely worded, or containing technical terms, they may be explained by a reference to the so-called duelling code,[39] or by the circumstances of the controversy and the acts, conversation, correspondence, &c., of the parties, as exhibited in evidence.[40]

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**The sending.** The early British Article from which ours was derived characterized the offence as the *giving or sending* of a challenge. The American Article, however, has, from the beginning, employed only the word send, and the present form declares that "*no officer or soldier shall send a challenge*," &c., and further makes punishable the accepting of a challenge "*so sent*." It is considered therefore safer to hold that the *giving* of a challenge, directly and in person, by the challenger himself, (which must be an act of rare occurrence,) is not an offence included within this Article but one which would properly be charged under Art. 62.

The Article forbids the sending of a challenge "*to another officer or soldier*," and it is clear that the offence is equally complete whether the challenge be addressed to a superior or an inferior in rank; it is also clear that the sending of a challenge to a civilian would not be within the Article.[41]

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The sending may be shown by evidence of a sending by a messenger, whether a *second* or other person, or by any other reliable and direct mode of transmission, as the mail. Actual delivery or receipt of the challenge need not be established, the offence being complete without it.[42] But the sending, where a receipt is not proved, must be shown to have been such as would presumably have resulted in a delivery. If the mail was resorted to, the prosecution should be prepared to prove that the communication was put into the post office or other proper place of deposit for letters, correctly addressed, and the postage pre-paid if necessary; for the law will then presume that it was duly forwarded to its destination.[43] It is not necessary to show that the challenge

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[36] Samuel, 384, 386. "As challenges are in violation of law, ingenuity is not uncommonly exercised to avoid a plain expression of their purpose. But these are artifices to defeat the law which courts of law will never favor." G. O. 2 of 1858. (Col. Sumner's case.)

[37] See Com. *v.* Hart; Com. *v.* Pope, *ante;* Hough, 183, and note. "When the meaning is so clear as to be intelligible to the party who receives the challenge, it answers its purpose, and is intelligible to the tribunal which tries it." G. O. 2 of 1858.

[38] In Com. *v.* Levy, 2 Wheeler, C. C., 245, where the challenger informed the party addressed that he "considered himself insulted and expected the satisfaction of a gentleman," the Court observe: "Now what does this mean? Everybody knows what it means—'I challenge you to fight a duel with me with deadly weapons.'"

[39] State *v.* Gibbons, 1 South, 51.

[40] 2 Bishop, C. P. § 309; Com. *v.* Hart; Com. *v.* Pope; Hough, 183; O'Brien, 104. The admissions and material statements of seconds are also competent both for and against their principals, for the purpose of rendering more intelligible the intentions of the latter. Wharton, C. L. § 1778; 2 Bishop, C. P. § 308; State *v.* Dupont, 2 McC., 334; State *v.* Taylor, 1 So. Ca., 108. See Chapter XVIII—"Res Gestæ."

[41] O'Brien, 104.

[42] Rex. *v.* Williams 2 Camp., 506; Wharton, C. L. § 1774; 2 Bishop, C. P. § 307.

[43] Bank *v.* Hart, 3 Day, 491. And see Henderson *v.* Coal Co., 140 U. S., 25; Schutz *v.* Jordan, 141 U. S., 213. It is even said in some cases that it will then be presumed to have been *received* by the person to whom it was mailed. McCoy *v.* State, 46 Hun., 268; Steiner *v.* Ellis, 7 So., 803.

was either accepted or declined by the person to whom it was sent.[44] The non-acceptance of the challenge in no manner exonerates the sender; to the completeness of *his* offence it is quite immaterial whether or not an offence be committed by the other party. It is equally immaterial to the question of the liability of the accused whether or not a duel actually ensues upon the challenge.[45]

Proof of the sending of a written challenge is in general completed by the production of the writing, with evidence that it is in the handwriting of the accused, or was penned by another at his dictation or request.[46] Where the writing cannot be produced—as where it is in the possession of the opposite party, (who will not exhibit it,) or is lost—proof of its substance will be sufficient.[47]

**ACCEPTING A CHALLENGE.** This offence may be established by proof of an acceptance either oral or written, and either communicated personally or dispatched by a messenger or by some other reasonably certain
919 agency—as the mail. Where the acceptance is by written missive, the actual delivery of the same need not be shown. Whether a duel resulted is immaterial. Where a written acceptance is put in evidence, the same proof of handwriting, &c., is to be made as in the instance of a challenge.

No form of words is necessary to constitute an acceptance; the only requisite to legal acceptance being that the language import an intent to accede to the invitation conveyed by the challenge.[48] As in the case of a challenge, parol evidence may be introduced to explain obscure expressions in an alleged written acceptance, and to determine whether it be an acceptance in law.

**DEFENCE—PUNISHMENT.** The sending or accepting of a challenge being *prima facie* established, the only *defence* open to the accused, where the facts are not denied, would appear to be that a criminal *intent* was wanting—as, for example, that a serious act was not proposed, but that the proceeding was by way of banter or joke.[49] No *provocation*, however great, can constitute a defence.[50] Circumstances, however, of provocation, may be admitted in evidence, as apposite, in a case of an enlisted man, to the question of the proper measure of punishment, and, in a case of an officer, (where the sentence is mandatory,) as material to the action of the reviewing officer in approving, disapproving, mitigating, &c., the penalty of dismissal.

### Twenty-seventh Article.

**THE CLASS OF OFFENDERS MADE PUNISHABLE.** This Article, conforming to the common-law doctrine already noticed, makes punishable as *principals*, *i. e.* in the same manner as the challenger whose offence is the subject of the last Article, not only active agents in the matter of challenges and duels, but some who are merely passive also—placing them all upon the same plane

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[44] Samuel, 383; Hough, 183, note 7; O'Brien, 104.

[45] Coke, 3 Inst., 158.

[46] Com. *v.* Levy, Wheeler, C. C., 245; Hough, 184.

[47] See Com. *v.* Hooper, Thach.; 400, 407.

[48] See the form of the acceptance in Com. *v.* Rowan, 3 Dana, 395.

[49] See Com. *v.* Hart, 6 J. J. M., 119; Ivey *v.* State, 12 Ala., 277; Wharton, C. L. § 1771.

[50] Hough, 184; Taverner's Case, 3 Bulst., 171. "The aggravating circumstances under which the challenge was made are no excuse for the offence." G. O. 33, Dept. & Army of the Tenn., 1864.

of culpability.[51] The several classes indicated, and the nature of their
920 offences, will be considered in the following order:—1. Seconds; 2. Carriers of challenges; 3. Promoters of duels; 4. Commanders of guards suffering persons to go out to fight duels.

**SECONDS.** That which peculiarly characterizes the second is his acting in a *representative* capacity for his principal: If a party does not sustain this character, he may be a "promoter" but cannot properly be charged as a second. Moreover, to make him a second, such capacity must be, not voluntary and gratuitous merely, but assumed at the instance or request of the principal or with his acquiescence. It need not, however, be directly proved that the principal requested or procured the accused to assist him as second:[52] the fact that he was named in the challenge as a "friend;" that he declared himself to be a second, or performed acts in that capacity which were accepted as such by the principal; or that he was viewed and treated with as such, in the arrangements, by the parties and seconds generally,—such facts and circumstances would ordinarily afford a sufficient presumption of his authority and representative capacity in the case. This acting of the second must, to constitute the offence, be either *at* a duel, or with a view to the fighting of one. It is not considered absolutely essential that there should be an actual duel, or, if there be one, that the accused should be present at it. If, in his character of second, he actively participate in making preparations for the duel, as by conveying the challenge or response, conducting the correspondence, arranging the preliminaries in connection with the second of the other party, providing the weapons, &c., he will bring himself within the description of "seconds or promoters of duels," as employed in the Article.[53]

**Proof.** Here, as under the charge of sending a challenge, the admissions and material statements of the principals, as well as of the other second or seconds, having reference to the subject of the duel, will be admissible in evidence
against (or for) the accused, as illustrating the nature and intent of his
921 acts.[54] The "duelling code" may also be put in proof, to indicate what acts and service pertain to the functions of a second.

**Defence.** The accused may show in defence that he consented to assume the role of second, for the purpose not of promoting but of preventing a duel by composing the strife or otherwise, and that he acted solely with this object. Or he may show that, having once consented to be second, he presently withdrew without having taken any part in preparing for a hostile meeting.

**CARRIERS.** By the designation—"carriers of challenges to fight duels,"[55] the Article no doubt mainly contemplates persons *other than seconds* who convey invitations to fight duels from one party to another, though seconds who perform this office are, of course, chargeable as carriers.

To constitute the offence of the carrier, the carrying must be performed *knowingly, i. e.*, the accused must know that the message is a challenge to

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[51] Samuel, 387, 390. And see O'Brien, 105.

[52] See Case of Lieut. Ivers, tried for requiring a non-commissioned officer to attend him as a second. James, 227.

[53] Compare Com. *v.* Boott, Thach., 394.

[54] Wharton, C. L., § 1778; 2 Bishop, C. P. § 308; Com. *v.* Boott, Thach., 392–3.

[55] It is noticeable that *carriers of acceptances* are not specifically made punishable by this Article. One, however, carrying, knowingly, an acceptance of a challenge would be chargeable under this Article as a promoter of a duel, or under Art. 62. In the criminal code of the District of Columbia, the carrying of an acceptance is made punishable in the same manner as the carrying of a challenge. (R. S., Dist. Col., Sec. 1164.)

fight a duel.[56] If the challenge is verbal, he can indeed scarcely but know its nature; it is therefore mostly in the case of written challenges that specific proof of knowledge is required to be produced. In proving knowledge, it is not necessary to show that the accused was informed of the character or contents of the paper by the sender: he may learn of it from other persons; from having himself been present at the quarrel of the parties, or been acquainted with the circumstances of their difference or of their personal relations; from common report; or even from the manner and tone of the sender provided these were so significant that they could not reasonably be misunderstood.[57] It is only essential that the carrier should have the knowledge before the carriage be completed.

922 The offence is consummated by the *delivery* of the challenge. We have seen that the offence of the *challenger* is completed upon his putting the challenge in the way of being delivered, whether it be actually delivered or not. But the carrier, to become amenable to the Article, must actually deliver the challenge, for until he does so there is a *locus pœnitentiæ*, and, if he repents himself of his assumed mission before it is fully performed, there is no carriage and he is not chargeable. It may be added that it is not absolutely necessary that there should be a delivery to the party *in person:* if, in his absence, the challenge be delivered, for him, to some person through whom it is reasonable to suppose that it will duly presently come into his hands, the carriage will be complete in law.[58]

**PROMOTERS OF DUELS.** This is a general designation, including any person who, by stimulating the resentments of another, or by appeals to his pride, shame, sense of "honor" so called, or otherwise, (and whether by direct and pointed means or by covert insinuation,) purposely incites him to tender or to accept a challenge,[59] or, in any way, other than by acting as a second, or the carrier of a challenge, designedly furthers or contributes to the fighting of the duel. Promoters are thus distinguished from seconds and such carriers; for though these are in effect promoters of duels, (and might, without material error, be charged as such,[60]) they have at the same time a distinct and

923 specific role, while that of the promoter proper is more general and not confined to any particular act or province. Carriers of *acceptances* are clearly promoters and so chargeable.

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[56] "Otherwise," observes Samuel, "he might be as little culpable as an ordinary letter carrier, who cannot be presumed to understand the contents of the correspondence that passes, almost mechanically, through his hands." And see Hough, 199, 200; O'Brien, 107; U. S. *v.* Shackelford, 3 Cranch C., 178.

[57] See Hough, 200.

[58] See Hough, 184.

[59] The term *promoters* "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." Samuel, 394. This writer adds:—"The meddling and mischievous spirit which is ready to mingle itself in the misunderstandings and quarrels of others, is as often prejudicial to the best interests of society as the bad passions of individuals immediately and principally engaged." And see, further, pp. 394–5, a curious recital by the author of the forms in which such spirit may "interpose itself." See also the case of Lieut. Dillon and others, (Samuel, 396; Hough, 190; James, 545,) of whom it is said in the General Order of publication that—"Their interference was equally uncalled for and unnecessary, and tended, not, as might have been expected, to settle the trivial difference which existed between their brother officers, but to magnify its importance and to instigate them to the measure which has led to so fatal a result." And see other cases of instigating and promoting, in James, 397, 437.

[60] Note the forms of charge in G. C. M. O. 130, Dept. of the Mo., 1872.

As it is not necessary, to complete the offence of the *second* or the *carrier*, that a duel should actually transpire; so, it is not deemed absolutely essential to the offence of the *promoter* that there should ensue a hostile meeting, or even that a challenge should pass between the parties. While there will ordinarily have been either a duel, or a formal challenging, where a case of promoting presents itself calling for a specific charge under this Article,[61] all that is *requisite* is that the acts of the alleged promoter should have been done with the intention to induce or aid in inducing a duel, and should have had a direct tendency to induce one. The intent[62]—where it exists—will in general be sufficiently presumable from the acts themselves without further evidence.

**CASES IN WHICH ONE OF THE PRINCIPALS IS A CIVILIAN.** Such cases, it may be added, (by way of general remark applicable to the offences of the three classes of persons above considered,) are clearly equally within the spirit and letter of the Article as are cases in which both principals are military persons.[63]

**COMMANDERS OF GUARDS.** The Article further makes punishable "*as a challenger, any officer or non-commissioned officer, commanding a guard, who, knowingly and willingly, suffers any person to go forth to fight a duel.*" The general term "any person" would appear to include civilians as well as military persons,[64] and, among the latter, persons of any grade; so that a
924 non-commissioned officer or officer of inferior rank would be chargeable under the Article for suffering a *superior* officer of whatever rank "to go forth," &c. The commander of the guard must not merely forbid the person to go forth from the post, station, &c., but *stop* him, and by force if necessary:[65] if he neglects to do so, he commits the offence here designated. To complete the criminal act or omission the accused must know that the intent of the person, in going forth, is to fight a duel. The source of the knowledge is immaterial: "it is not necessary that the party should be seen to pass the guard."[66] If therefore the accused is shown to have received from reliable persons specific and timely information of an intended going forth, which was in fact effected, and which he made no proper attempt to stop or prevent, he will justly be considered to have had the requisite knowledge, and be held amenable to trial under the Article, provided the locality of the going forth was within the lines of his guard or command.

**THE DUTY IMPOSED BY THE LAST CLAUSE OF THE ARTICLE.** The injunction with which the Article concludes is, in substance, only declatory of the duty incumbent upon commanders in general to arrest and bring to trial military offenders. From the use, however, of the word "*immediately*" it is evident that the design of the provision was to impress this obligation with especial emphasis, and to make it imperative upon commanders to check at the outset any scheme or combination looking to a duel by the prompt ap-

[61] In the only precedent which the author has found of *promoting*, charged specifically as such and independently of seconding,—that published in G. O. 223, Dept. of the Mo., 1864,—there was an actual duel, the cases of both principals being promulgated in the same Order.

[62] That this *intent* is the gist of the offence, see State *v.* Gibbons, 1 South., 49. And compare the analogous cases of the common-law misdemeanor of endeavoring to provoke another to send a challenge, referred to in 1 Russell, 297. The promoting of a challenging of *one's self* by the party addressed, (as done in one of these cases—Rex *v.* Phillips, 6 East, 464,) would appear to be as much within the general designation of the Article as a promoting of the challenging of another.

[63] See O'Brien, 106.

[64] Samuel, 388; Hough, 197; Id., (P.), 264; O'Brien, 105.

[65] Hough, 197; Id., (P.), 264.

[66] Hough, (P.) 265.

prehension and prosecution of the principal offenders. A commander, therefore, will properly perform his duty under the Article by placing under arrest without delay the party or parties concerned, and, where he is not himself empowered to convene a suitable court for their trial, by preferring charges against them for a violation of the 26th Article, and forwarding the same to the proper superior; for the latter it will remain to order a court as soon as practicable.

### TWENTY-EIGHTH ARTICLE.

**OBJECT AND EFFECT.** The object of this Article, (which repeats
925 almost word for word a provision of the Code of James II,) is to "protect and save the honor of officers and soldiers, who shall have the courage to refuse the acceptance of challenges, from every species of reproach which might attend the refusal;"[67] and, as a most effective means of attaining this object, it punishes with dismissal any one who "upbraids"—*i. e.* reproaches, censures, inveighs against, stigmatizes—another for not entertaining an invitation to fight a duel. The most familiar form indeed of upbraiding at the period of the adoption of the Article was "posting" as a coward, by means of a written or printed public notice,[68]—an offence still made punishable in the statutes especially of the older States. Thus, in the laws of Massachusetts,[69] it is provided that—"Whoever posts another, or in writing or print uses any reproachful or contemptuous language to or concerning another, for not fighting a duel, or for not sending or accepting a challenge, shall be punished by imprisonment," &c.

It is quite clear, however, that the upbraiding intended by the Article need not be in writing, but may be *oral* as well.[70]

The offence committed is moreover equally within the Article whether the upbraider is the original challenger himself or some other person. An instance of upbraiding by the former is that charged in the case of Col. Sumner,[71] where the officer who had tendered the challenge is alleged to have addressed the other party in the following terms:—"Sir: I received with great surprise your note of last evening, and have only to say to you that a man who could insult a brother officer from an official covert, and afterwards refuse to apologize, or to give him that satisfaction which he had a right to demand, is utterly
926 unworthy of any farther notice from me." This case also illustrates the point that, under the general provision of the Article, the upbraiding may be conveyed in a private communication as well as expressed in some public manner.

**PROOF.** If the upbraiding was contained in a written communication, the same should be set out in full or in substance in the charge,[72] and proved by showing either that it is in the handwriting of the accused, or was written for

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[67] Samuel, 402.

[68] See the precedent of indictment for the offence of posting in 3 Chitty, C. L., 853. A pointed instance, in our military history, of posting, was that, in 1808, of John Randolph by Brig. Gen. Wilkinson, who, when Randolph, after having unjustly assailed him in Congress, refused to accept his challenge, posted him as a "prevaricating, base, calumnious scoundrel and coward." The leading case tried by court-martial is that of Ast. Surg. Todsen, who was convicted of posting a captain, who had refused him "satisfaction," as "a liar and a coward." G. O. 20 of 1826.

[69] General Stats. of Mass., c. 160 § 14. And see a similar statue of New York—3 Rev. Sts., 972; also Act of Congress of Feb. 20, 1839, relating to the District of Columbia—R. S., Dist. of Col. § 1166.

[70] See case in G. C. M. O. 48, Dept. of the Mo., 1870; also Lieut. Wood's case, James, 752.

[71] G. O. 2 of 1858. And see Lieut. Wood's case, *ante*.

[72] See precedent in 3 Chitty, C. L., 853.

him and at his instance. Where it is thus connected with the accused as his personal act, it will not be necessary to prove the actual receipt of the communication by the party upbraided; it will be sufficient to show, as in the case of sending a written challenge, that the accused duly put it in the way of being properly forwarded to and received by such party.

## XIII. THE TWENTY-NINTH AND THIRTIETH ARTICLES.

[Redress of Wrongs in Regiments, &c.]

"ART. 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.*

"ART. 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.*"

### TWENTY-NINTH ARTICLE.

**CONSTRUCTION.** This is an antiquated provision,[73] now of but slight significance, and may be very briefly treated.

927 "**Wronged.**" This undefined but general term is interpreted as including any and all injuries or grievances that may be done or caused by a superior to an inferior officer in his military capacity or relation, and that are, at the same time, properly *susceptible of being remedied without a resort to a trial by court-martial.* Clode[74] expresses the opinion, in regard to the corresponding British Article, that its object is to provide for the "settlement of professional disputes;" and Hough,[75] that it relates to "matters of a professional or private nature." A more specific construction would be that the wrongs contemplated are mainly denials of rights or just privileges, or other arbitrary proceedings in contravention of military usage.

"**By the commanding officer of his regiment.**" This description has been persistently retained from the original code, while in the corresponding British Article the more comprehensive term, "his commanding officer," was after a time substituted. De Hart[76] was of opinion that our own Article should be held to apply to cases of wrongs received from any superior officer; that being a remedial statute it might properly be thus freely construed. But while such a statute is to be liberally interpreted as to its general provisions, its specific terms cannot be extended beyond their distinctive import; and the present Article, being expressly confined to cases of wrongs on the part of *regimental* commanders, must be held to have no wider or other application. It would not therefore authorize a complaint on account of a wrong done by a *post*

[73] See Art. 57 of the Code of James II.
[74] M. L., 79.
[75] Page 229.
[76] Pages 78, 253.

commander who was not also regimental commander.. The Article however merely indicates a routine of action, which may be, and in practice is, substantially pursued in cases of complaints in general, with the difference only that it is commonly simplified by a more direct form of communication.

**PROCEDURE UNDER THE ARTICLE.** This is in brief as follows. The aggrieved officer having first specifically applied in writing for redress to the regimental commander, and been refused, or granted but partial relief, complains by way of appeal, in writing, to the general commanding, (com-
928 monly the department commander,) setting forth the facts of the case, and stating the substance of the original application and its result. This complaint is properly transmitted through the regimental commander, who makes such endorsement thereon, or communication therewith, as he may deem desirable, and the general is thus possessed of both sides of the controversy. If the regimental commander declines or unreasonably delays to forward the appeal, the officer is authorized to transmit it directly. Either the complainant or the regimental commander may accompany his statement by affidavits or statements of other persons, or by documentary or other written evidence. The general will examine the statements, &c., and consider the arguments, and, if he concludes that a wrong has been done, will proceed to redress the same, so far as it may be authorized and practicable for him to do so, issuing for the purpose the proper order or orders; and will thereupon render to the War Department the report indicated in the Article. If not empowered himself to afford redress, he will properly, in his report, favorably commend the claim to the Secretary of War. On the other hand, if he considers that no wrong was done by the regimental commander, he will formally disallow the complaint, leaving the officer, if not satisfied, to appeal to higher authority."

A regimental officer, it is to be remarked, is not *required* to pursue the routine outlined in this Article. Like any other officer, who has been refused redress for a supposed grievance by his commanding officer, he may address an appeal through the proper channels directly to the Secretary of War, by whom it will commonly be referred to the chief of one of the staff corps, or to the division or department commander, &c., for report, and in due course disposed of. This is the more usual form of proceeding, the Article, *as such*, being rarely availed of.

THIRTIETH ARTICLE.

**AN INADEQUATE PROVISION.** This Article, which, (dating originally from the code of James II,[18]) has not been materially modified since
929 1806, is also a provision of comparatively slight value in the code. It entitles indeed a soldier, "who thinks himself wronged by any officer," to a hearing before a court of his regiment, and, if he is not satisfied with the result, to an appeal to a higher court; but the remedy is practically limited to cases arising in regiments; the courts, so far as relates to the matter of redress, are merely investigating bodies without defined powers; and the Article fails to indicate what classes of wrongs they may consider, or what authority may be exercised by commanders in carrying out their conclusions. Moreover, the effect of the threat contained in the last clause of the Article

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[17] On the general subject of the legal effect of this Article and the procedure under it, the student is referred to Samuel, 499–503; Simmons § 369–371; Hough, 229, 236; Stocqueler's "British Officer," 236; Clode, M. L., 79; Maltby, 147; O'Brien, 121–2, 307; De Hart, 78, 253–6; Benét, 170–2; G. O. 1 of 1856.

[18] See Arts. 50 and 51 of that Code.

must rather be to discourage soldiers from seeking relief under it. It has thus been found inadequate in practice, and is comparatively rarely availed of. Rather than resort to the cumbrous and precarious proceedings which it provides, enlisted men prefer in general to address their claims, through the proper channels, to the Department Commander or Secretary of War, for authoritative and final adjustment.

**CONSTRUCTION—"Who thinks himself wronged."** In the absence of any definition of this term in the Article, the authorities have construed it as referring mainly to such wrongs as result from mistake of fact, misapprehension of law, or want of judgment on the part of the officer in regard to some matter connected with the "internal economy," as Samuel[79] expresses it, of the command. Errors in the *accounts* of the soldier, as in denying to him a right to pay or to an allowance, pecuniary or otherwise, to which he is entitled, or in entering stoppages against him to which he should not be subjected, are held to be peculiarly of the class of "wrongs" for which redress is intended to be here afforded.[80] So, such grievances as the imposition of unreasonable arrest,[81] the assigning of improper duties, the enjoining of excessive work or service, the withholding of customary privileges, may, it is believed, sometimes be sought to be remedied by this proceeding, where the fault of the officer consists in a misapprehension of facts or lack of discretion rather than in an intention to injure or oppress.

930 But where the act of the officer, as complained of, amounts clearly to a specific military *offence*, it cannot in general properly become the basis of a complaint under this Article. The regimental court here authorized can neither *try* nor *punish;* and in assuming to pass judicially upon a military offence, it would be transcending altogether its province.[82]

The Article is also held to include only grievances which are *personal* to the soldier, and therefore not such acts as merely affect discipline in general;[83] and further, and especially, to contemplate such wrongs only as are *susceptible of being specifically redressed* by the regimental commander, in the due course of military administration.[84] Thus a wrong consisting in the denial of a substantial right which may be restored as such, or in the imposition of a liability which may be specifically done away with, would be within the purview of the Article: otherwise, where it consists in an injury which is not practicable to undo, and for which no satisfaction can be afforded other than the moral satisfaction experienced from the infliction of a punishment upon the offender.

**"By any officer."** While this general term may be held to include officers of whatever rank, and whether or not of the same company or regiment as the

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[79] Page 504.

[80] Hough, 239; G. O. 13 of 1843; Macomb 90; O'Brien, 127; DeHart, 258.

[81] G. O. 13 of 1843; O'Brien, 127, 129.

[82] See Adye, 105; Tytler, 336; Samuel, 505–6; Simmons § 342; Macomb, 90; O'Brien, 123, 128, 129, 287; Maltby, 133; De Hart, 257, 265; G. O. 13 of 1843; 1 Opins. At. Gen., 167. Simmons writes: "It would not be competent to a regimental court, thus summoned, to enter upon an inquiry as to a charge of tyranny and oppression, or ill treatment, brought forward against the captain or officer commanding a company." In the leading case, in our law, of Private Delap, (G. O. 13 of 1843,) the Secretary of War expressly held that a *striking* of a soldier by an officer was not of the class of wrongs which could properly be made the subject of a complaint under the present article. The action in Flynn's case, (G. O. 5, Hdqrs. 13th Infy., 1874,) where such a striking was investigated by a regimental court under this Article, (though supported by an early case in G. O. 5 of 1827,) must thus be regarded as erroneous.

[83] See Samuel, 504–5; O'Brien, 123.

[84] "It is evidently a personal wrong of such a nature as is capable of redress that the Article has in view." Samuel, 505. And see O'Brien, 123.

complainant, it is to be gathered from the history,[85] and text of the
931 Article that it was thereln contemplated that it would be mainly the acts of *company* officers and especially *company commanders* for which redress would be sought. It would seem indeed that the officer, equally as the complainant, should be within the command of the regimental commander, since otherwise the latter could not give effect to a specific recommendation made by the regimental court. It need scarcely be remarked that the "officer" must be *in the army,—i. ē.*, must not have resigned, been dismissed, &c.,—at the time the complaint is presented and heard; otherwise it cannot be entertained.

"**May complain to the commanding officer of his regiment.**" These words, and those which immediately follow, indicate that the present Article, like the last, is restricted in its application to cases arising in regiments. A regimental commander alone can entertain a complaint and summon a court under the Article: a post commander, where he is not also regimental commander, cannot legally exercise the authority.

"**Who shall summon a regimental court-martial.**" This provision is construed by the authorities as making it compulsory upon the commander to convene the court, and entitling the complainant, as of right, to have it ordered: it is held that the commander has no discretion in the matter, but that he is in all cases obliged to assemble the court within a reasonable time after receiving the complaint.[86] The general injunction, however, of the Article is to be viewed as subject to the condition that the matter of the complaint be within its purview: if the wrong complained of is not one which the regimental court is competent to entertain, the commander will properly decline to convene it.

The "*regimental court*" here indicated is, it should be remarked, not properly a *court* at all. It does not try an accused upon a charge of a military offence, nor does it acquit, convict, or sentence. It merely, as has already
932 been noticed, investigates and expresses an opinion, and thus, though distinct from either, resembles a court of inquiry or board much more nearly than a court-martial.[87]

"**For the doing of justice to the complainant.**" Inasmuch as the so-called "court" provided by the Article has not the powers of a court, and as no regimental court is in any event empowered to try a commissioned officer, it is clear that the "doing of justice" here contemplated cannot consist, the complaint being sustained, in the awarding of a *penalty* in any form whatever. To require the officer, for example, to pay a fine or make an apology, would be as foreign to the legal province of the court as it would be for it to impose upon him the punishment of confinement. Moreover, being itself without executive authority, it cannot compel or order the officer to redress the grievance suffered, restore the right denied, or otherwise rehabilitate or compensate the com-

[85] In the Article of 1806, the designation was—"*by his captain or other officer*;" *i. e.*, as the earlier authorities seem generally to have construed it, other officer of the company, or at least the regiment. See G. O. 13 of 1843; De Hart, 258–264. But see O'Brien, 127–8.

[86] "This provision is imperative and compulsory. It is not a matter of favor or discretion but of right, and is strictly *ex debito justiciæ*." 1 Opins. At. Gen., 167. "The commanding officer of the regiment has no discretion to exercise, but is absolutely obliged to assemble a regimental court-martial forthwith, or in such reasonable time as the case may admit." Samuel, 505. And see Simmons § 341; O'Brien, 123; De Hart, 264.

[87] Macomb, (p. 90,) in comparing this court to a court of inquiry, adds—"or it may be viewed as an *arbitration* or *board* called on to adjust and settle any differences arising in the settlement of accounts between the captain and his men." And see I Opins. At. Gen., 167; Maltby, 134; De Hart, 258. In the British Articles a regimental court of inquiry was substituted for the regimental court-martial, in 1860. Simmons § 341: as to the present law, see Army Act § 43.

plainant.[88] In the absence, therefore, of any indication in the Article as to the form of the doing of justice by the court, it is clear that it can, regularly, consist only in the expression of an opinion to the effect that the complaint is sustained and that the wrong complained of should be redressed in a certain mode specified, or—on the other hand—that the complaint is not sustained and no substantial wrong has been suffered.[89] This conclusion being duly approved by the regimental commander, and neither party appealing, the proper orders for effectuating such conclusion are issued *by the commander* and "justice" is thus done in the case.[90]

933 **"Either party may appeal," &c.** It is agreed by the authorities that an absolute right of appeal is here conveyed; that either party not acquiescing in the determination of the court is *entitled* to have ordered a further hearing by a general court-martial.[91] No time being specified within which the right shall be asserted, the general rule of reasonableness is to be applied, and an appeal not claimed within a *reasonable time* may in general be regarded as *waived*.[92]

**"Upon such second hearing."** The term "hearing" is well employed, since the proceeding before the general court is no more a *trial* in the legal sense of the word than that which has taken place before the regimental court, but is simply a re-presentation of the case before a body of superior degree and numbers. The details of the hearing and the action of the court thereon will be referred to under the head of the "Procedure."

**"If * * * the appeal appears to be groundless and vexatious, the party appealing shall be punished at the discretion of said general court-martial."** A "groundless" appeal may be said to be one without any substantial foundation: if an appeal have any material reason or merit, however slight, it cannot be said to be groundless. A "vexatious" appeal would be one characterized by a malevolent or litigious spirit, or taken with the intent of annoying the opposite party or delaying the redress due him, or one so entirely without probable cause or reasonable ground that to persist

934 in the proceeding can result in nothing but embarrassment and trouble to the adversary and to the military authorities.[93]

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[88] "The court are armed with no authority to award the restitution of any rights of which the individual has been deprived." Hough, 241. And see Maltby, 133.

[89] See Samuel, 505; Tytler, 336; Simmons § 342; Macomb, 87, 90; O'Brien, 123; De Hart, 265.

[90] "The colonel or commanding officer, who appoints the regimental court, will have to see, if he approves the same, that the decision be carried into execution." Samuel, 506. "It will then be the duty of the commanding officer of the regiment to see the restitution of the rights of the party complaining, or justice done him." Hough, 240. And see O'Brien, 128; De Hart, 265.

[91] "Either party has an absolute right of appeal." De Hart, 265. And see O'Brien, 286: Maltby, 135; Macomb, 89; Tytler, 335. Note also, in this connection, the remarks of Gen. Augur, in G. C. M. O. 60, Dept. of the Mo., 1884, as follows:—"The right of appeal from an immediate commander to a superior one is the right of every officer or soldier in the Army, and ought to be maintained untrammelled by fear of any resentment on the part of the officer whose acts or decisions are thus either expressly or impliedly questioned. To throw any impediment in the way of such appeal or to visit its exercise with confinement or threat of punishment, in the opinion of the Commanding General, does violence alike to discipline, justice and good order in the Army."

[92] "Though no period is laid down within which an appeal should be made, it is clear that it ought to be brought as soon after the publication of the regimental court-martial as possible; for some of the witnesses may die, or be absent, and thus, in some cases, render the trial impracticable." Hough (P.) 770.

[93] The mere fact that an appeal has not been successful will not properly render the party amenable to punishment, since he may have proceeded honestly and in good faith, or have failed only because of the absence of material testimony. See Samuel, 507–9; Hough, 241; O'Brien, 124; De Hart, 266.

Even in awarding the punishment authorized by the Article, the court does not exercise the power of *sentence* as upon a *trial*. The authority employed rather resembles that resorted to by judicial tribunals for the punishment of *contempts*, and the appropriate penalty will therefore in general be—to be reprimanded or to make an apology, or, in a graver case, to be confined or to forfeit pay, or both, for a limited period.

**PROCEDURE.** The procedure under the Article may be briefly described as follows: The soldier addresses his complaint in writing, preferably through his company commander, to the regimental commander, setting forth the particulars of his grievance or grievances. It is the sentiment of the authorities that where several soldiers have the same grievance, they should not be permitted to combine in a joint complaint,[94] since to allow this would be to encourage a mutinous or insubordinate feeling, but that separate and individual complaints only should be entertained.[95] Upon the receipt of the communication, the commander convenes the regimental court, stating in the order the purpose for which it is assembled. No arrest is made of the officer whose act is complained of.[96] Both parties appear—or may appear if they see fit; their presence is not absolutely necessary—before the court, (with counsel if desired,) and both are permitted to exercise the right of challenge through the judge advocate.[97] The complainant produces his witnesses or other testimony, and the officer, if he sees fit, follows with a defence or explanation and proofs.

Either party may be sworn and testify if he desires. Each has the same
935 right of cross-examination as at a trial. Each may present a closing statement or argument. The court then clears, deliberates, and frames its conclusion to the effect that the complaint either is or is not substantiated, with a further designation—if it be held sustained—of the particular form of relief which, in the opinion of the court, should be extended. The proceedings are then reported to the regimental commander, who, if he approve the same—as he can scarcely fail to do if they are legal and reasonable—will issue the proper order for carrying into effect the determination of the court.[98]

If an *appeal* be taken, the appellant applies through the regular channels to the department or other proper commander for a general court-martial, which is thereupon ordered (and composed of new officers,[99]) and before which the proceedings are similar to those before the regimental court, except that, if the officer be the appellant, he now takes the initiative, is first heard, &c. The investigation is now pursued *de novo*, and upon independent testimony. The evidence introduced may be the same as or different from that introduced at the first hearing, but it is now offered as original and precisely as if it had not been before presented. By the consent of parties, indeed, the record of testimony received by the regimental court may be admitted before the general court; but the latter court considers the evidence and makes up its

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[94] "As by signing a round robin, or any other paper, stating a general complaint." Hough, 240.

[95] See Samuel, 504; Simmons § 372; Hough, 240; O'Brien, 123; De Hart, 267.

[96] Such action at this stage would be "irregular and premature." 1 Opins. At. Gen., 168.

[97] Hough, (P.) 763; Hughes, 106; De Hart, 269; Coppée, 92–3.

[98] In Flynn's case, heretofore noted, the commander, in approving the proceedings, ordered that unless the captain, (the complaint against whom had been sustained,) should appeal to a general court *by a certain date designated*, the specific redress indicated by the court should be afforded.

[99] The members of the second court are similarly subject to challenge. That it is valid ground for challenging a member of the general court that he was a member of the regimental court, has been noticed in Chapter XIV.

opinion entirely independently of the action of the regimental court and unaffected by it. The opinion is to the effect that the appeal is or is not sustained,—that the conclusion of the regimental court is either affirmed or overruled,—with such additional expression of views as to the merits of the case as may be deemed desirable. If the appeal be found "groundless and vexatious," an appropriate punishment is adjudged. The proceedings are then finally acted upon by the commander, and his action is duly promulgated in Orders. An officer or soldier who neglects to abide by or comply with
936 the orders of a regimental or superior commander duly issued for the purpose of effectuating the decision of a regimental or general court assembled under the present Article, is liable to charges and trial as an offender against military discipline.

For reasons above indicated, it is believed that both these Articles may be dropped from the Code without prejudice to the service. As already remarked, a resort to either as a remedial statute is most unfrequent in practice.

## XIV. THE THIRTY-FIRST, THIRTY-SECOND, THIRTY-THIRD, THIRTY-FOURTH, THIRTY-FIFTH, THIRTY-SIXTH, THIRTY-SEVENTH AND FORTIETH ARTICLES.

[Unauthorized Absences and other Minor Offences.]

"ART. 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.*

"ART. 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.*

"ART. 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.*

"ART. 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.*

"ART. 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 offence.*

"ART. 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.*

"ART. 37. *Every non-commissioned officer who connives at such hiring*
937 *of duty shall be reduced. Every officer who knows and allows such practices shall be punished as a court-martial may direct.*"

"ART. 40. *Any officer or soldier who quits 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.*"

### THIRTY-FIRST ARTICLE.

**GENERAL EFFECT AND CONSTRUCTION.** The offence particularized in this prudent but antiquated Article, (which is derived from Art. 27 of the Code of James II,) consists in the unauthorized sleeping or retiring for the

night, (or some considerable portion of the same,) at a dwelling-house, inn, or other lodging or place, situated outside—the distance is immaterial—of the proper limits of the camp, post, &c., at which the offender is stationed or quartered. The bad example as well as the hazard attending such an offence, when committed by *officers* serving with troops in time of war, must be obvious.[100] At *any* time, it is a species of absenteeism on their part, which, if often indulged in, must tend to destroy the *rapport* which should exist between officer and men, and to loosen the bonds of military discipline. The unsteadying effect of such a practice, if permitted to *soldiers*, need not be enlarged upon. Samuel[1] refers to it as being an offence—"to the injury of the civil neighborhood and the corruption of the morals and discipline of the camp;" and Hough[2] observes—"On service, it is particularly required that all should sleep in their own beds, that they may be easily called out in case of need."

The "superior officer," without whose leave the act cannot be excused, will, as a general rule, properly be the commander of the regiment, detachment, post, &c.[3] The "leave," to constitute a defence in the case of an officer, need only be a verbal one: in the case of a soldier, it should, in view of the terms of Art. 34, be in writing, where the place at which he is to be allowed to pass the night is distant a mile or more from the camp or quarters.

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THIRTY-SECOND ARTICLE.

**NATURE OF THE OFFENCE.** This Article makes punishable the offence of *absence without leave* in general, in contradistinction to certain special forms of such absence which are made the subjects of other Articles, and especially Arts. 31, 33, 34 and 40.[4] Where the absence involves a violation of either of these Articles, a charge under such Article may well be joined with the charge under Art. 32. The absence here contemplated may be one unauthorized *ab initio*, or one which consists in not duly returning at the expiration of a pass or furlough. The Article, it will be observed, refers only to *soldiers*. Absence without leave by an *officer* is not made punishable in the code as a specific offence, and is therefore in general to be charged under Art. 62.

**PROOF.** That the absence was "without leave" should be proved affirmatively; it cannot in general properly be presumed from the mere fact of absence.[5] That the absence was unauthorized should be shown by some witness or witnesses—as the commanding officer, a company officer, a first sergeant, &c.—personally cognizant of the fact. The statement of a witness that the

[100] See the case published in G. O. 23, Dept. of the Ohio, 1864, of an officer convicted of an aggravated violation of this Article,—in that he "did lie out of quarters, at a distance of four miles more or less from his command, without the knowledge or consent of his commanding officer, at a time when the presence of every officer was required at his post, the enemy being supposed to be in close proximity, and did not return until an advanced hour on the following morning, his regiment having marched during his absence."

[1] Page 544.

[2] Page 286. And see O'Brien, 93.

[3] See Hough, 286.

[4] "The absence without leave contemplated by Art. 32 is an absence from camp, post, or station. Absence from roll-call is a mere neglect of duty, not a technical *absence without leave* under this Article." G. O. 18, 24, Fifth Mil. Dist., 1868.

[5] In G. O. 292 of 1863, the Secretary of War, in disapproving certain proceedings, says:—"The accused was tried for absence without leave, but there is no evidence whatever of an *unauthorized* absence, it not appearing but that he might have absented himself with full authority."

accused was "reported" absent without leave would be hearsay and insufficient. Similarly would an entry on a morning report book or muster-roll, that the soldier was absent without authority at a certain time, be quite insufficient as legal evidence of the fact, since it would amount to a *charge* only of the offence.[6]

939 **DEFENCE.** It will be a good defence that the party, while absent on pass or furlough, was prevented from returning at the proper time by sickness or other disability,[7] but to establish this excuse medical testimony will generally be required. That the accused was involuntarily detained by the force of the elements, the action of the civil authority, the operations of the enemy, or by being taken prisoner by the latter, may also constitute a valid defence;[8] but where he has once deliberately absented himself without authority, the fact that he was detained away longer than he had intended by some agency beyond his control, will be no sufficient answer to the accusation.

**PUNISHMENT.** The brief unauthorized absences of soldiers are, in time of peace, most commonly referred for trial to inferior courts by which they are usually visited with a small forfeiture of pay or other light sentence. The offence, however, may be aggravated and thus call for a serious punishment; as, for example, where the absence was long protracted; or where the soldier, in absenting himself, has abandoned an important duty; or where the offence was committed in time of war, when, in the words of Attorney General Legaré, "the absence falls, in contemplation of law, little short of desertion."[9]

**CONSEQUENCES BY OPERATION OF LAW.** Upon absence without leave, as upon desertion, there are entailed, by operation of law, certain consequences, declared in par. 132 of the Army Regulations,[10] as follows:—"An enlisted man who absents himself from his post or company, without authority, shall forfeit all pay and allowances accruing during such absence, and, upon conviction by court-martial, make good the time lost."[11]

THIRTY-THIRD ARTICLE.

**EFFECT AND CONSTRUCTION.** This Article, in its first clause, en-
940 joins the punctual attendance of officer and soldier at parade, drill, guard, inspection, roll-calls, muster, or other exercise, duty, or ceremony of the camp or station, as also at any other place at which he may be ordered to report himself as one of a body. The words—"or other rendezvous," &c., says Hough,[12] "mean any place appointed," by the proper commander, "for the assembly of officers, non-commissioned officers, or soldiers for any duty;" as, for example, the place fixed for recitations by officers,[13] the place appointed for gymnasium practice,[14] the riding-hall at the Military

[6] In a case in G. C. M. O. 10, Dept. of the Platte, 1874, a conviction of absence without leave was disapproved by Gen. Ord.—"because the only evidence of guilt is the statement of a witness that the accused was 'reported' absent for a certain time, but there is no evidence to show who 'reported' him, or that the report was true."

[7] Samuel, 338; O'Brien, 92–3.

[8] See authorities cited in last note.

[9] Opins. At. Gen., 695. And see Lieut. Asquith's case, in G. O. 43 of 1832.

[10] As amended by G. O. 69 of 1891.

[11] It is added, however,—"An absence without leave of less than one day shall not be noted upon the muster and pay rolls."

[12] Page 288.

[13] G. C. M. O. 42 of 1888.

[14] G. C. M. O. 109 of 1891.

Academy.[15] The instances of trials under this Article, though not as numerous as those under Art. 32, are not unfrequent in practice.[16]

The offence of "failing to appear at the fixed time," &c., may consist either in non-attending or attending tardily. The excuse of *sickness* should, of course, as remarked by Samuel,[17] be made out by the testimony of a medical officer. In the case of the offence, specified in the second clause of the Article, of "going from" the place of exercise or assembly, "nothing," Samuel observes, "will serve as a defence but the absolute leave of the commanding officer."[18]

THIRTY-FOURTH ARTICLE.

**PURPOSE AND EFFECT.** This Article, says Simmons,[19] "is of very ancient standing,[20] and appears to have been framed chiefly to prevent marauding, by checking inclination to straggle at great distances from camp during the time soldiers may be unemployed, and when they may be lawfully absent." Samuel observes[21] that "a mile is mentioned as a convenient place, probably, for all purposes of exercise and refreshment. But," he adds, "though 941 this is the prescribed limit beyond which soldiers cannot pass without particular permission, it does not follow that they may not be guilty of a military offence, 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." It is only, however, where the distance is at least a mile from the limits of the camp or line of sentinels that the permission must be in writing: where the distance is less than a mile the authority may be verbal merely.[22] In other words the distance of a mile may be regarded as fixing the limits within which, as a general rule, a mere verbal authority to be absent shall be legally operative in the case of a soldier.

THIRTY-FIFTH ARTICLE.

**PURPOSE AND EFFECT.** The "retirement" here indicated, says Hough,[23] is that "of soldiers to their usual place of rest for the night; to insure which the names of the men of each company are called over at retreat-beating." "The Article," observes Samuel,[24] "is calculated to secure the regular and orderly return of men to the posts wherein they are or ought to be found for the night, thus keeping the forces together to act on any emergent occasion. * * * The return of troops to their quarters at a reasonable time," he adds, "has another advantage: it gives an habit of retirement to rest at an early hour, inducing to the refreshment and health of the soldiery." The same writer cites, further,[25] from Sutcliffe's "Combination" the following old order which, in its spirit, is applicable to the army at all times:—"All manner of

[15] G. C. M. O. 66 of 1890.
[16] See cases in G. C. M. O. 1, 32, 66, 83, of 1890; Do. 17, 35, 52, 104, 109, (six specifications,) of 1891; Do. 44, 62, 71, 99, (nine specifications,) 103, of 1892; Do. 7, 9, 26, 93, of 1893.
[17] Page 548. And see O'Brien, 94.
[18] Page 548.
[19] § 183. And see Samuel, 543.
[20] It comes from Art. 20 of James II.
[21] Pages 542–3. And see O'Brien, 93.
[22] See Hough, 285.
[23] Page 287.
[24] Page 545–6. And see O'Brien, 94.
[25] Page 546–7.

persons within the camp or garrison, after the watch is set, shall repair to their quarters and there use silence that every man may rest. All stragglers and tumultuous persons, that are taken abroad after that time, shall be committed to prison, and there abide until their cause be examined by the officers of justice, and order taken for their punishment or dismissing."

In our service the "retreat" is usually beaten by drum or sounded by bugle, at sunset.

THIRTY-SIXTH ARTICLE.

942 **NATURE OF THE OFFENCES—Hiring to do duty.** Of the provision on this subject in the original British Article, Samuel writes,[26] that it was "framed for the purpose of obviating an abuse which had for some time previously prevailed, and in a very notorious degree, among soldiers quartered in the metropolis or its vicinity, who, being able to find there constant and more profitable employment than in the military service of the country, in work or labor on the Thames, or in the numerous yards and wharfs upon its banks, engaged their comrades to undertake, for a certain proportion of pay, the particular routine of military duty which they would otherwise be obliged to perform."

The consideration paid or given, or agreed to be paid or given—whether pecuniary or otherwise—for the doing of the duty by the party hired, is of course immaterial.[27]

The offence indicated is a rare one in our service. In an Order of the Department of the Missouri[28] is published a case of a soldier convicted of a violation of this Article in hiring another enlisted man to walk his post as a sentinel, while the accused took occasion to desert—an instance which forcibly illustrates the use of the prohibition of the Article.

**Being excused from duty.** This offence consists in procuring one's self to be excused from a military duty for any cause other than those specified in the Article, or upon a false pretence of the existence of one of these causes. The "sickness" or "disability" which shall constitute an excuse from duty will of course, as a general rule, properly be established by the testimony or certificate of a medical officer of the command or of the army.

THIRTY-SEVENTH ARTICLE.

**PURPOSE AND EFFECT.** According to Samuel,[29] this Article, which is supplementary to that last considered, was evoked by the existence of a
943 practice, on the part of officers at an early period, of consenting to the hiring of duty, upon the condition of receiving a pecuniary consideration, to be derived from deductions from the soldier's "pay or profits."

If, as says Hough,[30] such a practice were sanctioned, two men would in fact be required to perform the duty assigned to one.

This and the previous Article, besides being judicious rules of discipline, illustrate one of the aims of the military law, as a law not only of justice but of honor, *viz.* to preclude the subsisting of anything like a mercenary transaction or relation between officers and enlisted men.

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[26] Page 549.
[27] See Hough, 290.
[28] G. O. 90 of 1867.
[29] Page 549.
[30] Page 291.

FORTIETH ARTICLE.

**EFFECT AND CONSTRUCTION.** The main object of this Article, in the view of Samuel,[31] is to keep united the military bodies indicated, and thus secure their efficiency. It is now, however, an antiquated provision, and without significance except in so far as it relates to the offence of "quitting his guard" by an officer or soldier. This offence has been occasionally made the subject of a charge, and a few rulings upon the Article, with especial reference to this part of it, are to be found in the General Orders. Thus in one Order[32] the quitting of his guard without authority by an *officer of the guard* is commented upon as a grave instance of offence under this Article. In a case in another Order,[33] it is ruled that the description—"any officer," &c., applies to an *officer of the day*, "the guard mounted under his direction in the morning" being "deemed 'his guard' in the sense of the Article." In a further case[34] a conviction under the Article is disapproved because the specification did "not allege the absence of urgent necessity."

It may be noted that this term—"urgent necessity," is evidently of the same import as the words—"sickness or other necessity," employed in another of the Articles of this class, the 33d.[35]

944 It may also be added that the word "guard" is not to be construed as limited to the regular daily camp or post guard, but as including any formal guard—as an escort guard,[36] guard for prisoners, &c.

## XV. THE THIRTY-EIGHTH ARTICLE.

[Drunkenness on Duty.]

"ART. 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 shall suffer such punishment as a court-martial may direct. No court-martial shall sentence any soldier to be branded, marked, or tattooed.*"

**ORIGIN.** This provision, of which the original in our code is Art. 20 of 1775, may be traced, so far as pertains to drunkenness on the part of guards or sentinels, to Art. 51 of the Code of Gustavus Adolphus.

**CONSTRUCTION.** The principal questions which have arisen under this Article have been raised upon the meaning of the terms—"found on," "drunk," and "duty." To determine in what consists the specific offence, it will be necessary to interpret these several expressions.

"**Found on.**" From the use of these words it is to be implied that the drunkenness of the offender must exhibit itself after he has entered upon, and while he is on, the duty.[37] The Article does not require that the accused shall have become drunk, but that he shall have been found, *i. e.* discovered or perceived, to be drunk, when on the duty, and it does not therefore necessarily follow that his drunkenness shall have commenced after the duty has been entered upon. To permit an officer or soldier, when inebriated, to go upon any duty of importance, while in general involving an injustice to the individual, is

[31] Page 550. And see O'Brien, 95.
[32] G. C. M. O. 142, Dept. of the Mo., 1871.
[33] G. O. 71, Second Mil. Dist., 1867.
[34] G. O. 48, Dept. of Ark., 1864.
[35] See Hough, 292.
[36] See G. O. 48, Dept. of Ark., 1864.
[37] Samuel, 551; O'Brien, 136.

also a reprehensible act and a military offence in the superior who *know-*
945 *ingly* suffers it.[38] But the fact that he was already intoxicated cannot render the party himself any the less legally liable under the Article, if, after having entered upon the duty, his intoxication continues and his condition is detected.[39]

But, on the other hand, a soldier, (or officer,) is not "found" drunk in the sense of the Article, if he is simply discovered to be drunk when ordered, or otherwise required, to go upon the duty, upon which, because of his condition, he does not enter at all. His offence is then chargeable not under this but under the 62d Article.[40]

"Drunk." The state of drunkenness contemplated by the Article may be said to be one which incapacitates the officer or soldier, mentally or physically, for the proper performance of the duty upon which he has entered.[41] There are of course various grades of intoxication, and, under those which are less pronounced, the party may be able to perform the duty imperfectly—to get through it after a fashion—but not *properly*. In any such case he is in general to be held to be "drunk" in the sense of the Article equally as if he were totally incapacitated; a due, proper, and full execution being that which is required of him, and his offence being complete where, by becoming intoxicated, he has rendered himself either more or less incompetent for the same.[42]
946 And, as a general rule, in proportion as the duty is difficult or important,[43] and especially in time of war,[44] a less degree of intoxication may

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[38] "The officer who details or puts him on duty, knowing his drunken condition, is liable to censure and punishment." (Gen. Schofield.) G. C. M. O. 123, Div. Atlantic, 1887. And see remarks of Gen. Pope in G. C. M. O. 111, Dept. of Cal., 1885; also G. O. 21, Id., 1869; Do. 14, Id., 1871; Do. 51, Dept. of the East, 1869; G. C. M. O. 5, Id., 1871; Do. 20, Dept. of Texas, 1866; G. C. M. O. 12, Id., 1880; Do. 23, Dept. of Dakota, 1881; Do. 1, Dept. of Arizona, 1891; Do. 17, H. A., 1892.

[39] G. O. 11, Dept. of La., 1869; G. C. M. O. 113, Dept. of the Mo., 1873; Do. 12, Dept. of Texas, 1880; Do. 3, Dept. of the Platte, 1886; Do. 123, Div. Atlantic, 1887.

[40] G. C. M. O. 123, Div. Atlantic, 1887; Do. 17, H. A., 1892.

[41] See Samuel, 551; Hough, 295; O'Brien, 136; also Orders cited in next note.

[42] In G. C. M. O. 33 of 1875, a finding upon a specification to a charge, under this Article, of "guilty excepting the words 'did become drunk,' and substituting therefor 'did become under the influence of intoxicating liquor,'" was disapproved by the Secretary of War, (as drawing too fine a distinction for the practical administration of justice,—see DIGEST, 38,) and the general rule is laid down that—"Any such intoxication as is sufficient to sensibly impair the rational and free exercise of the mental or physical abilities, is drunkenness within the meaning of the law." In G. O. 53, 98, Army of the Potomac, 1862, it is said on this subject: "Unfitness may be more or less complete; but to be intoxicated *at all* unfits a man either to give an order or to execute it." * * * "Nothing can be more erroneous than to suppose that as long as an officer is not drunk to insensibility—a condition, moreover, in which he is far less apt to do mischief than when he is simply drunk enough to be indiscreet—he is not drunk at all. The fullest possession of his faculties, by every officer, is necessary to fit him to discharge his duties properly. These duties are not so simple as to be within the competency of a half-sober person." (Gen. McClellan.) And see remarks of Gen. Augur in G. O. 33, Dept. of the Platte, 1871. In G. C. M. O. 13, Dept. of the Mo., 1882, Gen. Pope refers to the unsatisfactory action of a court in not finding an officer guilty under this Article, as apparently owing to the fact that—"while the accused was always more or less under the influence of alcohol, he never quite reached the gutter." In G. C. M. O. 21, Dept. of the Mo., 1870, Gen. Schofield notices that—"it is not necessary to prove an officer so drunk as to be unable to *walk*, or to exercise in some degree his mental faculties, to convict him of being drunk on duty." In G. O. 48, Dept. of Va. and No. Ca., 1864, it is held not to be necessary "in order to be drunk" that "a man must be in such a condition that he cannot *ride*." That drunkenness, intoxication, and inebriation are synonymous terms, see G. O. 58, 98, Army of the Potomac, 1862; 1 Opins. At. Gen., 296.

[43] As where the duty is that of commander of a separate post. G. C. M. O. 21, Dept. of the Mo. 1870.

[44] See G. O. 57, Dept. of Va. & No. Ca., 1863; Do. 2, 48, Id., 1864, Do. 5, Id., 1865.

be held sufficient to constitute the offence. But where the party is in fact qualified to perform the duty, as it was intended to be, or should be, performed, the circumstance that he is enlivened or made dull or unwell by his indulgence, will not alone render him chargeable under the Article.[45]

It should be observed that it is not essential that the drunkenness be caused by the drinking of spirituous beverages. As is well remarked by Simmons,[46] the offence is complete whether the party found drunk be "under the influence of liquor, *opium, or other intoxicating drug or thing.*"

"Duty." The connection in which this term is employed—"guard, party, or other duty," has at times induced the impression that only such duty was meant as was similar in its nature to guard duty; that is to say, some regular and stated duty for which the officer or soldier has been formally *detailed.*

947 But the ruling in an early General Order of the War Department,[47] that the Article had "reference solely to duties of detail," was overruled in a later Order,[48] in which it was held by the Secretary of War that the omission from the present Article, after the word "duty," of the words "*under arms,*" which were contained in the original codes of 1775 and 1776, was "*with intention to include all descriptions and circumstances of duty.*" In a third Order[49] this second interpretation of the Article was expressly affirmed, and it was remarked that "the omission of the words '*under arms*' removed one restriction without introducing a new one," and that "the general words '*or other duty*' provide for all actual occasions of duty." Upon this authoritative construction, which has been quite generally followed in practice, it may be held to be the law that not only is drunkenness on guard, drill, police, parade, inspection, muster, court-martial,[50] or any other duty or exercise of routine, fully within the contemplation of the Article, but also drunkenness upon any occasion of duty properly devolved upon an officer or soldier by reason of his office, command, rank, or general military obligation.[51] The specification should of course set forth precisely the description of the duty which the accused was on at the time of the offence.[52]

**Continuous duty.** While the term "on duty" can scarcely be regarded as so broad or comprehensive, in respect to the periods or occasions embraced, as the phrase "in the line of duty," employed in statutes relating to pensions, bounty and the like,[53] there are yet some instances recognized by the authorities,

948 where officers or soldiers, by reason of the peculiar nature of their office or duty, are considered to be continuously, or during business or working hours, on duty, and thus amenable to charges under this Article if becoming intoxicated during such period. Within this description have been classed *post*

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[45] See O'Brien, 136, 309.

[46] § 136. And see Hough, (P.) 208; James, 60; also cases—to the same effect—in G. O. 28 of 1851; G. C. M. O. 49 of 1883; Do. 32, Dept. of the Mo., 1888.

[47] G. O. 59 of 1843.

[48] G. O. 7 of 1856.

[49] G. O. 5 of 1857.

[50] See G. O. 58 of 1831; G. C. M. O. 53 of 1882.

[51] As to drunkenness on occasions of *reporting* for duty or for orders, see DIGEST, 37; also case, in G. C. M. O. 2 of 1888, of an officer tried for being found drunk on reporting as new officer of the day to his post commander, and sentenced to be dismissed, which sentence is approved by the President. In G. C. M. O. 18 of 1891, is a case of drunkenness on duty by a musician of the band of the Military Academy at a military funeral—of which the proceedings and sentence are duly approved.

[52] G. O. 18 of 1887.

[53] In the Joint Resolution of April 12, 1866, the term "*in the line of duty*" is expressly defined as meaning—"while actually in service under military orders, not at the time on furlough or leave of absence, nor engaged in any unlawful or unauthorized act or pursuit."

*commanders*[54] and *post surgeons*,[55] who are in general liable to be called upon for duty at any time during at least the business hours of the day. So a *post* or *depôt quartermaster* would ordinarily be similarly amenable during any of the hours in which he may properly be called upon for the performance of duties pertaining to his office.[56] An *officer of the day* is thus liable if found drunk at any moment of his tour of duty whether in the day time or at night.[57]

Again, *in time of war*, and especially in the field before the enemy, the status of being *on duty*, in the sense of this Article, may be uninterrupted for very considerable periods. As remarked by the reviewing authority, in approving a conviction of an officer under the Article early in the late war,[58]—"an officer, when his regiment is in front of the enemy, is at all times *on duty*." In a more recent Order of the War Department,[59] in the case of an officer found drunk while on duty in command of a company "on an expedition against hostile Indians," it was held by the Secretary of War that—"the nature of the service and the safety of the command certainly constitute this a duty in the sense of the Article."[60]

949 **Term of duty.** The status of being on duty continues of course till the duty is executed or the party is discharged or relieved therefrom. A question, however, as to when the status actually commences has sometimes been raised in cases of soldiers ordered to go on guard, or to turn out for parade, drill, &c., and who are "found drunk" while being inspected or formed in the ranks before entering upon the specific duty designated. In these cases it has, in some instances, been held that as the soldier, when so found, has not yet gone upon the guard, &c., he has not commenced to be "on duty" in the sense of the Article.[61] But the opposite—as held in other instances[62]—is deemed the better view; for although the soldier, in such cases, has not entered upon the duty for which he is finally destined, he is upon the duty preliminary to that, and which is as much a duty as that is, of reporting and being inspected.

**What is military duty.** The term "duty," as used in this Article, means of course military duty. But—it is important to note—every duty which an

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[54] See cases in G. O. 5 of 1857; G. C. M. O. 10 of 1879; Do. 53 of 1883; Do. 21, Dept. of the Mo., 1870; Do. 48, (H. A.) 1887. And compare G. C. M. O. 9 of 1875.

[56] DIGEST, 37. And note remarks of Secretary of War in G. O. 64 of 1851.

[56] See the case published in G. C. M. O. 49 of 1883.

[57] "It is not necessary," to bring his case within the Article, "that the officer of the day should be drunk at inspection of the guard, or at the performance of any particular act as officer of the day. He is liable, if found drunk between going on and going off guard." G. O. 54, Dept. of the South, 1875. (Gen. McDowell.) And see Do. 7, War Dept., 1856; Do. 5, Id., 1857. So a member of a camp or post guard is *on duty* not merely while on post as sentinel, but during the entire day or period for which he has been detailed for guard. See above cited G. O. of Dept. of the South; also case in G. C. M. O. 2 of 1888, referred to *ante*.

[58] G. O. 57, Dept. of Va. & No. C., 1863. And see Do. 1, 48, Id., 1864; G. C. M. O. 5, Id., 1865.

[59] G. C. M. O. 9 of 1875.

[60] An officer may be *on duty* for certain purposes, but not in the sense contemplated by this Article. Thus an officer ordered to relinquish his command and to remain at his post and "await further orders from Washington," was held to be "under orders in the line of duty," and "on the duty of awaiting orders," so far as to be entitled to the commutation allowance for fuel and quarters under the then Army Regulations. 9 Opins. At. Gen., 376. But an officer found drunk at his post during such a status would not be amenable to trial under this specific Article, however much he might be under the 62d or 61st.

[61] See G. O. 27, 32, Dept. of the South, 1873; G. C. M. O. 2, Div. of Pacific & Dept. of Cal., 1881.

[62] G. O. 11, Dept. of La., 1869; G. C. M. O. 12, Dept. of Texas, 1880. And see Do. 113, Dept. of the Mo., 1873; also O'Dowd, 72.

officer or soldier is legally required, by superior military authority, to execute, and for the proper execution of which he is answerable to such authority, is necessarily a military duty, and this, although it be a duty which a civilian could with equal fitness be employed to perform. Thus an officer or soldier engaged in engineering operations, not connected with military works, under the orders of the Chief of Engineers of the army, or one duly serving upon a *posse comitatus* in aid of a civil official,[63] or acting as an Indian agent
950 under Sec. 2062, Rev. Sts.,[64] would, if disqualifying himself by intoxication for the proper performance of the service devolved upon him, be amenable to charges under the present Article.[65]

**PROOF.** The simplest and most satisfactory evidence of the fact of drunkenness will be the statements of witnesses as to the appearance, condition, manner, language or acts of the accused, or other attendant circumstances from which a state of intoxication may be presumed. But as drunkenness is to a great extent a matter of common observation, it is held not to be an infringement of the rule of evidence—that a witness, (not an expert,) shall not be asked or allowed to give his *opinion* for witnesses, when interrogated as to the condition of the accused, to state, as a fact, that he "*was drunk.*"[66] But witnesses so stating should, for the information of the court and the reviewing officer, properly be required to state also in detail the observed facts upon which their conclusion is based.[67] Further, military witnesses, when of the proper rank and experience to enable them to testify as *quasi* experts, may be asked their opinion as to whether the accused was or not capable, under the circumstances of the case, of properly executing the duty indicated in the specification.

**DEFENCE.** When a drunkenness while on duty is shown, but the fact is that the accused had become drunk before he was detailed on the duty, so that his actual offense was not properly one under this Article but rather under the 62d, he may show such fact by way of defence.[68] He may also show in defence that the spirits or drug had been taken by him as a medicine only, and that because of the strength of the dose, a weak head, depreciated health,
951 the heat of the weather, fatigue, or other cause, it had over-affected him. But he should prove further that the same had been prescribed by a medical officer or physician, since an officer or soldier is not authorized to risk incapacitating himself for duty by taking medicine at discretion.

**FINDING.** Where the evidence shows that the accused was drunk but not on duty, the court may and properly should find him guilty of the specification, *except* as to the averment in regard to the duty, and not guilty of the charge

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[63] See O'Dowd, 72.

[64] Otherwise perhaps where the officer was so serving under the Act of July 13, 1892, which detaches him from military command and places him "under the orders and direction of the Secretary of the Interior."

[65] In the leading case of Runkle *v.* U. S., 19 Ct. Cl., 412, it was held that services on a detail in the Freedmen's Bureau in 1870, was a military duty, and the court well say—"Whatever service a military officer is lawfully ordered by his superior officer to perform is, in the eye of the law, a military service, though when performed by a private citizen, under the employment of others, it would be a purely civil service. It is the military character of the officer, acting under lawful military orders, which makes the duty a military one, whatever may be the particular description of work involved in the performance of that duty."

[66] See Chapter XVIII—"Statement of opinion or belief."

[67] G. C. M. O. 59, Div. Atlantic, 1888.

[68] G. C. M. O. 17 of 1892.

but guilty of "conduct to the prejudice of good order and military discipline." This is one of the cases in which such form of finding is especially useful and appropriate.[69]

## XVI. THIRTY-NINTH ARTICLE.

[Offences of Sentinels.]

"ART. 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.*"

**OBJECT OF THE ARTICLE.** The purpose of this provision, (which may be traced to Art. 32 of the Code of James II, as derived from Art. 50 of Gustavus Adolphus,) is to secure on the part of sentinels that alert watchfulness and steadfastness which are the very essence of their service. These qualities, important as they are to the protection from depredation or loss by fire of the public property collected at a military station, are, in *time of war*, absolutely essential to ensure a camp or post against the danger of surprise and capture by a hostile force. Grave as must be on all occasions the offences specified in the Article, it is in the field before the enemy that they become of the most aggravated character, and it is especially to prevent their occurrence at such critical seasons that they are made punishable with *death*.[70]

952 **SLEEPING ON POST—Proof.** As to the proof of this offence, it should first be shown by the officer or non-commissioned officer whose duty it was to detail and to post the sentinel, that he was duly detailed and duly posted as charged. That he was found asleep should most properly be proved by the testimony of the officer of the day, or officer or non-commissioned officer of the guard, (or by some member or members of the guard or patrol then present,) by whom he was discovered in that condition. That he was actually asleep may be shown by some such fact or facts as the following, *viz.*—that accused, (if the offence occurred, as it usually does, in the night,) failed to challenge the officer or party approaching his post; that he was found lying down, or in a position favorable to sleep, instead of standing or walking his beat; that he was snoring or breathing as if in sleep; that he did not answer when spoken to, once or repeatedly; that he did not apparently become conscious till touched, shaken, &c.; that when roused he was stupid; that he had dropped or laid aside his musket, or that he allowed it to be taken from him without resistance, &c.

**LEAVING HIS POST BEFORE BEING REGULARLY RELIEVED—Proof.** After showing the due detail and posting of the accused, this offence is usually established by evidence that, when the post was officially visited during a tour of duty of the accused, he was not found upon it, and that he had not been for any cause relieved by an officer or non-commissioned officer of the

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[69] The corresponding form in our *naval* practice is—"*Guilty in a less degree than charged; guilty of drunkenness.*"

[70] "There is nothing upon which the safety of an army or command so much depends as the faithfulness and vigilance of sentinels." G. O. 67, Dept. of Washington, 1866. (Gen. Canby.) "The duty of a sentinel is of such a nature that its neglect by sleeping upon or deserting his post, may endanger the safety of a command or even of a whole army, and all nations affix to the offence the penalty of death." G. O. 8, Army of the Potomac, 1861. (Gen McClellan.) And see G. O. 15 and 24 of the same command and year; also Samuel, 556–559. The last named authority refers to another purpose of sentinels, that they "are required to watch that others may sleep, whereby the camp may be seasonably refreshed."

guard or other competent authority. Or it may be shown that he was, under similar circumstances, discovered to be at a place—his quarters for example—quite other than his post, or was seen *off* his post and at a material distance from it.

"Regularly relieved." The Army Regulations,[71] (expressing a custom of the service,[72]) direct that a sentinel's tour of duty, between reliefs, shall, as a general rule, be two hours; and they further prescribe by what officers a
953 sentinel may be relieved at the end of a tour.[73] In cases of illness or other urgency, occurring pending a tour, a sentinel may be relieved temporarily or altogether, upon application transmitted in the usual manner to the officer of the guard. A sentinel, however, cannot relieve himself,[74] nor can he "regularly" be relieved by another sentinel except in the presence and under the supervision and direction of an officer or non-commissioned officer of the guard. Referring, in a case of the offence under consideration, to the mere relieving of sentinels by each other, Gen. Ord well says—"This method of conducting guard duty is in direct violation of the Regulations, and sentinels allowing themselves to be thus relieved are liable to trial for a violation of the 39th Article."[75]

**DEFENCE AND EXTENUATION.** It has been held no *defence* to a charge of "sleeping on post" that the accused was on guard the day previous;[76] or that an imperfect discipline had prevailed in the command and similar offences had been allowed to pass without notice;[77] or that the accused was not duly posted as a sentinel;[78] or that he was ill, since, if really so, he should not have gone on duty at all but duly reported for medical treatment.[79] So, to a charge of "leaving post before being regulary relieved," it has been held no defence that it was a custom in the command for sentinels to relieve themselves, and that the accused had but followed this custom.[80]

Circumstances, however, which could not constitute a legal *defence*, may be admissible as evidence going to *extenuate* the offence committed and
954 reduce the measure of the punishment, or to induce a mitigation of the punishment, after sentence, by the reviewing authority. Thus it may be shown that the accused, when posted as a sentinel, was ailing or disabled;[81] or that he had already been overtasked by excessive guard duty or other continuous service;[82] or that he had temporarily left his post under an extraordinary stress of weather;[83] or that, in irregularly relieving himself or allowing

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[71] Par. 506.

[72] See Hough, 303; Id., (P.) 180.

[73] Par. 508.

[74] See G. C. M. O. 80, Dept. of the Mo., 1875; Do. 45, Dept. of the Platte, 1891.

[75] G. C. M. O. 38, Dept. of Texas, 1875. And see O'Brien, 138; G. O. 166, Dept. of the South, 1864; G. C. M. O. 80, Dept. of the Mo., 1875.

[76] G. O. 74, Army of the Potomac, 1862.

[77] See Order cited in note 78.

[78] For "he had lawfully assumed all the responsibilities of a sentinel, and should have been punished for his fault" accordingly. (Gen. Hancock.) And see G. O. 166, Dept. of the South, 1864.

[79] G. C. M. O. 32, Dept. of the Mo., 1887. (Remarks of Gen. Merritt.)

[80] For such a custom is "clearly contrary to law." G. C. M. O. 80, Dept. of the Mo., 1875.

[81] See G. C. M. O. 136 of 1864; G. O. 72, Dept. of Cal., 1872; Do. 14, Id., 1871; Do. 21, Id., 1869; Do. 20, Dept. of N. Mex., 1862; Do. 20, Dept. of Texas, 1866.

[82] See G. O. 10, 62, Dept. of Va. & No. Ca., 1863; Do. 2, Northern Dept., 1865; Do. 67, Dept. of Washington, 1866; G. C. M. O. 44, Dept. of Texas, 1875.

[83] Par. 506 of the Army Regulations specially authorizes the relieving of sentinels whenever "the state of the weather or other causes shall make longer or shorter intervals" than the regular tours "necessary."

himself to be relieved, he had but observed a usage sanctioned by his official superiors; or that, being a recruit, he had not been properly instructed in his duties as a sentinel.[84]

**PUNISHMENT.** The infliction of the death penalty for the offences specified in Art. 39 is as old as the history of armies.[85] In our practice, the extreme punishment is most rarely, if ever, resorted to except in time of war.[86] During the late war of the rebellion it was adjudged not unfrequently for the offence of sleeping on post.[87]

## 955 XVII. THE FORTY-FIRST AND FORTY-FOURTH ARTICLES.

[Causing False Alarms: Disclosing the Watchword.]

"ART. 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.*"

"ART. 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.*"

**ARTS. 41 TO 46.** Of this series of Articles—which refer to a class of *capital* offences pertaining mostly to time of *war*—those will be considered together which may be most conveniently associated.

### FORTY-FIRST ARTICLE.

**ITS OBJECT.** Samuel,[88] in commenting upon the corresponding early British Article,[89] writes:—"The mischiefs it seeks 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 fatigues of war render requisite; and secondly the harassing and vexing of the soldiers by unfounded alarms, by experience of the falsity of which in former instances they might chance to be deceived when" a true "signal of alarm might be given, or be less able or disposed to exert themselves * * * when their prompt and immediate services should be demanded."

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[84] See G. O. 74, Army of the Potomac, 1862. In cases where the offence of the accused has been in part induced through the neglect or oppressive treatment of a superior, the latter has been not unfrequently pronounced more culpable and deserving of punishment than the former. See G. O. 15, Army of the Potomac, 1861; Do. 10, 62, Dept. of Va. & No. Ca., 1863; Do. 21, Dept. of Cal., 1869; G. C. M. O. 59, Dept. of Texas, 1872; Do. 80, Dept. of the Mo., 1875; DIGEST, 39.

[85] "It is said that Epaminondas, in making the circuit of his camp, slew a sentinel whom he found sleeping, using this memorable saying—'that he did him no harm, leaving him only as he found him.'" Samuel, 557.

[86] See G. O. 20, Dept. of N. Mex., 1862.

[87] To refer only to cases published in the Orders of the War Department—see G. O. 125, 127, 185, 189, 197, 225, 234, 260, 264 and 377, of 1863; G. C. M. O. 31, 38, 75, 81, 113, 151, 235 and 402, of 1864. In every instance the sentence was either commuted or remitted by President Lincoln.

In G. O. 17, Dept. of the Mo., 1861, is approved a peculiar sentence for this offence, *viz.*—to forfeit certain pay, to stand on a barrel for a certain period in the centre of the camp, and to "have a sign hung on his back inscribed 'Sleepy Head.'"

[88] Page 575.

[89] See its originals in Arts. 14 and 15 of Sec. III of Charles I, Art. 28 of James II, and Art. 48 of Gustavus Adolphus. And compare Art. 11 of Richard II and note to same, in Appendix.

**THE NATURE OF THE OFFENCE.** For an illustration of the term "*false alarms*" recurrence may be had to the form of the Article in the code of 1806, where the language, repeated from the British original, is—

956 "Any officer, who, by discharging of firearms, drawing of swords, beating of drums, or by any other means whatsoever, shall occasion false alarms," &c.[90] A later British Article[91] added, (after "beating drums,")—"making signals, using words, or by any means whatever." Among "*other means*," says Hough,[92] "may be enumerated the sounding of trumpets, bugles, or other wind instruments." Samuel[93] observes that "by '*other means*' may be intended such noise, or cry, or signal, or report, as might be raised or made for the purpose of causing, or be calculated to cause, an unfounded alarm."

That the alarm was a *false* one will be established by evidence to the effect that there existed at the time no material cause or occasion which could reasonably induce a general alarm.[94] Thus, before the enemy, in the absence of any warning from the picket line or outposts, it would in general constitute an offence under this Article for an officer, within the camp or post, to order the long roll to be beaten or otherwise raise the alarm, except on account of some serious internal cause, as a dangerous fire.

Where indeed there may exist reasonable ground for an alarm, it will not be an offence but the reverse to arouse and notify the command by the most effectual means.[95]

**The intent.** The offence as defined in the later British Article[96] was that of "*intentionally*" occasioning false alarms. No such qualification is contained in our Article, and if only the alarm be false, that is to say without reasonable foundation, the offence will be complete whatever may have been the intention. That the officer honestly believed that sufficient cause existed for an alarm raised by him when the opposite was the fact, while not affecting the question of his legal liability to a conviction, may properly be shown in evidence as going to extenuate his offence and reduce the measure of the punishment.

957 **Application in practice.** "From the nature of the Article," observes O'Brien,[97] "it will most generally find its application in a season of war, though its letter does not in any way exclude times of tranquillity." Occasions of conviction under it have been rare in our army even in war. In an Order of 1863[98] is published a case of a lieutenant convicted of a violation of this Article in discharging his revolver "several times unnecessarily," while an officer of the advance guard, "thereby causing the garrison to stand under arms." In a more recent Order of the War Department,[99] is the case of an officer convicted of causing a cannon to be discharged in the garrison, thereby creating an unnecessary alarm.

FORTY-FOURTH ARTICLE.

**ORIGIN.** The original of this provision may be found in Art. 31 of the Code of James II, and Art. 26 of our first Articles of 1775.

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[90] One of the charges against Col. T. Chambers, 1st Infy., (1826,) was causing the camp to be alarmed at night by the unnecessary discharge of fire-arms and sounding of the long roll.—Am. S. P., Mil. Af., vol. 3, p. 307.

[91] Art. 55, (and also Art. 71,) of 1873. Clode, M. L., 269, 272.

[92] Page 320; also, Id., (P.) 177.

[93] Page 576.

[94] See Hough, 321.

[95] See Samuel, 575.

[96] Art. 55 of 1873.

[97] Page 139.

[98] G. O. 76, Dept. of the Gulf.

[99] G. C. M. O. 18 of 1876. This act, however, (committed under the influence of liquor and in time of peace,) is charged under Art. 62.

**WATCHWORD AND PAROLE DISTINGUISHED.** The British commentators[100] distinguish the *watchword* as the "key of the camp or garrison at night" and the *parole* as "the passport for the day." Our Army Regulations, (par. 493,) define these terms as follows:—"Countersigns, paroles and watchwords will be used in the performance of guard duty, especially in the presence or vicinity of an enemy. The *countersign* is a word given daily to enable guards and sentinels to distinguish persons at night. It is given to such persons as are entitled to pass and repass during the night, and to the officer, non-commissioned officers, and sentinels of the guard. To officers commanding guards a second word, called the *parole*, will be given as a check upon the countersign, by which such officers as are entitled to make visits of inspection at night may be distinguished."[1]

958 **THE TWO OFFENCES CONSIDERED—1. Making known the watchword to persons not entitled to receive it.** The Article, (which is applicable not merely to time of war, but also to time of peace,[2] upon those rare occasions when a countersign is employed,) includes, in the first of the offences designated, all impartings, secretly or openly, of the watchword to improper persons, whatever be the motive—whether, for example, the giving of aid to the enemy, or the facilitating of the admission into the camp or post of unauthorized persons not enemies, or the exit of deserters, prisoners, or other parties absenting themselves without authority.[3] It would include also cases of the offence committed without specific motive, but through negligence merely or want of appreciation of the purpose or significance of the watchword.[4]

What persons are "*not entitled to receive*" the watchword is best ascertained by considering who *are* or *may be* entitled to it. The Article itself indeed indicates in general terms to whom it may be communicated, *i. e.* to those "entitled to receive it *according to the rules and discipline of war.*" Such persons are—*First:* the officer of the day, and the officers, non-commissioned officers, and soldiers of the camp or post guard, provost guard, picket-guard and outposts;[5] *Second:* such officers or soldiers not on guard, members of the families of officers or soldiers, officers' servants, civil employees, or camp-followers, as may be authorized by the commanding officer to pass the lines
959 for any purpose;[6] as well as any other persons military or civil, not

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[100] Samuel, 571, 573; Hough, 316.

[1] As to the procedure of giving and receiving the countersign or parole, see pars. 513, 514, A. R. Beside the regular watchword or parole, a special one is "sometimes given preparatory to an action," (O'Brien, 140,) or to the members or officers of a force detailed to execute a particular movement, especially at night.

[2] See O'Brien, 140.

[3] See case in G. O. 242 of 1863.

[4] In a case of an officer convicted of improperly making known the parole, Gen. Rosecrans observes as follows:—"His excuse, that he did not know the object and purposes of the parole, and had not noticed what the Regulations contained on that subject, only aggravates his offence by adding to it inexcusable ignorance. After receiving the parole and not knowing its use, he should have sought information before putting it to any use." G. O. 24, Army of Occupation, W. Va., 1861.

[5] In nearly all the reported cases the accused was an officer or soldier of this class. See G. O., Army of Occupation, W. Va., 1861; Do. 18, Army of the Potomac, 1862; Do. 45, Dept. of the South, 1862; Do. 28, Id., 1864; Do. 47, Dept. of Washington, 1863; Do. 58, Dept. of the Mo., 1864; S. Field O., Dept. & Army of the Tenn., Jan. 11, 1864.

[6] See Samuel, 573–4, where, besides the proper officers and soldiers, he mentions, as persons to whom the watchword may be imparted, "such others as have the common or special privilege" of the garrison, &c.,—"as licensed inhabitants, sutlers, camp-followers and the like. But," he adds, "the countersign is not made known, as of course, to the latter description of persons, but on the sound discretion of the officer in command." And see O'Brien, 140.

connected with the command, who, as visitors or for purposes of business,[7] may be permitted by the same authority to enter the post or depart from it without detriment to its security or prejudice to the interests of the service. In brief the persons intended by the Article are those whom the law and custom of the service recognize as proper persons to be furnished with the countersign, and whom the rules of military discipline do not at the time preclude from being entrusted with it—a class liable to be restricted, at a period of war or other emergency, to a very limited number.

In charging an offence under the Article, it need not be alleged, nor need it be shown by the evidence, *who* the particular persons were: provided they were persons "not entitled" to receive the watchword, it is immaterial whether or not they were personally known either to the prosecution or the accused.[8]

It is no defence that the accused *did not know* that the party to whom he communicated the watchword was a person to whom it was not authorized to be imparted. The Article makes the act punishable without regard to the knowledge of the accused on this subject. The fact, however, that he honestly believed that he was giving the word to a proper person would be admissible in evidence in mitigation of punishment.

**2. Giving a parole or watchword different from that received.** It is observed of this offence by Samuel,[9] that, "though it could afford no information to an enemy, it might induce the most mischievous and ruinous confusion in the intended operations" of an army.

The term "that which he received" will include of course a second or new parole or watchword where such has been *substituted* for one previously given out for the same night or occasion. The issue of a new countersign, to
960 replace one which has been lost or communicated to the enemy, is provided for by par. 1075 of the Army Regulations of 1881.[10]

It would constitute an extenuating circumstance, though not a defence, that the accused, because of being a foreigner or for other good reason, had not understood the word when given out and so repeated it incorrectly.[11] Hough[12] observes, of the watchword or parole, that it "should be some short word which is familiar to all and easily to be pronounced."[13] According to an army regulation of 1863, (§ 558,) "the parole is usually the name of a general, the countersign that of a battle;" but this instruction is not repeated in the Regulations of subsequent dates.

## XVIII. THE FORTY-SECOND AND FORTY-THIRD ARTICLES.

[Misbehaviour Before the Enemy and Like Offences.]

"ART. 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.*

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[7] See Duane's Mil. Dict.—"Countersign."

[8] See the allegations in the specifications in cases published in G. O. 242 of 1863; S. Field O., Dept. & Army of the Tenn., Jan. 11, 1864.

[9] Page 573.

[10] As to the practice of changing the countersign when it is suspected that it has become known to the enemy or "improper persons"—see Samuel, 572; Hough, 317.

[11] See Samuel, 572; Hough, 316.

[12] Page 316; Id., (P.) 175.

[13] "It (the countersign) ought always to be given in the language most known to the troops." Duane, Mil. Dict.—"Countersign."

"ART. 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.*"

FORTY-SECOND ARTICLE.

**ORIGINALS.** The originals of this and the next Article may be traced in Arts. 9 and 13 of Sec. III of Charles I, Arts. 22, 23 and 24 of James II, and in various provisions of the Code of Gustavus Adolphus, especially in the
961 Arts. numbered 55, 56, 62, 64, 73, 79, 89, 92, 93 and 94. The offence of pillaging is denounced in the still earlier Art. 7 of Richard II.

**AS COMPARED WITH PROVISIONS OF EARLIER AMERICAN CODES.** The present Article is Art. 52 of the Code of 1806 expressed in improved English. The existing form is more general than that of 1775,[14] which provided for the punishment of the offences described only when committed "in time of an engagement;" and, as respects the offence of "leaving post, &c., to plunder and pillage," is also more general than the form of 1776,[15] which made this act punishable only "after victory." Other details in which the present Article differs from its predecessors will be noticed hereafter.

**MISBEHAVIOUR BEFORE THE ENEMY.** This offence may consist in:—

1. Such acts by a *commanding officer*, as—needlessly surrendering his command,[16] or abandoning it before the enemy;[17] abandoning, or absenting himself from, his post when expecting an attack;[18] failing to advance against, attack, or resist, the enemy, when ordered or properly called upon to do so;[19]
962 retreating, or withdrawing his command, before the enemy, without sufficient cause;[20] conducting a retreat in a disorderly manner and without the proper precautions;[21] falling to rally his force when in disorder but capable of being rallied;[22] procuring himself unnecessarily to be relieved from the com-

[14] See Arts. 25 and 30; also Nos. 10 and 12 of the "Additional" Articles of November of that year.

[15] Arts. 12, 13 and 14, of Sec. XIII.

[16] See case in G. O. 87, Dept. of the Ohio, 1864. The leading case in our military history of an officer tried under this Article for a *surrender* is that of Brig. Gen. Wm. Hull, who was convicted of "cowardice" in surrendering Fort Detroit and the "northwestern army" under his command to the British, in 1813, and sentenced to death. The court, however, "in consideration of his revolutionary services and his advanced age, earnestly" recommended him to clemency, and his sentence was approved, but remitted by President Madison.

[17] See G. C. M. O. 114 of 1864; G. O. 22, Mountain Dept., 1862; Do. 21, Dept. of the Tenn., 1863; Do. 37, Middle Dept., 1864; Do. 57, Dept. of the Gulf, 1864; Do. 7, Dept. of W. Va., 1864. An earlier leading case is that of Capt. Dyson, U. S. Artillery, tried and sentenced to be dismissed for running away and abandoning his post of Fort Washington, at the time of the capture of Washington, D. C., by the British. G. O. Tenth Mil. Dist., Nov. 17, 1814; American State Papers, Military Affairs, vol. I, p. 588.

[18] G. O. 144, Army of the Miss., 1862; Do. 174, Dept. of the Mo., 1864.

[19] See G. O. 18 of 1863; G. C. M. O. 33 of 1880; G. O. 7, Dept. of W. Va., 1864; S. Field O., Dept. of the Tenn., Jan. 11, 1864; Do. 71, Dept. of Washington, 1865.

[20] See G. O. 189, 282, of 1863; G. C. M. O. 33 of 1880; G. O. 144, Army of the Miss., 1862; Do. 73, Dept. of Va. & No. Ca., 1864. In G. O. 229 of 1863, an officer was convicted of allowing his command to retreat in disorder before a body of U. S. troops, supposed to be the enemy.

[21] Hough, 341. And see G. O. 144, Army of the Miss., 1862. The "misbehavior before the enemy," of which Maj. Gen. Chas. Lee was convicted, (1778,) was his making an unnecessary and in some respects disorderly retreat, at the battle of Monmouth.

[22] See G. O. 57, Dept. of the Gulf, 1864; Do. 73, Dept. of Va. & No. Ca., 1864; Do. 7, Dept. of W. Va., 1864.

mand when about to be engaged;[23] failing to succor, support, or relieve, another command, when ordered, or when circumstances make it a duty;[24] neglecting or refusing, when directed by a competent superior, or required by the nature of the duty devolved, to execute a movement or perform a service adverse, or with relation to, the enemy when in his front or neighborhood.[25]

2. Such acts by *any officer or soldier*, as—refusing or failing to advance with the command when ordered forward to meet the enemy;[26] going to the rear or leaving the command when engaged with the enemy, or expecting to be engaged, or when under fire;[27] hiding or seeking shelter when properly required to be exposed to fire;[28] feigning sickness, or wounds, or making himself drunk, in order to evade taking part in a present or impending engagement or other
963 active service against the enemy;[29] refusing to do duty or to perform some particular service when before the enemy.[30]

**Misbehaviour not necessarily cowardice.** Misbehaviour before the enemy is often charged as "Cowardice;" but cowardice is simply one form of the offence, which, though not unfrequently the result of pusillanimity or fear, may also be induced by a treasonable, disloyal, or insubordinate spirit, or may be the result of negligence or inefficiency.[31] An officer or soldier who culpably fails to do his whole duty before the enemy will be equally chargeable with the offence as if he had deliberately proved recreant.

**Where the offence may be committed.** The offence may be committed in a *fort* or other military post as well as in the open field,—as where an officer or soldier fails or neglects properly to defend or guard the post or its approaches, when threatened, attacked, or besieged by the enemy.[32]

**The act of misbehaviour must be voluntary.** The act or acts, in the doing not doing, or allowing of which consists the offence, must be conscious and voluntary on the part of the offender. The mere circumstance that he is found in a condition of intoxication, when called upon to march or operate against the enemy, will not constitute the offence,[33] unless such condition should have been induced for the express purpose of evading such service.

**"Before the enemy."** This term is defined by Samuel as—"in the face or presence of the enemy." It is not necessary, however, that the enemy should be in sight. If he is confronting the army or in its neighborhood,
964 though separated from it by a considerable distance, and the service upon which the party is engaged, or which he is especially ordered or properly required by his military obligation to perform, be one directed against the

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[23] G. O. 58, Dept. of the Tenn., 1863.

[24] See G. O. 18, 189, of 1863; Hough, 341.

[25] See G. O. 18 of 1863.

[26] See G. O. 204 of 1863; G. C. M. O. 90 of 1864; Do. 421 of 1865.

[27] See G. O. 146, 198, 204, of 1863; Do. 27 of 1864; G. C. M. O. 53, 134, 191, of 1865; G. O. 130, Army of the Potomac, 1862; Do. 22, Mountain Dept., 1862; Do. 21, Dept. of the Tenn., 1863; Do. 57, Dept. of the Gulf, 1864; Do. 37, Middle Dept., 1864; Do. 10, Middle Mil. Div., 1864; Do. 7, Dept. of W. Va., 1864; Do. 73, Dept. of Va. & No. Ca., 1864.

[28] G. C. M. O. 114 of 1864; G. O. 22, Mountain Dept., 1862; Do. 21, Dept. of the Tenn., 1863; Do. 10, Middle Mil. Div., 1864.

[29] See Samuel, 600; G. C. M. O. 90 of 1864; G. O. 21, Dept. of the Tenn., 1863; also G. O. 37, Middle Dept., 1864; where the allegation of which the accused was convicted, is—that he "did chew tobacco, and used other means to make himself sick, in a cowardly manner, that he might have an excuse for avoiding the coming engagement with the enemy."

[30] See G. C. M. O. 90 of 1864; Do. 53 of 1865.

[31] DIGEST, 40. Admiral Byng, while convicted of recreancy to duty before the enemy, was at the same time expressly acquitted of cowardice.

[32] See Samuel, 596; also G. O. 144, Army of the Miss., 1862.

[33] Samuel, 597–8.

enemy, or resorted to in view of his movements, the misbehaviour committed will be "before the enemy" in the sense of the Article.

The "enemy" may be hostile Indians, and the offence be committed in the course of warfare with Indians equally as in a foreign or a civil war.[34]

Defence. Beside negativing the facts charged, the accused may show in defence that in what he did he was acting under the orders or authority of a competent superior, or was properly exercising the discretion which his rank, command, or duty, or the peculiar circumstances of the case, entitled him to use. He may also show that he was suffering under a genuine and extreme illness or other disability at the time of the alleged misbehaviour. Brave or efficient conduct in action or before the enemy, subsequently to the offence, (where the accused, after the commencement of the prosecution—by arrest or service of charges—has been permitted to do duty,) while it may be put in evidence in mitigation of the punishment, and should in general mitigate it very considerably, will not, strictly, constitute a defence.[35] Nor will it constitute a defence, or scarcely an extenuation, that the accused did finally perform the service required of him or otherwise duly conduct himself before the enemy, if, after having originally misbehaved, he was compelled to such service or conduct by peremptory orders or by the use or display of force.[36]

**RUNNING AWAY.** This is merely a form of misbehaviour before
965 the enemy, and the words "runs away" might well be omitted from the Article as surplusage. Barker, an old writer cited by Samuel,[37] says of this offence:—"But here it is to be noticed that of *fleeing* there be two sorts; the one proceeding of a sudden and unlooked for terror, which is least blameable; the other is voluntary, and, as it were, a determinate intention to give place unto the enemie—a fault exceeding foule and not excusable."[a]

**SHAMEFULLY ABANDONING A FORT, POST, &c.** Of this specific form of misbehaviour before the enemy, it is to be said that whether or not the abandoning is to be regarded as "*shameful*" will depend upon the circumstances of the situation. Generally speaking, a commander is justified in surrendering or abandoning his post to the enemy only at the last extremity,—as where his ammunition or provisions are expended, or so many of his command have been put *hors du combat* that he can no longer sustain an effectual defence, and, no prospect of relief or succor remaining, it appears quite certain that he must in any event presently succumb. Every available means of holding the post and repulsing the enemy should have been tried and have failed before a surrender or abandonment can be warranted, and, if the same be resorted to on any less pretext, the commander will be chargeable with the offence indicated by the Article.[38] In time of war nothing indeed so fatally compromises the public interests, and nothing is so inevitably made the subject of investigation and trial,[39]

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[34] DIGEST, 40. In a case in G. O. 5 of 1857, the accused, a soldier, was sentenced to be *hung*, on conviction of this offence, committed in an engagement with Indians. In later cases of this offence, in G. C. M. O. 36 of 1879; Do. 33 of 1880, committed by officers commanding troops during hostilities against Indians, the accused were sentenced to be dismissed.

[35] See De Hart, 144; Ives, 100; DIGEST, 553.

[36] In G. C. M. O. 53 of 1865, a specification, (of which a soldier was convicted,) charges that having left his company while engaged in battle, he "had to be threatened to be shot in order to make him rejoin it." And see G. O. 5 of 1857.

[37] Page 601.

[38] See Samuel, 601–607; Simmons § 196; also the case of "the abandonment of Maryland Heights and the surrender of Harper's Ferry," of which the result is published in G. O. 183 of 1862.

[39] See the Resolution of Nov. 28, 1777, (2 Jour. Cong., 354,) which provides that it shall be "an established rule in Congress" to institute an investigation in the case of every fort or post abandoned, or taken by the enemy.

as the premature or unnecessary yielding up to the enemy of a fortified post; and when the periods of siege which have in many cases been withstood are recalled, it will be appreciated how possible it may be found to protract a defence under circumstances of extreme privation and difficulty.[40]

966 The "*shameful*" quality of an abandonment may be illustrated by the commander's unnecessarily leaving, to fall into the hands of the enemy instead of at least destroying them, valuable public stores under his charge at the post.[41]

The term "*post*," it has been said,[42] "has reference to some point or position, whether fortified or not, which a detachment may be ordered to occupy, or which it may be its duty to defend." The term "*guard*" is general, but would appear to contemplate an advance guard, or other outer or special guard, rather than the ordinary interior guard of a camp or station. The abandonment of a picket post or line, without using every reasonable endeavor to hold it and to retard as long as practicabe the advance of the enemy, thus enabling the main body to prepare against his approach, would be a marked instance of the offence of abandoning a "*post or guard*" specified in the article.

"WHICH HE IS COMMANDED TO DEFEND." This term is regarded as substantially synonymous with that employed in the original Article of 1775—"committed to his charge," or the fuller phrase of the corresponding British Article—"committed to his charge or which it was his duty to defend." It is conceived that, to constitute the offence, no express or specific intruction to defend the post need have been given, but that it is sufficient if an obligation to make a defence was—as it could hardly fail to be—devolved upon the commander as a necessary or reasonable implication from the order which assigned him to the command, or as a duty properly attaching to his position.

SPEAKING WORDS INDUCING OTHERS TO DO THE LIKE. Upon considering together our original Articles of 1775 and 1776, in connection with the earlier British form and the comments thereon of Samuel[43] and Hough,[44] the conclusion is reached that these words are most properly to he construed as referring not merely to the act of abandoning a post, &c., the designation of which immediately precedes such words in the Article, but also and equally to the general offence of misbehaving before the enemy first therein mentioned and to the specific offence of running away; in other words that "*the*

967 *like*" refers to any one or more of the acts previously mentioned in the Article.

By "words," as here used, may be regarded as included any verbal argument, persuasion or threat, language of discouragement or alarm, or false or incorrect statement in regard to the condition or operations of the troops or the movements of the enemy, that, whether or not intended to have such effect,[45] may avail to bring about an unnecessary surrender, retreat, or other dereliction before the enemy. As where a subordinate officer falsely reported to his superior, commanding a picket line, that the right of the line was giving way, and thus induced or contributed to induce the latter to fall back with his entire command.[46]

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[40] In the late instance of Belfort, (1870–1,) the defence was continued for three months. At Sebastopol it was protracted eleven months.

[41] See the case published in G. O. 144, Army of the Miss., 1862.

[42] Simmons § 199.

[43] Pages 607–609. And see O'Brien, 145.

[44] Pages 359–362.

[45] See Samuel, 608–9; also case of Lt. Col. Mullins, "in reference to his conduct before New Orleans, in 1815." Simmons § 152.

[46] G. O. 73, Dept. of Va. & No. Ca., 1864.

It is held by Samuel[47] that the offence is equally committed whether the *words* indicated "be used toward the commanding officer," or toward "the officers or troops under his command."

The same writer,[48] in holding that the *words* must be "unwarranted or unauthorized," notices the point that words spoken—in favor, for instance, of a surrender—in a *council of war*, convened by the commander, will not render an officer amenable to a charge under the Article.

**CASTING AWAY ARMS OR AMMUNITION.** This offence, which, from an early period of history, has been viewed as a most serious one, especially in time of war,[49] is, under the present Article, completed by the act itself of "casting away," whatever its inducement—whether it be to aid flight or relieve weariness, or a mere "wanton renunciation."[50] The term "*his* arms or ammunition," like the item "his horse, arms, clothing, or accouterments," employed in Art. 17, includes not only such arms, &c., if any, as may be personal property, but also such as have been furnished by the government to the
968 soldier for his equipment and use in the service;[51] the latter being those mainly or almost exclusively contemplated, since it is only in rare cases, as sometimes among militia or volunteer troops, that the soldier will own his arm, &c. Where—as is thus the general rule—the arm or ammunition discarded belongs not to the offender himself but to the United States, the offence is aggravated; and, in time of war, it is also aggravated by the further fact that the arm, &c., is likely to fall into the hands of the enemy.

That the arm or quantity of ammunition which the party is accused of having cast away, was thrown aside at the order of a commander, in requiring his command to lighten themselves of *impedimenta*, in order to facilitate a more rapid retreat, when pursued by the enemy, or for other military purpose, will of course constitute a defence to the charge.[52]

**QUITTING POST OR COLORS TO PLUNDER OR PILLAGE.** This offence, which, if permitted to be indulged in by troops, would convert legitimate warfare into mere marauding, and a disciplined military force into a band of stragglers and freebooters, is one of those which are regarded as the most immediately fatal to the discipline and *morale* of soldiers, and as calling in all cases for severe punishment.[53] It has been stigmatized as a grave military crime in all the codes of Articles from a very early period.[54] The General Orders, published during the late war, abound with declarations of commanders, denouncing and prohibiting pillaging and lawless foraging,[55] and

[47] Page 611. And see Hough, 362.

[48] Page 609. And see O'Brien, 145.

[49] See Samuel, 588–591.

[50] Samuel, 592; O'Brien, 146.

[51] Hough, 336; Samuel, 592.

[52] See Samuel, 592.

[53] Samuel, 585–6; Heath's Memoirs, 307.

[54] See the early British Articles referred to at the commencement of the consideration of this Article.

[55] "The whole country is overspread with straggling soldiers, who, under the most frivolous pretences, commit every species of robbery and plunder." Gen. Washington, in G. O., Hdqrs. Totoway, Nov. 6, 1780. And see G. O. 19, Army of the Potomac, 1861; Do. 40, Id., 1862; Do. 18, Dept. of N. E. Va., 1861; Do. 3, 21, Army of Occupation, W. Va., 1861; Do. 19, 30, Dept. of the Cumberland, 1862; Do. 5, Dept. of the Susquehanna, 1863; Do. 15, Dept. of the Gulf, 1862; Do. 23, 27, Id., 1863; Do. 26, 47, Dept. of the Ohio, 1864; Field Circ. 2, Dept. & Army of the Tenn., 1864; Do. 10, Army of the Tenn., 1865. In G. O. 26, Banks' Division, 1862, the Comdg. Gen. calls upon officers "to remember the declaration of the great master of the art of war, that pillage is the most certain method of disorganizing and destroying an army."

969 holding officers responsible for the conduct of their commands in this particular.[56] Repeatedly is the distinction pointed out between the authorized taking of, or making requisition for, supplies or levying of contributions for the public use, in accordance with law or the custom of war, and the unauthorized and illicit appropriation of private property by officers, soldiers, or camp-followers.[57]

In Europe, it may be observed, pillaging has almost disappeared from the practice of the armies of the civilized nations; the dispensing in a great degree with camp-followers having had much to do with its disuse. Its absence was conspicuous in the "Seven Weeks War" of 1866, and in the Franco-Prussian War of 1870. In regard to the latter, a writer of authority[58] records—"The German armies were absolutely without marauders." The system of formal requisitions and receipts, observed by those armies in France, will be adverted to in Part II of this work.

The term "*post*" is evidently used here in the most general sense, but as referring to a point for the time fixed. "*Colors*," on the other hand, is viewed as referring mainly to a regiment or other body on the march or operating in the field against the enemy.

To constitute the offense there must exist the *animus* indicated in the Article—"to," *i. e.* in order to, "plunder and pillage:" this *animus* was expressed still more clearly in the early form[59] by the words—"to go in search of plunder." It must be shown that the officer or soldier left the command with a view to the forcible seizing and appropriating of public or private prop-
970 erty; and whether private property sought to be taken belonged to persons hostile or friendly can in no manner affect the legal character of the offence.[60] The intent being complete, it is not essential that the property should actually be taken: that it is taken, however, will of course be the strongest evidence that the offender left his station for the purpose of taking it.

The offence is no less committed though the quitting of the post, &c., is by a *quasi* authority; as where soldiers go forth for the purpose of marauding under the orders of or in company with an officer or non-commissioned officer. In such a case, the act of the superior being prohibited and lawless, the legal offence of the soldier is as complete as if he had proceeded alone and of his own motion: his punishment, however, will properly be less severe than that adjudged his superior.

**PUNISHMENT.** The offences denounced by this Article, occurring as they mostly do in time of war, and generally in the presence of the enemy, and involving the gravest violation of orders or of the military obligation, have always been made punishable with the extreme penalty of death.[61] Formerly, for the

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[56] G. O. 3, 21, Army of Occupation, W. Va., 1861; Do. 30, Dept. of the Cumberland, 1862; Do. 15, Dept. of the Gulf, 1862; Do. 23, Id., 1863. "An officer who permits" such acts "is equally as guilty as the actual pillager." G. O. 107 of 1862. (Gen. Halleck.) In this connection see 1 Jour. Cong., 268; also Halleck, Int. Law, 442, 461.

[57] On this subject, see remarks of Gen. Halleck, in G. O. 107 of 1862; also Do. 109, Id.; Do. 23, 42, Dept. of the Gulf, 1863; Field Circ. 2, Dept. & Army of the Tenn., 1864. In G. O. 3, Army of Occupation, W. Va., 1861; Do. 19, Dept. of the Cumberland, 1862,—teamsters and camp-followers are indicated as especially liable to the charge of taking plunder. And see G. O. 2, Dept. of Va., 1861.

As to the *levying of contributions*, see par. 1076, Army Regulations of 1881; G. O. 18, Dept. of the Rappahannock, 1862; DIGEST, 470; and *post*, Part II—"Military Government."

[58] Edwards, "The Germans in France," p. 258.

[59] Art. 30 of 1775.

[60] So, "the penalty is the same whether the offence be committed in our own or in an enemy's territory." G. O. 107 of 1862. (Gen. Halleck.)

[61] G. O. 23, Dept. of the Gulf, 1863—remarks of Gen. Banks.

crime of misbehaviour before the enemy, this punishment was executed at the will of the commander and without trial;[62] and when this crime was committed conjointly by any considerable number, their decimation, or the summary taking of the life of every tenth man, was authorized by the Roman law.[63] Indeed, the stern necessity of war will at any time justify a commander in shooting down the leaders of a body of troops who abandon their colors during an engagement, if otherwise their revolt cannot effectually be suppressed; and a similar extreme measure will be warranted in cases of individual soldiers separately guilty of gross and conspicuous cowardice or misbehaviour in battle, of attempted desertion to the enemy, or of violent or aggravated acts of plunder or pillage,
971 where peremptory orders to desist are unavailing, and the commander has no effectual means of restraint within his power.

Such summary proceedings are of course of rare occurrence. Courts-martial, however, when offenders of this class have been brought before them, have not hesitated to inflict the death penalty,[64] and during the late war of the rebellion capital sentences were repeatedly adjudged for marked cases of violation of this Article.[65] In cases of officers, dismissal has been almost invariably imposed, and in some instances there has been added disqualification to hold office.[66] In one case a lieutenant was sentenced to be reduced to the ranks.[67] In several cases the dismissal of the officer or discharge of the soldier has been made ignominious by requiring that the same shall be accompanied by a stripping off of insignia of rank, drumming out, shaving of the head, placarding with the word "coward," or branding with the letter "C."[68]

The matter of the direction in the sentence as to the publication in the newspapers of the particulars of the case, upon a conviction for *cowardice*,
972 and the discontinuance thereupon of social relations between other officers and one who has been dismissed for such offence—has heretofore been noticed as enjoined in the 100th Article.

### Forty-third Article.

**NATURE OF THE OFFENCE.** This Article, which has undergone no material change since 1775,[69] refers, according to Samuel,[70] to the using "of direct

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[62] See Samuel, 594.

[63] Livius, lib. 2: Tacitus, an. 3; Samuel, 595, 600. This punishment was also prescribed in Arts. 60, 67 and 73 of the Code of Gustavus Adolphus, and Art. 8 of James II.

[64] G. O. 5 of 1857. In G. O., Hdqrs., Steenraple, Sept. 12, 1780, Gen. Washington gives notice of the execution on that afternoon of a soldier convicted, by general court-martial, of "plundering an inhabitant of money and plate."

[65] See cases published in G. O. 134. 317, of 1863; Do. 64, and G. C. M. O. 90, 272, 279, of 1864; Do. 91 of 1865; G. O. 22, Mountain Dept., 1862; Do. 40, Dept. and Army of the Tenn., 1864; Do. 174, Dept. of the Mo., 1864.

[66] G. O. 18 of 1863; Do. 21, Dept. of the Tenn., 1863.

[67] "To serve three years or during the war." G. O. 27 of 1864.

[68] G. C. M. O. 107, 124, 126, 191, 332, of 1865; G. O. 73, Dept. of Va. & No. Ca., 1864. Hough, (p. 346,) cites a case of an officer sentenced, upon conviction of misbehavior before the enemy,—to be dismissed, and to have his "coat and commission torn before his face, his sash cut into pieces, and his sword broken over his head in the most public manner." Samuel, (p. 599,) mentions a case of "an adjutant general," sentenced, for cowardice—"to be cashiered, and his sword to be broken over his head, and that he should do the duty of a swabber in keeping clean the hospital ship of the fleet."

In our "additional" Article, No. 12 of 1775, it was prescribed, for the offence of leaving post, &c., to go in search of plunder, that officers should be "cashiered and drummed out of the army with infamy," and that enlisted men should be whipped with from twenty to thirty-nine lashes, and, further, that *all* offenders should "forfeit all share of the plunder" taken.

[69] The word *it*, after "give," found in the original Article, has apparently been inadvertently omitted in the present form, and must therefore be understood.

[70] Page 608.

force or compulsion," in contradistinction to the use of the "influence or persuasion" intended by the previous Article in the act therein specified of *speaking words inducing* the abandonment of a post, &c. The compulsion need not consist in the use of actual violence or force. An absolute refusal to obey orders or do duty, or to participate in any further measures of defence, might be as effectual a form of compulsion as if physical constraint were resorted to. Of the offence Samuel further writes:[70]—"This amounts to a plain and palpable act of *mutiny*, being nothing less in effect than the supercession, or the assumption and exercise by force, of the powers of the governor or commanding officer, by his refractory troops." The moving cause or *animus* of the act, whether insubordination, cowardice, treachery, &c., is quite immaterial.[71] It is observed by O'Brien[72] that—"no amount of suffering, privation, or sickness, to which the garrison may be exposed by the firm intrepidity of the commander, will avail as an *excuse* for the crime."

No instance of a trial for the specific offence made punishable by this Article is known to have occurred in our army.[73]

## 973 XIX. THE FORTY-FIFTH AND FORTY-SIXTH ARTICLES.

[Relieving, and Communicating with the Enemy, &c.]

"ART. 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.*

"ART. 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.*"

**ORIGIN OF THESE ARTICLES.** These Articles may be traced to Arts. 3 and 4, Sec. II, of Charles I, Art. 8 of the Code of James II, and to Arts. 67, 70, 71, 76 and 77 of Gustavus Adolphus. In the American military law, they first appear as Arts. 27 and 28 of 1775.

**THIS CLASS OF OFFENCES COMPARED WITH TREASON.** Treason *as such* is not an offence properly cognizable by a court-martial.[74] The offences, however, which are the subject of these two Articles are treasonable in their nature and are characterized by Samuel[75] as "overt acts of treason;" by O'Brien[76] as "closely allied to treason." Our Constitution, (Art. III, Sec. 3 § 1,) declares that—"Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." Whenever, therefore, an overt act of the class specified in these Articles gives substantial aid and comfort to the enemy, and thus evidences, so far forth,

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[70] See Hough, 359.

[71] Page 148. But compare, in this connection, Art. 73 of the Code of Gustavus Adolphus.

[72] In 1862, twelve officers were, without trial, summarily dismissed by order, (G. O. 120, War Dept.,) for publishing a card stating that they had advised their regimental commander (previously similarly dismissed,) to surrender his post to the enemy.

[73] See Gen. Hull's Trial, p. 118; *In re* Stacy, 10 Johns., 333; Procés du Marechal Ney, Part I, p. 70, and Part II, p. 33; also G. O. 1, Dept. of the Mo., 1862; Do. 150, Dept. of the Ohio, 1863; Do. 27, Dept. of the Northwest, 1864. "Treason" has sometimes been charged before military commissions, and, in the English practice, before courts-martial held under martial law—as in Wolf Tone's case and the case of Geo. W. Gordon in Jamaica. See PART II.

[74] Page 577. And see Id., p. 583.

[75] Page 146.

an adherence to his cause, it can scarcely be regarded as less than an act
974 of treason.[77] It may thus happen that an offender whose crime has been committed upon the theatre of war, and who is therefore amenable to trial as for a military offence under one of these Articles, may at the same time be liable to an indictment for treason. A violation of the Articles, however, will not amount to the latter offence, in the absence of the requisite *animus* implied in the constitutional definition.[78]

**CONSTRUCTION OF THE TERM "WHOSOEVER."** The subject of the interpretation of this initial word of the two Articles, as indicating the classes of persons made amenable thereby to trial by court-martial for the offences therein specified, has already been considered in Chapter VIII on Jurisdiction.

### FORTY-FIFTH ARTICLE.

**THE OFFENCE OF RELIEVING THE ENEMY WITH MONEY, VICTUALS OR AMMUNITION—"Relieves."** This word is evidently employed not merely in the restricted sense of *alleviate* or *succor*, but also in that of *assist*. In the connection in which it is used it may be construed as substantially equivalent to *furnish* or *supply*. The mere giving or selling to the enemy of any of the things specified, though the same may not really be *needed* by him, is so far an assistance rendered him, and thus an offence within the Article. That the article furnished is *exchanged* for some commodity returned by the enemy does not, as noticed by the Judge Advocate General,[79] affect the legal quality of the act.

975 It is to be observed that the enemy must be *actually* relieved—reached by the succor or assistance tendered. An *attempt* to relieve him, not successful, will not constitute the specific offence.

**"The enemy."** This term does not necessarily refer to the enemy's government or army, nor is it required to constitute the offence that the relief should be extended *directly* to either: it is sufficient if it be furnished to a single citizen or to citizens, or to a member or members of the military establishment, in his or their individual capacity;[80] the words thus admitting of the same import as the term "*an enemy*" which occurs subsequently in the Article. In the language of Chief Justice Chase of the U. S. Supreme Court,—"all the citizens or subjects of one belligerent" are "enemies of the government and of all the

[77] See Respublica *v.* Carlisle, 1 Dallas, 39, a case of an indictment for treason, for giving intelligence to the enemy, &c.; also U. S. *v.* Pryor, 3 Washington, 234, 238, where the court speaks of a form of treason as—"an adherence to the enemy by supplying him with provisions." In a charge to the grand jury of the U. S. Circuit Court, in Nov., 1861, reported in 5 Blatchford, 549, 550, Nelson, J. clearly sets forth that giving intelligence, sending provisions or money, and furnishing arms or munitions to the enemy, are all overt acts of treason. And see *In re* Stacy, 10 Johns., 332; Jones *v.* Seward, 40 Barb., 563, also 4 Black. Com., 82, (and Christian's note;) Hensey's Case, 1 Bur., 650; Stone's Case, 6 Term, 527.

[78] Thus correspondence with an enemy in regard to matters purely social or domestic, while lacking the *animus* of treason, would, unless duly authorized, constitute an offence under Art. 46. (See *post*.) In Fottrell *v.* German, 5 Cold., 280, it was held not to be treason to relieve the sick and wounded of the enemy by renting a building for a hospital to a surgeon of the enemy's army—an act, however, which might be regarded as coming within the definition of the offence of *harboring* an enemy, made punishable by Art. 45.

[79] See G. O. 78, Mil. Div. W. Miss., 1864.

[80] The term "enemies," as employed in the British statute against treasons, the 25th Edward III, from which our constitutional provision on the same subject is taken, is defined, (4 Black. Com., 83; Simmons § 1070,) as including—"the subjects of foreign powers with whom we are at open war; pirates who may invade our coast; * * * and our own fellow-subjects when in actual rebellion."

citizens or subjects of the other," both in "civil and international wars."[81] Relief, therefore, afforded to individuals is relief to *enemies*, and, so far forth also, relief to *the enemy* considered as a nation or government.

It need hardly be remarked that the term "the enemy," or "an enemy," does not include enemies regularly held as *prisoners of war;* such, while so held, being entitled, by the usages of civilized warfare, to be furnished with subsistence, quarters, &c.[83] It would include, however, a prisoner of war who has escaped and while he is at large,[85] as also one who, having been made prisoner of war, has been paroled, and is at large upon his parole.[84]

976 The term under consideration embraces also—as has been specifically held by the Attorney General[86]—an Indian tribe or band in open hostility to the United States.

"**Money, victuals, or ammunition.**" In this enumeration the Article is bald and imperfect. Some such addition as *or other thing*, or *or otherwise* is required to complete and render fully effective the enactment.[86] "Money" includes of course either metallic or paper currency, as also money issued by or current with the enemy as well as money of the country of the accused. As held by the Judge Advocate General,[87] the furnishing of money to the enemy is no less a relieving of him where a consideration is received in return than where the amount supplied is a free gift. And convictions have been had, under the Article, for relieving the enemy with money, by purchasing (with money paid) cotton from agents of the Confederate government,[88] as also by similarly purchasing Confederate bonds.[89] "Victuals" is defined by Hough to be "any article that will support life;" and he concludes that all wines, spirituous liquors, "and even water are included in the term."[90] In the reported cases occurring during the late war, the most usual form of furnishing an enemy with victuals was for the accused to entertain him at meals at his residence.[91] As to "ammunition," no sufficient grounds are perceived

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[81] The Venice, 2 Wallace, 418. And see The Prize Cases, 2 Black, 666; also case of Mrs. Alexander's Cotton, 2 Wallace, 274; Gooch *v.* U. S., 15 Ct. Cl., 287–8. The term "the enemy" includes not only civilians, soldiers, &c., but also persons who, by the laws of war, are outlaws—as "guerillas" and other freebooters. See G. O. 30, Dept. of the Mo., 1863.

[83] Compare Hough, 328.

[85] See the case of harboring, &c., an enemy, published in G. O. 88, Mil. Div. W. Miss., 1864, where the person harbored was an escaped prisoner of war.

[84] In the leading case of B. G. Harris, a member of Congress from Maryland, the relieving by the accused, with money, of two soldiers of the army of the enemy, at large under their parole as prisoners of war, and unlawfully within our lines, was considered by the court to be, as charged, an offence under Art. 45, and the conviction and sentence of the accused accordingly were duly approved. G. C. M. O. 260 of 1865; also Proceedings published in Ex. Doc., No. 14, H. of R., 39th Cong., 1st Sess. And compare 11 Opins. At. Gen., 204.

[86] 13 Opins. At. Gen., 470.

[86] In the early Resolution of Congress, *in pari materia*, of Oct. 8, 1777, the particulars are stated as—"supplies of provision, money, clothing, arms, forage, fuel, or any kind of stores." 2 Jour. Cong., 281.

[87] DIGEST, 41.

[88] G. O. 14, Mil. Div. W. Miss., 1865—where the accused is convicted of having paid to the enemy's agents about $500,000 for cotton.

[89] See G. O. 78, Mil. Div. W. Miss., 1864.

[90] Page 327; Id., (P.) 158. In a case published in G. O. 27, Mil. Div. W. Miss., 1865, the enemy was relieved with "flour, coffee, oil, wines and whiskey."

[91] See G. O. 76, 175, of 1863; Do. 51 of 1864. Also G. C. M. O. 260 of 1865, where the accused procured two rebel soldiers to be fed at the house of a neighbor. In the cases of two women convicted of this offence by military commission, published in G. O. 148, Dept. of the Mo., 1863, the enemy. ("bushwhackers,") were relieved by sending and carrying victuals to them in the woods.

977 for ascribing to this word a meaning larger or other than that which it bears in common military parlance.[92]

**THE OFFENCE OF KNOWINGLY HARBORING OR PROTECTING AN ENEMY.** This offence may be defined as consisting mainly in receiving and lodging, sheltering and concealing, or shielding from pursuit, arrest, or "any injury which in the chance of war may befall him,"[93] a person known as, or confidently believed to be, and who is in fact, an enemy. If the party harboring, &c., is in no manner apprized that the other is an enemy, the specific offence is not committed; but where the circumstances are such as to induce the inference that he is or may be an enemy, it will be for the accused to rebut the presumption that he had the knowledge contemplated by the Article. In the cases as published in General Orders, this offence has commonly been committed by lodging or procuring lodging for officers or soldiers of the enemy's force,[94] or by concealing them, and denying their presence or refusing to furnish any information of their whereabouts.[95]

**PROOF.** It must of course appear that a *status belli* prevailed at the date of the offence, but of the existence of such status the court will ordinarily take judicial notice without proof. Where it is doubtful whether the war had begun at the time of the offence, or had not ended before such time or the time of the ordering of the court, it may be necessary to put in evidence the action of Congress or the Executive in declaring war, announcing the recurrence of peace, &c. A state of war being admitted or established, the fact that the party

978 relieved, &c., was an enemy will be exhibited by evidence that he was a member of the military force of the enemy, or a citizen or resident of the enemy's country.

**DEFENCE.** The only justification of an act made punishable by this Article would ordinarily be the order or sanction of a competent military superior,[96] or an authority conferred by an Act of Congress or the President.[97]

**PUNISHMENT.** This, being in the discretion of the court, will commonly be not severe where the relief or harboring is but slight or for a very brief period, or where it is rendered to a destitute person; and will ordinarily be less severe where assistance is rendered to an individual for his personal benefit than where it is rendered to the government or the army of the enemy. But in every case the *animus* of the offender will properly be the most material circumstance to be considered in awarding the punishment. Where his act has proceeded from, or illustrates, a strong sympathy on his part with the cause of the enemy, or a marked animosity towards his own government, he will merit a much heavier penalty than where he was actuated mainly by an impulse of

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[92] The view expressed by Hough, (p. 328,) that "ammunition" was synonymous with *munition*, and included arms and other *matériel* of war, does not seem to have been favored by other authorities.

[93] Hough, 328.

[94] See cases, cited in note *ante*, of relieving an enemy by entertaining him at meals,—in which cases he was generally also lodged.

[95] See two cases in G. O. 52, Dept. of the Ohio, 1863. In a case in G. O. 88, Mil. Div. W. Miss., 1864, a seaman was convicted of harboring and protecting a prisoner of war, "by hiding him in the hold of the ship to enable him to escape."

[96] Samuel, 578–9: G. O. 78, Mil. Div. W. Miss., 1864.

[97] See the Act of July 13, 1861, authorizing the President to permit commercial intercourse with persons in the insurrectionary States, under which it was held by the Supreme Court, (5 Wallace, 630; 6 Id., 521,) that the President was alone empowered to license such intercourse, and that a military or naval commander was not authorized to do so.

hospitality. Capital sentences were rarely imposed for violations of this Article during the late war; imprisonment and fine being the forms of punishment usually resorted to.[98]

FORTY-SIXTH ARTICLE.

**THE OFFENCES MADE PUNISHABLE.** This Article makes capitally punishable by sentence of court-martial the two distinct acts of holding
979 correspondence with, and giving intelligence to, the enemy; and all material communications made to the enemy will be found to be included within the one or the other description. The terms "*whosoever*" and "*the enemy*" have already been construed under the preceding Article.

**HOLDING CORRESPONDENCE WITH THE ENEMY.** The word "*correspondence*" is understood to be here employed in its usual and familiar sense, as intending written communications, especially by letter, and embracing of course communications in print and telegrams. The term, however, is not to be viewed as implying that there has been, or should be, a mutual interchange of letters or communications between the accused and the enemy; nor is it necessary that the communication which is the occasion of the charge should be an answer to a previous one from the party to whom it is addressed. The offence may consist in the sending of a single letter, and this may be the first and the only one that has passed, or been attempted to be transmitted, between the parties.

Any correspondence with the enemy being a violation of the absolute rule of non-intercourse pertaining to a state of war, the Article, naturally, does not characterize the correspondence, the holding of which is made punishable, as treasonable, hostile, injurious, &c.,[99] but makes it an offence to hold *any* correspondence whatever. Not only therefore is correspondence by which valuable information is imparted or important public business transacted, as well as correspondence calculated to stimulate or encourage the enemy,[100] properly chargeable under the Article, but also correspondence of a comparatively harmless character—as the writing of a letter relating to private or domestic affairs.[1] And so of the communicating to the enemy of supposed facts, which however are not true and do not therefore amount to the giving of intelligence.[2]

It is further to be observed that the crime is complete in the writing or
980 preparing of the letter or other communications, and the committing it to a messenger, or otherwise putting it in the way to be delivered. It is not essential that it be received by the person for whom it is intended, or that it reach its place of destination. If it be intercepted while *in transitu*, the legal character of the offence will not be affected.[3]

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[98] An instance of a *capital* sentence is found in G. O. 76 of 1863, where, however, the same was commuted by the President to imprisonment during the war at Fort Delaware. Instances of sentences of confinement at hard labor for *twenty* years occur in G. O. 14, 27, Mil. Div. W. Miss., 1865. In the case of Harris, (G. O. 260, of 1865,) the offender being an official person, (member of Congress,) disqualification for office was added to imprisonment.

[99] In the "additional" Article of November, 1775, the offence was described as "holding a *treacherous* correspondence."

[100] See case in G. O. 190, Dept. of the Mo., 1864; also case, (tried by a military commission,) in G. O. 132, Dept. of the Gulf, 1864.

[1] Unless of course such correspondence be expressly authorized by the Government. See *post*, p. 635.

[2] See *post*, as to the offence of *giving intelligence*, also DIGEST, 42.

[3] Hensey's Case, 1 Bur., 65; Stone's Case, 6 Term, 527; Samuel, 580; Respublica *v.* Roberts, 1 Dallas, 42; DIGEST, 42; also cases in G. O., 203, Dept. of the Mo., 1864; Do. 132, Dept. of the Gulf, 1864.

**GIVING INTELLIGENCE TO THE ENEMY.** This offence will consist in communicating to the enemy, by personal statement, message, letter, signal or otherwise,[4] information in regard to the number, condition, position, or movements of the troops, amount of supplies, acts or projects of the government in connection with the conduct of the war, or any other fact or matter that may instruct or assist him in the prosecution of hostilities.[5]

Of the specific instances of a direct violation of this Article which have been made the subject of trial, some of the principal, as published in General Orders, are—the furnishing to the enemy a plan of the defences of a military post;[6] the pointing out to enemy's cavalry the road by which a herd of government cattle had been driven to avoid capture, and stating that the same was without a guard;[7] the writing and sending letters to a person in the enemy's service in which information was given of the movements of troops and of intended military operations;[8] and the giving of similar information to scouts of the enemy.[9]

It is necessary that the enemy shall have been *actually informed*. If therefore the intelligence fails to reach him, this offence is not completed,
981 though the offence of holding correspondence may be.[10] It would seem also that the facts communicated should be in part at least true, since, if they are entirely false, *intelligence* cannot be said to be given.

**"EITHER DIRECTLY OR INDIRECTLY."** These words are construed as applying to both the acts made punishable, not to the last one only. The modes of holding correspondence and giving intelligence already instanced have been mainly of a direct character. It was, however, the indirect modes which, during the late war,—as in previous wars,[11]—principally exercised the vigilance of our military authorities. The proceeding of this sort which it was found especially necessary to denounce and prohibit was the *publication in newspapers* of particulars in regard to the numbers, organization, position, operations, &c., of the army, by which information might readily be communicated to the enemy;[12] and in several instances the offence thus committed was made the subject of charges under the present Article,[13] or of trial by military commission.[14] The publishing by way of advertisement in newspapers, of "Personals," by means of which an indirect correspondence was maintained with individuals within the enemy's lines, was also expressly prohibited.[15]

**PROOF.** In addition to what has already been said on this subject, (including the observations under the previous Article—apposite here also—as to the

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[4] See case in G. O. 26, Dept. of Va. & No. Ca., 1864, in which a soldier guarding a prisoner is charged with allowing the latter to escape *for the purpose* of having him communicate to the enemy valuable information.

Art. 8 of James II made punishable the giving of intelligence "either by letters, messages, signs, or tokens, or in any manner of way whatsoever."

[5] The intelligence may be of a negative character. Thus in Stone's case, 6 Term, 527, the sending to the enemy a paper containing reasons for *not invading* England was held to constitute high treason.

[6] G. O. 242 of 1863.

[7] G. O. 250 of 1863.

[8] G. O. 371 of 1863.

[9] G. O. 157 of 1864.

[10] "It is essential to the offence of giving intelligence to the enemy that material information should actually be communicated to him." DIGEST, 42.

[11] See G. O. of Nov. 27, 1812; Tulloch, 40–41.

[12] G. O. 67 of 1861; Do. 151 of 1862; Do. 125, Army of the Potomac, 1862; Do. 29, 48, Id., 1863; Do. 44, Id., 1864; Do. 48, Dept. of the Mo., 1862.

[13] G. O. 10, Dept. of Washington, 1863; Do. 13, Dept. of the Tenn., 1863.

[14] G. O. 29, Army of the Potomac, 1863.

[15] G. O. 10, Dept. of the East, 1865.

proper evidence of the existence of a state of war, &c.,) it may be added that where the correspondence has been carried on, or intelligence supplied, by a written communication in the *handwriting* of the accused, it will be necessary to prove this in the usual mannner, as indicated in the Chapter on Evi-
982 dence. Where the communication is in *cipher*, the possession of a key, or a knowledge of and ability to employ the cipher, must ordinarily be brought home to the party.[16]

**DEFENCE.** The general principle laid down as applicable to defences to charges under the 45th, is apposite under the present Article.

Under a charge for holding correspondence, where the communication referred solely to private or domestic affairs, it would be a good defence to show that the same was authorized under regulations such as those which prevailed during the late war, by which communications of such a character were permitted to be exchanged with the enemy through the lines at Fortress Monroe.

A not unusual form of defence to a charge of giving intelligence to the enemy, (especially where it was verbally and personally communicated to the enemy in his presence,) has been that the same was furnished *under duress*. But to constitute this defence, the duress must have been such as to put the party in reasonable fear of present *death* if he refused to give the information required of him. Any form of bodily constraint or injury, not immediately endangering life, although it might be admitted in evidence in mitigation of punishment, would not amount to a *defence* in law. Thus, neither the mere presence of a force of the enemy sufficient to overpower the party and destroy him, nor the ordering him peremptorily to furnish the information desired, nor the imprisoning of him until he should disclose facts within his knowledge, would constitute the defence of *duress*, where his life was not seriously threatened or otherwise put in actual peril.[17]

**PUNISHMENT.** The penalty to be awarded will properly depend upon the *animus* of the offender, whether treasonable, treacherous, or sympathetic
983 with the enemy's cause, or comparatively innocent of any such feeling; upon the matter of the communication—whether beneficial to the enemy, authentic and original, or mounting merely to hearsay or rumor; upon the manner and form of imparting it—as whether it be communicated to the enemy's government or its official or military representative, or to a private individual, &c. The death penalty has sometimes been adjudged in our practice for a violation of this, as of the previous, Article,[18] but imprisonment has been the more usual punishment.[19] In some cases the sentence has required that the accused be sent without the lines of the army.[20]

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[16] In Smithson's Case, (G. O. 371 of 1863,) the letter conveying intelligence, to the enemy was signed with a fictitious name and enclosed in an envelope addressed in *cipher*. See also a case of writing a letter with a fictitious signature in G. O. 203, Dept. of the Mo., 1864.

[17] See the analogous case of entering the military service of the enemy under duress, in Respublica *v.* McCarthy, 2 Dallas, 86; U. S. *v.* Vigol, Id., 346; U. S. *v.* Greiner, 4 Philad., 396. And compare U. S. *v.* Hodges, Brunner, 465. See also, in this connection, the comments of the Secretary of War upon the findings in Cashell's Case, in G. O. 250 of 1863.

[18] G. O. 106, 157, of 1864; Do. 67, Dept. of the Gulf, 1865.

[19] In a case published in G. O. 14, Mil. Div. W. Miss., 1865, the sentence is confinement at hard labor for twenty years.

[20] Thus, in a case in G. O. 58, Dept. of the Mo., 1863, the sentence was—"To be sent South beyond the lines of the Federal forces." And see a similar sentence in G. O. 13, Dept. of the Tenn., 1863.

## XX. THE FORTY-SEVENTH, FORTY-EIGHTH, FORTY-NINTH, FIFTIETH, AND FIFTY-FIRST ARTICLES.

[Desertion and Kindred Offences.]

"ART. 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.*

"ART. 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; 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.*

"ART. 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.*

"ART. 50. *No non-commissioned officer or soldier shall enlist himself* 984 *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.*

"ART. 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; and in time of peace, any punishment, excepting death which a court-martial may direct.*"

### FORTY-SEVENTH ARTICLE.

**PREVIOUS LEGISLATION.** This is Art. 20 of the code of 1806, not materially modified, and—consolidated with it—the Act of May 29, 1830, c. 183, prohibiting the imposition of the death penalty for desertion committed in time of peace. In the code of 1775, desertion and absence without leave were made punishable by provisions of the same Article—No. 8. In that of 1776, the two provisions were embodied in separate Articles, that relating to absence without leave, (now contained in Art. 32,) following next after that relating to desertion.

In the British law, desertion—formerly declared a *felony* by statute,[21] and therefore not made punishable as a military offence in the earlier military codes—is now, (as with us,) a purely military offence cognizable only by court-martial.[22]

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[21] Desertion, which was originally a civil offence in the English law, (soldiers not being enlisted by the State, but by private contractors engaging to furnish certain numbers of men for the army,) appears to have been first declared to be *felony* by the 18th Henry VI, c. 19. See Tytler, 41–45; Samuel, 71–74; Simmons § 1088; Manual, 8; also Trask *v.* Payne, 43 Barb., 575. In the early (1688) case of King *v.* Dale, (or Beale,) 2 Shower, 511, and 12 Howell St. Tr., 262, a soldier convicted of desertion, was *attainted of felony* and executed accordingly. By the original Mutiny Act of 1689, desertion was first made punishable by court-martial within the kingdom.

[22] See Army Act, s. 12.

985 **DESERTION DEFINED.**[24] A deserter is one who absents himself from his regiment, or military station or duty, and from the service, without authority, and with the intention of not returning. The offence of desertion thus consists of the minor offence of absence without leave coupled with and characterized by a deliberate purpose not to rejoin the military service but to abandon the same altogether, or at least to terminate and dissolve the existing military status and obligation, *i. e.* the pending contract of enlistment. It is thus the *animus non revertendi*, which is the gist and essential quality of the offense.[25]

The absence. This may be unauthorized from the beginning, as is the case in the majority of instances; or it may consist in not returning at the expiration of a furlough or other defined leave of absence.[25] A soldier may also desert pending a pass or brief leave of absence from his post, &c.; the fact that he is authorized to be thus absent from the particular command not being incom-
986 patible with his deserting from the army and the service.[26] Further, the absence may be originally involuntary, *i. e.* caused by an agency beyond the control of the party—as where he has been taken prisoner by the enemy; in such case, if, on being released or escaping, he does not return but takes the opportunity to abandon the service; or if, upon his capture, he enlists, (not under duress[27] but of his own choice,) in the enemy's army—he is a deserter.[28] Again, the absence may be caused originally by an arrest or imprisonment of the accused, as an offender against the local law, by the civil authorities. Or it may consist in an avoidance of military arrest or confinement; as where an officer or soldier escapes while held in close arrest or confinement awaiting trial or sentence, or while under sentence.[29] And an enlisted soldier may absent himself and desert, while already in the status of a deserter from a previous enlistment, the fact that he is amenable to justice for a certain desertion not affecting his capacity to desert again.

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[24] Besides those whom the military common law defines as deserters, certain classes of *officers* have been expressly declared to be such—*viz.* by Sec. 1229, Rev. Sts., (authorizing the dropping as deserters of officers absenting themselves without leave for three months,) and by Art. 49, presently to be considered.

During the late war, *drafted persons* failing to report or fraudulently avoiding the draft, were, by the Act of March 3, 1863, c. 75, s. 13, and subsequent statutes, made amenable to military trial and punishment as *deserters*, and many of this class were brought to trial accordingly. See cases in G. O. 85, 86, Northern Dept., 1864; and frequent cases in G. O., Dept. of the Monongahela, 1863; G. O., Middle Dept., Dept. of the Susquehanna, and Dept. of Pennsylvania, of 1864; and especially in G. O. of the last-named Dept. of 1865.

[25] As defining, or illustrating the definition of desertion, see Samuel, 323; Hough, 136–7; Id., (P.) 131; Simmons § 180, 182, 183; Griffiths, 22; Harcourt, 25; Manual, 20, 21; O'Brien, 95; G. O. 91 of 1881; G. O. 59, Army of the Potomac, 1861; Do. 11, Dept. of the Tenn., 1866; Do. 32, Dept. of the Platte, 1869; Do. 67, Id., 1871; G. C. M. O, 33, Dept. of the Mo., 1870; Hickey *v.* Husé, 56 Maine, 493; Hanson *v.* S. Scituate, 115 Mass., 336, 342; 15 Opins. At. Gen., 158.

Desertion *at maritime law* is similarly defined as:—"A quitting the ship and her service, not only without leave and against the duty of the party, but with an intent not again to return to the ship's duty. There is thus a distinction taken between a mere absence without leave and a final quitting of the ship *animo derelinquendi*." Curtis, Rights and Duties of Merchant Seamen, 129. And see Coffin *v.* Jenkins, 3 Story, 138; Cloutman *v.* Tunison, 1 Sumner, 373; The Rovena, 1 Ware, 313.

[26] See Circ. No. 7, (H. A.,) 1893.

[27] See case in G. C. M. O. 90, Dept. of Cal., 1884. Compare also Manual, 21 § 17.

[28] Respublica *v.* McCarthy, 2 Dallas, 86; U. S. *v.* Vigol, Id., 346.

[29] Note in this connection the declaration in G. O. 53, Dept. of the Gulf, 1863, to the effect that all officers or soldiers giving their paroles as prisoners of war, otherwise than as prescribed by the cartel of exchange, will be considered deserters and punished accordingly.

[30] As to the *animus* in cases of *escape*, see *post*.

**The intent—From what presumable.** The nature of the intent in desertion is best understood in considering the acts and occurrences from which it may be presumed, its existence being in general a matter of inference from the circumstances of the particular case. 1st. As to the *length of absence*—the mere fact of an unauthorized absence for a certain period is not, in our law, either conclusive or *prima facie* evidence of the requisite intent.[30] A protracted unexplained absence affords indeed a strong presumption that the party absented himself with the *animus* of desertion, and the longer the absence, (prior to the arrest,) the stronger, in general, the presumption. To infer such intent solely from unauthorized absence of but brief duration, especially if followed by a voluntary return, will commonly be unwarranted:[31] an
987 absence, however, for a few days or even a part of a day, may, under certain circumstances, fully justify such an inference;[32] and, in time of *war*,[33] an absence of slight duration may be as significant as a considerably longer one in time of peace.

2d. The *other circumstances* which may go to indicate that the absence has been actuated by the *animus* in question are numerous and varied, consisting as they may do in acts or declarations of the accused, not only prior to the offence but also pending his absence, and at the time of or even after his apprehension. Among such circumstances the more familiar are—Secretly making preparations as for a permanent absence, by collecting or disposing of personal effects,[34] &c.; procuring a civilian's dress or other disguise;[35] declarations by the accused to comrades, &c., of a desire to quit the service or command; attempts to persuade others to decamp with him; taking a horse, arms, ammunition, clothing, rations, or such other property of the government, (or of individuals,) as may facilitate a rapid removal, defend against arrest, protect against the weather, provide sustenance, &c.; taking passage on a railway train, steamer, or other conveyance for a distant point;[36] the commission, in leaving, of some other military offence necessary to effectuate the desertion, as a quitting of his post as a sentinel;[37] the fact that he has committed a
988 homicide, larceny, embezzlement, or other crime, for which he would have been liable to severe punishment;[38] the fact that, in leaving, he has escaped from a confinement or close arrest; his writing, during his absence,

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[30] "Mere length of absence is, by itself, of little value as a test, for a soldier who has been entrapped into bad company through drink, or other causes, may be absent some time without any thought of becoming a deserter." Manual, 20.

[31] See G. C. M. O. 31 of 1876; Do. 79 of 1886; Do. 12, Dept. of the East, 1892. Bringing to trial for desertion soldiers who have simply been absent without authority for a few days has been not unfrequently condemned in the G. O. See G. O. 19 of 1829; Do. 59, Army of the Potomac, 1861; Do. 57, Dept. of the Mo., 1867. Mere stragglers on the march are not to be treated as deserters. G. C. M. O. 28 of 1888.

In par. 132, A. R., (as amended by G. O. 69 of 1891,) it is directed as follows—"No man shall be reported a deserter until after the expiration of ten days (should he remain that length of time away), unless the company commander has conclusive evidence of the absentee's intention not to return. * * * Should the soldier not return, or be apprehended, within the time named, his desertion will date from the commencement of the unauthorized absence."

[32] An absence of an *hour* was held sufficient where the accused was pursued and apprehended in the act of flight. G. C. M. O. 33, Dept. of the Mo., 1870. That the absence need only be for a brief period, compare *In re* Grimley, 137 U. S., 147.

[33] See the stringent order of Gen. Terry in G. O. 11, Twenty-Fourth Army Corps, 1864.

[34] Hough, 137; Pipon & Col., 152.

[35] See O'Dowd, 56.

[36] Samuel, 323; Simmons § 182; Manual, 20.

[37] Hough, 142.

[38] Simmons § 816; Hough, 138; Pipon & Col., 152; G. O. 32, Dept. of the Platte, 1869; G. C. M. O. 52 of 1877, (Lieut. Fleming's case.)

to comrades, &c., declaring an intention not to return; his assuming, during absence, a false name, or resorting to other means to conceal his identity and avoid detection; his being apprehended at a long distance from his station;[39] his being pursued and overtaken when in evident flight; his being found, on arrest, dressed wholly or partly in civilian's clothes,[40] or otherwise disguised his resisting arrest; his denying, upon arrest, his identity, making false or contradictory statements, or failing to explain satisfactorily his absence;[41] his surrendering himself *as a deserter*, &c.

**CONSTRUCTION OF THE ARTICLE**—"Having received pay or having been duly enlisted." These words are evidently intended to include all persons who, as officers or soldiers, have entered into a formal or informal engagement or enlistment, as evidenced by their written contract or by the receipt of pay or otherwise, to render military service to the United States.[42] In what consists an enlistment has been considered under the "Second Article."

"In time of war." This term, as employed in the Articles of War, has already been construed as including not only foreign or civil war but a period of hostilities against an Indian tribe.

"A court-martial." Under this general description, desertion, (com-
989 mitted in time of peace, when it is not a capital offence,) may legally be taken cognizance of by a regimental or garrison court. In view, however, of the limited power of sentence vested in inferior tribunals by Art. 83, cases of desertion are invariably referred for trial to *general* courts in time of peace equally as in time of war.

**CHARGE.** Forms of charges of desertion are given in the Appendix. It need ony be observed here that the specification, in addition to the averment of the desertion, will properly set forth the date of the enlistment of the accused and state whether he surrendered himself or was apprehended.

**PLEA.** The subject of pleading guilty, under a charge of desertion, to the lesser offence only of absence without leave; as also the subject of the introduction of evidence in connection with the plea of guilty of desertion, and of the relation between the "statement," (if any,) and the plea where such plea is interposed—have been considered in Chapter XVI. The special plea of the statute of limitations in cases of desertion has been treated of in the same chapter.

**PROOF.** In order to substantiate a charge of desertion under this Article, it is necessary to establish—1, The fact of the due enlistment of the accused, or of the receipt of pay by him; 2, The fact that he absented himself without authority; 3, The fact that he did so with the intention not to return. The *onus* of proving each of these facts rests upon the prosecution.

**Proof of enlistment or receipt of pay.** It will rarely be necessary to present this part of the proof in a formal manner. The accused indeed—if no question of identity is raised—will generally admit of record, or not contest, the

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[39] But that desertion cannot "invariably be judged by distance"—see Simmons § 183, repeated in Manual, 21.

[40] Samuel, 323; Hough, 137; Pipon & Col., 149; Manual, 20, 21; O'Brien, 96; G. O. 91, Army of the Potomac, 1863.

[41] G. O. 91, Army of the Potomac, 1863; Do. 33, Dept. of the Northwest, 1864; Simmons § 878.

[42] The view of O'Brien, (p. 96,) that, of these words, those alluding to the receipt of pay were intended to apply rather to officers than to soldiers, is not sustained by a reference to the history of the Article as derived from the British Mutiny Act. The present phraseology would be simplified and improved by omitting altogether these words, and making the Article read—*Any officer or soldier who deserts the military service of the United States shall, &c.*

point that he is duly in the military service within the contemplation of the Article. In rare cases,—as where a soldier claims that his enlistment was illegal and void,—it may become essential to introduce, (in the original or by copy,) the enlistment contract or the official roll containing a receipt of pay signed by the accused, or, in the absence of such written testimony, some competent parol evidence either of an actual receipt of pay or of acts held equivalent in law to a formal enlistment.[44] Commonly, however, it will be
990 sufficient to *identify* the accused as one who, having voluntarily served and acted as a soldier, (or an officer,) of the regiment, or corps, &c., named, is estopped to deny his amenability as such.[45]

**Proof of the unauthorized absence.** This is in general readily made by the commanding officer, first sergeant, or other officer or non-commissioned officer of the command who is cognizant of the fact. If it is alleged that the offence was committed when the accused was on leave of absence or furlough, the written authority, or its details, should be put in evidence, with proof that the accused failed to return at the proper time. Proof merely of absence is not proof of absence without authority, nor does it impose upon the accused the *onus* of showing that he had authority: the want of authority must be affirmatively established by the prosecution. Thus it has been held that evidence that a soldier, when absent from his post, was arrested, was not proof that he was absent without authority.[46] A mere *attempt* by a soldier to absent himself without leave has also been held not to be sufficient evidence of an unauthorized absence.[46]

**Proof of the intent.** Except where established by a specific declaration of the same by the accused, the fact that he absented himself *animo non revertendi* is proved as a presumption[47] from some one unequivocal fact, as an unexplained long-protracted absence without authority, or—more commonly—from a combination of circumstances having a similar significance. The more familiar of such circumstances have already been instanced as illustrating the definition of desertion, and need not be repeated. It may be added that facts should not be accepted as proof of the intent, which, though casting suspicion upon the accused, are yet consistent with his innocence. As, for example, the fact that while absent without authority he was *arrested as a deserter*.[48] It is a
991 matter of common knowledge that soldiers, when thus absent, are not unfrequently arrested by policemen or others with a view to the obtaining of the reward for the apprehension of deserters; but from such an arrest alone, (even in a case where the reward has been paid,[49]) it would not be safe or just to presume that the soldier was absent with the *animus* of desertion. So, this *animus* is not to be presumed from the mere fact alone that the soldier has

[44] As to such acts, see under "Second Article," *ante*.

[45] In some cases the proceedings have been disapproved on account of the absence of *any* proof whatever of receipt of pay or enlistment. See, for example, G. O. 2, Dept. of the East, 1863; Do. 31, 45, 52, 63, Id., 1864; Do. 5, Id., 1865.

[46] See G. O. 50, Dept. of Cal., 1867.

[46] See G. O. 27, Dept. of Dakota, 1868.

[47] "Presumptive evidence on this point is generally the best that can be produced." O'Brien, 304.

[48] G. C. M. O. 1, Dept. of Texas, 1875; Fitchburg *v.* Lunenburg, 102 Mass., 358. Nor does the fact that, upon arrest, he was closely *confined* imply in law anything more than that he is *charged* with the offence. See G. O. 50, Dept. of Cal., 1867. In a case in G. C. M. O. 5, Dept. of Texas, 1891, a letter from a post adjutant, relating the circumstances of the surrender of the accused as a deserter, which had been admitted by the court as evidence of the desertion, was of course held by the reviewing authority to be wholly incompetent.

[49] G. O. 30, Northern Dept., 1864; G. C. M. O. 55, Dept. of the Mo., 1872.

*escaped* from a confinement, since he may have liberated himself for some such purpose as the procuring of liquor, tobacco, &c.[50]

In making proof of the intent it is important to require the witnesses to confine themselves to *facts within their knowledge*, not merely as distinguished from hearsay,[51] but from opinion; this being one of the instances where witnesses are most apt to state *conclusions* which it is not for them but for the court to deduce. Thus a witness should not be asked whether the accused has "deserted," or what he knows about his "desertion," or the like.[52] Nor should he be allowed in his testimony to characterize the act of the accused as a "desertion" or to speak of him as having "deserted,"—at least without stating the specific facts upon which his deduction is based. In some cases the sole testimony upon which the conviction was founded was that of an officer or non-commissioned officer to the effect that the accused "deserted" at a certain time. Such an assertion is not, strictly, evidence, and where admitted in evidence should not in general be accepted by the reviewing authority as sustaining the finding.[53]

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**Written evidence—Charging desertion distinguished from proof of it.** It is also important to remark that a note of entry upon a muster-roll, morning report book, descriptive list or other official certificate or statement, to the effect that a soldier has deserted, is not legal proof of the intent essential in desertion, nor admissible in evidence to establish the commission of the offence, upon a trial by court-martial. Such an entry or record is, so far as respects such a trial, a *charge* of desertion, and no more. No statute has made it proof of the offence, and to hold it so would be to substitute the opinion of an officer for the determination of a court-martial—the only authority empowered to find the offence and affix the penalty. Whatever effect, therefore, it may have for other purposes, it can not legally be availed of as proof of desertion before a military tribunal.[54]

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[50] In G. O. 87, Dept. of the South, 1872, a conviction of desertion was 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." In G. O. 32, Id., 1873, a similar conviction was disapproved in a case where it appeared that the escape was the act of a drunken man to obtain more liquor. And see DIGEST, 340, with the citation, (in note,) from Samuel, 324.

[51] That it is important that the evidence should be direct and not hearsay is noticed in G. O. 39, Dept. of the Platte, 1871. And see G. O. 8, Dept. of the Gulf, 1873; G. C. M. O. 37, Dept. of Texas, 1873.

[52] See O'Dowd, 7.

[53] In a case in G. C. M. O. 1, Dept. of Texas, 1875, where the only witness testified that the accused "deserted," and was subsequently arrested and returned "as a deserter," the conviction was disapproved by Gen. Augur, on account of insufficiency of the evidence. And see DIGEST, 339.

[54] "Upon the muster-roll, which is made every two months, the reasons and time of absence of each soldier are required to be entered," (by the 12th Art. of war,) "and entry of the word '*deserted*' by the commanding officer of the company, (who is then to account for all the men of his command,) against the name of the soldier, is in the nature of a *charge* against such soldier of the crime of desertion; but it is *not an adjudication* that he is guilty of the offence, which, as it is one of the gravest offences known to the military law, can be made only by a court-martial." Devens, J., in Hanson *v.* S. Scituate, 115 Mass., 341. "He is not made a deserter by the entry of his name as such in the company books." G. O. 10, Dept. of the Platte, 1871. "The entry on the roll of a company that a soldier has deserted is not proof of the offence, but merely evidence that he has been charged with its commission." Circ., Dept. of Dakota, Jan. 3, 1873. "The descriptive roll introduced as evidence against the prisoner for desertion was simply no evidence whatever, and he could not legally be convicted of desertion upon it. * * * The roll was not evidence: * * * is not legal evidence: * * * was not proper evidence." Four cases in G. O. 29, Northern Dept., 1864. And see Do.

993 **DEFENCE.** In defence the accused may offer evidence of his non-identity with the person charged, or he may show that he has neither received pay in the service nor been legally enlisted therein, and is therefore not amenable under this Article.[55] Or he may prove that his absence was not unauthorized: and it will be a good defence that he was absent in good faith by the permission of a superior, although the latter may have had no authority to allow such absence. So it will be a good defence that the accused being absent by authority, was prevented from returning, at the expiration of his leave or furlough, by serious disabling illness;[56] but this defence must, if practicable, be sustained by the evidence of a medical officer of the army, or, in the absence of such an officer, a civil physician. It will further be a sufficient defence to the charge of desertion that the absence of the accused was caused by his being, (involuntarily,) taken prisoner, and held as a prisoner, by the enemy;[57] or that it was occasioned by his being forced by his comrades to leave the company;[58] or that it was the result of his having been arrested and detained in confinement by the civil authorities.[59] Having been so arrested and held after a desertion had been *consummated* would of course be unavailing as a defence.

It will also be a good defence that the deserter has been restored to duty by competent authority under par. 128 of the Army Regulations, which clearly contemplates that, upon such restoration, a *trial* shall be dispensed with.

994 It would further be a complete defence, that the accused gave himself up under and within the terms of a proclamation of the President, offering amnesty or exemption from trial to soldiers absent in desertion if duly returning to the service.[60] It must appear indeed that the accused has complied with the *conditions*, if any, of the pardon or immunity offered—as, for instance, that he returned voluntarily, and within the specified time.[61]

It may be added that it is no defence to this charge that the accused, when he deserted, was a deserter from a previous enlistment, since this fact did not make the second enlistment void but voidable only at the option of the government.[62]

Upon the defence the accused may put in evidence any facts tending to negative the presumption that he absented himself with the *intent* of desertion;[63]—

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91 of 1881; Do. 12, Middle Dept., 1865; G. C. M. O. 33, Dept. of the Mo., 1875; Do. 22, Dept. of the East, 1882; Do. 1, Dept. of Texas, 1883; DIGEST, 339. So, in G. O. 30, Northern Dept., 1864, an official communication from a quartermaster to a company commander, in which the former informed the latter that he had paid the reward for the arrest as a deserter, of a soldier belonging to the company, was properly held to be not legal evidence of the desertion.

[55] See *ante;* also under Second Article—"Enlistment." That it is no defence that he had not received all the pay due him, see Hutchings *v.* Van Bokkelen, 34 Maine, 133.

[56] Compare the similar provision of the maritime law, stated by Pothier—as cited by Curtis, in Rights and Duties of Merchant Seamen, 135.

[57] Pipon & Col., 56. As to the defence of *duress*, to a charge of desertion to the enemy, see Chapter XVII—"Compulsion of the enemy, &c."

[58] This defence was recognized as sufficient in G. C. M. O. 97, Dept. of Cal., 1884.

[59] See G. C. M. O. 55, Dept. of the Mo., 1872. And see case in G. C. M. O. 64, Div. Atlantic, 1869, where the absence of the soldier was induced by misinformation as to his right of exemption from arrest for debts incurred before enlistment.

[60] Proclamations and announcements of this character are published or referred to in the following General Orders of the War Department, viz: G. O. of Nov. 5, 1811; Do. of June 17, 1814; Do. 35 of 1848; Do. 58 of 1863; Do. 35 of 1865; Do. 43 of 1866; Do. 102 of 1873. A proclamation of this kind was directed to be issued by Gen. Washington, by a Resolution of Congress of Oct. 17, 1777. 2 Jour. Cong., 294.

[61] G. O. 61, Dept. of the East, 1865.

[62] G. C. M. O. 83, Dept. of the Mo., 1873; Do. 67, Dept. of Cal., 1884.

[63] "Every facility should be given him to introduce testimony in his defense." G. O. 91, Army of the Potomac, 1863. (Gen. Meade.)

as, for example, the fact that he absented himself when under the influence of liquor; that when he departed he left a considerable amount of pay due him that would be forfeited upon desertion;[64] that he had not proceeded far or with haste when arrested; that his real object, though illicit, was one involving only a mild criminality and a temporary absence, as the obtaining of liquor at a neighboring town, ranch, &c.;[65] that he returned, after a brief absence, voluntarily[66] and not because induced by privations,[67] &c.

**EXTENUATING CIRCUMSTANCES.** The accused may also exhibit in evidence facts and circumstances which, though not constituting a defence, may avail to extenuate his offence with the court or the reviewing officer. Such as that—he absented himself in good faith, under a claim, honest and not
995 without some foundation, that he was entitled to terminate his service;[68] that he had been subjected to cruel or arbitrary punishment, or other oppressive treatment by his superiors;[69] that he had been urged to his act by the continued hostility of comrades;[70] that he had been advised or incited to desert by an officer of the command;[71] that he had been induced to leave by the prevalence of an epidemic or contagious disease at the post;[72] that his rations had been for a considerable period deficient in quantity or quality;[73]

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[64] G. O. 10, Dept. of the Platte, 1871.

[65] Samuel, 324; G. O. 32, Dept. of the South, 1873.

[66] Hough, 141; G. O. 10, 52, Dept. of the Platte, 1871; G. C. M. O. 174, Dept. of the East, 1871; Do. 29, Dept. of Cal., 1872. A voluntary return from absence is of course to be distinguished from a surrender *as a deserter*.

[67] See Hough, 141.

[68] See, for example, case in G. O. 77, Dept. of the Cumberland, 1867, where the defence of a soldier, charged with desertion, that, having been enlisted *for the war*, he had a right to leave the service when active hostilities were over, was held by Gen. Thomas to have been improperly accepted by the court. See also case of soldiers—about two hundred—of the First Michigan Cavalry, who, having re-enlisted, in December, 1863, "for three years or during the war," and having been ordered in June, 1865, to New Mexico to quell an Indian outbreak, left the regiment and returned to their homes, and were held to be deserters. 16 Opins. At. Gen., 675. Also cases in G. O. 80 and 108, Army of the Potomac, 1862, of members of a volunteer regiment who left the service in the belief that their three months' term had expired and were held properly treated and convicted as deserters. And compare Wilbour *v.* Grace, 12 Johns., 72.

[69] See cases in G. O. 13, Dept. of the Tenn., 1867; Do. 3, Dept. of the Lakes, 1870; G. C. M. O. 58, Dept. of the East, 1872. In G. O. 29, Dept. of the Lakes, 1870, "the rough and inhuman treatment he (the accused) received from *members of his company*" is referred to as ground for the remission of the sentence. And compare citation from Curtis in note *post*.

[70] Cases of this description are found in G. O. 31, Dept. of the South, 1866; Do. 53, Dept. of Washington, 1867; Do. 14, Second Mil. Dist., 1867; G. C. M. O. 102, Dept. of the Mo., 1871; Do. 68, Id., 1873; Do. 29, Dept. of Cal., 1874. And see a case in G. C. M. O. 80, Dept. of the Mo., 1872, where the *acquittal*, on a charge of desertion, of a soldier who had been induced to absent himself by having been made the subject of a mock trial and sentence by a pretended court-martial, (held by the men of the company, with the permission of the company commander,) was approved by Gen. Pope.

[71] In a case in G. O. 22, Dept. of Va., 1863, the soldier was induced to desert by being told, in the presence of men of the company, by his officers, impatient of his worthlessness, that they "wished he would desert, and that they would be willing to pay his passage" if he would go. He disappeared accordingly, but was subsequently arrested, tried, and severely sentenced. It was held that the conduct of the officers was an "invitation" to the soldier to commit the crime, and the sentence was in great part remitted, by Gen. Dix.

[72] See G. O. 26, 27, Dept. of the Mo., 1867. *Contra*—G. O. 35, Fifth Mil. Dist 1867.

[73] At maritime law, "it is not desertion to leave the ship on account of cruel or oppressive treatment, or for want of sufficient provisions in port when they can be procured by the master." Curtis, Rights and Duties of Merchant Seamen, 131. What would absolutely excuse desertion in the merchant service may reasonably be held to palliate it in the similar but stricter law of discipline governing the soldier.

996 that he had not been furnished with proper quarters, or sufficient clothing or blankets, especially in winter;[74] that his pay had been for an unreasonably long period in arrears; that he was young and inexperienced in the service, and had been influenced by the bad advice or example of older soldiers or of a non-commissioned officer deserting with him; that he had never been made acquainted with the Articles of War and did not comprehend the gravity of the offence;[75] that he surrendered himself as a deserter after but a brief absence.[76]

**FINDING.** The authority of a court-martial, under the established usage of our service, to find not guilty of the desertion charged, where the requisite *animus* is not proved, but guilty of *absence without leave*, has been remarked upon in a previous Chapter.[77] The finding, under a charge of desertion, of *attempt to desert*, is expressly authorized in the British law,[78] and may, it is considered, properly be sanctioned in our service.[79]

997 **PUNISHMENT.**[80] The Article leaves the punishment to the discretion of the court. In our army at present the usual sentence for desertion, in time of peace, as fixed by G. O. 16 of 1895, (under the Act of Sept. 27, 1890,) is—dishonorable discharge, forfeiture of all pay and allowances, (a penalty in great measure unnecessary by reason of the forfeitures incurred by operation of law,[81]) and confinement at hard labor in a military prison for from one year to five years. The duration of the term of confinement thus limited is declared to be affected by the length of the unauthorized absence of the accused, the period during which he had served at the time of desertion,[82] the fact that he surrendered or was apprehended, the fact of previous convictions for the same offence, and other circumstances of the desertion specified in the Order. Within the legal maximum in each case, the amount of the confinement should also be measured by the presence or absence of such further facts as that the accused, in deserting, abandoned an important duty—as that of sentinel or guard over prisoners, or committed some such criminal offence as larceny or embezzlement of public property or a violation of Art. 17; that he induced others to desert with him, or was persuaded by others—his superiors or seniors—to desert; that he was a recruit, or an experienced soldier or non-commissioned officer;[83] or by any other circumstance illustrating the original

[74] In a case in G. O. 19, Dept. of Cal., 1866, a sentence of a deserter is mitigated by Gen. McDowell, for the reason that, upon his enlistment and during the mont following of November and December, he had had neither clothing nor blankets issued to him, though abundant supplies of the same were on hand.

[75] In a case in G. C. M. O. 73, Dept. of the East, 1872, Gen. McDowell mitigates the sentence, for desertion, of a recruit, "in consideration of the fact that he had been in service but a few days, and had not heard the Articles of War."

A case may be noted here, which, in 1869, was brought to the attention of the Secretary of War, by the diplomatic representative of Switzerland at Washington, of a Swiss—George Tobler—who had enlisted in our army and deserted, in whose behalf it was urged that his offence had been induced by nostalgia, or *maladie du pays*. While this fact could not be accepted as excusing the offence, (especially as the right of expatriation is asserted by our laws—Sec. 1999, Rev. Sts.,) the discharge of the soldier was, as a matter of comity, conceded.

[76] Hough, 141; Simmons § 180; G. O. 10, 52, Dept. of the Platte, 1871; G. C. M. O. 174, Dept. of the East, 1871; Do. 29, Dept. of Cal., 1872.

[77] Ch. XIX.

[78] Army Act, s. 56. (3.)

[79] It has been so sanctioned in a naval case. Dynes *v.* Hoover, 20 Howard, 65. And compare Bankhead *v.* U. S., 20 Ct. Cl., 405.

[80] See Chapter XX—"SENTENCE AND PUNISHMENT."

[81] See *post*—p. 645.

[82] See Circ. No. 11, (H. A.,) 1892.

[83] That a recruit is in general to be less severely, and a non-commissioned officer more severely, punished, upon conviction of desertion—see G. C. M. O. 174, Dept. of the East, 1871; Do. 47, 140, Id., 1872; Do. 47, Id., 1873; G. O. 71, Dept. of the South, 1874.

criminality, subsequent intentions, &c., of the party, and tending either to dispose the court unfavorably or to render it lenient.[84]

In time of war, when the offence is made *capital*—*i. e.* punishable capitally—by the Article, desertion is visited with especial severity. Desertion to the enemy is almost invariably punished with death;[85] and this penalty has
998 also not unfrequently been enforced in cases where the party has enlisted solely with the view of obtaining a bounty and then abandoning the service.[86]

**LEGAL CONSEQUENCES OF DESERTION.** Irrespectively and independently of the *punishments* which are or may be awarded by a court-martial upon conviction of desertion, there are certain legal consequences resulting from the commission of this offence of which some notice is desirable to a completion of the present subject. These consequences, which do not require to be expressed in the sentence, but which result *by operation of law* upon a due ascertainment of the *fact* of desertion, are as follows:—

999 **Forfeiture of pay and allowances.** By pars. 220[87] and 2458,[88] Army Regulations, it is declared in substance that all deserters shall forfeit all pay and allowances due them at the date of their desertion, as well as all accruing during the period of unauthorized absence.[89] This is a forfeiture quite other than that imposable as a punishment by court-martial, resulting as it does simply by operation of law from the violation of the contract of enlistment or obligation of service.[90] It is not essential to its taking effect that there should

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[84] In a case in G. O. 24, Div. of the Pacific, 1868, the court imposed a lenient punishment "on account of the condition of the accused, whose foot and lower leg are rendered useless by frost bite, which occurred during the period of his unauthorized absence."

[85] In a Resolution of Congress of June 20, 1777, (2 Jour. Cong., 173,) it is declared that—"Congress considers simple desertion as a crime the most atrocious and detestable, but, when coupled with an intention to desert *to the enemy*, the offence becomes doubly heinous and wicked, the person committing it being guilty of both perjury and treason." In Circ., Twenty-fourth Army Corps, March 21, 1865, the Dept. Commander announces—"I will give one hundred dollars reward and three months' leave or furlough, to any officer or soldier who shoots, or brings in, a deserter going to the enemy."

To a similar effect see G. O. 136, Eighteenth Army Corps, 1864. And see, generally, Lieber's Instructions, G. O. 100 of 1863 § 48.

[86] In the case of James Devlin, *alias* Pat Diamond, *alias* Frank Tully, substitute—one of the most conspicuous of the class of professional deserters, known in the late war as *"bounty-jumpers,"*—published in G. O. 9, Dept. of the East, 1865, Gen. Dix, in approving the death sentence, and ordering it to be presently executed, adds as follows: "The Major-General Commanding is thus prompt in the execution of the sentence pronounced upon the accused, on account of the aggravated circumstances of the case. Within the period of eight months he enlisted twice in the Army, and once in the Navy, having twice during the same period deserted the flag of his country. His case is one of those in which bad men, tempted by enormous bounties, enlist into the service for the sake of making money, with the deliberate purpose of deserting, and in which the profit is proportioned to the number of successful repetitions of the crime. By common consent, these infamous men are designated by the expressive appellation of bounty-jumpers. They might more properly be termed traitors and public plunderers, and the Major-General Commanding, in approving the sentence of death pronounced by the Court, deems it his duty to the Army and the Country to announce, that, in all like cases, he will cause the punishment awarded, to a crime subversive of every principle of moral and political obligation, to be executed with the utmost inflexibility and promptness." And see remarks, to a similar effect, of the same commander, in G. O. 28, Dept. of the East, 1864; also case of Downing *alias* Bail, cited under "Fiftieth Article," *post*.

[87] As amended by G. O. 68 of 1883. This paragraph includes all absentees without authority, whether or not deserters.

[88] Amended by G. O. 52 of 1884.

[89] A corresponding forfeiture of wages is incurred by deserting seamen at maritime law. Curtis, Rights and Duties of Merchant Seamen, 130, 303, 305, 306.

[90] See U. S. *v.* Landers, 92 U. S., 79; 13 Opins. At. Gen., 199.

have been any conviction of the offender;[91] but as a conviction is the most satisfactory form of ascertaining the fact of desertion, the forfeiture, (except in cases where the deserter is restored to duty without trial under par. 128 of the Regulations,) is rarely enforced in the absence of a conviction.[92] It includes, with the pay proper, all the pecuniary emoluments due the deserting soldier or officer,[93] except only such as may accrue *after* the interval specified in the Regulations, that is to say after the return of the party from desertion and while he is awaiting trial and the action on his case of the reviewing authority. It is in general only the amounts due for this last-indicated period that are actually affected by the penalty of forfeiture commonly contained in the *sentence*.[94]

Besides the pay forfeited under the Regulations above mentioned, a deserter forfeits also, (by reason of his desertion alone, irrespective of sentence,) the "*retained pay*," (if any be due him,) provided by Secs. 1281 and 1282, Rev. Sts., and also the pay *retained* under the Act of June 16, 1890; such pay being
1000 payable only in case the soldier "serves honestly and faithfully to the date of discharge."[95]

**Forfeiture of savings.** The Act of May 15, 1872, incorporated in Sec. 1305 of the Revised Statutes, in providing for the deposit, by soldiers, of their savings with the Pay department of the army, to be returned with interest upon discharge, declares that the amount deposited "*shall not be liable to forfeiture by sentence of court-martial, but shall be forfeited by desertion.*" In the opinion of the author, this forfeiture takes effect, by operation of law, upon ascertainment of the fact of desertion, similarly as does the forfeiture last considered; a conviction being the preferable, though not an essential, form of such ascertainment.

**The obligation to make good the time lost to the United States.** This liability forms the subject, in part, of the succeeding Article, (Art. 48,) and will be reserved for consideration thereunder.

**The loss of citizenship and disqualification for office.** Sec. 21 of the Act of March 3, 1865, c. 79,[96] in providing that persons then occupying the status of deserters from the military or naval service, who should not return to the service within sixty days from a specified date, should, "*in addition to the other lawful penalties of the crime of desertion, be deemed and taken to have voluntarily relinquished and forfeited their rights of citizenship and their rights to become citizens, and * * * be forever incapable of holding any office of trust or profit under the United States,*"—proceeded to add the general provision that "*all persons who shall hereafter desert the military or naval service * * * shall be liable to the penalties of this section.*" This general enactment was subsequently incorporated in the Revised Statutes as Sec. 1998,[97] and continues to be law.

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[91] See authorities cited in last note; also U. S. *v.* Kingsley, 138 U. S., 90.

[92] It cannot of course be enforced if the accused is acquitted; nor, upon a conviction, if the finding is *disapproved* by the competent authority. DIGEST, 342–3. And see 13 Opins. At. Gen., 459; Circ. 12 of 1883; Do. 2 of 1885.

[93] *Bounty* has been held to be included in the term "allowances." U. S. *v.* Landers, *ante;* 13 Opins. At. Gen., 188. But the forfeiture would not affect amounts already paid to the party, and in his possession or held in trust for his benefit by the military authorities. 13 Opins. At. Gen., 210, 257.

[94] See U. S. *v.* Landers, *ante;* U. S. *v.* Kingsley, 138 U. S., 90.

[95] G. O. 70, 127, of 1890; Do. 56 of 1891; U. S. *v.* Kingsley, *ante.*

[96] Compare the provision of the Act of April 14, 1802, s. 4, by which persons "convicted of having joined the army of Great Britain during the late war" are rendered ineligible to citizenship.

[97] It had meanwhile been recognized as a continuing general provision by an enactment of July 19, 1867, excepting certain persons from its operation. (Sec. 1997, Rev. Sts.)

This statute has been construed by the courts of several of the States, and it has invariably been held that the forfeiture declared was a penal con-
1001 sequence of desertion, and could be incurred only upon a *conviction* of the offence by the court which alone has jurisdiction of the same, *viz.* a court-martial. It has therefore been ruled that, to establish against a party the fact of an incapacity resulting from the loss, by reason of desertion, of the rights of citizenship,—as for example the incapacity to exercise the right of suffrage,—it is essential that the legal record of his conviction, (*i. e.* of a conviction duly approved,) be produced and proved.[98]

The penaltes prescribed by the statute need not of course be specifically included in the *sentence* of the court-martial,[99] and are not so included in practice.

It has been held by the Attorney General [100] that the President is empowered to "*pardon* a deserter so as to re-enfranchise him;" that is to say that a pardon will operate to remove the disabilities attaching as continuing penalties under the statute in question.

It may be added in regard to this statute that, though general in its terms, it was manifestly intended as a means of enforcing the draft and of preventing desertion at a period of emergency and public danger. It was thus in fact a *war* measure, and the general clause was apparently added only to cover such period as might remain of the then existing war. Not being limited, however, to such period, it has been treated as of continuous operation. In a normal condition of peace, a statute of this exceptional character, by which desertion is visited with a "political" punishment,[1] is incongruous and unnecessary, and its retention in our military law is no longer desirable.

**Ineligibility to reappointment.** By Sec. 1229 of the Revised Statutes, "*the President is authorized to drop from the rolls of the army, for desertion,*
1002 *any officer who is absent from duty three months without leave;*" and it is added—"*and no officer so dropped shall be eligible for reappointment.*" [2]

**Ineligibility for re-enlistment.** Sec. 1116, Rev. Sts., in which it is declared that deserters shall not be eligible for enlistment, has already been considered in treating of the Third Article.

**Qualified ineligibility to admission to the Soldiers' Home.** By Sec. 4822, Rev. Sts., it is provided that no one "*who has been a deserter*" shall be received into this Institution, "*without such evidence of subsequent service, good conduct, and reformation of character, as is satisfactory to the Commissioners.*"

**Vacating of warrant as non-commissioned officer.** It is declared in the Army Regulations that—"The desertion of a non-commissioned officer vacates his appointment from the date of desertion.[3]

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[98] See Huber *v.* Reily, 53 Pa. St., 112; Gotcheus *v.* Matthewson, 61 N. Y., 420, (also 58 Barb. 152 and 5 Lans., 214;) State *v.* Symonds, 57 Maine, 148; Holt *v.* Holt, 59 Id., 464; Severance *v.* Healy, 50 N. H., 448. And compare Kurtz *v.* Moffitt, 115 U. S., 487. Such a conviction will not of course affect the right to vote under the laws of a *State*, unless those laws, by providing that a voter in the State shall be a citizen of the United States, or otherwise, have in fact adopted the penalty in question. Huber *v.* Reily, Gotcheus *v* Matthewson, State *v.* Symonds.

[99] See in this connection State *v.* Dupont, 2 McCord, 334.

[100] 14 Opins., 124.

[1] Compare McCafferty *v.* Guyer, 59 Pa. St., 127.

[2] As to this provision, see "Ninety-Ninth Article," *post.*

[3] Par. 254, A. R., as amended by G. O. 67, of 1893.

**Incapacity to receive a bounty-land warrant.**[4] In Sec. 2438, Rev. Sts., it is provided that—"*No person who has been in the military service of the United States shall, in any case, receive a bounty-land warrant, if it appears by the muster-rolls of his regiment or corps that he deserted or was dishonorably discharged from service.*"

**REWARD FOR ARREST OF DESERTERS.** By the Act of Congress of October 1, 1890, c. 1259, s. 2, it is provided as follows—"*That it shall be lawful for 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.*" Up to
1003 a recent date the "reward" for arrest, &c., of deserters at large, was fixed by the Army Regulations at *sixty dollars.*[5] But the recent Army Appropriation Act of August 6, 1894, c. 228, in making appropriation "for the apprehension, securing, and delivering of deserters and the expenses incident to their pursuit," provides that—"*no greater sum than ten dollars for each deserter shall be paid to any officer or citizen for such service and expenses.*" Thereupon, in G. O. 65 of 1894,[6] the existing regulation on the subject—par. 122, A. R.—was amended as follows:—

"122. A reward of ten dollars will be paid to any civil officer having authority under the laws of the United States, or of any State, Territory, or District, to arrest offenders, for the apprehension, securing, and delivering to the proper military authority at a military station (or at some convenient point as near thereto as can be agreed upon) of any deserter from the military service, except such as would have the right to claim exemption from trial and punishment under the provisions of the act of Congress approved April 11, 1890, amending Article 103 of the Rules and Articles of War. This reward will be paid by the Quartermaster's Department in full satisfaction of all expenses for arresting, keeping, and delivering, and its payment will be reported to the commander of the company or detachment to which the deserter may belong."

In view of the laws fixing and limiting the pay and emoluments of members of the army, it is clear, and it has heretofore been held,[7] that a reward for the arrest of a deserter is not legally payable to an enlisted man; and similarly it cannot of course be paid to a commissioned officer. Under the existing law it is thus legally payable only to a "civil officer" of the description set forth in the Act of 1890.[8] Such officer must be one having a general power under
1004 the laws of the United States, or of the State, &c., to make arrests of offenders. An official empowered to arrest only a special class of offenders—as, for example, an inspector of customs authorized to arrest only

[4] It may be noted here that, prior to the Act of June 27, 1890, desertion did *not* render a soldier ineligible to receive a *pension*, provided only that he had been *discharged* from the service, even if his discharge was a *dishonorable* one. Thus it was held in the Pension Office that—"The nature or the character of the discharge itself does not impair nor otherwise affect the claim for pension, on account of disabilities due to the service." Pension Decisions, vol. 3, (1890,) p. 138. The prior rule and practice were changed by the Act of 1890.

[5] This amount has varied from time to time. Prior to 1890, it had been, for upwards of fifty years fixed at *thirty* dollars. Rewards of $5 and $10, with expenses, &c., were on several occasions authorized by Congress during the Revolutionary War. See 1 Jour. Cong., 165; 2 Do., 211, 293; 4 Do., 651. In the last instance the offer is for apprehending the deserter and securing him "*in any of the gaols of the neighboring States.*"

[6] By the same G. O. is amended par. 126, A. R., and the same amount—ten dollars—is fixed as the sum to be paid "for the capture of an escaped military convict."

[7] Circ. No. 10, (H. A.,) 1886.

[8] Circ. No. 13, (H. A.,) 1892. And see DIGEST, 348.

offenders against the customs laws—could not lawfully arrest a deserter from the army or be paid the reward. Nor will the reward properly be paid where there has been *collusion* between the official and the soldier.[9]

Being empowered to arrest summarily, the civil officer will of course not require a warrant[10]—will require one no more than would a military person in making such an arrest. This right, however, of summary arrest will not authorize the arresting party to violate the vested rights of third persons. Thus it will not authorize forcing an entrance into a private house against the consent of the occupant, for the purpose of apprehending a deserter concealed therein.[11] In such a case the arrest may sometimes be effected by taking out a warrant against the occupant for the offence of harboring a deserter, made punishable by Sec. 5455, Rev. Sts.

The fact that the deserter surrendered himself to the officer claiming the reward will not preclude its payment, if the surrender was made in good faith.[12] The receiving and holding of the soldier and the due delivery of him to the military authorities will be considered as bringing the case within the statute and regulation.[13]

Where, before settling a claim by a civil officer for the reward, the soldier has been brought to trial for desertion by court-martial, and has been acquitted or convicted of absence without leave only, or where a conviction by the court has been disapproved by the reviewing authority, the reward is
1005 not legally payable. Nor, in any such event, can the amount of a reward, paid *before* the trial, legally be stopped against the pay of the soldier.[14]

### FORTY-EIGHTH ARTICLE.

**PREVIOUS LEGISLATION.** This provision first appears as an Article of war in the code of 1874. Previously it had existed as a section of the successive Acts of May 30, 1796, c. 39, March 16, 1802, c. 9, January 11, 1812, c. 14, and January 29, 1813, c. 16. The only material change that need be remarked in its language is that the words—"in addition to the penalties mentioned in the rules and articles of war," formerly inserted after the word "shall" in the second line, have been omitted in the present form.

**THE SUBJECTS OF THE ARTICLE.** The Article comprises two distinct subjects:—1. The liability of the deserter to complete, or "make good," the term of his contract; 2. The amenability of the deserter to trial after the period for which he enlisted has expired.

**1. THE LIABILITY OF THE DESERTER TO COMPLETE HIS CONTRACT.**—When it takes effect. It has been held by the Judge Advocate General that the liability, to make good the time lost to the United States by the desertion, attaches to the deserter as such, as a result of his violation of his

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[9] Circ. No. 1, (H. A.,) 1892. And see DIGEST, 348.

[10] See Hutchings *v.* Van Bokkelen, 34 Maine, 126; Hickey *v.* Huse, 56 Id., 493. Compare the provision of the British Army Act, 154.

That a deserter arrested at a place not conveniently near a military station may be temporarily confined in the local jail, is illustrated in Hutchings *v.* Van Bokkelen, *ante*. That the officer or person arresting a deserter is not authorized to seize private property belonging to him, see Clark *v.* Cummins, 47 Ills., 372.

[11] Clay *v.* U. S., Devereux (Ct. of Cl.,) 25. The ruling, *contra*, announced in Circ. 6 of July 10, 1885, is believed to have been inadvertently approved and published.

[12] Circ. No. 1, (H. A.,) 1892.

[13] Circ. No. 1, (H. A.,) 1886; DIGEST, 347.

[14] Par. 125, A. R.; 16 Opins. At. Gen., 474. And see Circ. Dept. of Va., March 31, 1890; Circ. Dept. of the Mo., June 9, 1871; G. O. 48, 53, Dept. of the Mo., 1866; Do. 23, Dept. of La., 1868; Circ. No. 6, (H. A.,) 1883.

contract, whatever be the disposition of his case; that it is complete though the deserter be not brought to trial and convicted. This view may appear to be sustained by the above-mentioned omission in the present form of the Article, as also perhaps by the general terms of pars. 127 and 128 of the Army Regulations.[15] The Attorney General, however, assimilating this provision to that of the statute depriving deserters of the right of citizenship, which has been uniformly interpreted as taking effect only upon a conviction by court-martial,[16] holds of the injunction in question, of Art 48, that it "is to be construed along with the other penal provisions relating to the offense of desertion, all of which contemplate a trial and conviction before the infliction of the penalty. * * * It comes into play only after a conviction."[17] A similar understanding of the law is conveyed by par. 132 of the Army Regulations, which directs that enlisted men absenting themselves without authority "shall, *upon conviction by court-martial*, make good the time lost."[18] If a conviction be required in a case of absence without leave, *a fortiori*, it would seem, should it be made a condition in a case of desertion—a much more serious offense, involving a special intent, and calling for more extended and exact proof.

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If, accepting the conclusion of the Attorney General, a conviction be held to be essential, such conviction, to authorize the enforcement of the liability, must of course be duly *approved*. If *disapproved*, all liability on account of the alleged desertion is put an end to, in the same manner as if there had been an acquittal by the court.[19]

Further—adopting the same view of the law—it is clear, though once considered otherwise,[20] that the liability in question, attaching as it would by operation of law upon conviction, would be quite independent of any *punishment* that might be adjudged by the court, and need not therefore be included in the sentence.[21] In practice it is now most rarely thus expressed. On the other hand, whatever be the terms of the sentence, it cannot affect the attaching of the liability. Any reference to it in the sentence is thus surplusage.

**Period of time to be made good.** This period is that of the time intervening between the day on which the unauthorized absence commenced and that of the arrest, return, or surrender of the soldier. Time passed by him in arrest or confinement or in hospital, while awaiting his trial or the disposition of his case by the reviewing authority, cannot be computed as a part of such period; nor can time passed in confinement (without discharge) under his sentence be credited to him thereon, such time being not service but punishment. So, the entirety of the period cannot be affected by the fact that pending his confinement under the sentence, the term of his enlistment, (dating from its inception,) may have expired.

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**The liability dissolved by discharge.** Where, however, the deserter is sentenced to be dishonorably discharged, and has been duly discharged accord-

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[15] But see reference to par 132, *post*.

[16] *Ante*, under "Forty-Seventh Article," pp. 646–647 and note.

[17] 15 Opins. At. Gen., 162.

[18] It may well be questioned whether this regulation, in extending the penalty to a class other than that specified in the statute—deserters, does not assume to legislate and is not therefore without legal sanction.

That the penaly cannot be enforced against soldiers who have lost time of service by reason of having been confined, (when not absent without leave,) by the civil authorities—see Circ. 5 of 1883.

[19] 13 Opins. At. Gen., 459.

[20] See G. O. 26, 45, of 1843.

[21] G. C. M. O. 329 of 1864; G. O. 94, Dept. of the Mo., 1867; Do. 23, Dept. of the Lakes, 1873; G. C. M. O. 74, Dept. of the East, 1873.

ingly, he is finally separated from the military service under his enlistment and cannot legally be remanded to the same to make good the time of his absence. And herein is the reason why this liability is so rarely enforced in practice, *viz.* because deserters, upon conviction, are now almost invariably sentenced to be dishonorably discharged prior to confinement.

So, where a deserter, in the absence of a trial and sentence, or pending the execution of a sentence which did not impose discharge, is discharged as an executive act under Art. 4, he cannot be subjected to the liability in question, the Government having, by thus discharging him, *waived* the enforcement of the same.[22]

**Status of soldier when making good his time.** It is declared by par. 127, Army Regulations, that a deserter, when returned to the proper command to make good the time due by him to the United States, "will be considered as again in service." While thus serving he will occupy in his military relations the same status as that of any soldier in good standing, except in so far as his rights to pay or allowances may have been divested by a forfeiture of pay, &c., "to become due," contained in his sentence. Otherwise he is to be paid, subsisted, &c., as well as treated in general, like any other soldier. He is not in arrest, and is not to be discriminated against because of having been a deserter. His discharge at the end of his service will be an honorable one in law, though it may properly state the circumstances under which it is given.

1008 **Deserters, &c., alone subject to this liability.** The liability to make good the time lost by absence, being prescribed only in cases of desertion, (and absence without leave,) cannot legally be enforced in an instance of any other offence, although the same may have resulted in withdrawing the soldier for a time from the service. Though such loss to the United States may have been the consequence solely of his own misconduct, the offence must be visited with some penalty other than that involved in this obligation.[23]

**2. THE AMENABILITY OF THE DESERTER TO TRIAL AFTER THE PERIOD FOR WHICH HE ENLISTED HAS EXPIRED.** The Article, in its second clause, in effect provides that a deserter, though not arrested till after his term of enlistment has expired, shall be amenable to trial and punishment in the same manner and to the same extent as if apprehended before its expiration. This amenability has already been adverted to in the Chapter on Jurisdiction.[24] Such amenability, which may of course be terminated by a *discharge* given by competent authority, is subject to the limitation as to the initiation of prosecutions enjoined by the 103d Article.

### FORTY-NINTH ARTICLE.

**ORIGIN OF THE PROVISION.** This statute first appears as an Article of war in the present revised code of 1874, having previously formed the second section of the Act of Aug. 5, 1861, c. 54. It is understood to have originated in the fact that sundry officers of the army, intending to join the Southern Confederacy, had, prior to the date of the Act, tendered their resignations, and, without waiting for their acceptance, departed for their respective States.

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[22] The law on this subject is recognized in par. 127, Army Regulations, which declares that deserters shall make good time lost, &c., "unless discharged by competent authority." Compare Holmes' Case, 18 Opins. At. Gen., 427.

[23] See case in G. C. M. O. 62, Dept. of the Platte, 1886, where a sentence adjudging the making good of 57 days lost by sickness in hospital, induced by the misconduct of the accused, was disapproved as "unauthorized by law or regulations."

[24] Chapter VIII, pp. 89–90.

**THE ARTICLE DECLARATORY OF THE EXISTING LAW.** The Article is simply a definition of desertion as illustrated by a particular class of cases.

An officer of the army by merely resigning his commission modifies in no
1009 manner his amenability to the military law and jurisdiction. This remains unchanged until he has been officially notified of the acceptance of the resignation as tendered.[35] If prior to such notification he assumes to abandon the service, he is a deserter under the military common law, no special statute declaring him such being required. Thus Art. 49 merely designates a certain class of officers as deserters, who, without it, would still be amenable to justice as such under the general provision of Art. 47.

The Article may further be viewed as declaratory, by implication, of a principle of the law governing *resignations, viz.* that when an officer has in fact been duly notified of the acceptance of a resignation tendered to take effect immediately or on a certain day, he is entitled at once or on that date to quit his post and duties, and separate himself, as a civilian, altogether from the military service; and, moreover, that thereafter no reconsideration or attempted withdrawal of the acceptance by the authorities can remit him to his former status, render him amenable to military law, or be otherwise than wholly futile.[36]

### Fiftieth Article.

**THE SUBJECTS OF THE ARTICLE.** This Article, which dates from the code of 1776, relates to two different matters:—1. The act of re-enlisting without a regular discharge; 2. The duty and liability of officers in regard to persons so re-enlisting.

**RE-ENLISTING WITHOUT A REGULAR DISCHARGE.** Art. 4, as has been seen, prescribes in what manner and form a soldier shall be discharged, and the present Article in effect declares that a soldier who assumes to discharge *himself* from his proper regiment, &c., *i. e.* to leave it "without a regular discharge," and enlist in another, does so at the peril of being treated as a deserter.[37] It is to be construed, however, not as creating an offence distinct
from the desertion made punishable by Art. 47, but as indicating a specific
1010 form of such offence, or rather as declaring that the act of re-enlisting under the circumstances described shall constitute *proof of desertion* on the part of the soldier.[38] The object of the provision evidently was to preclude the notion that a soldier could be relieved from liability as a deserter because, on abandoning his regiment, he proceeded to re-enter the service in another, or, in other words, that he could be excused from repudiating his pending contract by substituting another in its place.[39]

**THE CHARGE.** The charge under this Article should be "Desertion in violation of the 50th Article" or "Desertion," simply. The act should *not* be charged as Fraudulent Enlistment; this being now—by the Act of July 27, 1892—constituted and made punishable as an offence under Art. 62.

**PROOF—DEFENCE.** The previous voluntary enlistment or service, and the absence of any discharge therefrom, together with the deliberate enlistment in

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[35] See Barger *v.* U. S., 6 Ct. Cl., 35; also Mimmack's case cited in next note.

[36] Mimmack *v.* U. S., reported in 10 Ct. Cl., 584, 97 U. S., 426, 12 Opins. At. Gen., 555, and 14 Id., 262.

[37] It has been noticed by the Judge Advocate General, (Digest, 45,) that this Article does not apply to a case of a naval *seaman* or *marine* enlisting in the army without a discharge from his former service.

[38] G. C. M. O. 129, Dept. of the Mo., 1872; Do. 77, Id. 1874, Do. 4, Id., 1883.

[39] Samuel, 330; G. C. M. O. 39, Div. Atlantic, 1887.

the "other" regiment or company, being shown by the evidence of the proper commanding officer, adjutant, recruiting officer, &c., the act of desertion defined in the Article is proved, and there can be no valid defence. It is not a defence to claim that the second enlistment, being fraudulent, was *void*, and that therefore no desertion could be committed. The second enlistment under the circumstances is not void, but voidable merely at the option of the United States, which may elect to hold the accused to it and bring him to trial as a member of the second regiment for a desertion from the first.[30]

**Punishment.** The provision, in regard to punishment, of Art. 47 applies of course to the form of desertion specified in *this* Article, which is therefore punishable with death in time of war,[31] and with any lesser legal penalty or penalties in time of peace. While *any* re-enlistment in violation of the Article is a species of fraud upon the United States, the offence will be aggravated and the punishment properly made more severe where the party in re-enlist-
1011 ing, uses an assumed name, makes false statements, exhibits a false or forged discharge, &c., with deliberate intent to deceive the military authorities.[32]

**DUTY AND LIABILITY OF OFFICERS UNDER THE ARTICLE.** The object of the second provision of the Article was, according to Samuel,[33] "to counteract the interest," which officers might sometimes have, to fill up with improper persons the quotas of their organizations, with a view to obtaining the increased rank or other advantage attaching to the command of a certain number of men. A further purpose of the provision, in our law, would seem to be to deter officers from becoming, through connivance or indifference, practically accessories to desertion,[34] and thus also to render more certain the detection and punishment of the deserters themselves.

The term "*receive and entertain*" would include not only the harboring or relieving of the class of deserters specified, or the assisting them to evade justice,[35] but the admitting of them to the command, or recognizing and treating them, as soldiers in good standing.[36] In a charge against an officer under this Article, the *scienter*, or that he acted "knowingly," must be expressly alleged and proved.

The purpose, observes Hough,[37] of requiring the deserter to be imme-
1012 diately confined is to prevent the escape which he would be likely to attempt upon perceiving himself to be the object of suspicion. Such

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[30] See Circ. No. 3, (H. A.,) 1890.

[31] The death sentence was on several occasions during the late war adjudged upon a conviction of desertion under this article. See cases in G. O. 30, 35, of 1864; G. O. 83, Dept. of Washington, 1864.

[32] Especially where the purpose is to secure bounty money or other emolument. In the case of Downing *alias* Ball, published in G. O. 83, Dept. of Washington, 1864, the accused, a "bounty-jumper," was convicted of seventeen separate re-enlistments, as a substitute, entered into during a period of less than a year, and in six different States, and upon which he was found to have received in all nearly eight thousand dollars in bounties. The sentence of death was approved and executed in this case. And see case of Devlin, p. 645, note.

[33] Page 332. And see O'Brien, 98. Hough, (p. 163,) appears to be of opinion that *recruiting* officers are mainly intended by the Article. Its terms however are general and equally applicable to all officers.

[34] See O'Brien, 98.

[35] In a case in G. O. 79, Army of the Potomac, 1862, a captain was convicted of a violation of this Article in that he "did wilfully harbor and conceal" a deserter from another regiment, and did "neglect and refuse to surrender him on the demand of" his company commander.

[36] See cases in G. O. 49, Dept. of Washington, 1864; Do. 1, Dept. of W. Va. 1864.

[37] Page 164.

confinement would also properly be resorted to with the view of promptly bringing him to trial. The term "immediately," as applied especially to the giving of "notice," is to be construed as meaning with all reasonable dispatch.[38]

The severe and mandatory *punishment* of cashiering, prescribed by this part of the Article, is evidently an expression of the uniform policy of the law to visit with extreme penalties the entire class of acts which either involve, induce, or encourage desertion.[39]

### Fifty-first Article.

**THE OFFENCES CONTEMPLATED.** This Article, which dates from the code of 1775,[40] is viewed as making punishable two distinct acts—that of counselling the commission of the crime of desertion, and that of inducing, by persuasion, such crime to be committed. It is quite evident that it was intended that these acts should constitute separate offences.[41]

**ADVISING TO DESERT.** The offence is complete with the giving of the advice, by one officer or soldier to another, with serious intent.[42] Whether the act is or is not induced by the advice given, is quite immaterial.

1013 **PERSUADING TO DESERT.** But to persuade a person to desert is to cause him to do so by the influence employed.[43] The offence of persuading is not therefore complete unless the party prompted actually proceeds to consummate the crime. Persuading to desert is thus in the nature of the offence of an accessory before the fact to a felony. The persuasion may be by solicitation or argument, promise of reward, or other form of inducement brought to bear for the purpose.[44]

In perhaps a majority of the cases, (which however are not numerous,) this offence has been committed by one who himself contemplated desertion, and who did in fact desert, accompanied by the party persuaded.[45]

A peculiarly aggravated form of the offence would be presented by a case where an officer enticed men to desert from their regiment in order that he might enlist them in his own command.[46]

To constitute the offence it is not essential that the accused should have been alone in the persuasion. If he is clearly shown to have promoted the result, to

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[38] See Samuel, 332; O'Brien, 99.

[39] Compare Sec. 5455, Rev. Sts., which makes punishable by fine or imprisonment, to be imposed by a U. S. court, any person who shall entice, procure, or assist a soldier to desert, or knowingly harbor, protect, conceal, or refuse to give up, a deserter.

[40] Neither this code nor that of 1776 made these offences capitally punishable.

[41] "There is this difference between having *advised* and having persuaded to desert, that the one is an advice to another to do an act, which he may or may not consent to commit; the other a persuasion by which the act is *done*." Hough, 172. *Contra*, Samuel, (p. 339,) who, as usual, is repeated by O'Brien, (p. 99,) views the word "persuades" as substantially synonymous with "advises," and so regards the Article as contemplating but a single offence. The construction, however, of the Article by Hough is more natural and reasonable, and is sustained by the etymology of the word *persuade*. It is further supported by the ruling in the parallel case of Respublica *v.* Roberts, 1 Dallas, 39, where the court held that the term "persuade to enlist" in a statute, meant advise with success—induce to actually enlist; citing Regina *v.* Rhodes, Ld. Raym., 889. And see Digest, 45–6, and the G. O. cited *post*, under "Persuading to Desert."

[42] It has been held by the Judge Advocate General, (Digest, 45,) that a mere "declaration made by one soldier to another of a willingness to desert with him in case he should decide to desert, was not properly an *advising* to desert in the sense of this Article."

[43] See note *ante*.

[44] See Samuel, 343; Hough, 172; O'Brien, 99.

[45] Such cases occur in G. O. 23, Dept. of the Mo., 1863; G. C. M. O. 11, 152, Id., 1868.

[46] See this *charged*—the officer was acquitted—in G. O. 1, Dept. of W. Va., 1864.

have been instrumental with other persons or agencies in bringing it about, he may equally be convicted as if he had been the sole cause.[47] So it is not necessary that the persuasion should have been personal: if employed, for instance, by an officer, through a non-commissioned officer or soldier, it will be within the Article.[48]

The desertion persuaded to be committed may be either of the ordinary
1014 form or that particularized in Art. 50. The latter was the form charged in the well-known English case of Sergeant Grant.[49]

**PUNISHMENT.** This being discretionary, a court will ordinarily be inclined to visit the latter form of offence more severely than the former; the fact that the desertion was actually induced going to indicate a more persistent and criminal purpose than would naturally be inferred where its commission, though advised, was not brought about. The offence charged should also be the more severely punished in proportion to the rank and position of the offender. For one to advise or persuade desertion whose higher rank or office gives a peculiar force and significance to his words and acts, and from whom a good example and a faithful enforcement of discipline are properly to be expected, is of course a much graver dereliction than a similar offence committed by one of the same military grade or status with the person attempted to be influenced.[50] In any case, the persuader, if of superior rank, will be deserving of a severer punishment than the party persuaded.

## XXI. THE FIFTY-SECOND AND FIFTY-THIRD ARTICLES.

[Attendance and Behaviour at Religious Services—Profanity.]

"ART. 52. *It is earnestly recommended to all officers and soldiers diligently to attend divine service. Any officer who behaves indecently or 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 offence, forfeit one-sixth of a dollar; for each further offence he shall forfeit a like sum, and shall be confined twenty-four hours. The money so forfeited shall be deducted from his next pay,*
1015 *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.*

"ART. 53. *Any officer who uses any profane oath or execration shall, for each offence, 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 offences shall be applied as therein provided.*"

### FIFTY-SECOND ARTICLE.

**ORIGIN.** The originals of this and the succeeding Article—Arts. 2 and 3 of 1775—may be traced to British articles of a very early date; corresponding provisions being found in the "Lawes and Ordinances of Warre" for the Royal

[47] Compare case of Grant *v.* Gould, as commented upon in Samuel, 341–3. And see the cases in G. C. M. O. 152, Dept. of the Mo., 1868, of a corporal, an artificer, and a private of the same company, who are charged each with persuading the two others to desert; the two former being convicted.

[48] Such was the form of the offence in a case in G. O. 40, Dept. of Washington, 1865.

[49] Grant *v.* Gould, 2 H. Bl., 69.

[50] In the case, above cited, in G. O. 23, Dept. of the Mo., 1862, the death penalty (commuted by the reviewing authority to imprisonment) was adjudged a corporal convicted of having persuaded a private to desert with him. In a case in G. C. M. O. 16 of 1892, the offence was aggravated by the fact that the advice was given by a *sentinel* to a prisoner under his charge.

army, of 1639,[51] in the Articles for the Scottish army, of 1644,[52] and in Art. I of the Code of James II.[53]

**THE RECOMMENDATION.** The Article, in its first clause, differs from the corresponding British article,[54] from which it was directly derived and which *requires* attendance at divine worship, in *recommending* only such attendance;[55] a difference doubtless growing out of the provision in our Constitution,[56] by which Congress is forbidden to make any "law respecting an establishment of religion or prohibiting the free exercise thereof."[57] A statute making it obligatory upon officers or soldiers to attend religious services on Sunday (or other day) would be of doubtful constitutionality, as opposed to the spirit if not to the letter of the organic law. The Article, therefore, while
1016 favoring such attendance, has well left it optional with officers and soldiers whether they will or not be present at any such services.

**THE PENAL PROVISION.** The awkward and exceptional procedure prescribed by this Article would be sufficient to preclude, at this date, a resort to it for the disposition of offenders.[58] For the punishment indeed of an offence such as indicated, a prosecution under Art. 62 or 61, would in general be found entirely adequate and effectual. The Article is thus practically as unnecessary as it is clumsy and antiquated, and having now no material value or significance, might well be dropped from the code.[59]

### Fifty-third Article.

**ITS FORMER SIGNIFICANCE.** The enforcement of this Article, (which is derived from provisions of the Codes of Charles I and James II,[60]) was, at an early period of our law, much insisted upon. Thus, in a Resolution of December, 1776,[61] recommending to the States the appointing of a day of "fasting and humiliation," it is added:—"The Congress do also, in the most earnest manner, recommend to all the members of the United States, and particularly the officers civil and military under them, the exercise of repentance and reformation; and further require of them the strict observation of the Articles of war, and particularly that part of the said Articles which forbids profane swearing," &c. Again, in February, 1777,—"It being," (to quote from the Journals,[62]) represented to Congress that profaneness in general, and particularly cursing and swearing, shamefully prevail in the army of the United States," it is "Resolved

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[51] 1 Clode, M. F., 429.

[52] Pipon & Col., 16.

[53] See Appendix. And compare Arts. 5 to 16 of Gustavus Adolphus.

[54] Art. 1, Sec. 1, of 1765. See Appendix.

[55] Similarly "it is commended," in G. O. 7, Army of the Potomac, 1861, "to commanding officers that the men shall attend divine service after the customary Sunday morning inspection."

[56] Art. 1 of the Amendments.

[57] A pointed contemporary exposition or illustration of this provision of the Constitution is found in the declaration inserted in the Treaty with Tripoli of 1796–7, (8 Stats. at Large, 155,) and still in operation, (see Public Treaties, 756,) that—"the Government of the United States of America is not in any sense founded on the Christian religion," and "has in itself no character of enmity against the laws, religion or tranquility of Mussulmen."

[58] As to the inconvenience of this procedure, see Hough, 56; Id., (P.) 28; McNaghten, 84; O'Brien, 58.

[59] McNaghten, (writing in 1828,) refers, (p. 84,) to the corresponding provision of the British Articles as "a mere dead letter."

[60] See Appendix. And compare Arts. 2, 3 and 4, of Gustavus Adolphus.

[61] 1 Jour. Cong., 577.

[62] 2 Jour. Cong., 51.

that Geueral Washington be informed of this, and that he be requested to take the most proper measures, in concert with his general officers, for reforming this abuse." And, in a subsequent Resolution of October, 1778,[63] officers of the
1017 army are "strictly enjoined" to see, among other things, "that the good and wholesome rules provided for the discountenancing of prophaneness * * * are duly and punctually observed."

**PRESENT UNIMPORTANCE.** The extent, however, of the use of profane language in the army has long ceased to be regarded as a matter of public concern. The vehement and copious profanity of an earlier period is indeed now rarely indulged in. In practice, such language, where so employed as to amount to a *disrespect* or a *disorder*, is made the subject of a charge under the 62d or other appropriate Article, but otherwise does not in general receive official notice. The 53d Article is never enforced and is practically obsolete: its provisions need not therefore be further considered.

## XXII. THE FIFTY-FOURTH, FIFTY-FIFTH, FIFTH-SIXTH AND FIFTY-SEVENTH ARTICLES.

[Protection to Citizens and their Property, &c.]

"ART. 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.*

"ART. 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, beside such penalties as he may be liable to by law, be punished as a court-martial may direct.*

"ART. 56. *Any officer or soldier who does violence to any person bring-*
1018 *ing 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.*

"ART. 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.*"

FIFTY-FOURTH ARTICLE.

**ITS OBJECT.** This statute, which, taken from a previous British article, dates in our law from 1775, was evidently designed to protect civilians[64]

[63] 3 Jour. Cong., 85.

[64] That the Article contemplates only injuries done to this class, see Samuel, 465; O'Brien, 117; DIGEST, 25. Our Article is in effect the corresponding provision of the British code,—which applied only to cases of injury done to landlords or other persons with whom soldiers were billeted,—extended to citizens in general.

from disorderly and riotous[65] acts on the part of the military, and, while providing for the punishment of the latter, to secure to the former an indemnification for such injuries as they may have suffered.

**CONSTRUCTION.** The Article, however, is, as a remedial provision, incomplete and unsatisfactory, especially in that (1) it leaves in doubt what classes of injuries are had in view—whether injuries to the person only, or injuries to property as well as person; and (2) fails to indicate in what manner and by what instrumentality the reparation for such injuries is to be effectuated.

**As to the injuries contemplated,** the language of the Article would rather imply that it was bodily assault only that was intended. But as the species of disorderly conduct specified are such as naturally to result in damage to property, such damage, at least when incidental to violence against the person or the outgrowth of a breach of the peace, might well be regarded as within the spirit of the Article. There was support therefore for the practice which grew up during the recent war, and was sanctioned later by the War Department in the General Order presently to be cited, of summarily mulcting
1019 soldiers by stoppage of their pay, under the present Article, for damage done civilians in their *property*, (in violation of Art. 55 or otherwise;) nor was this damage always the accompaniment of a personal assault or of a riotous outbreak. A liberal construction thus came to be given in practice to the Article in the particular in question, and, though in some instances this practice was extended to cases quite beyond the proper scope of the statute,[66] a prompt justice, within the equity of its provisions and suited to the exigencies of the times, was in most cases administered.

**As to the modus operandi of the reparation,** the Article does not indicate whether the appropriation of pay is to be made directly by the order of the commander himself or through the instrumentality of a court-martial. Early in the late war, however, the construction was put upon it by the Judge Advocate General[67] that it *authorized* the making of the reparation through the summary action and order of the military commander, independently of any proceedings before a court-martial, and this view of the law was in general concurred in by department commanders.[68]

**THE GENERAL ORDER OF 1868—PROCEDURE.** The interpretation thus given was in substance adopted, and the prevailing practice formulated, in G. O. 35, of the War Department, of 1868, as follows:—"Under the 32d, (now 54th,) of the Rules and Articles of War, it is made the duty of commanding officers to see reparation made to the party or parties injured, from the pay of soldiers who are guilty of abuses or disorders committed against citizens. Upon proper representation by any citizen of wanton injury to his person or property, accompanied by satisfactory proof, the commanding officer of the
1020 troops will cause the damage to be assessed by a board of officers, the amount stopped against the pay of the offenders, and reparation made

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[65] The expression "any kind of riot," employed in the Article, may be regarded as of more general import than the technical legal term *riot*.

[66] As where it was applied to the reimbursement of a party for money or property *stolen* from him by a soldier, of which cases are found in G. O. 59, Dept. of Washington, 1866; Do. 6, Dept. of the Cumberland, 1867. That the article cannot legally be resorted to for the relief of persons whose property has been the subject of *larceny* or *embezzlement*, or to indemnify the United States for *public* property appropriated or damaged—see DIGEST, 47.

[67] DIGEST, 46, 47.

[68] See G. O. 123, Dept. of the Gulf, 1864: Do. 74, Dept. of Ark., 1865; Do. 48, 55, Dept. of La., 1866; Do. 59, Dept. of Washington, 1866; Do. 6, Dept. of the Cumberland, 1867. *Contra*, O'Brien, 117, following Samuel, 464.

to the injured party. This proceeding will be independent of any trial or sentence by court-martial for the criminal offence."

Under the Article, as illustrated and supplemented by this Order, the procedure is initiated by a "complaint made" by the injured party [69] to the commander of the regiment, post, &c. The commander may be directed by a superior—as by a department commander, in passing upon the proceedings of a court-martial previously ordered for the trial of the offender, or otherwise—to entertain the complaint, see to the matter of reparation, &c.; [70] or he may himself take action in the first instance, according to circumstances. The complaint, which will properly be expressed in writing, should set forth the details of the injury, and be sustained by evidence showing it to be meritorious and well-founded; and this evidence may also properly be required to be exhibited in the form of affidavits or written statements. The commander, if he deems it expedient, may examine the witnesses in person, or cause them to be examined and their testimony to be taken down by an officer of his staff or command. But the commander cannot properly himself initiate the investigation; *i. e.* cannot dispense with complaint or testimony from the aggrieved party and proceed *sua sponte*.

"Proper representation" having been made and "satisfactory proof" furnished, the commander will convene a "board" for the assessing of the damage. This, in a case of injury to *property*, will be such amount as may justly and reasonably be required to make good the loss. In a case of injury to the *person*, it will ordinarily be a sum sufficient to reimburse the party for actual expenses incurred for medical or surgical attendance, nursing and the like.[71] The party cannot be awarded punitory *damages:* if he claims them, he must be
1021 referred to the civil courts. To assist it in its assessment, the board may avail itself of the testimony of experts or other persons cognizant of values, prices, &c.

The conclusion of the board being approved by the commander, he will by the proper order, direct the amount to be stopped against the pay of the offender on the muster and pay rolls of the command, or otherwise charged against his pay account, till it be collected in full, and the amount or amounts, as collected, to be paid over, by the paymaster, company commander, or other proper officer, to the injured party or some duly authorized person in his behalf.

The Article specifies that the reparation shall be made "so far as *part* of the offender's pay shall go toward" it. Thus if the amount assessed is greater than the pay then due or which will become due at the next pay day, a portion only of such amount should properly be stopped against and deducted from such pay, leaving the remaining portion to be similarly stopped against a future payment or payments.

Where it appears that several persons were concerned in the disorder, the commander will divide the amount assessed among the different parties in equal sums or in such proportions as he may deem just. In some exceptional cases of destruction or damage to private property participated in by members of regiments or other bodies of troops on the march, where it has not been practicable to distinguish certain individuals as the parties liable, a stoppage has been ordered, under this Article, against the entire command.

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[69] It is not *essential* that the injured party personally make the complaint, as it may be made by a parent in behalf of a minor child, (G. O. 48, 55, Dept. of La., 1866,) by a police officer, (G. O. 161, Dept. of Washington, 1865,) or an attorney.

[70] See instances in G. O. 123, Dept. of the Gulf, 1864; Do. 59, Dept. of Washington, 1866; Do. 48, 55, Dept. of La., 1866; Do. 6, Dept. of the Cumberland, 1867.

[71] The only precedents of such an assessment which have been meet with are those in G. O. 48 and 55, Dept. of La., 1866.

As indicated in the Article, and specified in the last clause of the Order, the offender or offenders may be *tried* and punished for the military offence involved in his or their act, quite irrespectively of any proceeding for the reparation of the citizen had under the Article. The *trial* will preferably be first ordered,[72] since, if the reparation be subsequently sought to be made, the commander and the board will have the benefit of any material facts developed upon the original investigation. So, if the accused be acquitted, such acquittal will furnish good ground for not favorably entertaining the complaint or for reducing the
1022 amount to be assessed. If, upon the trial, a forfeiture of pay be adjudged, such forfeiture, in its execution, will take precedence of a stoppage that may subsequently be made under the Article..

It need scarcely be added that notwithstanding a trial by court-martial, and proceedings had under the Article, the offender will still be amenable to the *local law* for such crime or misdemeanor as may have been involved in his acts, as well as to suit for damages.

**DEFECTS OF THE ARTICLE—PRACTICE.** It may be remarked of this Article, in conclusion, that it is antiquated in some of its terms, indefinite and obscure in its more important provisions, and, as at present construed, confers upon military commanders a summary authority, which is exceptional in our law and of doubtful expediency. In view of its defects, commanders have been reluctant to act upon it, and the comparatively rare proceedings which have been instituted have been mostly confined to the period pending and immediately succeeding a time of war. There have been but two or three precedents of trials of officers for "refusing or omitting" to comply with its injunctions,[73] and, in the opinion of the author, it might be omitted from the code without prejudice to the service.

### Fifty-fifth Article.

**ITS PURPOSE.** This Article, which, dating from an early period of the British law,[74] first appeared in our code in the Articles of 1776,[75] is designed, by making severely punishable trespasses committed by soldiers on the march or otherwise, to prevent straggling and maintain order and discipline in military commands, while at the same time availing to secure from intrusion and injury the premises and property of the inhabitants.

1023 **CONSTRUCTION—"Waste or spoil."** These words, which are of similar signification, are not necessarily to be understood in a strictly legal or technical sense. Thus "waste" is defined by Bouvier as "*spoil* or destruction, done or permitted, to lands, houses, or other corporeal hereditaments, by the tenant thereof, to the prejudice of the heir, or of him in reversion or remainder:" according to Greenleaf,[76] "it includes every act of lasting damage to the

[72] This has in fact been done in the majority of cases. See G. O. 123, Dept. of the Gulf, 1864; Do. 48, 55, Dept. of La., 1866; Do. 59, Dept. of Washington, 1866; Do. 6, Dept. of the Cumberland, 1867.

[73] See cases in G. O. 4, Dept. of the Ohio, 1863; Do. 161, Dept. of Washington, 1865. Compare here the penalty prescribed by the original Article (the 12th) of 1775—that the commander "shall be punished in such manner as if he himself had committed the crimes or disorders complained of."

[74] Samuel, (p. 539,) while tracing it to ordinances of the reigns of Elizabeth and Charles I, adds: "This Article is formed principally on the 21st Art. of the Rules for the government of the land forces, of James II." See Appendix.

[75] The original Article, after the words "by the order of" the general commanding, &c., added the words, dropped in the form of 1806—"to annoy rebels or other enemies in arms against said States."

[76] 2 Ev. § 650.

freehold or inheritance." But, as employed in this Article, the words "waste or spoil" may be held to embrace any deliberate or wanton destruction or damage done not only to the real estate itself but to animals or things kept or held within or upon it,[77] and to include acts of military persons, whether occupying the premises for the purposes of a camp or bivouac, marching through or near the same, or operating or being quartered in their neighborhood.

"**Maliciously destroys any property whatsoever.**" The act here denounced is of a similar nature to the offence known to the common law, and which is now a statutory misdemeanor in most of the States, of "malicious mischief" or "malicious trespass." Under the present Article, however, in view of the general terms in which the offence is described, it is not considered necessary, as it was at common law,[78] to show that the accused was actuated by malice against the *owner* of the property, but is deemed sufficient to establish the existence of *any* form of malice; as, for example, malice toward the race, class, or family to which the owner belongs, or toward the thing itself where it is an animal,[79] or toward a person who has the property in temporary possession as tenant or bailee,[80] or evil disposition in general.

1024 The malice may be established by declarations of the accused, made before or after[81] the offense, or by acts or demonstrations evincing personal ill-will and resentment. Or it may be inferred from the deadly or dangerous character of the weapon or instrument employed, from the mere wantonness of the act, or from any of the circumstances that afford a presumption of malice upon the proof of crimes of which malice is an ingredient.[82] The existence of malice may be negatived by evidence that the act was simply one of carelessness, or a mere incident of a neglect or disorder, unaccompanied by personal or evil *animus;* or that it was committed under a *bona fide* though mistaken sense of duty, or in compliance with the orders of a military superior, though such superior may not have been the army commander specified in the Article.

The *destruction* will be complete if the property be substantially ruined for the purpose for which it was designed, as where clothing is so injured that it cannot be worn,[83] or where telegraph wires are severed and thus rendered useless.[84]

Malice being the gist of this second offence made punishable by the Article, the court, where the evidence showa an unjustifiable destruction of property but without malicious intent, will properly find the accused not guilty of the specific offence charged, but guilty of "conduct to the prejudice of good order and military discipline."

"**Belonging to inhabitants of the United States.**" This term, expressed in the Article of 1776 as "belonging to the good people of the United States," while general enough to embrace military persons as well as civilians, was evidently intended to refer mainly or entirely to the latter. It includes of course the property of a corporation[85] equally with that of an individual. So, although,

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[77] See a case in G. O. 10, Middle Mil. Dept., 1865, where the waste charged consisted mainly in injuries done to deer and sheep in a private park.

[78] State *v.* Robinson, 3 Dev. & B., 130; State *v.* Newby, 64 No. Ca., 23, and cases cited; Northcot *v.* State, 43 Als., 330. The common law rule has been modified by the statutes of some of the States.

[79] See State *v.* Avery, 44 N. H., 392.

[80] Stone *v.* State, 3 Heisk., 457.

[81] State *v.* Graham, 46 Mo., 490.

[82] Hobson *v.* State, 44 Ala., 380; Hill *v.* State, 43 Id., 335.

[83] See case in G. O. 10, Dept. of the South, 1870.

[84] See case in G. O. 29, Dept. of the Gulf, 1874.

[85] See case in G. O. 29, Dept. of the South, 1874.

as has been seen, the original Article was restricted in its application to acts directed against enemies or persons in rebellion, the present statute, as a more general rule of discipline, applies to trespasses upon the property as well of resident aliens as of citizens, and of disaffected or disloyal as well of loyal individuals.[86]

1025 **"Unless by order of a general officer commanding a separate army in the field."** This exception is a recognition of a general principle of military law already referred to under Art. 42, in treating of the offence of committing "plunder or pillage," *viz.* that the property of private individuals can legally be taken or destroyed by the military only in time of war and by the authority of the officer in chief command of the troops operating against the enemy. The general commanding, referred to in the present Article, where the due prosecution of hostilities, or the exigencies of the situation may require it, is empowered to seize and consume private property, especially when required as supplies for his command or as material for quarters or defences, or to prevent its falling into the hands of the enemy.[87] In exercising such authority he represents the sovereignty of the government; but no subordinate officer can undertake to exercise this function, or, however proper or desirable be the object in view, assume to make in the first instance the order which the statute empowers the army commander alone to originate.[88]

**"Besides such penalties as he may be liable to by law."** The Article has here in view the punishments affixed by the statutes of the State, &c., to the commission of "malicious mischief" and like offences. It thus recognizes the principle that an officer or soldier, in committing a military disorder, becomes liable not only to trial by court-martial but also to the civil judicature for such criminal offence, (or cause of action,) as may be involved in his wrongful act.

This Article is not regarded as one important to be retained upon a revision of the code.

### Fifty-sixth Article.

**THE ORIGINAL FORM.** This provision has come down from Art. 91 of Gustavus Adolphus, through Art. 11 of Sec. IV of Charles I and Art. 33 of James II. In our own original article on the subject—No. 24 of the code of 1775—it was prescribed that an officer or soldier who should "*do violence, or offer any insult or abuse, to any person,*" &c., * * * *should suffer such*
1026 *punishment as should "be ordered by a regimental court-martial;"*— such court having, under that code, jurisdiction of the offences of officers as well as of soldiers. In the succeeding code—of 1776—the Article assumed substantially its present form.

**PRINCIPLE OF THE ARTICLE.** This, and Art. 57, (making punishable the forcing of safeguards,) are the only ones in the code which provide specifically for the punishment of offences committed "*in foreign parts.*" An offence, to be cognizable under this, (or that,) Article must have been committed in time of war, or while our army was passing through the territory of a friendly power, or occupying some portion of a foreign country under a treaty, &c. The principle upon which a military court, in the absence of statutory authority, is invested with jurisdiction under the circumstances, is that of *exterritoriality*, or a principle analogous thereto, by which an army, when with-

[86] In a case in G. C. M. O. 15, Fourth Mil. Dist., 1867, an officer is severely sentenced for destroying the type, printing material, &c., of an alleged disloyal or hostile newspaper. And see Digest, 48.

[87] See Part II—The Law of War.

[88] Compare Terrill *v.* Rankin, 2 Bush, 453; Lewis *v.* McGuire, 3 Id., 202.

out the domain of its own government, is held to carry with it its own code of dicipline,—a principle already considered in Chapter VIII. In this instance, and that of Art. 57, the jurisdiction is conferred by express enactment.[89]

**OBJECT OF THE ARTICLE.** The main object of the Article, according to Samuel[90] and Hough,[91] is to conciliate the inhabitants and induce them to bring provisions into the camp, &c., of the army by assuring to them protection in so doing. As violence against them would effectually deter them, this is prohibited under the extreme penalty of death, and the prohibition is held properly to cover the period of their coming to, remaining at, and returning from, the camp or station.[92]

**THE "VIOLENCE" CONTEMPLATED.** In view of the mandatory penalty of death imposed by the Article, the term *violence* is strictly construed to mean an immediate violence to the person, and to embrace any crime or
1027 offence involving a battery.[93] For acts within the spirit but not the letter of the Article,—as for conduct not involving bodily injury, (the "insult" or "abuse," for example, included in the original Article,) or for a taking, destruction, &c., of the provisions, unaccompanied by personal assault,—the offender would still be liable to trial, and to a punishment proportioned to the gravity of his offence, under Art. 55 or 62.

### Fifty-seventh Article.

**ITS SCOPE.** This provision is to be traced to Art. 12 of James the Second. As it first appeared in the code of 1776, it was thus expressed:—"*Whosoever, belonging to the forces of the United States employed in foreign parts, shall force a safeguard, shall suffer death.*" Early in the late war, however, by an Act of Feb. 13, 1862, the field of its application was extended to *the United States during a period of rebellion*, and it assumed its present form as an Article of war in the revised code of 1874.

Premising that by the term, "rebellion against the supreme authority of the United States," is mainly had in view that insurrectionary status, (illustrated under the next Article,) the existence of which the President is, by the Act of July 13, 1861, (Rev. Sts., Sec. 5301,) empowered at any proper time to declare, we proceed to define the term "safeguard," and to consider in what the offence of *forcing* one may consist.

**THE SAFEGUARD—ITS NATURE, FORM AND EFFECT.** The term "safeguard" has sometimes been treated as synonymous with "safe-conduct,"[94] and the two have been confounded by some writers on military law.[95] Both indeed are *personal* concessions and not transferable.[96] A safe-conduct, however, which is a privilege accorded generally to an enemy or an alien—especially where a diplomatic, consular, or other public official—of passing

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[89] An offence of this kind described but committed within the Indian country in a Territory, would not be cognizable under this Article. See G. C. M. O. 77 and 88, Dept. of the Mo., 1870.

[90] Pages 560–1. And see O'Brien, 115.

[91] Page 307.

[92] Samuel, 566.

[93] As *robbery*—the form of the violence in the cases in the G. C. M. O. cited in note 1, *ante*.

[94] Halleck, Int. Law, 665.

[95] Samuel, 567–571; Hough, 311–314; Simmons § 204.

[96] Like a passport. That safe conducts are not transferable, see Vattel, (Chitty's edition,) 461; 1 Kent Com., 162; Halleck, 663.

through the territory of a nation during war,[97] is quite different from a
1028 safeguard as that term is now understood in our military law. As used in the present Article, and described in the Army Regulations,[98] the word signifies a special privilege of protection for persons, household, or property—all or either—against military marauders or other disorderly parties, granted by a military commander to private individuals, (deemed to have a claim upon the protection of the government,[99] or whose premises or
1029 property it is thought desirable to protect in the interests of military discipline or otherwise,[100]) to corporations, or to hospitals or other public

[97] Vattel, c. XVII; 1 Kent, Com., 162; Woolsey, 337; Halleck, 663; Lieber, (G. O. 100 of 1863,) § 86, 87.

In a Resolution of May, 1776, (1 Jour. Cong., 339,) *Congress* guarantees to an individual a safe-conduct for a journey from one place to another and for a residence there during pleasure. The granting of safe-conducts was probably indeed more common at that time than it has been at any later period in our history. [See 3 Jour. Cong., 693, and the Act of April 30, 1790, s. 28, by which the violation of safe-conducts and passports is made punishable by fine and imprisonment as a crime against the United States.]

[98] The following are the paragraphs of the Army Regulations of 1881, relating to this subject:—

"SAFEGUARDS.

1083. Safeguards are protections granted to persons or property in foreign parts by the commanding general, or by other commanders within the limits of their command.

1084. Safeguards are usually given to protect hospitals, public establishments, establishments of religion, charity, or instruction, museums, depositories of the arts, mills, post-offices, and other institutions of public benefit; also to individuals whom it may be the interest of the army to respect.

1085. A safeguard may consist of one or more men of fidelity and firmness, generally non-effective non-commissioned officers, furnished with a paper setting out clearly the protection and exemptions it is intended to secure, signed by the commander giving it, and his staff officer; or it may consist of such paper, delivered to the party whose person, family, house, and property it is designed to protect. These safeguards must be numbered and registered.

1086. The men left as safeguards by one corps may be replaced by another. They are withdrawn when the country is evacuated; but if not, they have orders to await the arrival of the enemy's troops, and apply to the commander for a safe conduct to the outposts.

1087. Form of a safeguard:

By authority of ——— ———,

A safeguard is hereby granted to [A. B———; *stating precisely the place, nature and description of the person, property, or buildings.*] All officers and soldiers belonging to the army of the United States are therefore commanded to respect this safeguard, and to afford, if necessary, protection to [*the person, family, or property of* ———, *as the case may be.*]

Given at Headquarters, the —— day of ———.

——————— Maj. Gen. Commanding.

——————— Adjutant General."

[99] Tullock, (p. 39, 40,) refers to safeguards as privileges originally given under the law of nations, to enemies, and, in 1811, extended by Wellington to the inhabitants in Spain.

Persons holding property under the Government upon the theatre of war, would of course, if their property were endangered, be entitled to safeguards, where the public exigency would allow their being furnished. Thus, in G. O. 27, Dept. of the Tenn., 1863, it is ordered as follows:—"All military commanders within this department will, on application, give safeguards to Government lessees of plantations on the Mississippi River, for their stock, provisions, household property, and every thing connected with the plantations so leased."

[100] Granting a safeguard to an *improper* person may constitute a military offence. Thus, in a case in G. C. M. O. 267 of 1864, a general officer was convicted of "conduct to the prejudice," &c., in furnishing a safeguard for the protection of the property of a "notorious rebel," without "obliging him to take the oath of allegiance."

institutions or places.[1] In according this privilege, the commander either causes a guard, (a soldier or soldiers,) to be posted[2] at the dwelling of the applicant or other proper place, or he furnishes the proper person with a formal certificate or order in writing, subscribed by him in his official capacity to the effect that a safeguard has been granted, stating its subject and scope, and calling upon the military to respect it. Or the commander may furnish both guard and certificate: indeed, in practice, a person to whom is accorded a written protection is generally also supplied with a guard to assure and enforce it.[3]

1030 In common military parlance the term "safeguard" is applied somewhat indifferently to the writing or order and to the sentry or guard; strictly speaking, either is but the evidence of the existence of the privilege. Hall, in his International Law,[4] in describing a safeguard as "a protection to persons or property accorded as a grace to a belligerent," adds—"It may either consist in an order in writing or in a guard of soldiers charged to prevent the performance of acts of war. * * * When a safeguard is given in the form of soldiers, the latter can not be captured or attacked by the enemy.

Where the grant of protection is in written form, the writing should exactly and fully specify and describe the person or persons, property, buildings, places, &c., intended to be included: it should also properly state the limit of its duration, so that it may be known for what period it is good, when it may require renewal, &c. Where a guard only is employed, the sentinel, or the officer or non-commissioned officer commanding the detail, should be clearly instructed as to the same particulars.

**By whom to be granted.** The Army Regulations[5] describe safeguards as granted "by the commanding general or by other commanders within the limits of their command." As "the effect of a safeguard is to pledge the honor of the nation that the person or property shall be respected by the national troops,"[6] the same could not in general properly be accorded by a subordinate commander, but should proceed from the commander of the army, department or district, or the officer commanding a separate force acting independently in the enemy's country. It is to be observed of a safeguard that, though given

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[1] See the description of a safeguard in Halleck, 665; Hall, (Int. Law,) 477. Compare also 1 Kent, Com., 163, note; Vattel, 369; O'Brien, 140; Army Regs. of 1881, pars. 1083, 1084. As to the granting by Gen. Scott of safeguards for churches, colleges, hospitals, mills, &c., in Mexico, see his Autobiography, p. 547.

[2] The guard is generally posted by the provost marshal. See G. O. 22, Mountain Dept., 1862.

[3] The writing may be furnished to the guard, (see par. 1085, Army Regs. of 1881, *ante;*) or to a person employed as custodian of the property. (See O'Brien, 140.) Halleck, (p. 665,) writes of safeguards:—"Sometimes they are delivered to the parties whose persons or property are to be protected; at others they are posted upon the property itself, as upon a church, museum, library, public office, or private dwelling." In G. O. 60, Army of the Potomac, 1862, it is ordered: "All safeguards granted at these headquarters will be countersigned by the Provost Marshal General. Persons found violating these safeguards will be instantly arrested by the provost marshals." As to the form of a written safeguard, see par. 1087, Army Regs. of 1881, *ante;* also the form recited in the specification of a case published in G. O. 111, Sixteenth Army Corps, 1863. In some instances safeguards have been announced in General Orders. Thus, in Gen. Wool's Orders, No. 424 of 1847, it is declared that safeguards have been granted to the following persons, their families and property, (naming them and their *haciendas,*) and all officers and soldiers are required to respect such safeguards, and afford protection accordingly where necessary. And see O'Brien, 140.

[4] Page 477. Vattel, (p. 369,) referring to safeguards as "granted to lands and houses intended to be spared," adds—"These consist of *soldiers* who protect them against parties by producing the general's orders." And see McNaghten, 90.

[5] Par. 1083, A. R. of 1881, *ante.*

[6] O'Brien, 140.

by the commander of a separate army, &c., it is, in general, equally to be
1031 respected, during the term of its operation, by the successors of such commander, as well as by all other commanders, armies, or forces who may occupy or pass through the locality.[7]

**Revocation.** A safeguard, however, is always subject to be revoked for good cause, either at the discretion of the authority from whom it proceeded or his successor in command, or by the order of a superior commander or the President.[8] A controlling cause would be the treason, treachery, or disloyalty of the recipient, which, when discovered, would exhibit him as no longer worthy of the special protection afforded.[9]

**FORCING A SAFEGUARD.** The offence of the forcing of a safeguard will consist in a wilful disregard and violation of the protection, to the injury of the person, property, &c., to whom, or for which, it has been accorded. In a majority of the cases published in General Orders, the offence consisted in plundering, or in larceny or robbery, committed upon premises which had been duly placed under the protection of a safeguard;[10] the act being sometimes accompanied by violent or threatening conduct toward the inmates.[11] The thrusting aside, disarming, resisting, or otherwise assaulting, of a sentinel or guard posted for the purpose of enforcing a safeguard, in connection with a failure to comply with his order against entering or interfering with the
1032 house, property, &c., placed under the protection, would be another marked form of a violation of the Article.[12]

It is of course essential to the specific offence that the accused should have known of the existence and purpose of the safeguard which he is accused of forcing.[13] In the absence of positive or presumptive evidence of such knowledge on his part, his act will properly be charged under the 42d or 62d rather than the 57th Article.[14]

## XXIII. THE FIFTY-EIGHTH ARTICLE.

[Jurisdiction of Crimes in War, &c.]

"ART. 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,*

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[7] See Vattel, 416, as to the rule, in this respect, in regard to safe-conducts. As to safeguards, the same author states that the guards posted to enforce them must be respected also by the *enemy*. He says, (p. 369,)—"The persons of these soldiers must be considered by the enemy as sacred: he cannot commit any hostilities against them, since they have taken their station there as benefactors, and for the safety of his subjects." See par. 1086, Army Regs. of 1881, *ante*.

A safeguard given for an illegal or traitorous purpose is a fraud and not entitled to respect. Similarly, Arnold's passport furnished to André, being given him by a traitor with whom he was in complicity, was null and void as a safe-conduct. See sec. 1343, Rev. Sts., as to Spies—*post*.

[8] As to the rule in this respect in regard to safe-conducts, see Vattel, 418; 1 Kent, Com., 163; Halleck, 664.

[9] "Every privilege when it becomes detrimental to the State may be revoked." Vattel, 418.

[10] See cases in G. O. 36 of 1864; Do. 22, Mountain Dept., 1862; Do. 111, Sixteenth Army Corps, 1863; Do. 31, Dept. of the Ohio, 1864; Do. 105, Dept. of No. Ca., 1865.

[11] G. O. 105, Dept. of No. Ca., 1865.

[12] See McNaghten, (p. 89,) who also notes, (p. 91,) that the forcing must be actual; that an *attempt* to force will not constitute a violation of the Article.

[13] Samuel, 571; O'Brien, 141.

[14] In a few instances in our service of convictions under this Article, the sentence—to be shot—has been mitigated by the reviewing authority. See G. O. 36 of 1864; Do. 105, Dept. of No. Ca., 1865.

*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 offence, by the laws of the State, Territory, or District in which such offence may have been committed."*

**ORIGIN AND OBJECT.** This provision, which, with but a single material change of language,[15] is a republication of s. 30 of the Act of Congress of March 3, 1863, c. 75, appeared first as an Article of War in the Revision of 1874. Prior to its enactment, courts-martial were not invested, either in peace or war, with a jurisdiction of the violent crimes cognizable by the civil courts, except 1033 where the same directly prejudiced "good order and military discipline."[16] In 1863, however—during the late civil war—the provision, incorporated in this Article, initiated in our military law the marked innovation of investing general courts-martial with jurisdiction, in time of war, &c., of the graver civil crimes when committed by military persons, without regard to whether such crimes directly prejudice military discipline or affect the military service. Its main object evidently was to provide for the punishment of these crimes in localities where, in consequence of military occupation, or the prevalence of martial law, the action of the civil courts is suspended, or their authority can not be exercised with the promptitude and efficiency required by the exigencies of the period and the necessities of military government.[17]

**THE JURISDICTION CREATED—Its limit as to time or occasion.** The operation of the Article is limited to "time of *war, insurrection,* or *rebellion.*" The term *war* has been heretofore defined as including foreign or international war, internal or civil war, and the state of hostilities known as Indian war.[18] Under Art. 57, *rebellion* has been referred to as the status of armed revolt against the authority of the Government, the existence of which the President is empowered in a proper emergency to declare, by Sec. 5301, Rev. Sts. *Insurrection* is but a less extended form of rebellion, as rebellion is, ordinarily, less extended than civil war. "Insurrection against government," it is remarked by Grier J. in the Prize Cases[19] "may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the government." In our late war, however, in view of the dimensions of the 1134 existing insurrection, the words "rebellion" and "civil war" came to have for the time substantially the same meaning, and the terms "insurrection" and "rebellion" were indifferently employed with a similar import in executive proclamations and orders as well as in statutes.

**Duration of war, &c.—Commencement of the period.** In order to determine the limit of the jurisdiction as to *time*, it will be necessary to consider when a period of war, &c., commences and when it ends.

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[15] This change is the omission of the words—"or military commission," after the words—"a general court-martial," an omission proper for the reason that a military commission is not the appropriate tribunal for the trial of *military* persons.

[16] They were distinguished in this respect from the British courts-martial. See, for example, the Trial, in the British army, in 1782, of Captain Lippencott for the murder of Captain Huddy, an American prisoner of war. As to the jurisdiction of civil crimes as vested in British Courts-martial by existing law, see Army Act, sec. 41.

[17] See remarks of Gen. Pope in G. O. 29, Dept. of the Northwest, 1864. In Coleman *v.* Tennessee, 97 U. S., 513, it is observed that "the swift and summary justice of a military court" was invoked by this Article, "not merely to insure order and discipline among the troops, but to protect citizens from the violence of soldiers." It is certainly immaterial upon or against whom the crime was committed, whether another soldier, a citizen, or a prisoner of war.

[18] *Ante,* pp. 86, 101.

[19] 2 Black, 666.

A foreign or international war will generally commence to exist upon a declaration of the same in some form by Congress under the clause of the Constitution which empowers that branch of the government "to declare war." Thus the war of 1812 was declared by the Act of June 18th of that year, consisting of a single section, enacting—"*That war be and the same is hereby declared to exist between the United Kingdom of Great Britain and Ireland and the dependencies thereof, and the United States of America and their territories; and that the President of the United States is hereby authorized to use the whole land and naval force of the United States to carry the same into effect, and to issue to private armed vessels of the United States commissions or letters of marque and general reprisal,*" &c. In the only other instance in our constitutional history of a foreign war—that with Mexico, the declaration was less formally contained in the preamble to an Act of May 13, 1846, in these words:—"*Whereas, by the act of the Republic of Mexico, a state of war exists between that government and the United States,*" &c.,—the statute then proceeding to empower the President to employ the army, navy, militia, and a specified force of volunteers, for the prosecution of the war, and making appropriations for the purpose.

But a declaration of war by Congress is not absolutely necessary to the legal existence of a status of foreign war.[20] Such a war cannot indeed be declared or initiated by the President, but, if declared or commenced against us by another power, which, thereupon, before our Congress can or does act, proceeds to invade our territory, or to attack the defences of our coast or frontier, such invasion or attack must, under the orders of the Executive as Commander-in-chief, be met and resisted by force against force, and in this armed meeting and resistance there is war.[21] Under such circumstances a legal status of foreign war would actually exist, and the jurisdiction created by the present Article would become operative, in the absence of, or rather prior to, any formal declaration or other action on the part of Congress.

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A *civil war* resembles this last form of foreign war in that is exists of its own force and independently of any authentication of Congress; the Constitution making no provision for the declaration either of the beginning or end of such a status. Thus in the Prize Cases,[22] the court say of civil war that it "is never solemnly declared; it becomes such by its accidents—the number, power, and organization of the persons who originate and carry it on."[23] And the like is true of an *insurrection* or *rebellion*, not properly amounting to a civil war;—it commences and exists, in the sense of the Article, when it has assumed such proportions that it becomes necessary to employ the armed force of the United States to combat and suppress it.

The proper date, however, of the commencement of such a status will ordinarily be determined by the *proclamation* or order issued by the President, (in conformity with the existing statute law, if any,) declaring the existence and character of the insurrection, requiring the insurgents to disperse, calling out the militia, announcing the proposed employment of the army and navy, &c.[24]

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[20] Declarations of war or similar formal notices are held by modern writers on International Law not to be necessary to the initiation of a *status belli*. See Phillimore, vol. 3, ch. V; Hall, 321. And compare the interesting publication on "Hostilities without Declaration of War," by Lt. Col. Maurice, Royal Artillery, London, 1883.

[21] On this point see remarks and rulings of Grier, J., in The Prize Cases, 2 Black, 668; also Rawle on the Const., 109, 198; Cooley, Prins. Const. Law, 86, 100. Specific authority to employ the militia to repel an invasion is vested in the President by Sec. 1642, Rev. Sts.

[22] 2 Black, 666.

[23] Compare Alire *v.* U. S., 1 Ct. Cl., 233, cited *post*, as to the initiation of *Indian* wars.

[24] See The Protector, 12 Wallace, 700.

In the instance of the "Whiskey rebellion" in western Pennsylvania, the existence of the insurrectionary status was declared by the President in two proclamations issued under the Act of May 2, 1792, the second of which, of Sept. 25, 1794, was published immediately before marching the militia and
1036 volunteers against the insurgents.[25] Later, in the case of the obstruction in the same State to the enforcement of the tax upon dwellings, &c., the status of insurrection was first announced by proclamation of the President of March 12, 1799.[26] In the further case of the recent Southern rebellion, the Supreme Court of the United States, in the case of The Protector,[27] fixed upon the President's proclamation of intended blockade of April 19th, 1861, as properly establishing the date of the commencement of the war status, so far as concerned the States, mentioned therein, of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas; and the supplementary proclamation of the same character, of April 27th, 1861, embracing Virginia and North Carolina, as furnishing such date with reference to events occurring in those two States. These proclamations were issued during a recess of Congress, the former announcing in terms the inauguration of the "insurrection."[28]

The *existing law*, under and by the authority of which, in the event of insurrection, &c., the President would take action, by proclamation, &c., is contained in Title LXIX of the Revised Statutes.

**Termination of the period.** The Constitution, in vesting in the President, "by and with the advice and consent of the Senate," the authority to make treaties, practically constitutes him, concurrently with that body, the peace-making power so far as relates to wars with foreign nations. In the instance therefore of such conflicts, the war status will properly be held to end with the date of the *treaty*, or other agreement for the cessation of hostilities, thus formally entered into with the foreign power—a date which will ordinarily be publicly announced by executive proclamation.

1037 In the case of a *civil* war, rebellion, &c., in the absence of any constitutional or legislative provision on the subject, a proclamation by the President to the effect that hostilities have come to an end or the rebellion or insurrection has been suppressed, may ordinarily be accepted as fixing an authoritative date for the discontinuance of the *status belli*. This mode of legally terminating such status was resorted to in the instance of the late rebellion, and has been recognized by the courts as sufficient.[29] In the case, above cited, of The Protector,[30] the Supreme Court held that the war ceased, in all the States except Texas, on April 2d, 1866, the date of the President's proclamation announcing the final suppression of the rebellion in those States, and in Texas on August 20th following, the date of the proclamation declaring its extinction in that State and generally.[31]

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[25] Wharton, State Trials, 118, 141.

[26] Id., 458.

[27] 12 Wallace, 700. And see Prize Cases, 2 Black, 635.

[28] A previous proclamation of April 15th, had announced the fact of an organized opposition to the laws and obstruction to their execution, and called out the militia to suppress the same, &c. It was the next succeeding proclamation of the 19th, however, which first declared the existence of the insurrection as such. As to the subsequent sanction, by legislation of Congress, of this proclamation,—a sanction, however, evidently regarded by the court in the Prize Cases as quite unnecessary in law,—see 2 Black, 670, 671.

[29] "The suppression of the rebellion describes a political condition, and not a judicial fact. That condition can only be defined and determined by the political departments of the government; and their decision is not only binding but conclusive upon the judiciary." Grossmeyer *v.* U. S., 4 Ct. Cl., 15. And see Heflebower *v.* U. S., 21 Id., 228.

[30] 12 Wallace, 702.

[31] See U. S. *v.* Anderson, 9 Wallace, 56; Grossmeyer *v.* U. S., 4 Ct. Cl., 28.

In several cases in which courts-martial assumed to exercise jurisdiction, under Art. 58, *after* this date, their sentences were formally disapproved as adjudged in time of peace.[83]

Whether *Congress*, by its legislation, (resorted to subsequently to the date of these proclamations,) of March, 1867, known as the Reconstruction Laws, did not in fact pronounce that the status of rebellion was still subsisting, so far at least as to authorize it to provide for the government of the insurrectionary States, is a question which will be adverted to in PART II of this work.[83]

1038 It may well be remarked here that no temporary *truce or armistice*, pending hostilities, will have the effect to discontinue or suspend the war status, so as to deprive military courts during such interval of the jurisdiction created by the Article.[84]

As to *Indian* warfare—which is initiated, not by formal declaration or proclamation, but by the breaking out of active hostilities[85]—this, with us, is prosecuted under such varying situations that the question whether a certain offence of the class specified in the Article was committed during a period of such war can be determined only by the circumstances of the particular case. If committed pending active operations against an Indian tribe, during the interval after the troops have entered upon the campaign and before they have been ordered to return to their previous posts as being no longer required for the prosecution of hostilities, it may be said to have been committed in a "time of war," and thus to be cognizable by a court-martial under the Article.[85]

**The period as affected by the place.** It is to be noted that where the hostilities are confined to a particular State or States, or to any particular portion of the territory of the Republic, a court-martial will, strictly, be authorized to exercise the jurisdiction conferred by the Article only in cases of crimes committed within the limited theatre of such hostilities, for it is "time of war," &c., only in such locality. This condition is especially applicable to crimes committed in Indian wars, whose field is necessarily restricted to some inferior, though not always well-defined, region of the public domain.[87]

**Jurisdiction of courts-martial in time of peace not affected by the Article.** The Article, in investing general courts with a special jurisdiction of certain crimes in times of *war*, by a necessary implication excludes them

1039 from exercising jurisdiction over the same in time of peace, except in so far as they may be authorized to exercise it under other Articles.

The only *specific* provision conveying such authority is that of Art. 60, by which *larceny* is made cognizable, at all times, by courts-martial, where committed in respect to *public* property. Except in this instance the crimes named in Art. 58 cannot, in time of peace, legally be brought to trial by court-martial *unless* they may come within the description of the general Article 62,—in that, being not capital, they are committed under such circumstances as to be "*preju-*

[83] Note cases in G. O. 59, Dept. of Washington, 1866; Do. 14, Dept. of the South, 1866; Do. 15, Dept. of the Gulf, 1866; Do. 85, Dept. of the Cumberland, 1867; Do. 14, Dept. of Dakota, 1868.

A court-martial can of course have no capacity of itself to determine whether a state of war has begun or ended, but must accept the fact as declared or recognized by the proper superior authority. See DIGEST, 49.

[83] See PART II, Title VII.

[84] That a truce or armistice is not peace, but merely a suspension of active military operations of a hostile character—see Vattel, book III § 234; Lieber, (G. O. 100 of 1863,) § 142.

[85] Alire *v.* U. S., 1 Ct. Cl., 233.

[85] In a recent case, in G. C. M. O. 12 of 1882, three Indian scouts in the U. S. service were sentenced to be hung on conviction of murder in violation of Art. 58, (and mutiny,) committed in Arizona, during a period of active hostilities against Apaches.

[87] See Chapter VIII, p. 101—Jurisdiction under Art. 63: Application to Indian wars.

*dicial to good order and military discipline;*"[38] or may constitute "*conduct unbecoming an officer and a gentleman*" within the meaning of Art. 61.[39] Under Art. 62, courts-martial have duly and not unfrequently taken cognizance of civil crimes when committed by soldiers, (and within the above description;) and that this jurisdiction is not affected by the provisions of Art. 58 is thus noticed by the U. S. Supreme Court in the recent case of *Ex parte* Mason:[40]—"As it" (Art. 58) "is to operate in time of war, it neither adds to nor takes from the powers which courts-martial have under the 62d Article in time of peace."

**The military jurisdiction conferred by the Article not exclusive of that of the civil courts.** That the jurisdiction created by the Article is not exclusive of, but concurrent with, that possessed by the criminal courts of the United States or the States, has been repeatedly declared. Thus, in the leading case on this point, Coleman *v.* Tennessee,[41] the Supreme Court holds as follows:—"The section does not make the jurisdiction of the military tribunals exclusive of that of the State courts. It does not declare that soldiers committing the offences named shall not be amenable to punishment by the State courts. It simply declares that the offences shall be *punishable*, not that they *shall be punished* by the military courts; and this is merely saying that they *may* be thus punished. Previous to its enactment the offences designated were punishable by the State courts, and persons in the military service who committed them were delivered over to those courts for trial; and it contains
1040 no words indicating an intention on the part of Congress to take from them the jurisdiction in this respect which they had always exercised. With the known hostility of the American people to any interference by the military with the regular administration of justice in the civil courts, no such intention should be ascribed to Congress in the absence of clear and direct language to that effect."[42]

**THE CRIMES SPECIFIED IN THE ARTICLE.** These crimes will be defined in the following order:—Murder, Manslaughter, Mayhem, Rape, Robbery, Arson, Burglary, Larceny, Assault and Battery with intent to kill, &c. For anything further than definitions and the details of definitions, the student must be referred to the treatises of the approved authorities on criminal law and the rulings in adjudged cases.

**To be defined by the common law.** It is to be observed that as these crimes are not specifically defined in the Article, or elsewhere in the written military law, they are to be interpreted by the doctrines of the *common law*, each being viewed as the common-law offence of the same name.[43]

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[38] See *post*—Sixty-Second Article.

[39] See *post*—Sixty-First Article.

[40] 105 U. S., 699.

[41] 97 U. S., 513–14—a case of a homicide committed by a soldier in Tennessee in 1865.

[42] And, to a similar effect, see People *v.* Gardiner, 6 Park., 143; State *v.* Rankin, 4 Cold., 146; Whiting, War Powers, 376; G. O. 29, Dept. of the Northwest, 1864; Do. 32, Dept. of La., 1866. But in Coleman *v.* Tennessee, *ante*, the Court was careful to note that the above statement of the law did not apply to courts-martial held in an insurgent State, *i. e.*, in the enemy's country during the late war. "When," it is said, "the armies of the United States were in the enemy's country, the military tribunals mentioned had, under the laws of war and the authority conferred by the section named." (the enactment now contained in Art. 58,) "*exclusive* jurisdiction to try and punish offences of every grade committed by persons in the military service." (97 U. S., 515.) And see, to the same effect, Tennessee *v.* Hibdom, 23 Fed., 795..

[43] That common-law rules are to be followed in defining designations of crimes, and construing technical words, in criminal statutes, (in the absence of specific definition in the statute itself,) see U. S. *v.* King, 34 Fed., 302, 306; U. S. *v.* Magill, 1 Washington, 463; U. S. *v.* Outerbridge, 5 Sawyer, 620; 1 Hale, P. C., (Am. Ed.,) 454, notes.

**Degrees of crime not known to the law military.** In this connection it may also be noted that no such distinctions as *degrees* of offences, such as are established by the statutes of some of the States, are recognized by the
1041 military law,[44] and that such distinctions have no bearing whatever upon the subject of the definition of the crimes specified in the Article, but are material only with reference to the question of their punishment, hereafter to be considered.

**MURDER—Definition.** 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.[45] The homicide must be unlawful, that is to say "felonious" or other than "justifiable" or "excusable;" it must be committed by one who is neither *non compos* nor an infant under the age of criminal capacity; the person assailed must be a living being, (not an unborn child;) such person must be entitled to the protection of the laws, not a public enemy[46] nor a pirate; and lastly the act must be characterized by "malice aforethought" or "malice prepense," *i. e.* evil and deliberate purpose.

A brief description of murder which would cover all cases likely to arise under the present Article would be—*the unlawful killing, with malice aforethought, by a legally responsible person, of any other person not a public enemy;* or, as all killing with malice aforethought must be unlawful, as a person not legally responsible cannot be chargeable with malice aforethought, and as no killing of a public enemy can be regarded as committed with such malice,—murder, at common law and unaffected by statute, may be simply and briefly described as *homicide with malice aforethought.*"[47]

The definition of murder is completed by adding that, to constitute this crime, the *death must occur within a year and a day* after the date of the act. This is the rule for both species of homicide, murder and manslaughter, at common law. Where the death is not shown to have followed within a year and
1042 a day, the law presumes that the wound or injury was not the occasion of the death—that it proceeded from some other cause.[48]

It may here be noted that where the act which is the cause of the death is committed in one State or district, while the actual death occurs in another, it is the former place which is in law, as held in Guiteau's case,[49] the *place* of the murder or homicide.

**Malice aforethought.** The term *malice*, as ordinarily employed in criminal law, is a strictly legal term, meaning not personal spite or hostility but simply the *wrongful intent* essential to the commission of crime. When used, however, in connection with the word "aforethought" or "prepense," in defining the particular crime of murder, it signifies the same evil intent, as the result of a determined purpose, premeditation, deliberation, or brooding, and therefore as indicating, in the view of the law, a malignant or depraved nature, or, as the early writer, Foster, has expressed it, "a heart regardless of social duty and

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[44] See *ante*, p. 149. So, no such discriminations are recognized in the laws of the *United States* relating to civil crimes. U. S. *v.* Outerbridge, *ante*.

[45] Coke, 3 Inst., 47; 4 Black. Com., 195; 1 East, P. C., 214; 1 Russell, 482; 1 Gabbett, 454; 3 Greenl. Ev. §130; 1 Wharton, C. L. § 303; 2 Bishop, C. L. § 732, and notes; Com. *v.* Webster, 5 Cush., 304; G. O. 23, Dept. of Cal., 1865.

[46] That taking the life of an enemy, after he has surrendered, or while held as a prisoner of war, is murder—see State *v.* Gut. 13 Min., 341.

[47] Compare Holland *v.* State, 12 Fla., 117.

[48] 3 Greenl. Ev. § 120, 131—note, 143; 1 Wharton, C. L. § 312; 2 Bishop, C. L. § 640.

[49] U. S. *v.* Guiteau, 1 Mackey, 498; State *v.* Keily, 76 Maine, 331.

fatally bent upon mischief."[50] The deliberate purpose need not have been long entertained; it is sufficient if it exist at the moment of the act. Malice aforethought is either "express" or "implied;" *express*, where the intent,—as manifested by previous enmity, threats, the absence of any or of sufficient provocation, &c.,—is to take the life of the particular person killed, or, since a specific purpose to *kill* is not essential to constitute murder, to inflict upon him
1043 some excessive bodily injury which may naturally result in death;[51] *implied*, where the intent is to commit a felonious or unlawful act but not to kill or injure the particular person—as where a party, intending to kill by shooting, &c., one person, actually hits and kills another;[52] or, when detected in a burglary, fires his pistol in the dark to aid his escape and kills an inmate of the house; or, being engaged in a riot, fires indiscriminately and kills some one; or, in resisting an officer of justice engaged in the execution of his duty, unintentionally kills him, &c.[53] Thus a soldier who resists a military superior, when legally engaged in making an arrest or executing any other duty, and in resisting kills him, though not purposely, is guilty of murder in law.[54]

In every case of apparently deliberate and unjustifiable killing, the law *presumes* the existence of the malice necessary to constitute murder, and devolves upon the accused the *onus* of rebutting the presumption. In other words, where in the fact and circumstances of the killing as committed no defence appears, the accused must show that the act was either no crime at all or a crime less than murder; otherwise it will be held to be murder in law.[55]

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[50] Crown Law, p. 257, 262. In Com. *v.* Webster, 5 Cush. 304, Shaw, C. J., says of "malice" in the term "malice aforethought," that it is "used in a technical sense, including not only anger, hatred, and revenge, but every other unlawful act and unjustifiable motive. It is not confined to ill will toward one or more individual persons, but is intended to denote an action flowing from any wicked and corrupt motive." And see the case of murder, indicating a malignant *animus*, commented upon by Gen. McDowell in G. O. 23, Dept. of Cal., 1865. In U. S. *v.* King, 34 Fed. 306, the definitions cited of malice are—"An intent to do injury to another;" or "a design formed of doing mischief to another." And see U. S. *v.* Meagher, 37 Fed. 878–879.

[51] "The law considers that the party meant to effect what was the natural consequence of his act; that if the natural consequence of his act was death, he meant to kill." U. S. *v.* McGlue, 1 Curtis, 3. That killing in a duel is murder, see *ante*, p. 591—"Twenty-Sixth Article."

[52] As in the case of a soldier who, in resisting arrest by an officer, discharged his musket at him with intent to kill him, but killed instead another soldier. Angell *v.* State, 36 Texas, 542. And see the recent case of Pinder *v.* State, 27 Fla. 370.

[53] See U. S. *v.* King, 34 Fed. 312; U. S. *v.* Meagher, 37 Fed. 880.

[54] See U. S. *v.* Travers, 2 Wheeler, C. C. 490, where the killing was by a private marine of an orderly sergeant who was properly attempting to arrest and restrain him while engaged in a brawl.

[55] Foster, 255; 1 Gabbett, 455, 502; Manual, 110. "When, on the trial of an indictment for murder, the killing is proved to have been committed by the defendant, and nothing further is shown, the presumption of law is that it was malicious, and an act of murder, and proof of matter of excuse or extenuation lies on the defendant." Com. *v.* York, 50 Mass. (9 Met.) 93. "Malice is implied in every case of intentional homicide; that is to say, when once it is established that a person was intentionally killed, the law implies that malice existed in the person who caused the death. If there are any circumstances of excuse or palliation which will rebut the presumption of malice, it is incumbent on him to show them." U. S. *v.* Outerbridge, 5 Sawyer, 622. And see U. S. *v.* Travers, 2 Wheeler, C. C. 490; Holland *v.* State, 12 Fla. 117; People *v.* Gibson, 17 Cal. 283; People *v.* Walter, 1 Idaho, 393.

The rule, as applicable to military cases, is similarly stated in the Manual of Military Law, p. 71, as follows—"Where it is proved that an unlawful act has been committed, a criminal intention is presumed, and the proof of justification or excuse lies on the prisoner. On a charge of murder the law presumes malice from the act of killing, and throws on the prisoner the burden of disproving the malice by justifying or extenuating the act."

1044 **Justifiable and excusable homicide.** The definition of Murder is well illustrated by the two defences apposite to this charge, viz: 1, that the killing was not murder but manslaughter; *i. e.* a killing without "malice;" 2, that it was not felonious but justifiable or excusable in law.[56] The distinction between murder and manslaughter will be further noted presently. Homicide is said to be "*justifiable*" when committed by a public officer in the due execution of the laws or administration of public justice, or when committed by any person in the due prevention of a violent crime. Thus, homicide is justifiable where committed by an officer of the army, or at his instance, in the suppression of an actual mutiny or other violent disorder, or in the capture of an escaping prisoner or deserter, where no other adequate means are available for the purpose. Homicide is in law "*excusable*" where it is the result of accident or mishap, or where it is committed in self-defence.

Self-defence. "A man may oppose force to force in defence of himself, his family or property."[57] Only such amount of force, however, may be used as is reasonably proportionate to the danger. Killing in defence of the person will be justified where the circumstances are such as to warrant the conviction that danger to life or serious bodily harm is threatened and immediately impending.[58] In defence of property, killing, as a means of preventing a trespass unaccompanied by violence, will not be justified. Where the trespass is serious, as in a case of housebreaking with evident felonious intent, the occupant, especially if the breaking be in the night, will be justified in taking life in protection of his domicil. As, under a charge of murder, evidence may be given of the
1045 disposition of the accused, so, upon a plea of self-defence, it may be shown that the person killed was of a vindictive or violent nature.[59]

**MANSLAUGHTER.** This crime is defined as an *unlawful killing without malice aforethought express or implied.*[60] It is this absence of malice aforethought which distinguishes manslaughter from murder; its commission being ascribed to the "infirmity of human nature," and not to a depraved or wicked heart.[61] The only *malice* in manslaughter thus is the wrongful intent which is an ingredient in crime in general. Homicide is commonly *manslaughter*,

[56] Homicide is described by the authorities as of three species:—"felonious" homicide, (which is either murder or manslaughter,) "justifiable" homicide, and "excusable" homicide,—the two latter not being crimes at all. The defence that homicide is justifiable or excusable is pertinent to an indictment or charge either for murder or manslaughter.

[57] U. S. *v.* Wiltberger, 2 Washington, 515.

[58] "The law of self-defence justifies an act done in honest and reasonable belief of immediate danger." R. R. Co. *v.* Jopes, 142 U. S., 23.

[59] Or of a "bad temper or a quarrelsome disposition." Williams *v.* State, 74 Ala., 18; Territory *v.* Harper, 1 Ariz., 599.

On a trial, in 1894, of an officer for a shooting of another officer, in violation of Art. 62, which resulted in the killing of the latter, the court-martial permitted the accused, who claimed that he had acted in self-defence, to put in evidence a General Court-Martial Order, of 1872, (twenty-two years before,) setting forth charges against the accussed, not necessarily indicating a violent nature or a choleric or pugnacious disposition, with the conviction and sentence adjudged thereon. This evidence was held by the Judge Advocate General to have been wholly inadmissible, (DIGEST, 402,) and the acquittal of the accused was disapproved by the President. G. O. 28 of 1894.

[60] Compare the definition in Sec. 5341, Rev. Sts., of manslaughter, in U. S. law,—an "unlawful and wilful killing of another but without malice."

[61] "The true nature of manslaughter is, that is it homicide mitigated out of tenderness to the frailty of human nature." Shaw, C. J., in Com. *v.* Webster, 5 Cush., 307. And see 4 Black. Com., 191; 3 Greenl. Ev. § 119, 125; 1 Wharton, C. L. § 304; 2 Bishop, C. L. § 625, 672; G. O. 23, Dept. of Cal., 1865.

where, being unaccompanied by an intent to kill, it yet lacks some element which would have made it "justifiable" or "excusable" in law.

The authorities specify two kinds of manslaughter—*voluntary* and *involuntary*. "Voluntary" manslaughter (the more usual of the two) is that which is committed in a moment of excitement or while under the influence of passion, and commonly either in the course of a sudden *fighting* or upon some immediate strong *provocation*.

To determine whether an act of homicide is murder or voluntary manslaughter, the main test is the quality of the provocation by which the act was induced. Mere words, however gross or insulting, will not justify taking life,

and where a homicide is committed under no other provocation than irri-
1046 tating language, the killing will be murder in law.[62] The same is true of

gestures, unless they be of a character manifestly threatening to life—as where a pistol or other deadly weapon is evidently attempted to be drawn and used: in such case the crime committed may be reduced to manslaughter. In any case where the provocation, though material, is not excessive, as where a bare trespass is committed on property other than a dwelling, or where the person is assailed but not seriously; or where a more considerable battery is committed but by a party not accountable—as a drunken man,—the law will in general hold the killing to be not manslaughter but murder.

"Involuntary" manslaughter consists in the accidental and unintentional causing of death, either by the doing or attempted doing of an act which, though unlawful, is not felonious or highly criminal or likely to be dangerous to human life, or by the doing of a lawful act in an incautious or negligent manner.[63] Thus where a military superior, in the act of enforcing law or discipline, takes unintentionally the life of an inferior, when less extreme means of prevention

or restraint are available, his act is without justification and he is guilty
1047 of involuntary manslaughter.[64] Similarly where a superior, by the imposition of an excessive punishment or measure of discipline, causes, presently

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[62] "No mere words applied by one man to another will justify the use of a deadly weapon; nor can they be the lawful occasion of that '*heat*' which would reduce the act of killing from murder to manslaughter." U. S. *v.* Carr, 1 Woods, 480. And so of defamatory newspaper articles. State *v.* Elliott, Ohio Com. Pl., 26 Wkly. Law Bul., 116.

[63] In U. S. *v.* Meagher, 37 Fed., 880, the court, (Maxey, J.,) observes that "the distinction between voluntary and involuntary manslaughter is now obsolete at common law." But the common law does not thus change, and the distinction is believed to be a well-considered and wise one.

[64] In G. C. M. O. 47 of 1877, in a case of an officer convicted of manslaughter in causing the death of a soldier by unnecessarily assaulting him with his sword, the Secretary of War observes as follows:—"It will be especially remembered by officers that the use of the sword or bullet to enforce their authority can only be justified by a necessity for the instant suppression of mutiny or violence. The law, in conferring this exceptional power of life or death upon an officer of the Army, expects in him the equable temper and judgment requisite for its proper exercise, and holds him accountable accordingly. It is highly disgraceful for an officer so to lose his head as to be unable to discriminate between a drunken brawl and a mutiny." And see case in G. C. M. O. 93 of 1867, in which an officer is convicted of causing the death of a deserting soldier by having him needlessly shot down; also Do. 153 of 1866; DIGEST, 486; Ensign Maxwell's case, Prendergast, 162. And note Rex *v.* Thomas, 1 Russell, Cr., 732, a case of an unnecesaary shooting and killing of a civilian by a sentry.

Otherwise, where the shooting, &c., and killing were the only adequate means. DIGEST, 485; G. C. M. O. 177 of 1865; G. O. 89, Second Mil. Dist., 1868; S. O. 158, Hdqrs. Gen. Rec. Ser., N. York, Nov. 5, 1868. And compare 14 Opins. At. Gen., 71. It is remarked by the Court in U. S. *v.* Carr, 1 Woods, 484, that "the law will not require an officer charged with the order and discipline of a camp or fort to weigh with acrupulous nicety the amount of force necessary to suppress disorder. The exercise of a reasonable discretion is all that is required."

or eventually, the death of an inferior, such superior is chargeable with involuntary manslaughter.[66] And the legal crime will be the same where the superior causes the death of another by reason of *negligence*, in not properly regulating the use of fire-arms in his command—as in target firing or artillery practice.[66]

**MAYHEM.** Mayhem, maiming, or maim, at common law, is the violently inflicting, upon any part of a man's body, of such an injury as to render him less able to fight or defend himself against his adversary; the gravamen of the offence being that the act permanently disables the person "to fight in defence of the king and country, and as a soldier protect himself on the field of battle."[67] Thus, while to cut off or disable a hand, an arm, or a leg, or to strike out or blind an eye, was a mayhem at common law, to deprive a person of an ear or of his nose was held *not* to be, since such an injury would disfigure only and not incapacitate for war-service.[68] Acts indeed of the latter character have, *by* 1048 *statute*, been made punishable similarly to common-law maims,[69] but such acts would not, by a military court, properly be cognizable as "mayhem" under the present Article,[70] which, as to this term, is to be interpreted by the common law.[71]

To constitute mayhem, it was not deemed essential that the injury should be inflicted upon another; a self-mutilation being regarded as within the definition. Thus a soldier who deprived himself of the use of a member necessary to qualify him for the military service, was considered to be chargeable with a mayhem.[72]

The malice, or criminal purpose, essential to legal mayhem, *viz.* the intent to effect the disabling of a member, may be presumed from the circumstances of the act by which the maiming is effected. It is not necessary to show that

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[66] 1 Wharton, C. L., § 431; U. S. *v.* Cornell, 2 Mason, 91. In U. S. *v.* Freeman, 4 Mason, 505, a master of a vessel who caused the death of a sick seaman by forcing him to go aloft was convicted of manslaughter. If the act is characterized by a brutal or cruel *animus* the offence will be *murder*. Id.

[66] See Regina *v.* Hutchinson, 9 Cox, 555; also case in G. C. M. O. 14, of 1871.

[67] 1 Hawkins, c. 44, s. 1, 4 Black. Com., 205; 1 Russell, 719; 1 Gabbett, 98; I Wharton, C. L. § 581; 2 Bishop, C. L. § 1001; Com. *v.* Newell, 7 Mass., 248; State *v.* Briley. 8 Port., 474. Neither the weapon or instrument by which, nor the manner in which, the disabling or injury is effected, is material. U. S. *v.* Scroggins, Hempstead, 478; Rex *v.* Carroll, Leach, 55. It is no less mayhem, though the severed member is restored to its place and grows again. Slatterly *v.* State, 41 Texas, 619.

[68] 1 Hawkins, c. 44, s. 2; 4 Black. Com., 205; 1 Russell, 720; 1 Wharton, C. L. § 581; Scott *v.* Com., 6 S. & R., 226.

[69] Thus by the act of April 30, 1790, c. 9, s. 13, (now Sec. 5348, Rev. Sts.,) the maliciously cutting off an ear, cutting out or disabling the tongue, putting out an eye, slitting the nose, cutting off the nose or lip, and the cutting off or disabling of any limb or member, with intent to maim or disfigure, are made together equally and alike punishable with imprisonment and fine. Our statute is derived mainly from the 22 & 23 Charles II, c. 1, known as the "Coventry Act," from Sir John Coventry, a member of parliament, who had been assaulted by a slitting of the nose. See U. S. *v.* Scroggins, Hempstead, 478.

[70] In a recent case in G. C. M. O. 103, Dept. of the Mo., 1881, in which the biting off, by a soldier, of a large piece of the *ear* of another soldier was charged as "Mayhem in violation of the 62 Art. of war,"—while such charge was properly held a substantially sufficient pleading of a disorder under the Article named, and the proceedings were approved, it was well remarked that the act did "not constitute mayhem within the common law meaning of that term." And see the similar cases in G. O. 86, Dept. of Texas, 1870; Do. 36, Dept. of the Platte, 1871.

[71] As to this rule of interpretation as applying to the present Article generally, see *ante*—MURDER.

[72] Rex *v.* Wright, 1 East, 396; 1 Russell, 720. "One may not innocently maim himself, and, if at his request another maims him, both are guilty." 1 Bishop, C. L. § 259.

this intent was the result of deliberation, since it may be formed instantaneously, or upon or in the course of a sudden encounter or combat.[73] As in
1049 the case of homicide, the charge may be disproved by evidence showing that the injury caused was committed in self-defence.[74]

**RAPE—Definition.** Rape is defined as the unlawful carnal knowledge of a woman forcibly and against her will or consent.[75]

**The persons.** It is a general principle that rape must be committed by a male person of at least fourteen years of age; it being a conclusive presumption of the common law that a person of a less age is physically incapable of its perpetration. It is therefore the almost uniform ruling of the courts that where the accused is under fourteen, evidence to show that he is an exception to the rule and in fact capable will be inadmissible.[76]

The person upon whom the crime is committed may be of any age; a female is never too young to be the subject of it.[77] So, its subject may be any woman except the legal wife of the accused, even although she be his mistress, or a common harlot.[78]

**The carnal knowledge.** This is established by proof of penetration only. The least penetration will be sufficient. It is not necessary to prove emission nor even that the *hymen* was ruptured or injured.[79] "The essence of the
1050 crime," as the court observe in an early case, "is not the begetting of a child, but the violence done to the person and feelings of the woman, which is completed by penetration."[80]

**The force.** The force implied in the term "rape" may be of any sort, if sufficient to overcome resistance. The intent to ravish by force, notwithstanding

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[73] 1 East, P. C., 393.

It is to be noted that in mayhem under the U. S. statute—Sec. 5348, Rev. Sts.—no premeditated design is necessary to complete the offence. Thus a soldier, committing a mayhem by accident, would be amenable to trial by a federal (or Territorial) court. See U. S. *v.* Gunther, 5 Dakota, 534, where the conviction was affirmed of a sergeant, who, at Fort Yates, in effecting the arrest of a private, in the line of duty, accidentally put out his eye.

[74] 1 Wharton, C. L. § 582; 1 Bishop, C. L. § 257.

[75] Co. Lit., 123 b; 1 Hawkins, c. 41, s. 1; 4 Black. Com., 210; 1 East, P. C., 434; 1 Russell, 675; 1 Gabbett, 831; 3 Greenl. Ev. § 209; 1 Wharton, C. L. § 550; 2 Bishop, C. L. § 1113.

[76] 1 Hale, 630; 4 Black. Com., 212; 1 Russell, 676; 3 Greenl. Ev. § 215; 1 Wharton, C. L. § 551; 2 Bishop, C. L. § 1117; Reg. *v.* Phillips, 8 C. & P., 736; Reg. *v.* Allen, 9 C. & P., 31; People *v.* Randolph, 2 Park., 213; State *v.* Handy, 4 Harr., 566; State *v.* Sam, Winst., 300.

[77] 2 Bishop, C. L. § 1118; Stephen *v.* State, 11 Ga., 227.

[78] 1 Hale, 628; 1 Hawkins, c. 41, s. 2; 4 Black. Com., 213; 1 Russell, 677; 1 Gabbett, 832; 3 Greenl. Ev. § 211; 1 Wharton, C. L. § 564; 2 Bishop, C. L. § 1119; People *v.* Abbott, 19 Wend., 192; Pleasant *v.* State, 13 Ark., 362; Higgins *v.* People, 1 Hun, 307; G. O. 26, Fifth Mil. Dist., 1867. In stating the law, that rape may be committed even upon a concubine, East, (1 P. C., 445,) adds—"for a woman may forsake her unlawful course of life, and the law will not presume her incapable of amendment."

[79] 1 East, P. C., 438; 1 Russell, 678–9; 3 Greenl. Ev. § 210; 1 Wharton, C. L. § 554, 555; 2 Bishop, C. L. § 1132; Reg. *v.* Allen, 9 C. & P. 31; Reg. *v.* Jordan, Id., 118; Reg. *v.* Hughes, Id., 752; State *v.* Le Blanc, 3 Brev., 339; Waller *v.* State, 40 Ala., 325. Upon this point, however, the English rulings conflicted in some measure until the law was settled by the statute of 9 Geo. 4, c. 31, which enacted that—"the carnal knowledge shall be deemed complete upon proof of penetration only." Statutes to a similar effect exist in many of our States.

[80] Pennsylvania *v.* Sullivan, Add., 143. "The essence of the crime consists in the violence done to the person of the sufferer, and to her sense of honor and virtue." 3 Greenl. Ev. § 210. Or, in the language of Foster, (p. 274,) "her quick sense of honor and pride of virtue."

resistance, is the gist of the offence.[81] It is not essential that the force employed consist in physical violence; it may be exerted in part or entirely by means of other form of duress, or by threats of killing or of grievous bodily harm or other injury, or by any moral compulsion.[82] A less degree of force or intimidation will ordinarily be required to be shown where the female is of tender age, in feeble health, or imbecile, than where she is mature, strong and intelligent.[83]

**Non-consent.** Absence of free will, or non-consent,[84] on the part of the female, may consist and appear in her making resistance till overpowered by physical force; in her submitting because, in view of the strength and violence of her assailant or the number of those taking part in the crime, resist-
1051 ance must be useless if not perilous;[85] in her yielding through reasonable fear of death or extreme injury impending or threatened; in the fact that she is rendered senseless and incapable of resistance by intoxicating drink or a stupefying drug;[86] in the fact that she is imbecile or otherwise *non compos*,[87] or that she is a child under the age of ten—in which case the law presumes that she is incapable of consenting to this act;[88] in the fact that her will has been constrained, or her passive acquiescence obtained, by fraud, surprise, false pretence, or other controlling means or influence.[89]

As to the details of the proof required to establish the offence under the different circumstances of its perpetration, the subject of the testing of the credibility of the prosecutrix, the defences which may be set up to the charge, &c., the student must be referred to the treatises on criminal law and the authorities therein cited.[90]

**ROBBERY—Definition.** Robbery, at common law, is a felonious taking of his property from the person, or presence of another, by means of violence,

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[81] "The jury must be satisfied that the prisoner when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do so at all events, and notwithstanding any resistance on her part." Rex *v.* Lloyd, 7 C. & P., 318. And see 1 Russell, 692; Com. *v.* Merrill, 14 Gray, 417.

[82] "If the woman submitted from terror, or the dread of greater violence, the intimidation becomes equivalent to force." Pleasant *v.* State, 13 Ark., 374. If the jury are "satisfied that her will was overcome by fear of the accused," a conviction will be proper. Strang *v.* People, 2 Mich., 1. And see 1 Hawkins, c. 41, s. 6, 1 East, P. C., 444; 1 Russell, 677; 3 Greenl. Ev. § 211.

[83] See 1 Wharton, C. L. § 558, 560; 2 Bishop, C. L. § 1123, 1124.

[84] It is rather more precise to describe the act as committed *against* or *without the consent* than *against the will* of the female, since cases of rape may occur where the woman, while certainly not consenting, is incapable of exercising will at the time. See definition in 2 Bishop, C. L. § 1115.

[85] "If non-resistance on the part of the prosecutrix proceeds merely from her being overpowered by actual force; or from her not being able, from want of strength, to resist any longer; or if, from the number of persons attacking her, she considered resistance dangerous and absolutely useless, the crime is complete." 1 Russell, 677. "A consent induced by fear of personal violence is no consent." 2 Bishop, C. L. § 1125.

[86] 3 Greenl. Ev. § 211; 1 Wharton, C. L., 562; 2 Bishop, C. L. § 1121, 1125, 1126; Reg. *v.* Camplin, 1 C. & K., 746; Com. *v.* Burke, 105 Mass., 376; Com. *v.* Beale, 2 Whart. & Stillé, Med. Jur. § 245. It does not affect the case that the insensibility or powerlessness be self-induced. In some of the States carnal knowledge of an intoxicated female is made a separate statutory offence.

[87] 2 Bishop, C. L. §1123; Rex *v.* Fletcher, 8 Cox, 131; State *v.* Tarr, 28 Iowa, 397.

[88] 1 Hale, 628; 3 Greenl. Ev. § 211; Stephen *v.* State, 11 Ga., 225; G. O. 14, Dept. of the South, 1866.

[89] See 1 Russell, 677; 3 Greenl. Ev. § 211; 1 Wharton, C. L. § 559; 2 Bishop, C. L. § 1122; Reg. *v.* Case, 4 Cox, 220; Rex *v.* Stanton, 1 C. & K., 415; Walter *v.* People, 50 Barb., 144.

[90] See, for example, 1 Russell, Book III, Ch. Fifth; 1 Wharton, C. L., Book II, Ch. II; 2 Bishop, C. L., Book X, Ch. XXXVI.

1052 or putting in fear.[91] Its nature is well illustrated by comparing it with larceny. Thus it is called by Blackstone[92]—"an open and violent larceny from the person;" and Bishop[93] writes:—"Robbery is a species of aggravated larceny, committed from the person, (or from his immediate presence and custody, deemed in law a taking from the person,) the principal aggravating matter being usually, not always, an assault." And the same author further characterizes robbery as "a mere compound larceny."[94]

**The felonious intent.** The term "felonious," in the definition of robbery, refers to the sort of criminal intent with which, in this crime as in larceny, the taking must be accompanied, *viz.* the purpose to steal or *animus furandi;* in other words the intention illegally to possess one's self of the property of another without his consent.[95] Thus if a party take forcibly from another an article of property under a *bona fide* belief that it is his, (the taker's,) own, the act is not robbery but a trespass only; but in such case it must clearly appear that the claim of title was an honest one.[96]

**The taking.** To constitute the taking in robbery, the property must pass into the actual possession of the alleged taker, although it remain in his 1053 possession but for a very brief period.[97] There may be a taking in law as well as in fact;[98] as where the property is not *seized*, but, by force, threats, or other intimidation is *caused to be delivered* to the accused, or to come into his hands.[99] So is the taking held to be robbery in law, where it is *pretended* to be, or is given the *form* of, a regular transaction by the offender, force or intimidation being however at the same time employed.[100]

**The property.** This may be personal property of any description or value. It must indeed possess some value, but how much is immaterial.[1] "A penny as well as a pound, forcibly extorted, makes a robbery."[2] The property need not be held by the party by right of absolute ownership: it is sufficient if he has in it only such special property as may arise from its being in his legal custody as agent, bailee, or trustee, that is to say a right of possession, use, &c. Indeed in robbery the essential point as to the ownership of the property is, not so

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[91] Coke, 3 Inst., 68; 1 Hale, 532; 1 Hawkins, c. 34; 4 Black. Com., 242; 3 Chitty, C. L., 801; 1 Russell, 867; 3 Greenl. Ev. § 223; 1 Wharton, C. L. § 846; U. S. *v.* Jones, 3 Washington, 216; Com. *v.* Clifford, 8 Cush., 216.

[92] 4 Com., 243. The taking must be by force or a previous putting in fear, which makes the violation of the person more atrocious than privately stealing. For, according to the maxim of the civil law, "*qui vi rapuit, fur improbior esse videtur.*" "This previous violence or putting in fear is the criterion that distinguishes robbery from other larcenies." *Id.* Robbery is also "distinguished from larceny in being a violent or demonstrative act in the presence of the party assailed, while larceny is in general characterized by secrecy, privacy, or fraud." Mahoney *v.* People, 48 How. Pr., 185.

[93] 1 C. L. § 992, (third edition.) In the seventh edition, § 1156, the definition is—"Robbery is larceny committed by violence from the person of one put in fear."

[94] 1 C. L. § 1158.

[95] 1 Russell, 871; 3 Greenl. Ev. § 227; 1 Wharton, C. L. § 848.

[96] See Rex *v.* Hall, 3 C. & P., 409; 1 Russell, 871; 1 Wharton, C. L. § 848, 853. That the taking of property under alleged belligerent rights, that is to say by the authority of a proper military superior in time of war, is not robbery—see Com. *v.* Holland, 1 Duv., 182; Hammond *v.* State, 3 Cold., 129.

[97] "Any appreciable, though momentary, removal of the Article from the possession of the owner or holder, will be sufficient." Rex *v.* Lapier, 1 Leach, 320. And see 3 Chitty, C. L. 802; 1 Russell, 870.

[98] 1 Russell, 871; 3 Greenl. Ev. § 226.

[99] 1 Wharton, C. L. § 849; U. S. *v.* Jones, 3 Washington, 216; Rex *v.* Winkworth, 4 C. & P., 444; Rex *v.* Edwards, 6 Id., 521; 2 East, P. C., 711–731, and cases cited.

[100] 1 Hale, 533; 1 Russell, 871; 2 East, P. C., 712; Case of Private Britton, G. O. 17 of 1864, (where however the offence is, erroneously, charged as "grand larceny.")

[1] Coke, 3 Inst., 69; 2 East, P. C., 707; 1 Gabbett, 582; 3 Greenl. Ev. § 224; Rex *v.* Bingley, 5 C. & P., 602.

[2] 1 Russell, 869.

much that it should belong to the person robbed as that it should not belong to the taker.[3]

**The person or presence.** It is characteristic of robbery that it is an offence as well against the person as against property, the violent harm or wrong done to the individual being indeed the element which gives it its gravity. The term person includes the body and the clothing. It is not necessary that the individual should have been aware that he has parted with his property, since he may at the time have been rendered insensible by a blow or otherwise,[4] or, occupied with the assault, may not have perceived the abstraction of the article.[5]

1054 It is also not essential that the article, when taken, should be in the actual bodily possession of the party: the possession may be *constructive* as well as actual, and if the taking be from his immediate custody or charge, or—as it is commonly expressed—*from his presence*, the act, in law, will be equivalent to a taking from the person.[6]

**The force, or putting in fear.** The employment of force and the inducement of fear may both concur in a case of this crime, but proof of either will be sufficient to establish the specific offence.[7] This element is sometimes described as "force actual, or constructive;" *actual* force, as it is expressed by Tilghman C. J., in a case in Pennsylvania,[8] "being applied to the body;" *constructive*, "operating, by threatening words or gestures, on the mind." The force may consist in any battery or duress sufficient to disable or overcome resistance,[9] but it must be physical: fraud, for instance, will not supply the place of actual violence.[10] The putting in fear may be by a display of superior force or numbers, by menace of death or other considerable bodily harm, by intimidating demonstration without words, by threats of destruction or injury to valuable property, &c. The fear, to supply the place of actual violence, need not amount to great fright or terror, but the circumstances must be such as to excite a reasonable apprehension of the danger menaced and to constrain the will.[11]

**ARSON—Definition.** Arson, at common law, is the malicious burning
1055 of the house of another.[12] "It is," says Blackstone,[13] "an offence against the right of habitation[14] which is acquired by the law of nature as well

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[3] Com. *v.* Clifford, 8 Cush., 218; People *v.* Vice, 21 Cal., 345.

[4] See Foster, 128.

[5] Com. *v.* Snelling, 4 Bin., 379.

[6] 1 Hale, 533; 4 Black. Com., 243; 2 East, P. C., 707; 3 Chitty, C. L., 802; 1 Russell, 873; 1 Gabbett, 583; 3 Greenl. Ev. § 223, 228; 2 Bishop, C. L. § 1177, 1178.

[7] The force must be employed before or with the taking. "A *subsequent* violence or putting in fear will not make a *precedent* taking, effected clandestinely or without either violence or putting in fear, (as a larceny,) amount to robbery." 1 Russell, 874.

[8] Com. *v.* Snelling, 4 Bin., 383.

[9] 3 Chitty, C. L., 804–5; 2 East, P. C., 708; 1 Russell, 871, 875–6; 1 Gabbett, 583; 3 Greenl. Ev. § 229.

[10] See 2 Bishop, C. L. § 1166.

[11] 3 Chitty, C. L., 803; 4 Black. Com., 243–4; 2 East, P. C., 713; 1 Russell, 874, 879; 1 Gabbett, 582, 587; 3 Greenl. Ev. § 229, 231–233.

[12] 1 Wharton, C. L. § 825; 2 Bishop, C. L. § 8. And see Coke, 3 Inst., 66; 1 Hale, 566; 1 Hawkins, c. 39; 3 Chitty, C. L., 1121; 2 East, P. C., 1015; 2 Russell, 548; 1 Gabbett, 74.

In Sec. 5385, Rev. Sts., arson is described as the wilful and malicious burning of "any dwelling house or mansion house, or any store, barn, stable or other building, parcel of any dwelling or mansion house."

It is to be noted that, at common law, the burning of "*a barn stored with hay or grain*," though not within the curtilage or neighborhood of a dwelling, is sometimes described as arson. Thus Chitty, (3 C. L., 1121,) defines arson as a burning of "the house or barn of another." And see 1 Hale, 567; 1 Wharton, C. L. § 825, 834.

[13] 4 Com., 220.

[14] Or, as it is not unfrequently described,—"an offence against the possession." See *post*.

as by the laws of society;" or—as it is expressed by Bishop[15]—"though the thing burned is realty, the offence is rather against the security of the habitation than the property in it." Though ordinarily perpetrated under the cover of darkness, the time of its commission,—whether in the day or in the night,—is wholly immaterial.[16] Further, not being a crime against human life, it is not essential that there be any human being in the building at the time it is fired.[17]

**The intent.** The burning must be *malicious*, that is to say committed with a criminal or felonious intent. Legal malice, as has been heretofore explained, does not mean personal spite or hostility. In arson, therefore, it is not essential that the offender shall be actuated by a purpose to cause loss or injury to any particular individual.[18] The "malice" may be express or implied; *express*, where the intent is to burn the particular house which is fired; *implied*, where the burning does not correspond with the precise design of the offender—
1056 as where the design is to burn the house of A, and that of B is actually burned instead,[19] or where the burning has resulted from some other felony or criminal act which alone was originally contemplated.[20] But where the burning results not from such an act but from a mere trespass or negligence, the malice necessary to arson will not be implied.[21]

**The burning.** There must be an actual burning; an intent to burn, not carried out, will not be sufficient. But the burning need not involve the entire edifice or any considerable part of the same; it is enough if it extend to a small portion, how small is immaterial. And even such portion need not be wholly consumed. To constitute a burning, there need be only some decomposition, wasting, or destruction of the fibre of the wood, or some disintegration of the stone, brick, or other material; and, in the case of wood, though a mere scorching or smoking is not sufficient,[22] a charring is all that is required.[23]

**The house.** The term "house" in the definition of arson at common law includes not merely the dwelling or mansion in which the occupant has his abode, but, in the words of Hale,[24] "all out-houses that are *parcel* thereof, though not contiguous to it or under the same roof." The term has a somewhat broader scope than the term "dwelling-house" in burglary. The house must be a habitation, *i. e.* lived in,[25] though, if at the time of the offence the occupant and his family chance to be temporarily absent, the quality of the offence will not be

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[15] 1 Bishop, C. L. § 577.

[16] Coke, 4 Inst., 66; 3 Chitty, C. L., 1126; 2 East, P. C. 1021; 3 Greenl. Ev. § 57.

[17] Arson is not necessarily a crime against human life or the personal safety of others. Although the endangering of human life is a frequent consequence of its commission, it is not one of its necessary characteristics. The offence may be complete without the life of any human being having been put in the slightest peril. The probable danger to life is undoubtedly one of the circumstances which aggravate the offence, but it does not constitute it." People *v.* Henderson, 1 Park, 563.

[18] "The term *malice*, in this case as in many others, does not imply a design to injure the party who is eventually the sufferer, but merely an evil and mischievous intention, however general, producing damage to individuals." 3 Chitty, C. L., 1122.

[19] Coke, 3 Inst., 57; 2 East, P. C., 1019; 2 Russell, 549; 3 Greenl. Ev. § 56.

[20] On the familiar principle of law that every man is to be taken to intend the natural and probable consequences of his acts. See 3 Greenl. Ev. § 56.

[21] 1 Hawkins, c. 39, s. 5; 4 Black. Com., 222; 1 Gabbett, 74; 1 Wharton, C. L. § 829.

[22] Woolsey *v.* State, 30 Texas, Ap., 346.

[23] On this part of the subject see Coke, 3 Inst., 66; 1 Hawkins, c. 39, s. 4; 3 Chitty, C. L., 1120, 1121; 2 East, P. C., 1020; 2 Russell, 548; 3 Greenl. Ev. § 35; 1 Wharton, C. L. § 826.

[24] 1 P. C., 567. And see the terms of Sec. 5885, Rev. Sts., cited *ante*.

[25] Reg. *v.* England, 1 C. & K., 533; Surman *v.* Darley, 14 M. & W., 186; Com. *v* Barney, 10 Cush., 478.

changed in law.[26] The most approved test for determining, in a case of
1057 doubt, whether a domestic out-building is within such reasonable proximity as to identify it with the actual residence, in a case of arson, appears to be "to inquire whether the burning of it would endanger the main structure."[27]

**The ownership or property.** Arson being an offence against the possession and made punishable for the protection of the habitation not of the title, the *person* indicated in the definition need not be the absolute owner of the house but may have in it the special property of a tenant only.[28] And the nature or duration of his tenancy is immaterial, nor will the law inquire into it, provided the house is shown to be his private dwelling at the date of the offence. It is thus the legal possession rather than the actual ownership which is to determine whose house the building burned should be alleged and proved to be.

As arson consists in the burning of the house of another, it is clear—and it is so held—that for one to burn *his own* dwelling is not arson at common law.[29]

**BURGLARY—Definition.** Burglary, at common law, is an uniawful breaking and entering, in the night-time, into the dwelling-house of another, with the intent to commit a felony therein.[30] Like arson, it is an offence, not so much against property as against the peace and security of the habitation, of which Blackstone[31] writes that "the law of England has so peculiar and tender a regard to the immunity of a man's house that it styles it his castle, and will never suffer it to be violated with impunity." The especial significance and aggravation of the crime consists in the fact that the dwelling is invaded in the hours of darkness and repose, when sleep has disarmed the inmates
1058 and exposed them to be assailed or despoiled while defenceless and in terror.[32]

**The breaking.** This may be actual or constructive; that is to say by a direct physical act of force, or indirectly by means of fraud, artifice, intimidadation, or conspiracy with an inmate of the dwelling.[33]

**Actual breaking.** The force here contemplated is merely legal force, not violence. A very slight degree of force is often only required, and the kind of force exerted is quite immaterial. Burglary being a violation of the security of the habitation, the breaking must be of some portion or fixture of the building relied upon for the protection of the dwelling.[34] The term breaking is used in a technical sense; an opening, removing, displacing, &c., of any fastening or customary barrier to entrance, being equivalent to an actual breaking or severing.[35] Thus the breaking, in burglary, may consist in picking a lock, opening a locked door by a false key, turning with an instrument a key left in

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[26] State *v.* McGowan, 20 Conn., 246; 1 Wharton, C. L. § 835.

[27] See 1 Wharton, C. L. § 833; Gage *v.* Shelton, 3 Rich., 250.

[28] 3 Chitty, C. L., 1121, 1124; 2 Russell, 551; 3 Greenl. Ev. § 64; 1 Wharton, C. L. § 836.

[29] 1 Hale, 568; 2 East, P. C., 1022; 3 Greenl. Ev. § 53; 2 Bishop, C. L. § 12. Such a burning, where resorted to for the purpose of fraudulently securing the insurance, is a statutory arson in some of the States. See 1 Wharton, C. L. § 843.

[30] Coke, 3 Inst., 63; 1 Hale, 549; 1 Hawkins, c. 38, s. 1; 4 Black. Com., 224; 2 East, P. C., 484; 3 Chitty, C. L., 1101; 1 Russell, 785; 1 Gabbett, 169; 3 Greenl. Ev. § 74; 1 Wharton, C. L., § 758; 2 Bishop, C. L. § 90; State *v.* Wilson, Coxe, 440.

[31] 4 Com., 223.

[32] Coke, 3 Inst., 63; 4 Black. Com., 224; 3 Greenl. Ev. § 75; R. *v.* Margetta, 2 Leach, 931.

[33] See 2 East, P. C., 485; 1 Russell, 786, 792. 1 Gabbett, 169; 3 Greenl. Ev. § 76, 1 Wharton, C. L. § 765, 766.

[34] 2 Bishop, C. L. § 96; State *v.* Boon, 13 Ire., 246.

[35] 4 Black. Com., 226; Com. *v.* Stephenson, 8 Pick., 355; State *v.* Boon, *ante.*

the door on the inside,[36] prying open a fastened door or window,[37] boring and pushing back an inside bolt, cutting out a panel or making a hole in a door, wall, shutter, &c., cutting through or breaking in a pane of glass,[38] or in simply opening a shut door by raising the latch or drawing back the bolt by turning the handle, or in raising or letting down a closed window-sash.[39]

1059 But gaining access to an interior by means of a barrier left carelessly open is not a breaking. Thus entering by an open outer door, or by a window however slightly raised, or by an open skylight or ventilator, is held not burglary.[40] The breaking, however, to constitute bulglary, need not be of an outer barrier. Where a person, having entered without opposition, by an outer door or window left carelessly open, proceeds, (with the requisite intent,) to break and enter an *inner* door, he is equally guilty of burglary as if he had forced the main door or any outer fastening of the dwelling.[41] And since it is not essential that an *outer* door be broken, a servant or other inmate may commit burgalry by breaking and entering the room-door of the master or mistress of the house, or any member of the family, or of a guest or lodger, with a felonious intent.[42]

**Constructive breaking.** A breaking, (as also an entry,) may further be effected by means of fraud, false representations, stratagem, or the use of threats. As—by decoying the occupant from his house, which is thus left open or unfastened; by practising a deceit upon him; by procuring him to open the door by professing to hold a search-warrant or other legal process requiring service; by asking to be admitted while imitating a familiar voice; by pretending to have business with the occupant; by intimidating him with threats against person or property; by raising a tumult or causing an alarm without; or by taking lodgings in the house with a view to the perpetration of a felony within it.[43] The constructive breaking, &c., thus effected is held equivalent in law to a breaking by direct manual force; for, as says Coke,[44] "that which is done *in fraudem legis*, the law giveth no benefit thereof to the party;" and, as Hawkins[45] observes "the law will not endure to have its justice defrauded by such evasions."

1060 Further, a breaking may be constructively effected through a conspiracy with a servant or other inmate of the dwelling, by whom a door, &c., is opened to the assailant, or keys are furnished him.[46]

**The entering.** This is the accompaniment or complement of the breaking, without which the burglary is not effected; a breaking alone does not complete

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[36] Otherwise where the locked door is opened by means of a key left in the door on the outside; such a case being analogous to that of a door or window left open. Rex *v.* Alston, 1 Swin, 433.

[37] Prying off a portion of the weather-boarding from an out-building, parcel of the dwelling, was held a breaking, in Fisher *v.* State, 43 Ala., 17.

[38] See Rex *v.* Perkes, 1 C. & P., 300; Do. *v.* Bird, 9 C. & P., 44; Do. *v.* Robinson, 1 Mood., 327.

[39] 1 Wharton, C. L. § 759, 767; 2 Bishop, C. L. § 91.

[40] 2 East, P. C., 485; 1 Russell, 786; 3 Greenl. Ev. § 76; 1 Wharton, C. L. § 769; 2 Bishop, C. L. § 91. So, entering by a transom left open over a door. McGrath *v.* State, 25 Neb., 780. But getting in by an open chimney is held a breaking, because, in the words of East, (2 P. C., 485,) "it is as much enclosed as the nature of the thing will admit of."

[41] 1 Russell, 790; 3 Greenl. Ev. § 76; 1 Wharton, C. L. § 762.

[42] Rex *v.* Gray, 1 Stra., 481; U. S. *v.* Bowen, 4 Cranch C., 604; and authorities cited in last note.

[43] See Coke, 3 Inst., 64; 1 Hale, 552; 1 Hawkins, c. 38, s. 5; 4 Black. Com., 226; 2 East, P. C., 485; 3 Chitty, C. L., 1106; 1 Russell, 792–3; 3 Greenl. Ev. § 77.

[44] 3 Inst., 64.

[45] 1 P. C., c. 38, s. 5.

[46] 1 Russell, 794; 3 Greenl. Ev. § 77; 1 Wharton, C. L. § 766. In such cases both parties are held equally guilty of burglary.

the crime. To constitute an entry, it is not essential that the party should personally enter in the ordinary sense of the word; the least entering of any part of the body, as a hand, foot, or even finger, is sufficient to satisfy the law.[47] Thus, where a party thrusts his hand or a part of his hand through a hole which he has made in a shutter or window and seizes or attempts to seize property; or where, with felonious intent, he puts his arm or hand through a pane of glass which he has broken, for the purpose of unfastening or opening an inner barrier—a legal entering is held to be effected.[48] And so it is said that there is an entering where the foot of the burglar crosses the threshold of the house.[49] Further, to constitute an entering, it is not even essential that any portion of the body should enter the dwelling, provided some instrument, inserted for the purpose of accomplishing the felony, do actually penetrate within it.[50] Again, an entry may be affected and a burglary completed by means of an innocent third person; as where a young child is compelled to pass through a small window or aperture broken from without and instructed to seize and bring out certain articles of property.[51]

What has been said of the breaking of an *inner* door, &c., as well as of *constructive* breaking, applies also to the entering.

1061 **The time.** It is of the essence of burglary at common law that it shall be committed in the night-time, or, as it is termed in the old pleadings, *noctanter*. Both the breaking and the entering must be in the night, or there is no burglary; the two, however, may be on succeeding or different nights.[53] The ancient legal definition of night was the interval between sunset and sunrise; but from a very early date a different signification has been given to the term night-time, as employed in the description of burglary, namely that period of the twenty-four hours during which there is not enough light from the sun—either daylight or twilight—to enable one to perceive and distinguish with reasonable accuracy the features of the countenance of another.[52] Or, as Blackstone [54] expresses it,—"If there be daylight or *crepusculum* enough, begun or left, to discern a man's face withal, it is no burglary." But the prevalence of *moonlight*, however full and bright, is held to affect in no manner the question whether or not the breaking and entering were committed in the night; the law of burglary recognizing no middle space between night and day.[55]

**The place.** The scene of burglary at common law must be a *dwelling-house*. This term includes both the place of the actual residence of the occupant of the premises and all such other appurtenant buildings as are properly *parcel* of the main edifice. The dwelling itself must be a permanent structure intended or adapted for habitation and actually inhabited at the time—a building lived

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[47] Coke, 3 Inst., 64; 1 Hale, 551, 554; 1 Hawkins, c. 38, s. 3, 7; Foster, 108; 4 Black. Com., 226, 227; 2 East, P. C., 490; 3 Chitty, C. L., 1106, 1108; 1 Russell, 786, 794; 3 Greenl. Ev. § 76, 78; 1 Wharton, C. L. § 774, 775.

[48] Gibbon's Case, Foster, 108; Rex *v.* Perkes, 1 C. & P., 300; Do. *v.* Balley, R. & R., 341; Do. *v.* Davis, Id., 499; Fisher *v.* State, 43 Ala., 17; Franco *v.* State, 42 Texas, 276.

[49] 1 Hawkins, c. 38, s. 7; 4 Black. Com., 226.

[50] 1 Russell 795; 3 Greenl. Ev. § 78; 1 Wharton, C. L. § 774; 2 Bishop, C. L. § 92.

[51] 1 Hale, 555; 1 Russell, 797; 3 Greenl. Ev. § 78. So "If a man so employs his wife." 7 Dane, Ab., 136.

[52] 1 Hale, 551; 3 Chitty, C. L., 1106; 1 Russell, 821; 3 Greenl. Ev. § 75; 1 Wharton, C. L. § 806.

[53] Coke, 3 Inst., 63; 1 Hawkins, c. 38, s. 2; 2 East, P. C., 508; 1 Gabbett, 169; 3 Greenl. Ev. § 75; 1 Wharton, C. L. § 807. In view, however, of the uncertainty of the common-law rule, the period has been expressly defined by statute in Great Britain, (by the 7 Wm. 4 & 1 Vic., c. 86, s. 4, as from 9 o'clock p. m. to 6 a. m.,) and in some of our States.

[54] 4 Com., 224.

[55] 1 Hale, 551; 2 East, P. C., 509; 1 Russell, 820; 3 Greenl. Ev. § 75; 2 Bishop, C. L. § 101.

and slept in, not merely used as a place of business. It is immaterial, however, if the occupant be *temporarily* absent. Thus burglary, like arson, may be committed in the summer upon a house not then occupied but customarily inhabited as a winter residence. The dwelling includes the entire edifice,
1062 embracing a portion not used for purposes of residence—as, for example, a store or shop under the same roof—provided it be occupied by the occupant of the portion lived in and not by a different person. There may, indeed, be distinct dwellings under the same roof, (as in a case of a tenement house,) as to any one of which a burglary may be committed,—an instance, however, which does not include a hotel, where the guests being more or less transient, the different apartments are not viewed as distinct dwellings but as parts of the dwelling of the landlord. As to *outbuildings*, these are held to be "parcel" of the dwelling, where, being within a reasonable distance of the habitation, they are employed for domestic purposes in connection with it—are contributory or ancillary to it, as branches of the domestic establishment.[56]

**The ownership or occupancy.** The place must be the dwelling *of another;* a man cannot commit burglary of his own dwelling.[57] But here, as in arson, it is not essential that the tenement be lived in by the owner: it is sufficient if it be occupied as a dwelling by a tenant.[58]

**The intent.** The intent in burglary is to commit a felony, that is to say a particular felony, not merely felony in general.[59] In the great majority of cases the act intended is the commission of *larceny*. That the intent has actually existed and impelled the breaking and entering is all that is required to constitute the offence: whether it be executed or not is wholly immaterial.[60]
1063 There need not even be an *attempt* to commit the felony; the mere breaking and entering, with the intent to commit it, completing the crime.[61]

**LARCENY—Definition.** Larceny may be defined as—A taking of personal property from the possession of the owner, without his consent, with intent to appropriate the same. As will be illustrated in proceeding, it is a trespass with a distinctive criminal *animus*.[62]

**The taking.** This must be (1) an actual substantial taking of some thing by physical force:[63] an attempt to take, or an intention to take not carried out, will not suffice.[64] There must be force because the taking is a trespass, but the amount or kind is immaterial, mere *legal* force being alone requisite. So the force need not be wholly manual or personal; the instrument by which it is

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[56] On this part of the definition of burglary, see Coke, 3 Inst., 63, 64; 1 Hale, 554–558; 1 Hawkins, c. 38, s. 12, 15; Foster, 76; 4 Black. Com., 225, 226; 3 Chitty, C. L., 1102–4, 1112–13; 2 East, P. C., 491–507; 1 Russell, 797–819; 3 Greenl. Ev. § 79–81; 1 Wharton, C. L. § 781–791; also G. O. 29, Dept. of the South, 1865; Do. 5, Dept. of the Platte, 1870. It may be noted that neither a tent in a military camp, (compare 4 Black. Com., 626,) nor a mere warehouse at a military post, can be the subject of burglary.

[57] 2 East, P. C., 506; 1 Russell, 820; 1 Wharton, C. L. § 805.

[58] See Rex *v.* Collet, R. & R., 498; State *v.* Ginns, 1 N. & McC., 586; Houston *v.* State, 38 Ga., 166.

[59] 1 Russell, 822, 824; 3 Greenl. Ev. § 82; 2 Bishop, C. L. § 113.

[60] 2 East, P. C., 484, 509; 1 Russell, 785, 822; 2 Bishop, C. L. § 110. "It is in this point that burglary, (with intent to steal,) differs from *robbery* which requires that something be taken." 1 Wharton, C. L. § 812.

[61] In People *v.* Shaber, 32 Cal., 36, it was held that the existence of an intent to commit larceny made the breaking and entering a burglary, although the building contained nothing of which a larceny could be committed—was in fact empty.

[62] See 1 Hawkins, c. 33, s. 2; 4 Black. Com., 229; 2 East, P. C., 552, 554; 3 Chitty, C. L., 917; 1 Wharton, C. L. § 862; 1 Bishop, C. L. § 566; 2 Id. § 758.

[63] Coke, 3 Inst., 107; 2 Bishop, C. L. § 804.

[64] See Reg. *v.* Brooks, 8 C. & P., 295.

exerted being also immaterial.[65] (2) It must include an actual *removal* of the thing from its place; in other words there must be not only a *caption* but also an *asportation* or "carrying away." This carrying away, however, is no more than is reasonably implied in the term *taking*, since it may consist in the slightest removal of the article from the place which it occupied while in the owner's possession. It is never necessary, to complete the removal in law, that the thief should succeed in getting away with the property.[66] (3) The taking
1064 must be from the actual or constructive possession of the owner.[67] For one to appropriate property of another which is in his own possession, because of having been committed to him as a bailee, in trust, is not larceny but embezzlement.[68] (4) The taking must be *invito domino*, or without the owner's consent; *i. e.* without his consent to the taking of the article as *property*:[69] he may consent to the transfer of the *possession*, as to a servant or agent for safe-keeping,[70] without affecting the nature of a conversion by the latter, the possession being still constructively and the property wholly his own.[71]

**The property.** The subject of larceny must be *personal* property, and property of some recognized value. The articles taken, says Bishop,[72] "must be of some value: unless they are, they are not property, and no wrong is committed in taking them." The doctrine of the common law that animals *feræ naturæ*, (including dogs and cats,) were of no value and therefore *nullius bona* and not subjects of larceny, has been very considerably modified by modern statute. The common-law distinction of "grand" and "petit" larceny, based upon the value of the property stolen as being greater or not greater than twelve pence, is only material to be noticed in connection with the subject of the Punishment.

**The ownership.** Further, to constitute larceny, the article taken must be *another's*. In the first place it must have some owner; must not be property without a legal owner, as wreck, waifs, or estrays, or other property wholly abandoned.[73] But the ownership need not be that of the absolute or
1065 general owner, since larceny may be committed by a taking from a bailee or trustee, in whom the law, pending the bailment or other trust, vests a qualified property which is sufficient to constitute him a "special" owner as against the thief. As the thing taken must be another's, the owner certainly cannot steal his own property; and so it is ruled that joint owners or tenants in common of personalty cannot steal the same from each other.

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[65] Reg. *v.* Firth, 11 Cox, 234; Com. *v.* Shaw, 4 Allen, 308, (cases of abstracting gas by secretly attaching a pipe to the main supply pipe of a gas company;) Reg. *v.* White, 6 Cox, 213; 1 Wharton, C. L. § 924. So, the taking may be effected by means of an innocent agent, as a young child employed for the purpose. 1 Hale, 514; 2 East, C. P., 555.

[66] Coke, 3 Inst., 108; 1 Hawkins, c. 33, s. 18; 1 Hale, 508; 4 Black. Com., 231; 2 East, P. C., 555; 3 Chitty, C. L., 925, 943; 2 Russell, 5; 3 Greenl. Ev. § 154; 1 Wharton, C. L. § 923; 2 Bishop, C. L. § 794, 795. The removal being completed, the immediate *return* of the property to the owner will not render the act any the less a larceny. 3 Greenl. Ev. § 156, 2 Bishop, C. L. § 796. "The fact that a thief restores an article after he has been detected does not wipe out the fact that he stole it." G. C. M. O. 33, Dept. of Texas, 1885. (Gen. Stanley.)

[67] 1 Hawkins, c. 33, s. 5; 2 East, P. C., 554; 2 Russell, 5; 3 Greenl. Ev. § 155, 161.

[68] See under "Sixtieth Article."

[69] 2 East, P. C., 665; 2 Russell, 19; 2 Bishop, C. L. § 811.

[70] Or to a person for a mere temporary use not amounting to a bailment. 1 Hale, 506; 2 East, P. C., 555, 564; 2 Russell, 22.

[71] See 2 East, P. C., 668; 2 Bishop, C. L. § 813.

[72] 2 C. L. § 767.

[73] As to the nature of such property at common law, see 2 Russell, 11, 96; 2 Wharton, C. L. § 863; 2 Bishop, C. L. § 875, 876.

**THE INTENT.** To constitute larceny, the taking must be accompanied with an intent to appropriate the *property*, (in distinction from the mere possession,) to the personal use of the taker, or at least to deprive the owner of it. This intent is the gist of the crime; in its absence there may be trespass, but no larceny. The intent must concur with the taking, and is complete if then entertained though afterwards abandoned. Its existence may be presumed from such circumstances as the fact of the actual conversion of the property, the manner—secret or otherwise suspicious—of the taking or disposition of the articles, the possession, not satisfactorily explained, of the thing or things stolen, the resort to means to avoid arrest or trial, as desertion by a soldier, &c. On the other hand, counter-presumptions may be deduced from such evidence as that the article was taken under a claim of title, that it was designed to be borrowed only, or that it was *found* after having been *lost* by the owner, and converted in ignorance of the real ownership.[74] But a retaining of *found* property, which evidently belongs to another, without a reasonable effort to restore it, would be evidence of an intent to convert.[75]

**THE OTHER OFFENCES SPECIFIED IN THE ARTICLE.** These are —"Assault and battery with an intent to kill; Wounding, by shooting or stabbing, with an intent to commit murder;" and "Assault and battery
1066 with an intent to commit rape." The second of these offences[76] is merely an aggravated form of the battery first mentioned.

**Assault and battery defined.** A battery, or assault and battery,—for the two terms are substantially equivalent, every battery including an assault,—is any unlawful violence inflicted upon a person without his or her consent. A threatening of violence, or attempt or offer to exert force against another will not suffice, since this would be no more than an *assault*—the assault which is only preliminary to a battery. The force employed must be not merely aimed at but must reach the person or his dress; still, though some impact is essential, a mere touching of the body of the party assailed will satisfy the legal definition.[77] It is obvious, however, that a battery, when the expression of a homicidal intent or intent to ravish, will in general be of a vehement character.

**Wounding by shooting or stabbing.** The English cases fully explain that a *wound*, in the sense of the statutes making punishable batteries of this sort, must consist at least in a breaking or division of the continuity of the skin; that, to constitute a wound, not merely the cuticle but the internal and entire skin of the body must be pierced or broken, and that a scratch is therefore not a wound: that blood should flow is not however held *essential* to complete a wound.[78]

The term "*wounding by shooting*" removes from consideration all the cases of *shooting* at without hitting, which, being merely cases of *assault*, are not in point here where the physical act must consist in a battery. Shooting is,

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[74] As illustrating the subject of the intent in larceny, see Coke, 3 Inst., 107, 108; 1 Hawkins, c. 33, s. 3; 1 Hale, 54, 506–509; 4 Black. Com., 31, 232; 2 Chitty, C. L., 926, 927; 2 East, P. C., 510, 655–665, 694, 698; 2 Russell, 7, 9, 11, 12, 17, 18, 123; Wills, Circum. Ev., 47–50, 56, 57; 3 Greenl. Ev. § 157, 159, 169; 1 Wharton, C. L. § 883–913; 2 Bishop, C. L. § 840–851.

[75] See the law well stated by Gen. Ruger, in G. C. M. O. 16, Dept. of California, 1892.

[76] This attempt is in substance made punishable as a specific offence by the British statute of 1 Vic., c. 85, and by similar statutes in several of our States. See Wall *v.* State, 23 Ind., 150.

[77] See 1 Hawkins, c. 62, s. 2; 1 Russell, 751; 3 Greenl. Ev. § 60; 1 Wharton, C. L. § 617; U. S. *v.* Hand, 2 Washington, 437.

[78] Rex *v.* Payne, 4 C. & P., 558; Moriarty *v.* Brooks, 6 Id., 686; Rex *v.* Sheard, 7 Id., 846; Reg. *v.* Smith, 8 Id., 175; Reg. *v.* McLoughlin, Id., 635; Rex *v.* Wood, 1 Mood, 278; Rex *v.* Withers, Id., 294; Rex *v.* Becket, 1 M. & Rob., 526.

properly, the discharging of a loaded gun, pistol or other fire-arm. It is not absolutely necessary that the arm should be loaded with a ball, bullet, or shot, since the discharge of a gun loaded with powder and wadding only,
1067 if fired very close to a person, may inflict a dangerous wound.[79] That the arm was only thus loaded, however, would ordinarily go to indicate the absence of a murderous intent.

"Stabbing" may be defined to be the inflicting of an incised wound by thrusting with a pointed instrument, in contradistinction to a cutting made by a sharp-edged instrument, or an injury of any sort done with a blunt weapon.[80]

**Intent to kill.** This general intent, first specified in the Article, includes both an intent to commit murder, (the intent designated as that of the offence of "Wounding," &c.,) and an intent to commit manslaughter.

**Intent to commit murder.** This is, properly, a specific intent to murder a particular person, not an intent to commit murder in general.[81] It is essential to the proof of it that it should appear from the testimony that if a killing had resulted from the battery, the same would have been murder in law.[82] It may be evidenced by such circumstances as a declaration of such intent by the accused, his violent conduct at the time of the offence, the use of a deadly weapon, the grave character of the injury inflicted, the existence of previous enmity between the parties, or other motive adequate to account for the act, &c.

**Intent to commit manslaughter.** This, which is an intent comparatively rarely entertained, may be induced under circumstances of great provocation operating suddenly, or by the passion and excitement incidental to a mutual fight between the assailant and the party attacked. It can be imputed only where the killing, if death had ensued, would have been manslaughter in law. Thus it cannot be deduced where it is apparent from the evidence that the killing would have been justifiable or excusable homicide.

1068 **Intent to commit rape.** This must appear from the evidence to have been such as that the accompanying battery, if effectuated, would have amounted to the legal crime of rape.[83] It must be inferable from all the circumstances that the design of the assailant, in the battery, was to gratify his passions at all events and notwithstanding the opposition offered—to overpower resistance by all the force necessary to the successful accomplishment of his purpose.[84] If this design appears to have been once fully entertained in connection with the battery, the fact that the party afterwards voluntarily desisted, or changed his mind, will not affect the result of the proof.[85] The intent will be demonstrated by the character and degree of the violence employed, the language, threats, demonstrations, and entire conduct of the accused, the place, time, and other circumstances of the attempt, &c.

**CHARGE.** For the forms of charging the several crimes made punishable by this Article, the student is referred to the Appendix.

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[79] See Rex. *v.* Kitchen, R. & R., 95.

[80] See King *v.* Weston, 1 Leach, 247; Rex *v.* Oxford, 5 C. & P., 925, 1 Russell, 723.

[81] See Morgan *v.* State, 13 Sm. & M., 242; 1 Bishop, C. L. § 729–731. But in People *v.* Torres, 38 Cal., 141, it is held that if A, intending to murder B, shoots C by mistake and wounds him, he is guilty of assault with intent to murder C.

[82] Rex *v.* Mitton, 1 East, 411; Rex *v.* Payne, 4 C. & P., 558; State *v.* Neal, 37 Maine, 468; State *v.* Williams, 3 Foster, 321; State *v.* Reed, 40 Vt., 603; McCoy *v.* State, 3 Eng., 451; Hopkinson *v.* People, 18 Ills., 265; Dains *v.* State, 2 Hump, 439; State *v.* Anderson, 2 Over., 8; Kunkle *v.* State, 32 Ind., 220; Jackson *v.* State, 51 Ga., 402.

[83] Charles *v.* State, 6 Eng., 390; 1 Wharton, C. L. § 181; 1 Bishop, C. L. § 731.

[84] 1 Russell, 692; 1 Bishop, C. L. § 733.

[85] 1 Bishop, C. L. § 733.

**FINDING.** Certain special forms of finding may be noticed as allowable upon military trials had under this Article. Thus, (as remarked in Chapter XIX,) under a charge of murder the court may find guilty of manslaughter only; under a charge for robbery, the finding may be guilty of larceny; under a charge for burglary in which it is alleged that a larceny—the crime intended—was actually committed, the accused may be found guilty of larceny;[86] under charges for murder, manslaughter, mayhem and robbery, the court may convict the accused of assault and battery with intent to commit the crime, or assault and battery only—to the prejudice of good order and military discipline; under a charge for arson, the party may be convicted of an attempt to commit arson—to the prejudice, &c.; under charges for assault and battery with intent to commit murder, manslaughter, or rape, the accused may be found guilty of assault and battery only.[87]

1069 A court-martial cannot properly find an accused guilty of a lesser *degree* of the crime charged,—as guilty of murder in the second degree under a charge of "murder," since,[88] (as heretofore stated,) the military code does not recognize degrees of the specific crimes enumerated in this Article.

**PUNISHMENT.** The Article concludes with the following injunction:—*"and the punishment in any such case shall not be less than the punishment provided, for the like offence, by the laws of the State, Territory, or District, in which such offence may have been committed."*

**CONSTRUCTION**—"Shall not be less than the punishment," &c. These words, in directing that the punishment imposed by the sentence shall not be less, *i. e.* less severe, than that authorized by the local law,[89] evidently also contemplate that such punishment shall, (in part at least,) be *of the same species* as that thus authorized. Such is certainly the reasonable construction. But the Article, in thus fixing a *minimum* for the punishment to be adjudged by the court-martial, leaves it discretionary with the court to *add to* such punishment if it thinks proper, and if such addition be practicable. Thus, where death is the statutory penalty, the sentence of the court-martial must be capital also. But where the penalty is imprisonment for a certain term, or fine for a certain amount, (or both,) the court-martial, while it must impose an imprisonment of at least as long a term, or a fine of at least as large an amount, (or both,) may, if deemed just, increase such penalty or penalties at will; its discretion in the matter being without limit except in so far as it may

1070 properly be controlled by a principle analogous to that of the constitutional prohibition of "cruel and unusual" punishments.[90] So, the court may adjudge, in addition to the penalty prescribed by the local law, (whether or not itself enlarged,) a further punishment of a military character appro-

[86] See 1 Bishop, C. L. § 796, and cases cited.

[87] In these findings, the rule of military law that a court, under a charge of a specific offence, may always find a *disorder* included therein, (and within the contemplation of Art. 62,) will justify the court where perhaps the strict rules governing common-law verdicts would fail to do so.

[88] This irregular finding was made in a few cases during the late war. See G. O. 234, 246, of 1863.

[89] Where the punishment is in fact less severe, it is not only unauthorized but inoperative. DIGEST, 49. Sentences imposing punishments inferior to those provided by the law of the State, &c., have not unfrequently been disapproved, in cases where the court could not well be reconvened for the correction of the sentence. See such cases in G. O. 19, Northern Dept., 1864, (larceny;) Do. 57, Dept. of Ark., 1864, (do;) Do. 19, Dept. of Tenn., 1866, (do;) Do. 158, Dept. of No. Ca., 1865, (burglary;) Do. 43, Dept. of La., 1865, (rape.)

[90] See Chapter XX.

priate to the case, such as dismissal, discharge, reduction, forfeiture, suspension, &c.[91]

Where indeed the civil statute, in awarding a particular punishment, fixes a *maximum* and a *minimum* for the same, as where it assigns to the offender confinement in a penitentiary for a term not less than a stated number of months or greater than a stated number of years, the Article will be satisfied by a sentencing of the accused to the *minimum* term thus established, while of course even the *maximum* may legally be exceeded. But where—as is sometimes done—the statute merely establishes a *maximum*, as where it enacts that the offender shall be punished by imprisonment for a term *not to exceed* a certain number of years, or by a fine *not to exceed* in amount a certain sum named, then, as any degree of the punishment within such limit is legal, the court-martial is without any restriction whatever, under the Article, as to the term or amount which it shall impose by its sentence.

**"For the like offence."** Like means same or similar, and in general the "like" offence in the local statute will readily be distinguished. Where the statute establishes two or more *degrees* of an offence, with different punishments for the several degrees, it will be sufficient for the court-martial to impose the punishment belonging to the degree to which the offence found by it is "like" or corresponds. Where the common-law offence, as charged and found, can not readily be assimilated to either of the degrees of the offence as defined in the statute, it will be safest for the court to impose a punishment not less than that provided for the first or highest degree.

**"State, Territory, or District."** Of these terms, "District" evidently refers to the District of Columbia.

**MEASURE OF THE PUNISHMENT IN GENERAL.** In adjusting the measure of the punishment under the Article, the court-martial, while
1071 strictly observing the specific injunction last noticed, and considering—generally—the estimate of the criminality of the offence as indicated by the penalty or scale of penalties assigned to it by the laws of the State, &c., may well also consult, as a guide to assist its judgment, the *United States* statute, where any exists making punishable the particular offence. Thus, of the crimes enumerated in the Article, murder, arson, and rape are made punishable with death, and manslaughter, mayhem, robbery and larceny, by fine and imprisonment, when committed at sea or in places within the exclusive jurisdiction of the United States courts.[92]

## XXIV. THE FIFTY-NINTH ARTICLE.

[Surrender to the Civil Authorities of Military Persons Charged with Civil Offences.]

"ART. 59. *When any officer or soldier is accused of a capital crime, or of any offence 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*

[91] *Ex parte* Mason, 105 U. S., 696.

[92] See Secs. 5339, 5343, 5345, 5348, 5356, 5385, 5456, Rev. Sts. The crime described is indeed not always the common-law offence, and these statutes are not in general to be referred to for *definitions*.

*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 wilfully 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."*

**PRINCIPLE AND PURPOSE OF THE ARTICLE.** This provision, which, derived originally from a corresponding British Article, has undergone but a single material change, presently to be noticed, since its first appearance in our code of 1776, proceeds upon certain general principles well defined in our law. Of these, the fundamental principle of the distinctness and independence of the two sovereignties of the United States and of the separate States, as
1072 declared by the Supreme Court in Ableman *v.* Booth,[93] has been applied to the relations between the authorities of the States and the U. S. military authorities in the more recent adjudication of the same court in Tarble's Case,[94] and specially also in the leading case in Iowa of *Ex parte* McRoberts.[95] But, notwithstanding this independence of the military power within its peculiar field, the further principle is uniformly asserted of the subordination, in time of peace and on common ground, of the military authority to the civil, and of the consequent amenability of military persons, in their civil capacity, to the civil jurisdiction, for breaches of the criminal law of the land.[96]

It is in recognition of these principles, and to facilitate the exercise
1073—of such jurisdiction, that this Article has been enacted. Though in form an injunction upon commanding officers, &c., its general purpose, as expressed by the court in the case of McRoberts,[97] is "to aid the civil authorities in the administration of justice, and to place it out of the power of a criminal to escape the just civil penalties of his acts by entering the military service, or claiming its protection while in it." At the same time, by prescribing a condition to be complied with on the part of civil officials and persons, and investing military commanders with a reasonable discretion in accepting their applications, it protects the military from false arrest and arbitrary prosecution.

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[93] 21 Howard, 516. In this case Chief Justice Taney observes: "The powers of the General Government and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge or a State court as if the line of division was traced by landmarks and monuments visible to the eye."

[94] 13 Wallace, 397.

[95] 16 Iowa, 600.

[96] Dow *v.* Johnson, 100 U. S., 169; *Ex parte* McRoberts, 16 Iowa, 601; Rawle on the Const., 161; Halleck, Int. Law, 393; 6 Opins. At. Gen., 415, 417, 451; Tytler, 153; 1 McArthur, 38; DIGEST, 50.

The Journals of Congress during the Revolution contain sundry assertions of this principle. Thus in one case, (2 Jour., 572,) it was Resolved—"That all military officers and soldiers in the service of the United States, are, and of right ought to be, amenable to the laws of the State in which they reside in common with other citizens." In another case, (3 Jour., 77,) it is recited that—"Whereas complaint has been made to Congress that brigadier count Pulaski has resisted the civil authority of this State," (Pennsylvania,) "Resolved that the board of war do require his personal attendance at the war office; * * * it being the fixed determination of Congress to discourage and suppress every opposition to civil authority by any officer in their service." And further, (Id., p. 79,) the board are "directed to inform brigadier Pulaski that it is the duty of every military officer in the service of these States to yield obedience to any process issuing from any court, judge, or magistrate, within any of the United States." In a third instance, earlier in date, (2 Jour., 68,) it was Resolved by Congress that a regimental adjutant, charged with the murder of a citizen, "be delivered to the civil authority of Pennsylvania that he may receive his trial according to law."

[97] 16 Iowa, 603. And see Samuel, 489.

**OCCASION OF ITS OPERATION—CONSTRUCTION OF TERMS.** The occasion upon which the duty specified in the Article is devolved upon the officers indicated, is that of the application, to the commanding officer of a post, regiment, &c., for the surrender to the civil authorities of an officer or soldier present with the command, who is accused of a criminal offence. The circumstances under which the Article is intended to be operative will appear from a reference to the terms of the provision.

"Any officer or soldier." This designation clearly refers to officers and soldiers under present military command and control.[98] Military persons not within such control, as *persons on furlough or leave of absence*, or deserters, could scarcely have been contemplated. The Article not applying to such parties, it would follow that the civil authorities would be entitled to arrest and bring to justice a person of such class in the same manner as any *civilian*, *i. e.* without application to the military authorities. This was indeed the precise point ruled in *Ex parte* McRoberts already cited—a case of a soldier absent on furlough—in which it is said that such a soldier "is not in the custody or control of his commanding officer, and may therefore be arrested as any other person, and no conflict can arise." The fact that his leave of absence may be recalled "cannot, it is remarked by the court, affect his status while it continues in force: so long as it is *not* recalled, he remains without the military jurisdiction."[99] In the further case of Private Rosenback,[100] who, having been arrested, while on furlough, by the civil authorities of Wisconsin, on a charge of murder, in 1864, petitioned the Department Commander to be taken out of the hands of said authorities and tried by court-martial, it was determined by Gen. Pope as follows:—"The petitioner, at the time the crime is charged to have been committed, was on furlough and absent from his regiment in the State in which he enlisted, and was at the time acting in no sense in his military capacity. He was substantially in the same position before the law with any person not in the military service, and equally responsible to the civil authorities for any offence against the laws of the State of Wisconsin. His case is not one which would justify the interposition of the military authorities, and his petition is therefore refused."

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So, the term "*any officer or soldier*" cannot properly be regarded as including a military person who commits a breach of the peace or other civil offence outside of a military post, as in an adjoining town, and has not returned within the post when apprehended. The Article is clearly not intended to restrict the power of arrest on the spot, of such a person, by the civil authorities of the State or municipality, and he may legally be so arrested then and there, without awaiting his return to the post, and without a reference to the commanding officer.

"Accused." This word is construed by Samuel[1] as meaning regularly charged on oath before a civil magistrate, as best evidenced by the *warrant* of the latter or some other process issued by him. This construction is supported by the fact that the Article provides in terms for the delivery of the accused person "to the civil magistrate" and for his apprehension by "the officers of justice," as if it were contemplated that a judge or justice should issue a writ or summons requiring the party to be brought before him, and a

[98] See G. O. 87, Dept. of the Mo., 1863.

[99] That is to say, for the purposes of this Article. As to the *jurisdiction* of a court-martial over an offence committed by an officer or soldier on leave or furlough, see Chapter VIII.

[100] G. O. 29, Dept. of the Northwest, 1864.

[1] Page 491.

sheriff or constable should be present to serve it. Such indeed would be the regular course of proceeding, and one advisable in general to be pursued before a surrender is applied for under this Article. Nothing *more*, certainly, can be required; an indictment, for instance, can never be necessary. The pro-
1075 ceeding indicated, however, is not *essential;* the term "accused" is not necessarily to be construed in a technical sense; and a specific charge of an offence contemplated by the Article, formally made, and by a proper person, in the "*application*," may be accepted as sufficient in the absence of legal process.[2]

"A capital crime." These words are considered to be qualified, equally with those which follow, ("any offence," &c.,) by the words "punishable by the laws of the land." The capital crime here intended is thus properly a crime made punishable with death[3] by the laws of the State, &c., in which it was committed.

"Any offence against the person or property of any citizen of any of the United States." Here are evidently mainly intended crimes, other than capital, involving violence against the person, as manslaughter, mayhem, rape, robbery, and assault and battery, together with such as affect a person in his property, as arson, burglary, larceny, forgery, embezzlement and malicious mischief. Offences against society or the public, and offences against government, (except where immediately affecting individual persons or their property,) could scarcely have been contemplated.

The term "*citizen*" as used in this clause may be deemed to apply to a military person, in his civil capacity, equally as to a civilian. Thus a resident *retired* officer or soldier would be included. Such a person, however, would rarely have recourse to proceedings under this Article where the offence committed against him was one cognizable and adequately punishable at military law.[4]

The description "*any of the United States*" may also be taken in a general sense, and be deemed to apply, in spirit at least, to Territories as well as
1076 States. The Article is not, of course, intended to apply to cases of offences against the laws of the *United States* itself.

"Punishable by the laws of the land." The term "laws of the land" has been defined to mean "general public laws, binding on all members of the community under similar circumstances," in contradistinction to "partial or private laws affecting the rights of individuals."[5] The term as here employed is thus believed to include, not only such acts of the law-making power as State statutes, but also authorized municipal ordinances and by-laws.[6] Thus it would be the

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[2] In Jeffers' case, (2 Opins., 15,) Atty. Gen. Wirt does not intimate that the issuing of a warrant is *necessary*.

[3] As to the definition of the term "capital" as employed in the Articles of war, see Chapter XVIII—"Testimony by Deposition."

[4] "In ordinary cases, the party injured, if he be himself of the army, either as officer or soldier, will consider that the rights and the interests of the service are injured in the injury done to himself, and will prefer to have the guilty party dealt with by military law, and will not seek to have the civil magistrate interpose." 6 Opins. At. Gen., 426.

[5] Kalloch *v.* Superior Court, 56 Cal., 229; Vanzant *v.* Waddell, 2 Yerger, 260.

[6] It has been recently, (June, 1895,) so held by Atty. Gen. Olney, in concurrence with an opinion of the Acting Judge Advocate General. In St. Johnsbury *v.* Thompson, 59 Vt., 300, cited by the Atty. Gen., it is said—"The by-laws of a municipal corporation, authorized by its charter, have the same effect within its limits as a special law of the legislature."

*Contra*—the ruling of the court in *Ex parte* Bright, 1 Utah, 145, is believed to be unsound on this as upon some other points of the case.

duty of the officers referred to in the Article to surrender, &c., an offender, commorant at the post, &c., whose offence was a violation of a city ordinance, equally as where he had committed an offence made punishable by a statute of the State. In the majority of cases, however, offences against such ordinances would be committed by soldiers off duty in the town, and their arrest would be made (and properly) on the spot or presently, (*i. e.* before their return to the post,) so that the occasion for an application to the post commander would not arise.[7]

The fact that the crime against the State may also constitute or involve a military offence punishable by the military law cannot affect the right of the citizen, (or of the public,) to initiate proceedings under the Article.[8]

The right, it may be added, continues until the prosecution for the offence becomes barred by the civil statute of limitations and the offence is thus no longer "punishable." That the offence was committed by the accused before he entered the military service cannot impair the exercise of the right, provided the civil limitation has not taken effect.[9]

1077 Of course, where the crime or offence of the officer or soldier was committed within a military reservation or other locality, over which, by the cession of its jurisdiction by the State or otherwise, *exclusive jurisdiction* is vested in the United States, the State, (except in so far as it may have reserved authority to execute process,) is without jurisdiction, and the Article does not apply, (or only to the extent of the authority reserved.) In the event of a total absence of jurisdiction on the part of the State, the military authorities—if it be deemed expedient that the accused be tried by a civil tribunal—will properly refer to and concur with the U. S. District Attorney and Marshal with a view to a trial before the proper U. S. court.

**FORM OF PROCEEDING—The Application.** The Article requires that, to obtain the surrender of the accused by the military authorities, there shall be an "*application duly made by or in behalf of the party injured.*" A sufficient form of application will be a written communication or statement addressed to the commanding officer and signed by the party or his authorized representative (or, in the case of his death by homicide, by the public prosecutor or other suitable official, or some citizen), setting forth that a specific offence named, of the character indicated in the Article,[10] has been committed, or is charged and believed to have been committed, by a certain designated officer or soldier of the command, and that his delivery to the civil authorities is required with a view to his trial, or in terms to that effect. Such application may be presented by the person signing, who will properly be accompanied by an official provided with a warrant authorizing him to arrest the prisoner, or may be presented by such official unaccompanied. Or the application may consist simply in the formal *warrant*, duly issued on the oath or in behalf of the injured party, and presented for service by a proper officer. Where the application is not personal, the commander should satisfy himself that it is made by the authority

[7] See *ante*, p. 692.

[8] 6 Opins. At. Gen., 415, 416.

[9] G. O. 29, Dept. of the N. West, 1864.

[10] "It it not enough to tell him" (the commander) "that *some* offence has been committed; he must know what the specific offence is in order that he may see whether it is an offence 'punishable by the known laws of the land.' The application, according to the Article, must be duly made to him; and in my opinion, no application is duly made, which does not state the specific offence so as to enable the commander to see distinctly that the case contemplated by the Article has arisen." Atty. Gen. Wirt, 2 Opins., 14–15. And see Samuel, 492; DIGEST, 51.

1078 or with the acquiescence of the injured party, (if living,) and not as the gratuitous motion of a mere stranger.[11]

Whether or not, indeed, the application be "duly made" is a matter wholly within the discretion of the military commander to determine. If he thinks proper,—as where the original writing or warrant is not sufficiently explicit, or he is not assured that it is presented in good faith,[12]—he may require the application to be made more specific,[13] or to be sworn to, or to be supported by the affidavits or statements of other and credible persons. On the other hand, under circumstances justifying it, as in a time of emergency, or where the facts are notorious or fully within his own knowledge, he may dispense with a formal application or even accept an oral one.

**ILLEGALITY OF ARREST OR SURRENDER WITHOUT DUE APPLICATION MADE.** The application, says, At. Gen. Cushing,[14] "is the necessary antecedent condition of the right of the civil authorities to act." So, in the case of McRoberts,[15] it is held by the court that, in view of the enactment of Art. 59, "it becomes the duty of the civil officer to stop at the boundary line between the two jurisdictions, and there demand of the military officers the delivery of the accused. * * * The soldier, while he continues in the

1079 actual military service, cannot be arrested on civil process except in the manner provided by the Article." It follows that when an arrest, of an officer or soldier, *at a military post, &c.*, is made without a previous demand, or after a demand not duly made in accordance with the Article and therefore not acceded to, the law is violated, the act is a trespass, and it is the right as well as, in general, the duty of the commander, (who owes it to his command to protect them from illegal seizure,[16] and to the United States to maintain its just authority,) to retake the prisoner from the custody of the civil officials and remand him to his former status. In so doing the commander is entitled and properly required to employ such military force as may be suitable and sufficient to effect such purpose in an orderly manner; but, before resorting to this means, he will properly call upon the civil authorities to return the prisoner, allowing them a reasonable time for the purpose. And if he has any reason to question the policy of summary action, he will first seek instructions from the Secretary of War.

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[11] It is observed by Attorney General Cushing that a civil magistrate has no authority *as such* to demand the accused; the law giving him no "right of voluntary and officious interference in these matters;" he cannot, therefore, it is added, make the requisition, "unless moved so to do by the party injured." (See State *v.* Pollock, A. & N. Jour., Sept. 15, 1877, where a sheriff attempted to make the arrest" at his own instigation and motion.") In a case of *homicide*, however, where there can be no personal application, "the entire society," continued Mr. Cushing in the same opinion, "is the party injured;" and "the public prosecutor or grand jury," as taking the place of the party and representing the public, may properly make the demand: or it may be made by any private person, since, in such a case, "it is the right of any and of every citizen to move the courts of the country to apply the laws of the land to the criminal. 6 Opins. At. Gen., 421–2. And see Hough, 224.

[12] See 6 Opins., 423, 428.

[13] See 2 Opins. At. Gen., 15.

[14] 6 Opins., 421.

[15] 16 Iowa, 603, 604. But the fact that the arrest is actually made without the proper application cannot affect the jurisdiction of the State court in the case. *In re* O'Connor, 37 Wisc., 379.

[16] "The commanding officer owes a duty to the men under his command—he owes them the duty of protection, so long as they continue in the faithful discharge of their duty. This duty is first in point of time, and highest in point of obligaton. This Articie gives him no authority to withdraw that protection and deliver over his men to others, except in the case which it describes." 2 Opins. At. Gen., 14.

It may be added that while the civil authorities cannot legally arrest, nor the military authorities properly surrender, an accused officer or soldier except as provided in the Article, so, such accused person cannot in general properly be allowed voluntarily to surrender himself. However willing and ready he may be to yield to the course of civil justice, it is not for him to decide whether it is proper for him to do so, but for the commander alone. He should therefore await due proceedings under the Article and the orders of his commander thereon. If indeed the accused party does, of his own motion, actually appear before the magistrate and submit himself to the civil authority, his act gives to the latter the legal custody of his person, and his commitment, in default of bail, will be a legal and regular proceeding.[17]

**DUTY AND LIABILITY OF OFFICERS UNDER THE ARTICLE.** The duty imposed by the Article upon commanding officers and the
1080 officers under them,[18] is required of them in all cases except such as may arise *in time of war*. This exception, first introduced into the Article in 1874, was perhaps suggested by the fact that by the provision of the Act of March 3, 1863, now incorporated in the code as Art. 58, a special jurisdiction, concurrent with that of the courts of the States, &c., had been conferred upon military courts, *in time of war, &c.*, for the trial of the principal crimes made punishable by the general criminal law.

The requirement that officers shall use their "*utmost endeavors*," &c., is of course to be understood in a reasonable sense and with reference to the circumstances of the particular case.[19] Thus if the accused person is not within military control because absent as a deserter or on furlough, or is not actually present at the post or in the command at the time of the application, nothing more can in general be required of the commander, &c., and to furnish to the civil authority such information in regard to his present whereabouts and the prospect of his return as may be possessed.

If the accused, having been once duly delivered to the civil official, escapes and returns to his military station, he is not in general to be brought to trial by court-martial as for a military offence, but should properly be remanded to the civil authorities, or held subject to a renewed application by them for his surrender.[20]

As the commander, &c., is required by the Article "to aid the officers of justice" not only in "apprehending" the accused, but also in "securing him," he should properly furnish such officers, when they are not supplied with an adequate police force, with a guard of soldiers sufficient for the purpose of safely conducting the prisoner to his destination.

1081 **PRIOR ASSUMPTION OF MILITARY JURISDICTION AS AFFECTING THE INTERPOSITION OF THE CIVIL AUTHORITIES.** Where a civil and a military court have concurrent jurisdiction of an offence committed by a military person, the court which is the *first* to take cognizance of

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[17] See 6 Opius. At. Gen., 422.

[18] That the duty is mainly devolved upon the *commanders*, the province of inferior officers principally being to carry out their orders—see Samuel, 490–493; Hough, 221–224; Clode, 98, O'Brien, 119–120; 2 Opins. At. Gen., 14. It is remarked by Mr. Wirt, in the opinion last cited, that the Article is "entirely inapplicable to the *President*," and that no demand can be made upon him under it. And see 1 Opins., 244.

[19] See Samuel, 493; O'Brien, 119–120. Hough, (p. 224,) in construing the term "utmost endeavors," says:—"Therefore concealing or harboring the accused, or giving him the means of escape, or aiding or in any manner assisting therein, or conniving at or even advising such escape, would be criminal acts, and * * * would amount to the not using the best endeavors."

[20] G. O. 7, Dept. of the South, 1871.

the same is entitled to proceed;[21] and although the precedence of the civil jurisdiction is favored in the law, yet if this jurisdiction does not assert itself until the other has been duly assumed in the case, its exercise may properly be postponed until the other has been exhausted. Upon the commission of such an offence, of a serious character, the military authorities will in general properly wait a reasonable time for the civil authorities to take action;[22] but if, before the latter have initiated proceedings under the Article, the party is duly brought to trial by court-martial for the military offence involved in his act, the commander may, and ordinarily will, properly decline to accede to an application for his surrender to the civil jurisdiction until at least the military trial has been completed and the judgment of the court has been finally acted upon.[23]

## XXV. THE SIXTIETH ARTICLE.

[Frauds, Embezzlement, &c.]

"ART. 60. *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*

*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*

*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 claims; or*

1082 *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*

*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*

*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*

*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*

*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*

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[21] 6 Opins. At. Gen., 414.

[22] It is indicated in *Ex parte* Mason, 105 U. S., 699, that where the civil authorities do not presently apply for the accused under the Article, it is the *duty* of the military authorities to proceed to exercise their jurisdiction.

[23] See remarks of Atty. Gen. Cushing in Steiner's Case, 6 Opins., 423, and in Howe's Case, Id., 513–14.

*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*

*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,—*

1083 *Shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial may adjudge. And if any person, being guilty of any of the offences 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."*

**THE ORIGINAL ACT.** This statute, which, as an Article of war, appears for the first time in the revised code of 1874, consists of secs. 1 and 2 of the Act of March 2, 1863, c. 67, entitled "An Act to prevent and punish frauds upon the Government of the United States." In transferring the statute to the Revised Statutes, the several provisions have been condensed and simplified, but no materlal change has been made.

The legislation of 1863 was intended to bring to punishment a numerous class of specific frauds which the experience of the war had already shown to be likely to be committed during such a period in connection mainly with claims upon the Treasury, official accounts, and the disposition and custody of the public moneys and other property of the United States. Enacted mainly with a view to the circumstances of the existing state of war, the provisions of the Act were nevertheless not limited in terms to any defined period, and thus have survived to the present time.

The Act, which was of a comprehensive character, provided not only for the trial of military and naval persons charged with the offences specified in the first section, but also for the prosecution, both by *qui tam* action and criminal proceedings, of *civilians* similarly accused. The adjudications under the Act, in cases of civilians, in the U. S. courts, are especially pertinent and valuable, and will be cited. The provisions of the Act, as set forth in the present Article, are also embraced in the Fourteenth of the Articles for the Navy, and, as constituting a part of the general penal law applicable to civil offenders, are to be found contained in Secs. 3490–3494, 5438 and 5439 of the Revised Statutes.

The separate paragraphs of the Article will be briefly considered; the *ninth* only, as the most comprehensive and important, being dwelt upon more at length.

**THE FIRST SIX PARAGRAPHS.** These relate to fraudulent
1084 claims against the United States,[24] including the making, presenting,[25] &c., of any such claims; the entering into corrupt agreements and combina-

[24] In the description of these claims as claims "against the United States *or any officer thereof*," the concluding words are without significance and surplusage. A claim against an official, (as such.) or department, of the government is necessarily a claim against the United States. The statute does not contemplate *personal* claims upon officers.

[25] That making and presenting are distinct offences under this statute, so that the making of a false claim may be completed in a distant State while the presenting of the same may be committed at Washington, D. C.,—see *Ex parte* Shaffenburg, 4 Dillon, 271.

tions to defraud the government by the prosecution of such claims; and the making, using, &c., of false writings, the forging, &c., of signatures, and the taking, &c., of false oaths, for the purpose of obtaining the payment or approval of such claims.[26] It will be observed that it is not necessary to constitute an offence under any of these paragraphs that the fraudulent claim should have actually been induced to be *paid* or even *allowed* on the part of the United States.

**PARAGRAPHS 1, 2 AND 4.—Fraudulent claims for officers' pay.** It is under these paragraphs that charges for attempts by officers to secure double or repeated payments—the offence familiarly known as the *duplicating* of pay rolls—have been frequently laid.[27]

Thus, where an officer who has sold his claim for pay for a certain
1085 month, and assigned the pay rolls or accounts, which are the evidence of the right to receive the same, to a banker, creditor, or other party, subsequently himself presents, (or causes to be presented for him, by an attorney, a military subordinate or other person,) to the paymaster, a personal claim for the same pay upon a new set of accounts, he is clearly chargeable with the offence set forth in the 1st and 2d paragraphs, since the claim thus made and presented must, as well as the second set of accounts, necessarily be false and fraudulent.[28] Where indeed the original transfer is not absolute or unconditional, but by way of collateral security only, and is upon the condition that the assignee shall not present the claim without the express authority of the officer, but the same is improperly treated by the assignee as his absolute property, and, without the knowledge of the officer, is presented by and paid to the assignee; or where the officer, for the accounts first transferred, has substituted, or made arrangements to substitute, other security, and has supposed that these accounts have accordingly been cancelled;[29] these, or other facts, indicating that the personal presentation was made in good faith, may constitute a defence to a charge against the officer for presenting, or causing to be presented, the second set of accounts. But, especially in view of the fact that the Army Regulations, par. 1440, forbid the assignment of a pay account before due in any case,[30] all such defences should be entertained with great caution by military courts, and unless it clearly appear that the accused, when he presented, or caused to be presented, the claim, had taken such precaution

[26] The offence being specific, the general form of charge sometimes adopted of—"Fraud, in violation of the 60th Art. of war," is loose and faulty.

[27] See instances in G. C. M. O. 219 of 1865; Do. 56 of 1867; Do. 61, 72, of 1869; Do. 11, 22, of 1870; Do. 42, 57, of 1874; Do. 25, 50, 104, of 1875; Do. 37 of 1876; Do. 40 of 1878; Do. 32, 45, 62, 63, of 1883; Do. 8, 9, of 1884; Do. 20, 23, of 1885; Do. 88 of 1886; Do. 52 of 1887; Do. 54 of 1888; Do. 20 of 1890; Do. 28 of 1892; Do. 8, 56, of 1893. And see also DIGEST, 55. The opinion has already been expressed that this offence is not properly laid under Art. 13, which is viewed as referring to the signing of a certificate for the pay not of the signer, but of some other officer, &c. The offence, however, is sometimes, and properly as it involves a dishonor, (see G. C. M. O. 28 of 1872; Do. 59 of 1875,) charged as a violation of Art. 61; also, less frequently, as conduct prejudicial to discipline under Art. 62. (See G. C. M. O. 54 of 1888.) Where a pay account is transferred before the pay is due, the officer is chargeable under the last named Article for a violation of par. 1440 of the Army Regulations. (See G. C. M. O. 28 of 1872.)

[28] So it has been held that a civil person was equally indictable under the statute for presenting a false claim in behalf of another party as for presenting it in his own behalf. U. S. *v.* Hull, 4 McCreary, 272, 14 Fed., 324.

[29] See G. C. M. O. 28 of 1872.

[30] In G. O. 35 of 1829, it is said of this regulation, (referred to as an order of June, 1827,) that its effect was "to remove all pretences of excuse and defence on the ground of mistake and accident."

that he knew, or was fully and reasonably assured, that no other presentation had been or would be made, the defence should not be accepted as sufficient.[31]

It may be noted that it is no defence under this Article, (or under the 61st,) that either the first or a subsequent assignment of his pay by the officer
1086 was made before the pay became due and payable. That such assignment is forbidden by the Regulations, (par. 1440,) and would not be enforced by a civil court,[32] does not affect the criminal character of the act at military law.

Again, an officer who, having once drawn or sold his pay for a certain month or months, signs and transfers further pay rolls for the same, is chargeable with the offence specified in the 4th paragraph, since the rolls contain a "*statement*" known to him to be false and fraudulent, *viz.* the statement, in the printed certificate, that the amount charged in the account is "correct and just" and is "rightly due" him.[33]

**Other included claims.** Under these three Paragraphs (1, 2 and 4) also are properly laid Charges based upon the knowingly making, &c., of a variety of other fraudulent claims against the United States. Thus the General Orders contain cases of charges under this Article for the presenting by officers of false claims for disbursements to government employees,[34] for disbursements in the secret service,[35] for horses lost in battle,[36] for recruiting expenses,[37] for transportation of public stores,[38] for pay of soldiers on falsified muster rolls[39]
1887 for fuel for a detachment,[40] &c.; also claims by soldiers for pay upon falsified discharges, final statements,[41] or clothing accounts;[42] claims for the reward for the arrest of deserters who have not in fact been apprehended,[43] &c.[44]

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[31] See remarks of Secretary of War in G. C. M. O. 45 of 1883; also in Do. 88 of 1886; Do. 56 of 1893.

[32] See Swenk *v.* Wyckoff, 46 N. J. Eq., 560; also U. S. *v.* Phillips, 23 Wash. Law Rep., 198.

[33] See a late instance of this offence in G. C. M. O. 52 of 1877; also, in Do. 25 of 1875, a case of a false statement on a pay account that the officer had served ten years. [The making of the false certificate is often charged under Art. 61. See G. C. M. O. 20 of 1890.] And see instances of false statements of certificates, in connection with claims other than for pay, in G. O. 18 of 1864; G. C. M. O. 152, 614, of 1865; Do. 47 of 1870. [The last three are cases of false certificates furnished *contractors* in support of frauduient claims made by them to be paid under contracts not duly executed.]

[34] See G. C. M. O. 303, 605, of 1865; Do. 2 of 1868.

[35] G. O. 74 of 1864.

[36] G. C. M. O. 406 of 1865.

[37] G. O. 67 of 1864; G. C. M. O. 131, 241, of 1864; Do. 293 of 1865; Do. 208 of 1866. And see in this connection, cases of Langenbien, contractor (G. C. M. O. 181 of 1864), tried by court-martial for presenting fraudulent claims for subsistence and lodging furnished to recruits; and Johnson, Government agent (G. C. M. O. 191 of 1864), tried by military commission for presenting similar claims for the expenses of the care of sick and wounded soldiers and prisoners at New York.

[38] See G. C. M. O. 35 of 1872.

[39] G. C. M. O. 53 of 1870. And see case in Do. 395 of 1865.

[40] G. C. M. O. 20 of 1868.

[41] G. C. M. O. 639, 644, of 1865; Do. 39, 101, of 1866; G. O. 46, Dept. of the East, 1869; G. C. M. O. 55, Id., 1871; Do. 45, 46, Id., 1893; G. O. 16, Middle Dept., 1865.

[42] G. C. M. O. 59 of 1890; Do. 71 of 1893.

[43] G. C. M. O. 45, 46, Dept. of the East, 1872.

[44] A further case is that of the presenting of a fraudulent claim for the services of a telegrapher at a signal station. G. C. M. O. 61 of 1880. So. of a printer. G. C. M. O. 1 of 1883. A form of fraudulent claim, where the fraud consists in an altered and false statement, is that made by reporting on a clothing account a sum as due which is greater than the actual amount. G. C. M. O. 26 of 1883. And see a similar case in Do. 48 of 1879.

This part of the statute is not restricted to the presenting of claims by a party in his own behalf, but extends to claims presented in behalf of another person. U. S. *v.* Hull, 4 McCrary, 274.

The statement or paper containing the false or fraudulent claim need not in any case be set out in full; it should, however, be described with such particularity as sufficiently to inform the accused of the specific offence with which he is charged.[45] The claim should clearly appear to have been a claim against the United States, and the presentation to have been to a person in the U. S. service, whether or not an officer of the army.[46]

**Guilty knowledge the gravamen of the offence.** It is not the object or purpose of the party in transaction, but his *knowledge* that the claim is false or fraudulent[47] which is made by the Article the gist of the offence. If he knew, or the circumstances of the case were such as properly to charge him with the knowledge,[48] that the claim was a fictitious or dishonest one when made or presented, &c., he is amenable to trial under this part of the Article; otherwise not.[49] Where an officer presented his pay account and received his pay thereon without having been notified of a sentence of court-martial by which he was dismissed and his pay forfeited, he was held by the Judge Advocate General not to be chargeable with the offence of knowingly making a false or fraudulent claim under this Article.[50] So the mere filling out and signing of a pay account before the pay has become due does not constitute such an offence. An officer, for example, when required to absent himself from his post, may properly sign and leave with his family a form or forms of account for certain pay, before the same becomes payable, as a provision for their support during his absence: here, the design being that the account shall be presented only when it falls due, a knowingly making of a false claim cannot be ascribed.[51]

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**PARAGRAPH 3.** The offence here described is the entering into an *agreement or conspiracy* with a view to defraud the United States, by inducing the payment by it of a false or fraudulent claim. It will consist in such acts as the signing or approving of untrue certificates, vouchers, accounts, &c.; the procuring of such writings, by means of misrepresentation or deceit, to be approved by superior officers; the procuring false receipts, vouchers or statements to be signed by third parties, &c.,—pursuant to a collusion with one or more persons, and with fraudulent intent as above. A familiar illustration would be a conspiracy, between an officer (or soldier) on the one hand and a government contractor or other civilian on the other, to defraud the United

[45] See U. S. *v.* Ingraham, 49 Fed. 155.

[46] U. S. *v.* Strobach, 48 Fed. 902. In U. S. *v.* Wallace, 40 Fed. 147, it is held that the official or person to whom the claim is presented must be one "authorized to approve, audit, or pay the same."

[47] There is little distinction between a claim that is false and one that is fraudulent, and no significance is attached to the use of the disjunctive "*or*" in this connection.

[48] See U. S. *v.* Russell, 19 Fed. 594.

[49] In the recent (1893) case of U. S. *v.* Shapleigh, 54 Fed. 126, it was held that the jury would not be "warranted in inferring such knowledge" (that the claim was false or fraudulent) "merely from the fact that he acted negligently and without ordinary business prudence; they must at least be satisfied that he was aware of circumstances such as would induce an ordinarily intelligent and prudent man to believe his vouchers to be false." In U. S. *v.* Route, 33 Fed. 246, it is held that if the party honestly believes the claim to be valid, though he may be quite mistaken, the case is not within the statute. But with this is to be taken the qualification that a person who "presents a claim which he believes to be true and just" is yet chargeable under the statute where he "seeks to substantiate" the claim "by affidavits, certificates, or depositions of persons who to his knowledge depose or certify to material facts of which they know nothing." U. S. *v.* Jones, 32 Fed. 482.

[50] DIGEST, 55.

[51] See G. C. M. O. 28 of 1872.

States, to their mutual benefit, by means of falsified vouchers indicating
1089 the delivery by the latter of supplies not in fact furnished,[53] false accounts for recruiting expenses,[55] or other spurious or fraudulent claims.[54]

**PARAGRAPH 5.** The making of the false oath here indicated, though not of course perjury at common law, (which is the giving of such an oath in a judicial proceeding or course of justice,[55]) may properly be regarded as assimilated to that crime in some of its requisites.[55] Thus the oath, as in perjury, should be to some material point,—that is to say, here, to some writing or statement in whole or in part pertinent to the proof or prosecution of the claim presented,—and should be taken before an official or person legally authorized to administer an oath. And the same may be said as to an oath *procured to be made* by another, the procuring of the making of a false oath being assimilated to subornation of perjury.[57] As to the further offence of the *advising* of the making of a false oath, it may be added that "advises" is evidently to be construed like the same word in Art. 51, being related to the term "procures" much as it is there related to the term "persuades."[58]

**PARAGRAPH 6.** Here the expressions "forges or counterfeits," "forging or counterfeiting," &c., are evidently intended to include any fraudulent making of the signature of another person, whether the same be or not imitated; the word "counterfeiting" pointing rather to a simulation of the hand-
1090 writing, while the general term "forging" embraces any form of false writing of the name.[59]

While this paragraph, in common with the two which precede it, employs the general description—"any writing or other paper," yet, as the purpose of the forgery, &c., must be to obtain the allowance or payment of a claim against the United States, the prosecution, as in a case of forgery at common law, should be prepared to prove that the falsified signature is upon a paper which is material, or which appears on its face to be material, to the proof of the claim, so as to be capable of effecting or contributing to effect some fraud in connection with it.[60] The writings or papers mainly had in view in the paragraph are the usual drafts on the Treasury,[61] vouchers, certificates, returns, accounts, rolls, final statements, descriptive lists, &c., the completion of which by the signature of the person interested, or of the officer whose formal authentication is required, is essential to the substantiation of a claim for pay, &c.[62]

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[53] See cases in G. C. M. O. 11 of 1872; G. O. 8, Dept. of Cal., 1872; also cases in G. C. M. O. 4, 6, of 1873, where, however, the offence is not charged under the present Article.

[54] See cases in G. O. 18 of 1864; G. C. M. O. 131 of 1864.

[55] See cases in G. C. M. O. 152, 614, of 1865; Do. 47 of 1870; Do. 40 of 1890; also case of a combination of soldiers to alter and increase the amounts due some of them for clothing not drawn, and to make claim for the increased amounts—in G. C. M. O. 59 of 1890.

[55] 2 Bishop, C. L. § 1015.

[55] It may also be assimilated, in like particulars, to the statutory perjury made punishable by Sec. 5392, Rev. Sts.

[57] That subornation of perjury is but another form of perjury, see 2 Bishop, C. L. § 1056, 1197. And see Sec. 5393, Rev. Sts., by which subornation of perjury is made punishable precisely as is perjury.

[58] See Fifty-First Article, *ante*, p. 654.

[59] Compare definitions of forgery in 1 Wharton, C. L. § 653; 2 Bishop, C. L. § 523.

[60] See 2 Bishop, C. L. § 524, 533.

[61] See case in G. C. M. O. 54 of 1887.

[62] See cases in G. O. 181 of 1863; G. C. M. O. 1 of 1883; DIGEST, 55–6; also the case of the forging by a soldier of an officer's name to a check on the U. S., in G. C. M. O. 46 of 1884.

To establish a charge under this paragraph, it should of course appear that the accused made, &c., the signature alleged to be forged or counterfeited, wholly without the authority of the person whose name it is, since if any authority to sign it existed, the specific offence would not be committed.[63]

As has already been observed to be the fact with regard to this class of offences in general, no fraud upon the United States need actually be consummated in order to complete the offence specified in this paragraph. Here, as in forgery at common law, the mere making of the false signature with the illegal purpose constitutes the crime; the contemplated wrong need not have been effected, nor need the forged writing have been uttered or used.[64]

In the present instance indeed the *using* of the forged signature is made a separate specific offence: in the majority of the cases the two offences—
1091 the forging, &c., and the knowingly uttering—have generally both been committed by the accused:[65] the latter offence, however, is complete whether the falsification of the signature was the act of the accused or some other person.

As to the further offences specified, of *procuring*[66] and *advising* the forging, &c., of the signature, or its use when forged, &c., the remarks will be applicable which have already been made in regard to the similar forms of the offences designated in the previous paragraphs.

**PARAGRAPH 7.** The act here made criminal is, in substance, the paying out of public money, (or delivering of other public property,) to the person authorized to receive it, in a less amount however than is actually due him, and taking a receipt from him for the whole amount to which he is actually entitled. The criminality of the act consists, in general, in the illegal withholding from such party of the difference between the sum or quantity paid or delivered and the face of the receipt, and the converting of such difference to his own use, by a disbursing or other officer, who, by the transaction, is also enabled to obtain credit with the United States for a larger amount than has actually been expended by him.[67] While the proceeding may be collusive, the act is ordinarily effected by deceiving the employee, &c., as to the sum or quantity really due him, and causing him to sign a blank or falsified receipt therefor.[68] The criminal nature of the offence is illustrated by a refer-
1092 ence to Sec. 5483 of the Revised Statutes, by which an officer, charged with the paying out of any moneys appropriated by Congress, who pays to a government employee a sum less than that provided by law, while requiring him "to receipt or give a voucher for an amount greater than that actually

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[63] See 2 Bishop, C. L. § 579.

[64] 2 Bishop, C. L. § 602.

[65] See the cases in G. O. 336 of 1863; Do. 67 of 1864; G. C. M. O. 196, 395, of 1864; Do. 395 of 1865; Do. 39 of 1866; Do. 56 of 1867; Do. 53 of 1870; Do. 27 of 1872.

[66] In G. C. M. O. 605 of 1865, is published a case of an officer convicted of an offence of this class, in procuring a corporal to forge upon a pay-roll the names of twelve persons as government employees, with a view of substantiating a fraudulent claim for an amount of money as pay due them. In Do. 53 of 1870 is a further case of an officer's procuring an enlisted man of his command to falsify the company rolls by entering the name of a deserter thereon, preparatory to presenting the roll for payment and drawing the deserter's pay.

[67] See DIGEST, 56.

[68] Note cases in G. C. M. O. 196 of 1864; Do. 35 of 1872. In a case in Do. 52 of 1873, the offence was committed by an A. A. Q. M., in turning over public property to his successor. And compare case in Do. 31 of 1869, charged, however, under Art. 61. In a case in Do. 37 of 1877, a form of the offence was committed by causing a contractor to sign a receipt for a greater amount than was due him, formally paying him the full amount, and thereupon receiving from him the balance which was then appropriated. And compare similar case in G. C. M. O. 37 of 1877.

paid to and received by him," is declared to be guilty of *embezzlement*, and directed to be fined in double the amount so withheld from the employee, and imprisoned at hard labor for two years.[69]

**PARAGRAPH 8.** This paragraph makes punishable the giving by an officer, &c., of a receipt, known by him to be false or not known by him to be true, for property as duly delivered for public use in the military service—" with intent to defraud the United States." The act indicated is commonly a collusive transaction between the officer and the contractor, or other person, by whom the property is delivered; the former agreeing, for a consideration, to receive less than the amount to which the United States is entitled, (and thus relieve the latter from furnishing the entire quantity,) while at the same time giving him a receipt certifying on its face the delivery of the whole.[70]

**PARAGRAPH 9.** The forms of offence here designated are—the Stealing, Embezzlement, Misappropriation, Misapplication, and improper Sale or Disposition of money of the United States or other public property, " furnished or intended for the military service."

**STEALING.** The offence of *larceny* has already been sufficiently fully considered under the Fifty-Eighth Article, by which general courts-martial are invested with a jurisdiction of this and sundry other crimes, *in time of war.*

The present Article vests courts-martial with jurisdiction, *at all times*—
1093 in peace as well as in war—of larceny of *public property*, " furnished,"
&c., as above. For the stealing indeed of public money or military stores, a charge will *also* in general lie under Art. 62, inasmuch as such offence will ordinarily be one directly affecting military discipline.[71] Where the stealing is *not* of public property, it *must*, (in time of peace,) be charged as an offence, under the latter Article.

**EMBEZZLEMENT—Definition.** This is not a common-law but a statutory offence.[72] In general terms it may be defined as a fraudulent or unlawful appropriation of money or other property, by a person in a fiduciary capacity,—as a servant, agent, trustee, bailee, &c.,—to whom, in such capacity, it has been entrusted by the owner.[73] Embezzlement, though really a species of larceny,[74] differs from larceny at common law, and mainly in the fact that the latter involves, (as heretofore shown,[75]) a trespass by a taking from the possession of the owner, whereas, in embezzlement, in general, the property being in the rightful possession of the offender, no trespass is committed by the apropriation.[76]

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[69] See case in G. O. 63 of 1852. And note Sec. 5496, Rev. Sts., by which a disbursing officer who " accepts, receives, or transmits to the Treasury Department, to be allowed in his favor, any receipt or voucher from a creditor of the United States," without having in fact paid to him the full amount of its face, is declared to be guilty of the criminal conversion of such amount.

[70] See case reported by Hough, 256, 266; also case in G. C. M. O. 11 of 1872; and DIGEST, 56.

[71] See under the Sixty-Second Article, *post*, p. 720–721, and note; also DIGEST, 59.

[72] 2 Bishop, C. L. § 319; *Ex parte* Hedley, 31 Cal. 111.

[73] 1 Wharton, C. L. § 1009; 2 Bishop, C L. § 325; Samuel, 515; *Ex parte* Hedley, 31 Cal., 108. " The property must be shown to have been entrusted to him, so that it was in his possession and not in the possession of the owner." Com. *v.* O'Malley, 97 Mass., 586.

[74] See Com. *v.* Simpson, 9 Met., 143.

[75] Under the Fifty-Eighth Article, *ante*, p. 685.

[76] Upon the history of Embezzlement, see 1 Wharton, C. L., c. XV; 2 Bishop, C. L., c. XVI; Com. *v.* Stearns, 2 Met., 345; Com. *v.* Simpson, 9 Id., 142; Com. *v.* Hayes, 14 Gray 64; People *v.* Honnessey, 15 Wend., 151.

**Proof of the offence under the Article.** To establish embezzlement in general it is necessary to show—1. That the accused was a servant or agent of the owner of the money or property, or maintained some fiduciary relation toward him; 2. That he received into his possession, in his fiduciary capacity, certain money or other property of such owner; 3. That he fraudulently converted such money or property to his own use.[77]

1094 An officer or soldier of the army is always in a *fiduciary relation* to the United States as an agent or employee of the government, but it will not in general be necessary to prove his commission, appointment, or enlistment unless it be specially controverted. Where it is charged that the offence was committed by him in a particular function or capacity, as that of paymaster, quartermaster, commissary of subsistence, military storekeeper, or other disbursing officer, or as quartermaster sergeant, commissary sergeant, hospital steward, &c.,[78] the fact that such was his office or capacity and that he was duly acting therein at the time of the offence, will, if not admitted, readily be established by general notoriety, by the party's admissions of his status, or by the orders investing him with the particular character and duty.

The *receipt* and *possession* of the property will commonly be shown by the accounts, returns, &c., of the accused, by the testimony of the officer or other person by whom the money or other property was transferred, delivered, or paid, by the testimony of the public depositary, or by the open possession and use or disposition by the accused of the property *as* property of the United States.

The fact of the *fraudulent conversion* in embezzlement may be evidenced by the absconding[79] of the accused with public funds, or his desertion with articles of public property in his possession; by a deliberate falsification, as where the party denies that he has ever received the money or property which has been in fact committed to him; by the rendering of a false return or account in which the receipt of the money alleged to have been embezzled, is omitted to be acknowldged, or in which a fictitious balance is made to appear, or which is otherwise falsified or purposely misstated;[80] by a failure altogether to

1095 render an account required by statute, regulation or order; by the unauthorized selling, giving, or otherwise disposing of public property to civilians or military persons;[81] by the paying out of public funds to persons not entitled to receive the same; by a neglect to pay sums justly due to employees, contractors, or other public creditors, out of money furnished for the purpose,[82] or to make any other required disbursement; by a neglect to honor proper requisitions for military stores, or a dealing of them out in short or insufficient quantities notwithstanding that ample supplies have been provided

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[77] *Ex parte* Hedley, 31 Cal., 112.

[78] Or as post treasurer of a military post, (G. C. M. O. 52 of 1877;) treasurer of a military prison, (Id. 6;) sergeant in charge of a recruiting rendezvous, (G. C. M. O. 37 of 1877.) And see case in G. C. M. O. 31 of 1883, of a soldier who embezzled a "depot fund."

[79] The element of *stealth* is said by the authorities to be peculiarly characteristic of this crime. Rex *v.* Norman, C. & M., 501; Com. *v.* Tuckerman, 10 Gray, 201, 207; 1 Wharton, C. L. § 1030; Samuel, 515; O'Brien, 131.

[80] As by charging amounts as paid which have not been paid. G. C. M. O. 49 of 1867, O'Brien, 131. One of the most significant falsifications of account consists in carrying balances over from one account to another as "money on hand," when in fact the same is not on hand but has been in some way illegally appropriated or expended.

[81] The selling of ammunition, arms, clothing, &c., made punishable in Arts. 16 and 17, is a form of embezzelment; and so is the retention and conversion of captured property in violation of the injunction of Art. 9.

[82] See Samuel, 529; O'Brien, 131.

by the government;[82] by a failure to turn over to a successor, on being relieved, the full amount of public property for which the officer is legally accountable;[84] or by any other form of non-performance or mal-performance of the *trust* devolved upon the party.[85] Further, a conversion may be presumable from an inability on the part of an officer to respond to the demand of an inspector general, or other proper authority, to make actual exhibit of or account for the moneys, stores, &c., for which he is shown by his returns or accounts to be responsible.[86] It may also be presumable from an exhibit made of such moneys, effected by borrowing money from other officers or persons, to represent, for the moment, an amount of public funds which should be in possession but has in fact been illegally used and is in deficit.

Defence. Presumptive evidence, such as has been indicated, may be met by the proof of facts going to rebut the inference that the property has been fraudulently converted. Thus it may be shown that the funds or stores were captured by the enemy, lost without fault on the part of the officer, or 1096 stolen or presumably stolen by a clerk, soldier or other person;[87] or that a deficiency of supplies was caused by unavoidable wastage or an over-issue not involving culpability.[88] So, in a case of an alleged conversion of property *other than money*, the greater offence may be rebutted by evidence of a lesser; as for example, by evidence that the property was not embezzled but misapplied or improperly diverted only—as by using it for private purposes or loaning it.[89] But the using of public *money* for private purposes, or the loaning of it, would, (independently of the statutory provisions yet to be noticed,) constitute an act of embezzlement, and it would be no justification that the accused fully intended to restore the amount,[90] or even that he did actually restore it before charges were preferred.[91]

A defence in the nature of offset or counter-claim could, it need hardly be added, scarcely be tenable in a military case. Thus an officer could not excuse the appropriation of public money in his hands on the ground that he was but reimbursing himself for pay or allowances wrongfully withheld from him.

**SPECIAL STATUTORY EMBEZZLEMENTS.** The statutes of the United States, *viz.* Secs. 5488, 5491 and 5492, Rev. Sts., have expressly declared that certain acts, when committed by disbursing officers, shall constitute embezzlements of public money and be punishable as such with fine and imprisonment. The acts specified are—the depositing, or withdrawing from deposit, of public

[83] Samuel, 527–8.

[84] G. C. M. O. 19, 27, of 1872.

[85] G. O. 18 of 1861. The mixing of one's private funds with the public funds, by depositing them without authority with the same public depositary, may, under some circumstances, be evidence of a fraudulent intent to convert the latter. Remarks of Secretary of War in G. C. M. O. 34 of 1872.

[86] G. C. M. O. 49 of 1867; also Do. 5 of 1869; Do. 81 of 1874.

[87] See DIGEST, 58; also Secs. 1059, 1062, investing the Court of Claims with jurisdiction to determine the claims of disbursing officers for relief from pecuniary responsibility on account of the loss by them, while in the line of duty, of public funds, &c., by "capture or otherwise," and with authority to grant such relief where the officer was without fault or negligence.

[88] Hough, 257, 267.

[89] See "Misapplication," *post*.

[90] In Com. *v.* Tuckerman, 10 Gray, 201, 205, the Court say of an embezzlement that its criminality was not affected by the fact that, at the time of taking the funds, the party "intended to restore what he had so appropriated before the appropriation should become known to the owners, and believed that he should be able to do so, and had in his possession property to secure the full amount taken."

[91] G. C. M. O. 34 of 1872.

moneys except as legally authorized; the failing to deposit the same in
1097 the Treasury or with a public depositary when required to do so by the proper superior; the loaning of the same with or without interest; the failing to render accounts for the same as provided by law; and the transferring or applying the same for any purpose not prescribed by law.[92] A further embezzlement, designated in Sec. 5496 as consisting in the acceptance, or transmittal to the Treasury for allowance, of vouchers or receipts for money which has not in fact been paid, has already been noticed under Paragraph 7.

These acts, though in terms made the subject of trial and punishment by the U. S. civil tribunals, are, when committed by *military* disbursing officers, properly taken cognizance of by courts-martial under Art. 60, as being forms of the statutory offence of embezzlement expressly constituted and defined in the laws of the United States. This was in effect ruled by Gen. Holt as Secretary of War, in 1861, in the case of Capt. Jordan, Asst. Quartermaster,[93] charged with the offence specified in Sec. 5496; and, in a series of instances since arising, officers of the army have been tried and sentenced by court-martial for specific embezzlements of the class under consideration.[94]

**Rules of evidence on proof of these embezzlements—1. No specific intent required to be shown.** These statutory embezzlements are consummated by the mere commission of the *act* in which the embezzlement in any instance is defined to consist, without regard to the *purpose* or *motive* of the offender. It is the object of the statute law to ensure, by every precaution suggested by experience, the safe-keeping and proper disposition of the public moneys: it therefore makes the mere departure from the rules which it has established with this view a crime *per se* independently of the circumstances or the
1098 *animus* of the accused;[95] these being left to affect only the measure of the punishment. It is accordingly no defence that the act was unaccompanied with a design to defraud the United States, or to convert the money to the party's personal use; or that it was done innocently and in good faith but under a mistake of judgment; or, where moneys have been illegally withdrawn or used, that the amount was restored to the proper depositary or otherwise made good before formal demand was made for the same,[96] or before charges were preferred in the case.

**2. Demand and refusal, prima facie evidence of guilt.** The law,—in Sec. 5495, Rev. Sts.,—further expressly lays down a *rule of evidence* to the effect that the refusal of any person, charged with the custody and disposition of public moneys, to pay any draft, order, or warrant drawn upon him, by the proper accounting officer of the Treasury, for the public money in his hands, or to transfer or disburse any such money promptly, upon the requirement of an authorized officer, "*shall be deemed, upon the triat of any indictment against such person for embezzlement, as presumptive evidence*" of the commission of

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[92] To these is added—the converting of such moneys in any manner to personal use. But this general offence is no more than the ordinary embezzlement already considered.

[93] G. O. 1, War Dept., 1861.

[94] See cases in G. C. M. O. 175 of 1866; Do. 43, 86, of 1868; Do. 5 of 1869; Do. 2, 18, 21, of 1871; Do. 27, 34, of 1872; Do. 18, 58, 81, of 1874; Do. 51 of 1875. In some cases an unauthorized withdrawing or depositing of public moneys has been charged, in form or in substance, as "Violation of Sec. 5488, Rev. Sts., to the prejudice of good order and military discipline." See G. C. M. O. 52 of 1877; Do. 5 of 1881; Do. 30 of 1883.

[95] In G. C. M. O. 34 of 1872, it is said by the Secretary of War, specially of Sec. 5488, Rev. Sts., that it is "a statute enacted for the more complete protection of the Tressury, and which, without regard to the intent of the offender, denounces all withdrawals from a public depositary, or dispositions of public moneys, not authorized by express law." And see DIGEST, 57; 14 Opins. At Gen., 473.

[96] DIGEST, 57. And see G. C. M. O. 34 of 1872.

the offence.[97] Applying this rule to a military case—proof of a formal demand upon an officer or soldier in charge of public funds, made by an authorized superior, to pay over or account for the same, followed by his refusal, or—what is equivalent in law—neglect within a reasonable time, so to do, would be evidence *per se* of embezzlement. Such evidence being produced, the prosecution would not be required to show what had become of the funds, but the burden would be thrown upon the accused to establish that his disposition of the same had been in accordance with law.

**MISAPPROPRIATION.** The knowing and wilful, (*i. e.* intentional,) misappropriation of public property, specified in Paragraph 9, may be de-
1099 fined to be the assuming to one's self, or assigning to another, of the ownership of such property, where the same is not entrusted to the party in a fiduciary capacity and the act is therefore not an embezzlement. Thus the offence is committed where an officer appropriates materials known by him to belong to the United States, or the labor of government employees, in erecting a building or constructing a carriage which is to be his own property.[98] The appropriation, however, need not be for the party's own benefit, but may be resorted to for a friend or for the accommodation of a person interested with the officer in some business, &c.

**MISAPPLICATION.** This offence is, strictly, distinguishable from the last in that it is properly an appropriation not of the *ownership* of the property but of its *use*, and that, by the terms of the paragraph, it must be an appropriation for the *personal* "benefit" of the offender; as where an officer or soldier makes use without authority of animals, vehicles, tools, &c., of the government—whether or not specially entrusted to his charge—for the purposes of himself or his family.[99]

**WRONGFUL SALE OR DISPOSITION.** Under this designation are included sales, &c., such as are made punishable by Arts. 16 and 17, as also any other unauthorized sale,[100] or any unauthorized pledge, barter, ex-
1100 change, loan, or gift, of public property.[1] The general and comprehensive term "*wrongful disposition*" includes also any appropriation or application of such property not embraced within the previous descriptions of offences in this Paragraph. Thus it would include unauthorized applications of the possession or use of the property not for the private purposes of the offender;

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[97] A further rule of evidence, in regard to the form of showing a balance of account against a person charged with embezzlement of public money, is enacted in Sec. 5495, Rev. Sts.

[98] See G. C. M. O. 29 of 1881; Do. 83 of 1886. In the latter case it is charged that a commissary sergeant did "knowingly and wilfully misappropriate *and* apply to his own use certain subsistence stores."

[99] G. C. M. O. 379 of 1865. Inmates of a National Home for Volunteers not being in the military service, clothing issued to them is not "furnished for the military service," and an indictment will not lie against an inmate under this statute for misapplying such clothing. U. S. *v.* Murphy, 9 Fed., 26.

It may be remarked that a clear distinction of meaning between the terms "misappropriate" and "misapply," and between these and "embezzle," as also "wrongfully dispose of," is not strictly observed in practice. In pleadings, drawn with no more than ordinary care, the same act is not unfrequently found described by several or even all of these terms in the same charge. Such irregularities, however, will not in general affect the validity of a sentence where an offence of this class has been substantially proved and found.

[100] As, for example, a sale of condemned public property made by a quartermaster, in the absence of orders from the Department commander authorizing the same. G. C. M. O. 2 of 1878.

[1] Such transactions are declared by Sec. 3748, Rev. Sts., to pass no title, but to render the article sold, &c., subject to seizure on the part of the United States wherever found.

as, for example, the loaning by an officer or soldier to a civilian, (for his benefit exclusively,) of stores, tools, materials, &c., of the United States, with the understanding that the same were to be returned.[3] All such dispositions of public property are of course radically illegal for the reason that no executive officer, but Congress only, is empowered under the Constitution, (Art. IV, Sec. 3 § 2,) to dispose of property of the United States.[3]

This term, *wrongful disposition*, however, like the designations of *misappropriation* and *misapplication* which precede, is, in practice, not always employed in a strict sense, and it would not be exceeding the privilege of military pleadings to charge as a "wrongful disposition," under this Article, any illegal appropriation, diversion, or employment, knowingly made, of money or other property of the United States, not clearly constituting a larceny or embezzlement.[4]

**Defence, &c.** While an accidental, or slight and temporary, application to personal use, or an unimportant though irregular disposition, of government property will not in general be made the subject of a military charge, such application, &c., where material and continued, especially where so conspicuous as to constitute an example prejudicial to the *morale* or discipline of the command, may be a serious offence. And the fact that the same is practiced generally in a command, or is sanctioned by the commanding officer, cannot
1101 be accepted as a *defence* to the charge, though, as a circumstance to be considered in adjusting the measure of punishment, it may properly be admitted in evidence.

**PARAGRAPH 10.** This paragraph makes punishable the purchasing, or receiving in pledge, of arms, clothing, stores, or other public property, from an officer or soldier who is without authority to sell or pledge the same. It is thus in a measure the *complement* of the latter portion of the preceding paragraph, in which is designated the offence of selling or disposing of similar property. The act indicated is as a *military* offence most rare; as a civil offence, made punishable by Sec. 5438, Rev. Stats., it has been much more common.

**PUNISHMENT.** The Article provides that offenders, upon conviction, "*shall be punished by fine or imprisonment, or by such other punishment as a court-martial may adjudge.*" Such a court may therefore adjudge, in its discretion, (subject to the existing law fixing the *maximum* of punishment,) either fine or imprisonment or both, and either with or without other penalties such as dismissal, discharge, reduction or forfeiture,[5] or any one or more of these penalties without either fine or imprisonment. Where imprisonment or fine is imposed, the court may properly consult, as indicating a reasonable measure of punishment, the provisions of Sec. 5438, Rev. Sts., prescribing penalties for *civil* offenders upon conviction of the same offences as those described in the

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[3] See cases in G. C. M. O. 26 of 1869; Do. 18 of 1874.

[3] U. S. *v.* Nicoll, 1 Paine, C. C., 646. And see the cases of Loans, in large amounts, of lead and powder, made to civilians, by the Ordnance Department of the Army, in 1815–1817, specially reported upon and denounced as illegal by a Committee of the House of Representatives. Am. S. P., Mil. Af., vol. II, pp. 287, 425, 525. And compare Lear *v.* U. S., 50 Fed., 65.

[4] See note, *ante*, as to the absence, in general practice, of an accurate discrimination in charging, &c., the offences of the class indicated in this Paragraph. Instances of embezzlement charged as "wrongful disposition" are occasionally to be met with in the G. O.

[5] Embezzlement of military stores *in time of war* may be a most serious offence. By a Resolution of Aug. 22, 1780, (3 Jour. Cong., 511,) this offence was made punishable with *death*.

Article, or—in cases of the specific statutory embezzlements—the provisions, as to punishment, of the Sections defining the same. Where any considerable fine is adjudged, the court will do well to add an imprisonment until the fine be paid; this, with or without the limitation that the imprisonment shall not exceed a certain fixed number of years.[6] Where a dismissal is adjudged, the sentence, in a case of an offence involving *fraud*, should contain the direction in regard to the publication of the crime, punishment, &c., which is prescribed by Art. 100.[7]

1102 **EXTENT OF LIABILITY TO PROSECUTION UNDER THE ARTICLE.** The concluding provision of the Article, by which the jurisdiction of courts-martial over offenders is continued until after their separation, by discharge or dismissal, from the military service, has already—in the Chapter on Jurisdiction—been remarked upon as being of at least doubtful constitutionality, in that it subjects *civilians* to military arrest, trial and punishment. Enacted, (as we have seen,) in 1863, with a special view to the status of the then existing war, its application to the army in time of peace was probably not contemplated. Since 1865 the jurisdiction thus extended has been exercised in but few cases.[8]

That such exceptional authority and jurisdiction, if accepted as legal, are still subject to the general limitation of the 103d Article, has also been pointed out in a previous Chapter.[9]

## XXVI. THE SIXTY-FIRST ARTICLE.

[Conduct Unbecoming an Officer and a Gentleman.]

"ART. 61. *Any officer who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service.*"

**THE ORIGINAL ARTICLE.** The corresponding provision, as it appeared in the Articles of 1775, was as follows:—"*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.*" This language, which was taken from the then existing British Articles, was repeated in the code of 1776, and re-enacted in substantially identical terms in the revision of 1786. In the succeeding code of 1806, the Article first assumed its present form, the words "scandalous" and "infamous" being omitted.[10]

1103 **EFFECT OF THE PRESENT FORM.** It is the effect of this omission to extend materially the scope of the Article,[11] and thus indeed to es-

[6] See *ante*, Chapter XX, p. 390.

[7] *Ante*, Chapter XX, p. 407.

[8] See cases published in G. O. 15, Dept. of the Carolinas, 1866; Do. 13, Dept. of the South, 1867; Do. 143, Navy Dept., 1869; G. C. M. O. 15, (H. A.,) 1871; Do. 45, 46, Dept. of the East, 1893. The earlier cases were also few, the principal being those in G. C. M. O. 241 of 1864; Do. 45 of 1865; G. O. 78, Dept. of the East, 1864; Do. 105, Dept. of the Mo., 1864.

[9] Chapter XVI, p. 258.

[10] That the conduct need no longer be *scandalous* or *infamous*, see G. O. 41 of 1852; DIGEST, 61. The term "scandalous conduct" is preserved in the article of the *naval* code, (Art. 8, first par.,) most nearly corresponding to our 61st. The present corresponding provision of the British law, (Army Act § 16,) is:—"Every officer who behaves in a scandalous manner, unbecoming the character of an officer and a gentleman, shall on conviction by court-martial be cashiered."

[11] O'Brien, 160; G. O. 30 of 1852; Do. 29, Dept. of Cal., 1865; G. C. M. O. 69, Dept. of the East, 1870.

tablish a higher standard of character and conduct for officers of the army. As the Article now stands, it is no longer essential, to expose an officer to dismissal, that his conduct as charged should be *infamous* either in the legal or the colloquial sense;[12] nor is it absolutely necessary, (though this will often be its effect,) that it *scandalize* the military service or the community. It is only required that it should be "unbecoming"—a comprehensive term including not only all that is conveyed by the words "scandalous" and "infamous" but more.[13] At the same time the original phraseology is properly borne in mind as indicating that, to become the subject of a charge, the unbecoming conduct should be not slight but of a material and pronounced character.

**CONSTRUCTION.** In order to determine what is "conduct unbecoming an officer and a gentleman," it will be desirable first to define the two terms "unbecoming" and "gentleman."

"**Unbecoming,**" as here employed, is understood to mean not merely inappropriate or unsuitable, as being opposed to good taste or propriety or not consonant with usage, but morally unbefitting and unworthy.

"**Gentleman.**" So, *this* term is believed to be used, not simply to designate a person of education, refinement and good breeding and manners, but to indicate such a gentleman as an officer of the army is expected to be,[14] *viz.* a man
of honor; that is to say, a man of high sense of justice, of an elevated
1104 standard of morals and manners, and of a corresponding general
deportment.[15]

**THE MISCONDUCT CONTEMPLATED.** These terms being settled, it is next to be observed that the conduct had in view by the Article may not consist in conduct unbecoming an *officer* only, or in conduct unbecoming a *gentleman* only, but must in every case be unbecoming the accused in *both* these characters at once. Acts indeed which are discreditable to the officer can scarcely fail to involve the reputation of the individual as a gentleman; but there may be acts which, in the estimate of a court-martial, may be unbecoming to an accused party in the one capacity without being necessarily unbecoming to him in the other.[16] We have seen[17] that to except, from a conviction upon a charge of "Conduct unbecoming an officer and a gentleman," the words—"and a gentleman," and find the accused guilty of conduct unbecoming an officer only, would be quite unauthorized, the latter not being an offence specifically known to the military law. To constitute therefore the conduct here denounced, the act which forms the basis of the charge must have a double significance and effect. Though it need not amount to a crime, it must offend so seriously against law, justice, morality or decorum as to expose to disgrace, socially or as a man, the offender,[18] and at the same time must be of such a nature or

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[12] See Opin. At. Gen., in Gen. Swaim's case—G. C. M. O. 19 of 1885; 18 Opins., 113.

[13] Tytler, 212; O'Brien, 160.

[14] "An officer of the army * * * is bound by the law to be a gentleman." 6 Opins. At. Gen., 417. It is said by De Hart, (p. 372,) that—"the military community cannot expect, nor ought it to be expected of them, to preserve a higher tone of moral conduct than what is sustained by the higher orders of society." But they may fairly be expected to preserve one which is in no degree lower. See G. O. 41 of 1852, p. 5.

[15] Compare the definition of "gentleman" in the "Century" Dictionary, the "Imperial" Do.; the "Standard" Do.

[16] See G. O. 30 of 1852; Do. 29, Dept. of Cal., 1865; also Do. 3, War Dept., 1856, where a neglect of duty, charged under this Article, is referred to as not being "of the immoral and dishonorable or disreputable character necessary to sustain a charge under" the same.

[17] Chapter XIX—The Finding, p. 380.

[18] See 18 Opins. At. Gen., 117, cited *post.*

committed under such circumstances as to bring dishonor or disrepute upon the military profession which he represents.[19]

1105 It is to be observed that while the act charged will more usually have been committed in a military capacity, or have grown out of some military status or relation, it is by no means essential that this should have been its history.[20] It may equally well have originated in some private transaction of the party, (as a member of civil society or as a man of business,) which, while impeaching his personal honor, has involved such notoriety or publicity, or led to such just complaint to superior military authority,[21] as to have seriously compromised his character and position as an officer of the army and brought scandal or reproach upon the service.[22] Of this description is that disregard of his pecuniary obligations by an officer which—as will presently be noted—may, under certain circumstances, properly become the subject of a charge under the present Article. But a charge founded upon a purely private transaction of an officer of the army is not favored in military law, and unless clearly of the above compromising character should not be entertained.[23] And if the act, though ungentlemanlike, be of a trifling character, involving no material prejudice to individual rights, or offence against public morals or decorum, it will not in general properly be viewed as so affecting the reputation of the officer or the credit of the service as to be made the occasion of a prosecution under the Article.[24]

The quality, indeed, of the conduct intended to be stigmatized by this provision of the code is, in general terms, indicated by the fact that a conviction of the same must necessarily entail the penalty of *dismissal*. The Article

1106 in the fewest words declares that a member of the army who misconducts himself as described is unworthy to abide in the military service of the United States.[25] The fitness therefore of the accused to hold a commission in

[19] It is not absolutely essential that the act or conduct of the offender should be intrinsically dishonorable. In G. O. 25, Dept. of the Mo., 1867, Gen. Hancock observes:—"It is not to be considered that the conduct of an officer should necessarily affect his honor to make him subject to a charge laid under this Article. An officer may be guilty, in the heat of passion, of conduct properly so laid, without affecting his honor. * * * Although dishonorable conduct is conduct unbecoming an officer and a gentleman, the converse of the proposition is not always true. And see G. O. 3 of 1856, cited in note *ante*, where the conduct is described as "dishonorable *or* disreputable." Cases, however, in which conduct properly charged under this Article does not involve some dishonor, are of rare occurrence.

[20] De Hart, 373; O'Brien, 159–60; Runkle *v.* U. S., 19 Ct. Cl., 414, citing DIGEST.

[21] As to complaints made to the War Department, see *post*.

[22] Cited by the U. S. Supreme Court, (Gray J.,) in Smith *v.* Whitney, 116 U. S., 185.

[23] See Manual, 304.

[24] The act charged need not be of the "grossest" or "basest" character, or "of such a nature as to render the guilty party a moral and social outlaw." At the same time "mere indecorum" cannot properly form the basis of a charge under this Article. 18 Opins. At. Gen., 117, 118. And see G. O. 97, 111, Army of the Potomac, 1862; O'Brien, 159.

[25] "The retention of a member of the army, after a conviction of this derogatory nature, would not only be disreputable to the character of the military society, but of no indirect tendency, from the force of example, to contaminate the body of the society itself." Samuel, 645. Simmons, (§ 158,) refers to the Article as "essential to the high respectability and honorable character of the army, by providing for the removal from it of officers who may be guilty" of the conduct denounced. And see O'Brien, 159. In G. O. 111, Army of the Potomac, 1862, it is said by Gen. McClellan:—"These words, ('conduct unbecoming,' &c.,) imply something more than indecorum, and military men do not consider the charge sustained unless the evidence shows the accused to be one with whom his brother officers cannot associate without loss of self respect." In G. C. M. O. 88, War Dept., 1874, it is observed, that—"the chief end and aim of this Article is to maintain a correct rule of gentlemanlike conduct among officers of the

the army, as discovered by the nature of the behaviour complained of, or rather his worthiness, morally, to remain in it after and in view of such behaviour, is perhaps the most reliable test of his amenability to trial and punishment under this Article.[26]

**GENERAL DEFINITION.** "Conduct unbecoming an officer and a gentleman" may thus be defined to be:—Action or behaviour in an official capacity, which, in dishonoring or otherwise disgracing the individual as an officer, seriously compromises his character and standing as a gentleman; *Or* action or behaviour in an unofficial or private capacity, which, in dishonoring or disgracing the individual personally as a gentleman, seriously compromises his position as an officer and exhibits him as morally unworthy to remain a member of the honorable profession of arms.

**INSTANCES OF OFFENCES CHARGED UNDER THE ARTICLE.** The definition above given is best illustrated by a reference to the principal
1107 offences which, in practice, as indicated mainly by the General Orders, have been charged and prosecuted under this Article.[27] These are as follows:—

Making false official reports, statements, &c., to commanding or superior officers.[28]

Making false statements or representations to inferior officers intended to affect their official action or liability.[29] Making false representations to such an officer in turning over to him public property.[30]

Making false or calumnious reports or statements in regard to a commanding, (or other,) officer.[31]

Writing or publishing false or libellous matter in regard to another officer.[32]

Knowingly preferring false charges or accusations.[33] Attempting by underhand means to undermine the reputation of an officer.[34]

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army, and, with this view, to provide for expulsion from the service of any who may be guilty of such disgraceful or scandalous offences against decency as those set forth in these specifications," (gross drunken conduct, and association with prostitutes, in public.) And see G. O. 167, Dept. of Va. and No. Ca., 1864; Do. 29, Dept. of Cal., 1865; also opinion of At. Gen. in Swaim's Case, G. C. M. O. 19 of 1885; 18 Opins, 113.

[26] Compare 18 Opins. At. Gen., 118.

[27] It is in construing this Article that Hough, (P., 222,) well observes:—"The decisions of courts-martial, when confirmed, show more clearly than any legal work can do what is the opinion of military men, who sit to try such cases, (*i. e.*, cases of offences charged under this Article,) in a great measure as *a court of honor.*"

[28] G. O. 22 of 1845; Do. 36, 42, of 1851; Do. 30 of 1852; Do. 6 of 1856, Do. 234 of 1863; G. C. M. O. 279 of 1864; Do. 166, 179, of 1866; Do. 7, 38, of 1867; Do. 41, 60, 71, 74, of 1868; Do. 1, 5, 19, 20, 61, 62, 67, 71, of 1869; Do. 24, 38, 47, 49, of 1870; Do. 2, 20, of 1871; Do. 12, 13, 19, 35, of 1872; Do. 10, 27, 52, of 1873; Do. 3, 23, 68, of 1874; Do. 67, 84, 92, 104, of 1875; Do. 108 of 1876; Do. 18, 36, 46, 52, of 1877, Do. 38 of 1880; Do. 5, 11, of 1881; Do. 39 of 1882; Do. 30, of 1883, Do. 19 of 1885; Do. 18 of 1886; Do. 54 of 1888; Do. 40 of 1890; G. O. 35, Dept. of the Miss., 1862.

[29] G. C. M. O. 251 of 1864; Do. 61, 73, of 1869; Do. 4 of 1873, Do. 39 of 1877.

[30] G. C. M. O. 24 of 1868; Do. 5, 62, of 1869, Do. 52 of 1873.

[31] G. C. M. O. 27 of 1888.

[32] G. C. M. O. 80 of 1875; Do. 44 of 1878; Do. 1 of 1881; Do. 31 of 1889; G. O. 86, Dist. W. Tenn., 1862; Do. 28, Dept of the Mo., 1861.

[33] G. O. 9 of 1853; Do. 1, 6, of 1856; G. C. M. O. 638 of 1865; Do. 44 of 1878; Do. 1 of 1881; Do. 31 of 1889; Do. 8 of 1890; Do. 19 of 1886, (falsely charging a superior officer with perjury and procuring him to be indicted therefor.)

[34] G. O. 26 of 1835. And see Hough, 526; Id., (P.) 233. In a case, however, in G. O. 18 of 1861, in which an officer was convicted of keeping a "*black book*," in which to record the derelictions of his brother officers, with a view to charges, &c., as an offence under this Article, the finding was disapproved on the ground that public authority could have no right to inquire into private records of this nature.

1108 Using insulting and defamatory language, without justification, to another officer, or of him in the presence of other military persons, or behaving towards him in an otherwise grossly insulting manner.[35]

Opening and reading letters or communications addressed to another officer.[36]

Making a violent assault without due cause upon another officer.[37]

Giving false testimony as a witness before a court-martial or board.[38] Attempting to suborn testimony to be given before a court-martial.[39]

Breach of trust, official, semi-official, or personal.[40]

1109 Duplication of pay accounts.[41]

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[35] G. O. 41, 97, of 1835; Do. 30 of 1852; Do. 15, of 1860; Do. 146, 168, 183, 243. 249, 310, 330, 380, of 1863, Do. 13, 33, 49, 69, 81, of 1864; G. C. M. O. 100, 149, of 1864; Do. 425 of 1865; Do. 1 of 1870, Do. 20 of 1871; Do. 4 of 1872; Do. 9, 27, of 1873; Do. 11 of 1874; Do. 127 of 1876; Do. 41 of 1879; Do. 31 of 1889; G. O. 73, Army of the Potomac, 1862; Do. 16, Mountain Dept., 1862; Do. 64, Dept. of Arizona, 1887.

[36] G. O. 15, Dept. & Army of the Tenn., 1864, G. C. M. O. 177 of 1866. In Col. D'Utassy's case, (G. O. 159 of 1863,) this offence was charged under Art. 62.

[37] G. O. 30 of 1852; Do. 249 of 1863; Do. 13, 47, 69, of 1864; G. C. M. O. 197 of 1864; Do. 177 of 1866; Do. 28, 68, of 1869; Do. 42 of 1870; Do. 29 of 1871; Do. 58 of 1873; Do. 88 of 1887; Do. 79, Dept. of the Platte, 1888.

[38] G. O. 37, Dept. of Kansas, 1864; G. C. M. O. 13 of 1872, Do. 6 of 1873, James, 601. And see case in Do. 173 of 1876, of a conviction for the using of a false affidavit by an accused in connection with his address to the court.

[39] G. O. 69 of 1864. Conniving at the giving of false testimony G. C. M. O. 27 of 1888.

[40] *In an official capacity:* G. C. M. O. 31, 82 of 1868; Do. 45 of 1869; Do. 26 of 1871; Do. 36 of 1877—(cases of appropriating company savings;) G. O. 22 of 1845; G. C. M. O. 73 of 1869—(cases of appropriating the company fund;) G. C. M. O. 15 of 1870—(case of appropriating savings of flour ration of enlisted men and post hospital, by a post treasurer;) G. C. M. O. 26 of 1871; Do. 52 of 1877—(cases of appropriating the post fund by a post treasurer;) G. C. M. O. 52 of 1877—(case of appropriating a prison fund;) G. C. M. O. 28 of 1870; Do. 26 of 1871; Do. 51 of 1875—(cases of appropriating extra-duty pay;) G. C. M. O. 26 of 1871; Do. 12 of 1872—(appropriation of money due contractors and citizens;) G. C. M. O. 18 of 1874—(appropriation by an A. Q. M. of a check on a U. S. depositary;) G. C. M. O. 31 of 1869; Do. 25 of 1871—(appropriation by an A. C. S. and a military storekeeper of the proceeds of sales of public property;) G. O. 35, Dept. of No. Ca., 1865—(appropriation of captured cotton by the officer commanding the guard;) G. C. M. O. 376, 380, of 1864; Do. 38 of 1865—(appropriation of bounty money by recruiting officers;) G. O. 113, Dept. of the Gulf, 1865—(appropriation of soldiers' pay by their captain, who had received it for them from the paymaster;) G. O. 234 of 1863—(appropriation of money of deceased soldiers required to be sent to their heirs;) G. O. 59 of 1864—(appropriation of property in the charge of the officer as provost marshal;) G. C. M. O. 13 of 1879—(appropriation of medicines and hospital stores by the surgeon in charge.)

*In o semi-official or personal capacity:* G. O. 204 of 1863; G. C. M. O. 28 of 1870; G. O. 39, Dept. of Va., 1863; Do. 33 Dept. of No. Ca., 1865—(appropriation of money received from soldiers for safe-keeping, transmission, &c.;) G. C. M. O. 50 of 1874—(appropriation of money belonging to an officer's private mess;) G. C. M. O. 21 of 1869; Do. 50 of 1874—(appropriation of money committed to the officer by civilians;) G. C. M. O. 50 of 1884—(using for himself and family the provisions and property of his troop.) In a leading case of this class, in G. C. M. O. 24, Dept. of the East, 1878, of an officer charged, under Art. 61, with failing to account for a fund which had been raised for the erection of a soldier's monument, and entrusted to his charge, the finding was Guilty only of conduct to the prejudice of good order, &c.

[41] This offence has already been referred to as not unfrequently charged under Art. 60, when involving the presenting, &c., of a fraudulent claim for pay against the United States. It is peculiarly properly charged under Art. 61 where individuals are swindled by the fraud of the officers. For cases of convictions see the following Orders:—G. C. M. O. 56, 64, of 1867; Do. 61, 64, 72, of 1869; Do. 11, 22, 23, 38, 43, of 1870; Do. 28, 31, of 1872; Do. 42, 57, of 1874; Do. 25, 50, 59, 104, of 1875; Do. 17, 37, 100, of 1876; Do. 46, 52, of 1877; Do. 40 of 1878; Do. 32, 48, 62, of 1883; Do. 8, 9, of 1884; Do. 20, 23, of 1885; Do. 52 of 1887; Do. 54 of 1888; Do. 20 of 1890; Do. 28 of 1892; Do. 8 of 1893; Do. 37, Navy Dept., 1883. In 25 of 1875, the accused is also convicted of selling his pay-rolls to bona-fide purchasers after his pay had been, to his knowledge, stopped by the Pay Department. In 46 of 1877, the accused is also convicted of having twice sold and received value for his mileage vouchers.

Dishonorable neglect to discharge pecuniary obligations.[42]

1111 Cruel punishment, or cruel, or unduly violent, treatment of soldiers.[43]

[42] G. C. M. O. 87 of 1866; Do. 22, 46 of 1872; Do. 10 of 1873; Do. 25, 50, 68, of 1874; G. O. 55, Dept. of Washington, 1863; Do. 110, Id., 1864; Do. 1, Dept. of Va. & No. Ca., 1864,—(cases of non-payment of sums borrowed from, or otherwise due to, enlisted men;) G. C. M. O. 68 of 1874—(case of non-payment of a loan from another officer;) G. C. M. O. 17 of 1871; Do. 68 of 1874; Do. 25 of 1875; Do. 100 of 1876—(non-payments of depts due to post-traders;) also G. C. M. O. 3, 55, 64, of 1869; Do. 15 of 1870; Do. 22 of 1872; Do. 82 of 1874; Do. 100 of 1876; Do. 46 of 1877; Do. 44, 70, of 1881; Do. 31 of 1887; Do. 3, 85, of 1891; Do. 28 of 1892; Do. 106 of 1893; G. O. 53 of 1894; G. O. 150, Navy Dept., 1870; G. C. M. O. 36, Id., 1881; Do. 24, Id., 1886.

And see English precedents of convictions under a corresponding Article for dis-
1110 honorable disregard of indebtedness to military persons or civilians, in James, pp. 205, 223, 303, 510, 528, 614, 622, 696; also Hough, (P.) 234–5.

In these cases, in general, the debt was contracted under false representations, or the failure to pay characterized by deceit, evasion, false promises, denial of indebtedness, &c., and the neglect to discharge the obligation, at least in part, was continued for an unconscionable period. Some such culpable and *dishonorable* circumstances should characterize the transaction to make it a proper basis for a military charge. A mere failure to settle a private debt, (which may be more the result of misfortune than of fault,) cannot of course properly become the subject of trial and punishment at military law. (See G. C. M. O. 69, Dept. of the East, 1881.) A test of the amenability of the party to charges will be the effect of his conduct upon the reputation of the service. If it be such as to compromise not only the officer personally but also the honor or credit of the military profession,—if, in the words of Gen. McDowell, in G. C. M. O. 113, Dept. of the East, 1870, it "brings the service into disrepute by lowering the faith of the country in the integrity and fidelity to their obligations, of the commissioned officers of the Army,"—an offence within the present Article will in general properly be held to have been committed. And see further on this subject, G. C. M. O. 49, Dept. of the East, 1872; DIGEST, 63. In G. C. M. O. 70 of 1881, a conviction of the offence under consideration was disapproved on the ground that there was no *fraud* in the officer's conduct.

In the recent case of Fletcher *v.* U. S., 148 U. S. 84, where most of the acts charged as offences under Art. 61 consisted mainly in the continued non-payment, for long periods, of debts promised to be paid at certain times or speedily, (see the specifications in full in 26 Ct. Cl., 545–7,) the Supreme Court say—"While it is argued that the non-payment of debts does not justify conviction of Conduct unbecoming an officer and a gentleman, we think that the specifications went further than that, and contained the element that the circumstances under which the debts were contracted and not paid were such as to render the claimant amenable to the charge. * * * The specifications were not objected to for insufficiency, and cannot properly be held to be, on their face, incapable of sustaining the charge." And see remarks of Nott, J., in the same case in the Court of Claims, 26 Ct. Cl., 563.

In February, 1872, the following was published as a Circular to the Army, by the order of the Secretary of War: "The War Department is frequently annoyed by requests of creditors to compel payment of their just dues by officers of the army. There may be a few instances where delay in making payment is unavoidable. But in a large number of cases an evident disposition appears to evade payment altogether. It is not the province of the Secretary of War to adjudge such claims, nor is it within his power to stop the debtor's pay, and thus compel him to satisfy the claim. But such complaints, coming so frequently from creditors, civil and military, betray a fact greatly to be deplored, that the high standard of honor in such matters, which in former years caused the uniform to be respected and trusted without question, has become impaired. While, therefore, those concerned should relieve the Department from the mortification of such appeals, and the army from the odium which must attach to the necessity for making them, the Secretary now distinctly 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; and there are not wanting on record instances where commissions have been lost for this offence."

[43] G. C. M. O. 74 of 1868; Do. 13 of 1873; Do. 23 of 1874; Do. 114 of 1875; Do. 36 of 1880; Do. 61 of 1881, G. O. 34, Army of the Potomac, 1862. And see Hough, 536. In 13 of 1873, where the only excuse for the ill-treatment by the officer of the soldier was that he was an incorrigible drunkard, the reviewing authority remarks:—"This apology is wholly unavailing for the arbitrary and cruel punishment inflicted upon this unfortunate man. Indeed, his condition of helpless drunkenness at the time of the vio-

Demeaning of himself by an officer with soldiers or military inferiors.[44]

1112 Abuse of authority over soldiers by frauds or exactions practised upon them, or by requiring or influencing them to do illegal acts.[45]

Acts of fraud or gross falsity, cheats, or other corrupt conduct not included under former heads.[46]

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lent assault upon him by accused must be regarded rather as an aggravation of the latter's offence." In a case in G. O. 20 of 1826, an officer is convicted under this Article for striking with his fists and a cowhide a female camp-follower; in G. C. M. O. 48, Dept. of the Mo., 1884, for assaulting and beating a mess-servant.

[44] As by drinking and carousing, or other drunken conduct, with them;—see cases in G. O. 199, 209, of 1863; Do. 72 of 1864; G. C. M. O. 472 of 1865; Do. 37, 53, 60, of 1869; Do. 114 of 1875; Do. 34, 39, of 1877; G. O. 4, Army of the Potomac, 1863; James, 369: By gambling with them;—see G. O. of Dec. 10, 1812, (pitching dollars for money;) Do. 1 of 1847; Do. 234 of 1863; G. C. M. O. 93 of 1875; G. O. 39, Army of the Potomac, 1861; Do. 26, Id., 1862; Do. 34, Id., 1862, (while officer of the guard, with soldiers of the guard;) Do. 47, Dept. of Washington, 1863; Do. 112, Dept. of the Mo., 1863; Do. 15, Dept. & Army of the Tenn., 1864, (while officer of the day;) Do. 25, Dept. of the South, 1862; Do. 16, Mountain Dept., 1862; Do. 22, Dept. of the Gulf, 1863; Do. 149, Id., 1864; Do. 29, Dept. of No. Ca., 1865; Do. 14, Dept. of Ky., 1865: By indecently or unbecomingly familiar association or dealing with them, or indecent conduct in their presence;—see G. O. 10 of 1825; G. C. M. O. 665 of 1865; Do. 43, 61, of 1867; Do. 84 of 1875; Do. 173 of 1876; G. O. 49, Dept. of Washington, 1863.

In some early cases reported by James, (see pp. 206, 234,) officers were convicted of unbecoming conduct in associating on familiar terms with persons of inferior social rank,—as, (in a case of a lieutenant and an ensign,) with "a journeyman baker and a tinman's apprentice."

In this connection may be noted a class of cases, belonging mostly to the past, of officers charged with a violation of this Article in pusillanimously submitting to public insult or chastisement by inferiors or others, without taking any measures to vindicate themselves. See instances in James, 345, 654, 759, 762, 769; also *In re* Poe, 5 B. & Ad., 681. Similar cases in our service are found chiefly in G. O. between 1809 and 1812; of which the cases in G. O. of Jany. 2, 1810, Jany. 10, 1811, and March 18, 1811, were convictions. In a later case of this nature, published in G. O. 25, Dept. of Cal., 1871, the accused was acquitted. And see a recent marked case in G. C. M. O. 8, (H. A.,) 1890.

[45] As of defrauding soldiers of portions of their bounty money by false representations and pretences—G. C. M. O. 232, 519, of 1865: By paying a debt to a soldier by palming off property upon him of much less value, by means of false representations as to its worth—G. O. 234 of 1863: By exacting from soldiers excessive usurious interest, (25 *per cent.*,) on loans made to them—G. O. of Dec. 24, 1811: By exacting from soldiers double the amount, at the next pay day, for sums of money previously loaned—G. O. 4, Dept. of the Gulf, 1866; DIGEST, 64: By ordering a sergeant to report him (the accused) present when absent—G. O. 94 of 1863: By directing a soldier to make a false statement to another officer in regard to action of the accused—G. C. M. O. 5 of 1872: By employing soldiers to perform work for his private benefit—G. O. 72 of 1836: By causing soldiers to furnish their labor to a civilian in payment of a debt due the latter by the accused—G. O. 71 of 1822: By inducing soldiers illegally to sieze private property for his personal use, in time of war—G. O. 249 of 1863: By conspiring with soldiers to effect sales of public property to civilians, for personal gain and to the fraud of the United States—G. C. M. O. 58 of 1868: By causing a non-commissioned officer to make a false guard report, in order to relieve him (the officer) from an imputation of neglect of duty—G. C. M. O. 38 of 1880.

[46] As drawing forage for two private horses when not entitled to draw for any—G. O. 22, Dept. of the Northwest, 1865: Drawing rations for his wife and daughters as laundresses—G. O. 183 of 1863: Falsely entering on muster-rolls the names of men as enlisted by him, and causing them to be personated by other persons at the muster-in—G. O. 184 of 1863: As A. C. S., fraudulently overcharging officers and soldiers for commissary stores with intent to misappropriate the accruing profits—G. C. M. O. 2 of 1871: As Same, using false scales in issuing stores—G. O. 2, Dept. of the Pacific, 1864: As Same, giving to a company commander, for the amount of the company savings, a check on a bank where he had no funds—G. C. M. O. 61 of 1869: Obtaining money from civilians, and board at a hotel, by giving such checks—G. C. M. O. 104 of 1875; Do. 43 of 1870; G. O. 16, Div. of Pacific, 1866: Obtaining sums of money from citizens by transferring to them forged paymasters' checks on the Ast. Treasurer—G. O. 18, Dept. of the East, 1865: Obtaining money from a banker by falsely representing

1113 Drunkenness of a gross character committed in the presence of mili-
1114 tary inferiors, or characterized by some peculiarly shameful conduct or disgraceful exhibition of himself by the accused.[47]

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that it was for the use of the regiment—Hough, 540: Falsely denying his signature to a promissory note payable to a citizen—James, 360: Refusing to approve a citizen's vouchers for reward for arrest of deserters on the false ground that they could not be paid for some time, and thereupon buying them up for much less than their face and collecting and appropriating the full amounts—G. C. M. O. 71 of 1867: Extorting money from citizens—G. O. 16, Mountain Dept., 1862: Selling to an officer a public horse by falsely representing it to be private property—G. C. M. O. 493 of 1865; Do. 100 of 1867: Attempting to sell to another officer a public horse—G. C. M. O. 6 of 1865; Do. 46 of 1870: Attempting to pass the guards with a forged pass and by an assumed name—G. O. 5, Army of the Potomac, 1863: Giving a false name to an officer of the provost guard, on being arrested—G. O. 3, Army of the Potomac, 1862: Falsely availing himself of a leave of absence intended for another officer—G. O. 234 of 1863: Altering, so as to extend, a leave of absence—G. O. 49, Dept. of the Cumberland, 1869: Denying that he was an officer of the army, when absent from his regiment on an expired leave—G. O. 249 of 1863: By false representations retaining possession of certain personal effects of another officer, and pledging the same as security for the payment of a bill for board—G. C. M. O. 20 of 1868: Cheating at cards with other officers—G. O. 11 of 1849; Do. 6 of 1856: (And see case in James, p. 744, of a violation of this Article in conspiring to involve a young lord in deep play, and winning from him upwards of £1500:) Cheating a soldier of three dollars at cards—G. O. 25, Dept. of the South, 1862: "Displaying a want of veracity"—James, 397: Becoming, as quartermaster, corruptly interested in public contracts, and receiving large sums as part of the proceeds—G. C. M. O. 57 of 1870: Paying a contractor the face of a false voucher for an amount greater than was due, and receiving back from him the balance—G. C. M. O. 31 of 1869: Taking money from substitute agents for approving their appointment—G. C. M. O. 303 of 1865: Taking bribes from, and aiding and acting in complicity with, substitute brokers—G. C. M. O. 565 of 1865: Furnishing substitutes for drafted men for a compensation—G. O. 17, Dept. of the East, 1864; Do. 10, Dept. of the Susquehanna, 1864: Taking bribes to allow civilians to pass the picket line—G. O. 48, Dept. of the Gulf, 1863: The same, to allow them to pass goods within the line—G. O. 9, Dept. of Va., 1863: Receiving money in consideration for the appointment of a person as lieutenant in the regiment in which the accused was colonel—G. O. 33, Dept. of No. Ca., 1865: Offering money and promotion to two inferior officers in consideration of their not pressing charges against the accused—*Id*: Making a corrupt proposition to a quartermaster to induce him to permit the accused to keep and use a public horse as his private property—G. C. M. O. 54 of 1873: Secretly proposing to a civilian to join in a transaction for making a profit upon arms to be furnished by the U. S. to the States—G. O. 5 of 1856: Paying money in consideration of services rendered in procuring the appointment of his son to the Naval Academy—G. O. 156, Navy Dept., 1870: Corruptly soliciting and receiving money for procuring a contract for transportation of troops to be awarded to a certain steamship company—G. C. M. O. 9 of 1879. And see other more recent cases in G. C. M. O. 27, 28, of 1892; Do. 7, Dept. of the Columbia, 1890; Do. 42, Dept. of the East, 1891; People *v.* Porter, 3 N. Y. S., 35, (50 Hun., 161).

[47] See cases of convictions in the following Orders:—G. O. 72 of 1836; Do. 6 of 1840; Do. 1 of 1847; Do. 35, 52, 156, 187, 199, 261, 380, of 1863; Do. 36, 64, 72, of 1864; G. C. M. O. 100, 109, 114, of 1864; Do. 240, 472, 599, of 1865; Do. 15 of 1866; Do. 3, 5, 35, 43, 58, 59, of 1867; Do. 22, 45, 49, 62, of 1868; Do. 4, 23, 27, 37, 48, 53, 60, of 1869; Do. 6, 10, 15, 28, 53, of 1870; Do. 13 of 1871; Do. 4, 30, of 1872; Do. 21, 43, of 1873; Do. 41, 82, 88, of 1874; Do. 9, 33, 34, 58, 84, of 1875; Do. 39, 46, 55, 57, 58, 61, 75, of 1877; Do. 12, 39, 53, of 1878; Do. 59 of 1879; Do. 42, 50, of 1880; Do. 32, 59, 63, of 1881; Do. 49 of 1883; Do. 16 of 1888; Do. 106 of 1893; G. O. 4, Army of the Potomac, 1861; Do. 17, 81, Id., 1862; Do. 4, Id., 1863; Do. 52, Dept. of Washington, 1863; Do. 97, Id., 1864; Do. 175, Dept. of the Ohio, 1863; Do. 57, Dept. of Va. & No. Ca., 1863; Do. 54, Id., 1864. And see Hough, 634; James, 106, 119, 250; DIGEST, 62, 63.

That a mere act of drunkenness, unaccompanied by any unseemly behavior, violence or disorder, would not, in general, properly be charged under this Article, is pointed out in G. O. 97 & 111, Army of the Potomac, 1862. Of the cases above cited nearly all were of a gross character; most of the offences being committed in places of public resort, as on the street, in hotels, "saloons," theatres, &c., or in the presence of military persons at the officer's post or station, and under circumstances of aggravation.

Drunkenness, or indulgence in intoxicating liquor, after a formal *pledge* given to a commanding officer to abstain from such indulgence.[48]

Engaging in unseemly altercations or broils with military persons or civilians, breaches of the peace, or other disorderly or violent conduct of a disreputable character in public.[49]

1115 Defiance of, or gross disrespect toward, the civil authorities.[50]

Doing wanton injury to the property of civilians.[51]

Open ill treatment of his wife.[52] Obtaining or attempting to obtain a divorce through fraud, &c.[53]

Offending against good morals, in violation of the local law or of public decency and propriety.[54]

Commission of felony or crime.[55]

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[48] The "pledge" is properly in writing and is generally expressed to be "on honor." It commonly recites that it is given in consideration of having charges for previous acts of drunkenness withdrawn or suspended, or of being released from an arrest, imposed with a view to trial upon such charges. See instances of these pledges and of convictions of this offence in the following Orders:—G. C. M. O. 3 of 1867; Do. 9, 49, of 1868; Do. 23 of 1869; Do. 13, 28, of 1871; Do. 53 of 1873; Do. 73 of 1874; Do. 6, 21, 55, 58, 67, 103, of 1875; Do. 5, 24, 164, of 1876; Do. 30, 47, of 1878; Do. 36, 44, 74, of 1877; Do. 42, 62, of 1880; Do. 3 of 1881; Do. 49 of 1883; Do. 79 of 1891; Do. 124, Dept. of Cal., 1885; Do. 31, Navy Dept., 1882; Do. 18, Id., 1885; G. O. 161, Dept. of Washington, 1865. And see case of conviction, in G. C. M. O. 63 of 1876, where the pledge violated was "on honor as an officer and a gentleman" not to enter a gambling saloon or gamble, and was given on obtaining from the commander a suspension of action upon a pending charge preferred for a violation of a previous similar pledge.

[49] See cases in G. O. 20 of 1859; G. C. M. O. 599 of 1865; Do. 179 of 1866; Do. 5 of 1867; Do. 22 of 1868; Do. 4, 23, of 1869; Do. 6 of 1870; Do. 30 of 1872; Do. 58, 84, of 1875; Do. 64 of 1877; Do. 88 of 1887; G. O. 14, Dept. of the Mo., 1862; Do. 57, Dept. of Va. & No. Ca., 1863; Do. 54, Id., 1864; Do. 11, Dept. of Miss., 1866; Hough, 505, 542; James, 305, 574, 689.

[50] See case of grossly disrespectful and insulting conduct toward a judge of the U. S. Dist. Court, in G. O. 22 of 1845. Also case of aggravated interference with, and resistance of, police officers engaged in the proper discharge of their duty, in G. C. M. O. 103 of 1866; also case of public assault upon a Governor of a State. G. C. M. O. 31 of 1889.

[51] See case in G. O. 111, Dept. of Washington, 1864.

[52] See cases of assaulting and abusing of his wife by an officer at a military post, in G. C. M. O. 17 of 1871; Do. 63 of 1881; G. O. 1, Dept. of Miss., 1866; DIGEST, 64.

[53] DIGEST, 65; G. C. M. O. 79, Dept. of the Platte, 1886.

[54] As by abandonment of legal wife and committing of bigamy—G. C. M. O. 14 of 1879; DIGEST, 67. Introducing in camp, or at post, &c., and passing off as his wife, a woman who was not such—G. C. M. O. 265 of 1864; James, 696: Violent or insulting language or behavior to, or indecent assault upon, a respectable woman—G. C. M. O. 249 of 1863; Do. 35 of 1867; Do. 21 of 1869; Do. 13 of 1871; Do. 12 of 1874; Do. 33 of 1875; Do. 88 of 1887; Do. 24, Dept. of Dakota, 1886; G. O. 52, Dept. of Washington, 1863; Do. 52, Middle Dept., 1863. And see G. C. M. O. 15 of 1871: Public association or gross conduct with notorious prostitutes—G. O. 187, 380, of 1863; G. C. M. O. 74, 92, of 1867; Do. 33, 46, of 1870; Do. 88 of 1874; Do. 46 of 1877; Do. 61 of 1880; Do. 6, Dept. of the Mo., 1885; G. O. 17, Army of the Potomac, 1862; Do. 14, Dept. of the Ohio, 1863; Do. 19, Dept. of the Gulf, 1863: Frequenting houses of ill fame in uniform—G. O. 74 of 1864; G. C. M. O. 88 of 1874; Do. 13 of 1879; G. O. 11, Dept. of Miss., 1866: Visiting gambling houses and gambling, in uniform—G. C. M. O. 34 of 1880: Unauthorized intrusion at night upon the privacy of an officer's family—G. C. M. O. 20 of 1880.

[55] That an officer was properly chargeable under this Article for a felonious homicide, or other crime punishable by the laws of the land, was held by the Attorney General in Steiner's case, in 6 Opins., 415, and in a case in G. C. M. O. 28 of 1873, a murder of a civilian by an officer was charged as a military offence under Art. 61, and the conviction of the accused and his sentence of dismissal were approved by the President. Similarly officers have been charged and tried under this Article for stealing from other officers, (G. O. 4 of 1864; G. C. M. O. 149 of 1864; Do. 23, 164, of 1865;) stealing from citizens, (G. O. 249 of 1863;) receiving from soldiers, and keeping property known to be stolen, (G. O. 204 of 1863; Do. 36 of 1864;) robbery, (G. O. 6, Dept. of Ky., 1865.)

1116 **SCOPE OF THE ARTICLE AS DISTINGUISHED FROM ART. 62.** It is to be remarked that while Art. 62 is intended to cover only offences not cognizable under the other Articles, Art. 61 embraces offences made punishable by *any other Article*, provided such offences be characterized in their commission by circumstances so dishonorable or disgraceful as to bring them within the definition of "conduct unbecoming an officer and a gentleman." Thus while the conduct involved in some of the more strictly military offences, such as desertion or mutiny, could scarcely properly become chargeable under this Article, there are many other offences punishable in the code, such as the making of false musters, certificates or returns, together with embezzlement and other offences set forth in Art. 60, which, under certain circumstances, would very properly be presented under both Articles—Art. 61 and the specific Article in which the act is described or named. But unless such act clearly and directly compromises the individual as a *gentleman* as well as in his military capacity, the charge of "Conduct unbecoming," &c., should be omitted.

**PROCEDURE—Charge.** The offence not being described in the Article except merely by its technical name, the general rule that the constituents of the offence should be fully averred in the specification, applies with peculiar force to this charge.[56] An act which perhaps would not fall within the description of this Article, if concealed or private, may become properly chargeable thereunder if committed in the presence of enlisted men or other military inferiors, or in a public place, or even in uniform. Where so characterized the fact should be specifically stated. So, the purpose or motive of the accused in the conduct complained of should be set forth wherever it is his *animus* which has rendered his alleged acts unbecoming, &c.

A charge under this Article, involving as it does an imputation of disgraceful or dishonorable conduct, and entailing, upon conviction, the penalty of dismissal, should not wantonly be preferred.[57] An officer carelessly making
1117 this accusation against another renders himself liable to have his action severely animadverted upon by the court or reviewing authority, or, in a proper case, to be himself brought to trial for initiating a causeless and injurious prosecution.[58]

**Finding.** That the accused, under the charge of "conduct unbecoming an officer and a gentleman," may, where the evidence falls short of establishing the specific offence but shows the commission of a disorder or neglect, be found by the court "Not Guilty" but "Guilty of Conduct to the prejudice of good order and military discipline"—has been fully set forth in the Chapter on the Finding.[59]

An acquittal under this charge, (affecting as it does the honor of the accused,) is one which it may be especially proper to make "honorable" in terms.[60] Here also, where the charge has been clearly malicious or wantonly preferred, it will be especially fitting for the court to characterize it accordingly in connection with the acquittal.[61]

**Sentence.** The Article makes mandatory the sentence of dismissal upon conviction. This injuction is construed to mean not only that dismissal must in every case be adjudged, but that no other punishment may be adjudged in connection with it. The Article being thus exclusive, a sentence under it, which

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[56] Samuel, 646; Tytler, 212, O'Brien, 160, G. O. 111, Army of the Potomac, 1862.
[57] See remarks of Gen. Meade in G. C. M. O. 45, Army of the Potomac, 1864.
[58] Hough, 505, 533.
[59] Chapter XIX, p. 383.
[60] Hough, 504. As was done in Gen. Swain's second case, in G. C. M. O. 20 of 1885.
[61] Hough, 504–5, 533–4; James, 35, 203, 727.

assumes to impose any other penalty in addition to dismissal, is, as to such additional penalty, invalid and inoperative, and will properly be, so far, disapproved. [62]

The penalty being thus imperative, the court, where an offence duly charged under the Article is fully established, cannot properly evade its responsibility as to the sentence by finding the accused guilty only of "Conduct to the prejudice of good order and military discipline," and affixing a lighter punishment. It must find according to the testimony and attach the statu-
1118 tory sentence, those members who consider this too severe joining, if desired, in a *recommendation* for commutation.[63]

## XXVII. THE SIXTY-SECOND ARTICLE.

[CONDUCT TO THE PREJUDICE OF GOOD ORDER AND MILITARY DISCIPLINE.]

"ART. 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 offence, and punished at the discretion of such court.*"

**GENERAL PURPOSE AND USE.** This provision, taken originally from the British military law,[64] was in substance incorporated in our first code of 1775, and has similarly appeared in each subsequent issue of our Articles of war.[65] As will be illustrated in construing its separate terms, its evident purpose was to provide for the trial and punishment of any and all military offences not expressly made cognizable by courts-martial in the other and more specific Articles, and thus to prevent the possibility of a failure of justice in the army.[66] In practice, the greater number of the charges that are preferred against soldiers, and a large proportion of those preferred against officers, are based upon this, the "*general*" article of the code. Wherever the
1119 offence committed is one not certainly, or fully, designated or described in some other particular Article, or where, though so designated, no punishment is assigned for its commission, or where it is doubtful under which of two or more Articles the offender should be prosecuted, recourse is had to this comprehensive and serviceable provision as the authority and foundation for the charges and proceedings.[67]

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[62] See G. C. M. O. 396 of 1865.

[63] "The *law* in this case affixes the punishment, and it is the province of the revising power, and not that of the court, to mitigate it according to circumstances." G. O. 41 of 1852.

[64] In the Articles of the Earl of Essex, (1642,) the form is—"*All other faults, disorders and offences, not mentioned in these Articles, shall be punished according to the general customs and laws of war.*" In Art. 64 of the Code of James II the provision is worded as follows:—"*All other faults, misdemeanors and disorders, not mentioned in these Articles, shall be punished according to the laws and customs of war and 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 offence by these Articles and the laws and customs of war.*"

[65] The only material change has been the mention, in the Article of 1874, of the field officer's court.

[66] A corresponding provision is contained in the Naval code in Art. 22.

[67] "It will be obvious that there is scarcely any impropriety of conduct, or irregularity, which an officer or soldier may commit, that may not be brought under" this Article. Kennedy, 34. "It is the most useful of the whole." Napier, 59. Because of its providing a trial and punishment for every possible military offence, not specified in any other Article, thus precluding the evasion of justice by any offender, it was called by the British soldier "the Devil's Article." Clode, (M. L.,) 12, 18, 40.

**CONSTRUCTION—"All crimes."** The term "crimes," in its ordinary sense, imports, in the language of Bishop,[68] "those wrongs which the government notices as injurious to the public, and punishes in what is called a criminal proceeding in its own name." As employed in the present Article, where it is evidently to be distinguished as indicating a separate class of acts from the "disorders and neglects" next named, this word is understood to refer to the crimes—felonies other than capital and misdemeanors—created or made punishable by the common law or the statute law of the United States.[69] These civil crimes,—when and *provided*, as will presently be more particularly noticed, they are committed under circumstances rendering them prejudicial not only to good order but also to military discipline,—the Article constitutes military offences, and authorizes their trial and punishment by military courts.

And, in time of *peace*, it is only or mainly[70] under this Article that such 1120 crimes are so cognizable; the jurisdiction conferred by Art. 58 being limited in its exercise to time of *war*, insurrection, &c.

**"Not Capital."** The Article, by these words, expressly excludes from the jurisdiction of courts-martial, and, by necessary implication, reserves for the cognizance of the civil courts, (in time of peace,) all capital crimes of officers or soldiers under whatever circumstances committed—whether upon or against military persons or civilians. By *capital* crimes is to be understood crimes punished or made *punishable* with death[71] by the common law, or by a statute of the United States applicable to the case,—as, for example, murder,[72] arson, or rape.

The exclusion being absolute, the capital crime, however nearly it may have affected the discipline of the service, cannot be any more legally adjudicated *indirectly* than *directly*. A court-martial cannot take cognizance of a case of homicide charged as "manslaughter" or otherwise when the averments of the specification set forth a case of murder. So where, the specification being incomplete or ambiguous, the *evidence* on the trial shows the act thus charged, or charged as "conduct to the prejudice," &c., to have been in fact a murder,

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[68] 1 Crim. Law § 32.

[69] The term "crimes" is thus used in a sense similar to that in which it is employed in Art. 59, (see under that Article, *ante;*) as also in the Constitution. (See *In re* Fetter, 3 Zabr., 311.) O'Brien writes, (p. 162,)—"The crimes must be such as declared by the known criminal law of the land: the court are not authorized to legislate or to declare that to be criminal which the ordinary civil law has not thus declared." In Mann *v.* Owen, 9 B. & Cres., 579, the term "crimes," as used in the corresponding British Article, is held to mean civil crimes and misdemeanors.

[70] Larceny and embezzlement of public property are punishable under Art. 60; and under Art. 61 an officer may in some cases be charged with a civil crime as "conduct unbecoming an officer and a gentleman." Otherwise it is only under Art. 62 that such crimes may, when affecting military discipline, be taken cognizance of. See recent cases of "arson," "robbery," "burglary" and "manslaughter, to the prejudice," &c., in G. C. M. O. 43 of 1886; Do. 47 of 1887; Do. 63 of 1888; Do. 37 of 1889. Cases of "larceny" or "theft," similarly pleaded, are frequent in the G. C. M. O. In *Ex parte* Mason, 105 U. S., 696, the jurisdiction of a court-martial, under this Article, of the crime of shooting with intent to kill, was affirmed by the Supreme Court. And see Barrett *v.* Hopkins, 7 Fed., 312, *In re* Esmond, 5 Mackey, 64.

[71] See Chapter XVIII—"Testimony by Deposition."

[72] In G. C. M. O. 3 of 1871, in a case of a conviction of an offence amounting to murder charged under this Article, it is announced by the Secretary of War that—"the proceedings are set aside as null and void, for the reason that murder, being a capital crime, is not legally cognizable by a court-martial." And to a similar effect, see G. O. 18, Dept. of the Mo., 1861; Do. 104, Army of the Potomac, 1862; Do. 17, Dept. of Va., 1863; Do. 89, Dept. of the Gulf, 1863; Do. 14, Dept. of Dakota, 1868; G. C. M. O. 28, Dept. of Texas, 1875; 1 Clode, M. F., 519; Harcourt, 61; 7 Opins. At. Gen., 334; DIGEST, 67. And compare G. O. 68, A. & I. G. O., Richmond, 1863.

the court should refuse to proceed, or, if it assume to do so and to find or
1121 sentence, its proceedings should be disapproved as *coram non judice* and void in law.[73]

"All disorders and neglects." In this comprehensive term are included all such insubordination; disrespectful or insulting language or behaviour towards superiors or inferiors in rank; violence; immorality; dishonesty; fraud or falsification; drunken, turbulent, wanton, mutinous, or irregular conduct; violation of standing orders, regulations, or instructions; neglect or evasion of official or routine duty, or failure to fully or properly perform it;[74]—in fine all such "sins of commission or omission,"[75] on the part either of officers or soldiers as, on the one hand, do not fall within the category of the "crimes" previously designated, and, on the other hand, are not expressly made punishable in any of the other ("foregoing") *specific* Articles of the code, *while yet being clearly prejudicial to good order and military discipline.*

Neglect with reference to orders. It has already been noticed, in considering Art. 21, that a neglect to comply with a standing order, direction, or regulation, as well as a failure from mere negligence—as distinguished from
1122 a deliberate refusal or omission—to obey a positive or special order, is in general properly charged not under the 21st but under the present Article.

Drunkenness as a disorder. Among "disorders," it may be noted here that simple *drunkenness* is in general a military offence in violation of this Article, whether committed by an officer or soldier. Samuel[76] declares:—"It is not to be understood that drunkenness of itself is not a crime in the contemplation of the law martial. On the contrary it has always been a more heinous offence in the military than in the civil code." Hough[77] remarks that—"it ought never to be absent from the recollection of the soldier that drunkenness constitutes of itself a breach of military discipline." So, in reviewing a case of an officer,[78] Gen. Crook well observes: "Drunkenness by persons in the military service is an offence against good order and military discipline whenever and wherever

[73] In G. C. M. O. 28, Dept. of Texas, 1875, in a case of a soldier convicted of a homicide of another soldier, charged under this article as "manslaughter," but alleged in the specification to have been committed with malice, the reviewing authority, Gen. Ord, disapproved the proceedings relating to this charge and specification "as null and void *ab initio;* the actual offence, as set forth in the specification and established by the proof, being premediated murder, and therefore not cognizable by a general court-martial under the 99th (now 62d) Article. This principle"—it is added—"has been enunciated by the Judge Advocate General in similar cases and has been concurred in by the Secretary of War." A ruling to a similar effect was made by the Secretary in May, 1873, in a case, (promulgated in G. C. M. O. 21, Dept. of Cal., 1873,) where the charge was "Homicidal violence, to the prejudice of good order and military discipline." And see DIGEST, 67.

In a few cases indeed where the accused, though charged with murder, has been acquited, or convicted of manslaughter only, the proceedings, apparently from considerations of justice, have been approved by the reviewing officer. See instances in G. C. M. O. 45, Dept. of Texas, 1871; Do. 2, Id., 1872. But an accused, thus convicted, would be entitled, if raising the question, to have the entire proceedings declared void and inoperative.

[74] "Neglects" include "the improperly executing an order given, the not taking proper precaution, or doing the best according to the ability and judgment of the party." Hough, 633.

[75] Hough (P.) 270.

[76] Page 552. "Mere private drunkenness, with no act beyond, is not indictable at the common law. * * * Still the common law has always regarded drunkenness as being in a certain sense criminal. * * * Our jurisprudence deems it *malum in se.*" 1 Bishop, C. L. § 399, 403. Compare Chapter XVII, as to Drunkenness as a Defence, p. 292.

[77] Page 95. And see Harcourt, 54.

[78] In G. C. M. O. 47, Dept. of the Platte, 1876.

it occurs." And it has been repeatedly held in the General Orders that drunkenness, not on duty, is conduct to be charged under the present Article.[79] There can indeed rarely be an occasion when a soldier, or an officer, in camp or at a military post, may become intoxicated, and thus incapacitated for properly answering a call for duty, without rendering himself liable to be treated as an offender within the terms of Art. 62. Whether the act, when committed under other circumstances, as where the party is at a station which is not a military post, or is travelling, or is on a pass, &c., may properly be charged as a military offence, will depend upon the relation and effect, if any, which such act may have, under the circumstances, to the military service and upon military discipline.

1123 "**To the prejudice of good order and military discipline.**" This descriptive phrase is so familiar to military persons that it hardly need be explained that "prejudice" is used here in the sense of detriment, depreciation or an injuriously affecting.

The term "good order,"—inasmuch as most of the cases contemplated by the Article are cases of *military* neglects and disorders,—may be regarded as referring mainly to the order—*i. e.* condition of tranquillity, security and good government—of the military service.[80] Inasmuch, however, as civil wrongs, such as injuries to citizens or breaches of the public peace, may, when committed by military persons and actually prejudicing military discipline, be cognizable by courts-martial as crimes or disorders, the term "good order" may be deemed, in cases of such wrongs, to include, with the order of the military service, a reference to that also of the civil community.

By the term "to the prejudice," &c., is to be understood *directly* prejudicial, not *indirectly* or *remotely* merely. An irregular or improper act on the part of an officer or soldier can scarcely be conceived which may not be regarded as in some indirect or remote sense or manner prejudicing military discipline; but it is hardly to be supposed that the Article contemplated such distant effects, and the same is therefore deemed properly to be confined to cases in which the prejudice is *reasonably direct and palpable*. It is also to be noted that the act or duty neglected must be one which a military person may legally and properly be called upon to do or perform. A neglect to comply with a direction to do something not military but civil in its nature, (an order to perform which would not be a "lawful order," in the sense of Art. 21,) would not be a neglect to the prejudice of good order and military discipline.[81]

**General application of the term "to the prejudice," &c.—"Crimes" to the prejudice, &c.** It is now the accepted construction that the words, "to the prejudice of good order and military discipline," are of general application,

1124 and qualify not only the term "disorders and neglects" but the designation "crimes" as well.[82] A crime, therefore, to be cognizable by a court-martial under this Article, must have been committed under such circumstances as to have directly offended against the government and discipline of

[79] See cases in G. O. 14, Dept. of the Mo., 1864; Do. 131, Second Mil. Dist., 1867; Do. 5, Dept. of the South, 1868; G. C. M. O. 75, 78 of 1877.

[80] The term is commonly applied in this sense, and as being practically analogous to *discipline*, in the General Orders. See G. C. M. O. 3 of 1871; Do. 27, Dept. of the Platte, 1875; G. O. 59, Dept. of Washington, 1866; Do. 96, Dept. of the Cumberland, 1868; also 16 Opins. At. Gen., 578, (referring to the corresponding naval Article.)

[81] See G. C. M. O. 19 of 1887.

[82] See Samuel, 687; Hough, 629; Kennedy, 34; Harcourt, 58; O'Brien, 162; 16 Opins. At. Gen., 578. In the corresponding Article of the last code of British Articles immediately preceding the present Army Act, the above interpretation was made especially clear by the following punctuation: "All crimes not capital,—and all acts, conduct, disorders and neglects,—which officers and soldiers &c., may be guilty of to the prejudice of good order and discipline," &c.

the military state. Thus such crimes as theft from or robbery of an officer, soldier, post trader, or camp-follower; forgery of the name of an officer,[83] and manslaughter,[84] assault with intent to kill, mayhem, or battery,[85] committed upon a military person; inasmuch as they directly affect military relations and prejudice military discipline, may properly be—as they frequently have been [86]—the subject of charges under the present Article.[87] On the other hand, where such crimes are committed upon or against *civilians*, and not at or near a military camp or post, or in breach or violation of a military duty or order, they are not in general to be regarded as within the description of the Article, but are to be treated as civil rather than military offenses.[88]

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[83] Where not of the species made punishable in Art. 60. In practice, the forgeries have been chiefly committed by soldiers in connection with orders on the post trader.

[84] See 16 Opins. At. Gen., 579, 581.

[85] And so of criminal *attempts* and *conspiracies:* As an attempt by a soldier to poison his wife, (G. C. M. O. 23, Dept. of Texas, 1873;) a conspiracy of thirteen soldiers to commit robbery, &c., (G. O. 18, Dept. of the Miss., 1865;) a conspiracy of two soldiers to take the life of a third, (G. C. M. O. 28, Dept. of the Mo., 1880.) So also of the offence of *aiding and abetting in crime*. (G. C. M. O. 52, Dept. of the Platte, 1871.)

[86] See *ante*, p. 721, note 70.

[87] "It is obvious that Congress intended by the 62d Article to give to courts-martial jurisdiction of crimes, * * * when committed by persons in the military service; and the jurisdiction so given is to be exercised when and because such crime is committed to the prejudice of good order and military discipline." *In re* Esmond, 5 Mackey, 72.

[88] DIGEST, 68, 69. In the early G. O. 22 of 1833, a charge which set forth simply a stealing without describing it as in any manner effecting a military person or the public service, was held not to allege a military offence, and the conviction thereon was disapproved. In G. O. 59, Dept. of Washington, 1866, Gen. Canby well observed, in regard to theft of private property, that it—"is not a military crime *per se* but only as it affects, and to the extent that it does affect, the good order and discipline of the command in which it was committed." And to the same effect, see G. O. 8, Dept of the Columbia, 1872. In a case in G. C. M. O. 58, Dept. of the Platte, 1872, where the accused was charged with and convicted of "Theft, to the prejudice of good order and military discipline, in stealing property of a civilian," Gen. Ord., in disapproving the proceedings, adds: "The specification does not allege a military offence." The crime is "one against the civil law, and not against any law or regulation governing the military." In G. C. M. O. 27, Dept. of the Platte, 1875, in a case where the offence consisted in an embezzlement of money of a civilian, Gen. Crook, in disapproving the findings, &c., says: "The proceedings fail to exhibit any offence to any person or thing connected with the military service. Therefore the jurisdiction of the court-martial over the case fails. The evidence does not show that the person, (the civilian named in the specification,) was related to or connected with the military service in any capacity whatever. The 'crimes, disorders, and neglects,' referred to" in this Article "are such only as affect the good order and discipline of the military service." [Citing DIGEST.] In G. O. 85, Dept. of the Cumberland, 1867, Gen. Thomas disapproves the proceedings in two cases in which the accused were charged with assault and battery with intent to kill, robbery and rape, committed upon civilians, on the ground that the offences were of a purely civil character," and such as called for the action of a "civil tribunal." In Bird's case, (G. C. M. O. 3, War Dept., 1871,) already referred to as one of murder, it is announced by the Secretary of War, as one of the grounds upon which the proceedings are set aside, that the accused, at the time of his offence, "held no such practical relations to the military service as to connect his acts with its good order or discipline." And see G. C. M. O. 63, Dept. of the Mo., 1869; Do. 5, Dept. of Texas, 1871; Do. 85, Dept. of Dakota, 1874; Do. 45, 46, 49, Dept. of the Platte, 1887.

Otherwise, where the crime, though committed against a civilian, is itself a violation of orders and breach of military duty. Thus, in *Ex parte* Mason, 105 U. S., 698, the Supreme Court, in holding that the offence charged was "not only a crime against society but an atrocious breach of military discipline," adds—"While the prisoner who was shot at was not himself connected with the military service, the soldier who fired the shot was on military duty at the time, and the shooting was in direct violation of the orders under which he was acting."

For a distinction taken between an offence committed by a person in his capacity as an officer, (here an officer of militia,) and one committed by him in his capacity as a civilian—see People *v.* Townsend, 10 Abb. (N. C.) N. Y., 169.

1125 A strict rule on this subject, however, has not been observed in practice; and, especially as the civil courts do not readily take cognizance of crimes when committed by soldiers, military commanders generally lean to the sustaining of the jurisdiction of courts-martial in cases of crimes so committed against civilians, particularly when committed on the frontier,
1126 wherever the offence can be viewed as affecting, *in any material though inferior degree*, the discipline of the command[89]—a question which may in general, in the judgment of the author, properly be left to be decided by the Department, &c., commander, in each instance.

"**Though not mentioned in the foregoing articles of war.**" The construction of these words has uniformly been that they are words of limitation, restricting the application of the Article to offences not named or included in the Articles preceding; the policy of the provision being, as it is expressed by Samuel,[90] "to provide a general remedy for wrongs not elsewhere provided for." Or, as Coppée[91] observes,—"This Article is intended to be supple-
1127 mentary to all the others, and to provide a general charge under which every possible kind of offence not provided for may be ranged."

This very general description of the offences within the scope of the Article, as being simply those which are "not mentioned" in the other Articles, is characteristic of the military as distinguished from the civil code, where all offences are separately defined. Its indefiniteness, however, presents little difficulty to the student of military law who has familiarized himself with the precedents contained in the General Orders.[92]

It is to be observed of the term "not mentioned in the foregoing articles," that it embraces not only offences wholly distinct from and outside of previous designations and enumerations, but also, (1) acts which, while of the same general nature as those included in certain specific Articles, are wanting in some single characteristic which distinguishes the latter,—as, for example,

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[89] Thus the jurisdiction has not unfrequently been sustained where the offence was committed upon a civilian or an Indian upon a military reservation, or at or in the immediate vicinity of a remote military post, or elsewhere where civil justice could not readily be exercised. See instances in G. O. 6 of 1858; Do. 20 Dept. of the Mo., 1869; Do. 23, Dept. of Texas, 1873; Do. 19, Dept. of Cal., 1874; G. C. M. O. 53, Dept. of the Platte, 1870; Do. 4, Id., 1871; Do. 85, Dept. of Dakota, 1874; Do. 35, Dept. of the Gulf, 1875; Do. 46, 47, Dept. of the East, 1882.

The fact that the offence was committed publicly *in uniform* has generally been regarded as a fact going materially to render the act cognizable under this Article.

In a case of this class, promulgated in G. C. M. O. 17, Dept. of the Columbia, 1885, in which the proceedings and sentence were approved by the Dept. Commander, (Gen. Miles,) a question was subsequently raised as to whether the court had properly jurisdiction of the offence—robbery by soldiers of civilians on the road between Portland, Ore., and Vancouver Barracks, W. T. An elaborate printed argument in support of his action in the case was thereupon published by Gen. Miles, and such action was held to be legal and regular by the Acting Judge Advocate General, Col. Lieber, (to whom the question had been referred), in an opinion of Aug. 10, 1885. This opinion was approved by the Secretary of War on Nov. 20th following, and the jurisdiction and action were thus finally sustained. A similar case is published in G. C. M. O. 47 of 1887, of a robbery by a soldier of a civilian, committed on a public road at night, half a mile from the military station of Jefferson Barracks, Mo. The conviction and sentence were approved by Lieut. Gen. Sheridan.

[90] Page 688. And see Id., 689.

[91] Page 88. To a similar effect, see Hough, 630; Harcourt, 58; O'Brien, 165.

As apposite to the term "foregoing," it may be remarked that the present Article (unlike Art. 99 of 1806,) is not in the proper place in the code. It should have been inserted after *all* the Articles setting forth specific offences, and therefore after Arts. 65, 68, and 69.

[92] See the remarks of the Supreme Court in Dynes *v.* Hoover, 20 Howard, 82, in reference to the corresponding Article of the naval code.

the disrespectful behaviour to a superior who is not a commander, the disobedience of the orders of a non-commissioned officer, the mutinous conduct, the drunkenness *off* duty, and the embezzlement or misappropriation of *private* property, heretofore referred to as *not* included within Arts. 20, 21, 22, 38 and 60 respectively; as also acts similar to those described in Arts. 3, 5, 8, 14, 15, 16, 27, 50 and 60, but which lack the *gravamen* expressed in the term, "knowingly," "wilfully," or the like; (2) acts which, though in terms or in effect *prohibited* in other Articles, are not expressly *made punishable thereby*—such as the acts or neglects indicated in Arts. 4, 9, 10, 11, 12, 25, 29, 30, 67, 70, 84, 85, 87, 127, and, in part, in Arts. 54 and 55; and (3) acts made specifically punishable in other Articles but only when committed by persons of a grade other than that of the accused,—as, for example, absence without leave by officers, and breach of arrest by soldiers, which are not included in Arts. 32 and 65, because those Articles relate to offences by enlisted men and officers respectively, only.[93]

**ILLUSTRATIONS OF NEGLECTS AND DISORDERS CHARGED UNDER THE ARTICLE.** As indicating the species of offences, other
1128 than "crimes," which, in practice, have been brought to trial under Art. 62, it will be instructive to note some of the more pointed of the many and varied instances of "neglects" and "disorders," to the prejudice of good order and military discipline, published in the General Orders, or referred to by military authorities, as follows:—

In cases of officers. Absence without leave.[94]

Neglect to observe, or carelessness in observing, standing post orders.

Neglect of official duty in devolving important work upon an inadequate subordinate.[95]

Insubordinate conduct not properly chargeable under Art. 20 or 21.

Neglect to attend drills, or other exercises or duties, not chargeable under Art. 33.

Failure by a commanding officer to be present and properly exercise command.[96]

Failure to maintain discipline in his command by the suppression of disorders.[97]

Failure to restore and maintain the public peace on an occasion of a riot which he was called upon to suppress.[98]

Failure to properly supervise and inspect public work in his charge.[99]

Failure to bring offending inferiors to punishment.[100]

Allowing illegal or irregular practices within his command.[1]

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[1] G. O. 42, Dept. of Washington, 1866; G. C. M. O. 1, Dept. of the Mo., 1885.

[93] This class of acts, as properly chargeable under the corresponding British Article, is noticed in Mann *v.* Owen, 9 B. & Cres., 600.

[94] See *ante*—THIRTY-SECOND ARTICLE.

[95] G. C. M. O. 10 of 1878.

[96] G. C. M. O. 39 of 1877. And see Do. 38, 58, Id.; DIGEST, 70; also case in Do. 50, 59, Navy Dept., 1882, (under the corresponding naval Article,) of an officer who left his command without authority, when an epidemic, (yellow fever,) was impending.

[97] G. O. 3, Dept. & Army of the Tenn., 1877; Do. 5, Dept. of the Mo., 1864; G. C. M. O. 82, (H. A.,) 1891; Hough, (P.) 187.

[98] Case of Lt. Col. Brereton and Capt. Warrington, charged with neglect of duty at the "Bristol Riots" in 1831. (Col. Brereton committed suicide pending the trial; Capt. Warrington was sentenced to be cashiered.) Hough, (P.) 578–584; Clode, 2 M. F., 478. And compare case in G. C. M. O. 82 of 1891.

[99] G. C. M. O. 21 of 1889.

[100] G. C. M. O. 8 of 1890; G. O. 88, Army of the Potomac, 1862.

1129 Abuse of authority in assaulting or punishing inferiors.[3]

Arbitrary treatment of camp-followers.[4]

Allowing a soldier to go on duty when known to be materially under the influence of liquor.[5]

Employment of soldiers for non-military or other illegal uses.[6]

Neglect of public animals in his charge.[7]

Exceeding extended limits of arrest.[8]

Assuming a rank superior to his own—as a Lieutenant the rank of Captain.[9]

Inefficiency in service against Indians.[9]

Rendering himself unfit for duty by excessive use of spirituous liquors.[10]

Gambling, by an officer not a disbursing officer, with other officers or with enlisted men.[11]

1130 Altercation with another officer in the presence of an inferior.[12]

Fighting a duel. Inciting another officer to challenge him to a duel.[13]

Preferring or making of groundless charges.[14]

Publicly demeaning himself by receiving chastisement from an inferior, without properly resenting it or taking measures to bring the other to punishment.[15]

Making or causing publications in newspapers, pamphlets, &c., of strictures upon the acts or conduct, official or personal, of other officers,[16] or upon the administration of the army.[17]

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[3] G. O. 81 of 1822; Do. 8 of 1826; Do. 28 of 1829; Do. 2, 17, 68, of 1843; Do. 39 of 1845; G. C. M. O. 80, 114, of 1875; Do. 112, Dept. of the East, 1870; Do. 50, Dept. of the Mo., 1871; Do. 35, Dept. of Texas, 1873; Do. 39, Id., 1874; Do. 33, Id., 1876; G. O. 9, Div. of the Atlantic, 1869; Do. 5, Id., 1870; Do. 20, Div. of the Pacific, 1869; Do. 53, Dept. of Va. & No. Ca., 1864; Do. 22, Dept. of the Platte, 1867. And see G. O. 23 of 1824; Do. 34 of 1842; Do. 4 of 1843; Do. 2 of 1844; Do. 32, Div. of the Pacific, 1867; Hough, 634. And note case in G. C. M. O. 7 of 1880, of harassing junior cadets.

[4] G. O. 2 of 1861—a case of a conviction of an officer for the arbitrary imprisonment and ill-treatment of a sutler.

[5] G. C. M. O. 29, Dept. of Texas, 1881.

[6] G. C. M. O. 65 of 1874. And see the case of employment, for private purposes, of freedmen under military protection, in G. C. M. O. 213 of 1866.

[7] G. C. M. O. 34 of 1879.

[8] G. C. M. O. 37, Dept. of Texas, 1874; Do. 106, (H. A.,) 1893.

[9] G. O., Hdqrs. Valley Forge, May 11, 1778.

[10] G. C. M. O. 30 of 1877; Do. 36, 62, of 1879; Do. 33 of 1880.

[11] G. O. 46 of 1848; Do. 88, Army of the Potomac, 1862. In the cases of two officers convicted of gaming and sentenced to be reprimanded, Gen. Washington, in pronouncing the punishment inadequate, added—"A practice so infamous in itself as that of gaming, so prejudicial to good order and discipline, and so contrary to positive and repeated General Orders * * * demanded a much more severe penalty." G. O., Hdqrs., Valley Forge, May 21, 1778. Gambling by a *disbursing* officer is properly charged as a violation of par. 743, A. R. See *post*.

[12] G. O. 169, Dept. of Washington, 1865.

[13] DIGEST, 34, 70.

[14] G. C. M. O. 19 of 1886. See note 16 *post*.

[15] See G. C. M. O. 8 of 1890; G. O. 88, Army of the Potomac, 1862.

[16] G. O. 150 of 1863; G. C. M. O. 26 of 1878; Do. 35 of 1879; Do. 37 of 1885; Circ. No. 5, (H. A.,) 1886; G. O. 20, Dept. of W. Va., 1863; DIGEST, 69, 711. And see Lieut. Kennon's Trial, p. 8; also People *v.* Townsend, 10 Abb. (N. C.) N. Y., 169, in which a militia officer who had "published in a newspaper, in a sensational manner, charges and specifications against another officer, before lodging them with the proper officer for investigation," was held amenable to the charge of Conduct to the prejudice of good order and military discipline.

In connection with these cases may be noticed those of making alleged false or injurious official statements, preferring false charges, and the like, charged as violations of Art. 61, but *found* as offences under Art. 62. See G. C. M. O. 71 of 1879; Do. 51 of 1882; Do. 19 of 1885; Do. 116, Dept. of the East, 1884.

[17] Circ. 5, Dept. of Arizona, 1890.

Taking part in meetings convened for the purpose of expressing disapprobation of the orders or acts of superiors.[18]

Entering into illegal combinations with other officers or soldiers.[19]

Joining with others in requesting the resignation of a commanding officer.[20]

Tendering his resignation in language disloyal to the government.[21] Expressing sentiments disloyal to the government and in sympathy with the enemy.[22]

1131 Causing troops to be transported on a steamer known to be unsafe.[23]

Culpable neglect of the sick, or malpractice, by a surgeon.[24]

Inexcusable neglect by a chaplain to perform funeral services.[25]

Drunken conduct in public, in the presence of military inferiors,[26]

Disrespectful and insulting language to a superior officer, in the presence of officers and soldiers, while all were held confined as prisoners of war by the enemy.[27]

Failure to make proper investigation as member of a board of survey.[28]

Ordering a garrison court to try a capital offence, and putting the members in arrest because the court held that it had no jurisdiction of the same.[29]

As a *member of a court-martial*—improperly disclosing the proceedings had in secret session;[30] refusing to vote a punishment after conviction;[31] appearing drunk before the court, or behaving disrespectfully to the court:[32] As a *witness*—failing to comply with a summons;[33] testifying falsely under oath;[34] using disrespectful language, or behaving disrespectfully or contumaciously to the court:[35] As an *accused*, (or *counsel* for an accused,) transcending the privilege of the defence or "statement" by indulging in unwarrantable

1132 strictures upon a superior officer, or gross personalities;[36] attempting to suborn[37] or to intimidate[38] witnesses.

Contempt of court, where not punished summarily under Art. 86.[39]

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[18] Harcourt, 95.

[19] G. C. M. O. 602 of 1865, (Case of Bvt. Brig. Gen. Briscoe;) Do. 116, Dept. of the East, 1884.

[20] DIGEST, 70.

[21] G. O. 35, Dept. of the Tenn., 1863.

[22] G. O. 242, 377, of 1863; Do. 38, Middle Dept., 1863; Do. 35, Dept. of the Tenn., 1863; Do. 76, Dept. of Washington, 1865; Hough, 634.

[23] DIGEST, 70.

[24] G. O. 64 of 1827; Do. 3 of 1856; G. C. M. O. 18 of 1877; Hough, (P.) 275. As to the disposition of cases of negligent medical officers during the late war, see IV Rebellion Record, 85; V Id., 28.

[25] G. O. 96, Army of the Potomac, 1862.

[26] G. C. M. O. 16 of 1888.

[27] G. C. M. O. 425 of 1865.

[28] See G. C. M. O. 36 of 1877; Do. 73, 74, Dept. of the Mo., 1869.

[29] G. O. 10 of 1857.

[30] G. C. M. O. 113, Dept. of the Mo., 1868.

[31] See Hough, (P.) 277–9.

[32] See G. O. 1 of 1858; G. C. M. O. 9, Fourth Mil. Dist., 1867.

[33] G. O. 190, Fifth Mil. Dist., 1869.

[34] G. O. 77, Dept. of Va. & No. Ca., 1864.

[35] G. O. 14 of 1855; Do. 126, Sixteenth Army Corps, 1863. And see Do. 48, Dept. of the East, 1863; also case in G. C. M. O. 23 of 1873, of a *cadet* convicted of refusing to answer a proper question as a witness.

[36] G. O. 25 of 1859; G. C. M. O. 5, Dept. of the Platte, 1874.

[37] G. O. 25, Mountain Dept., 1862; G. C. M. O. 27 of 1888. More properly charged under Art. 61.

[38] G. C. M. O. 13, Dept. of Texas, 1876.

[39] See Samuel, 634; Simmons § 434. In a case in G. O., Hdqrs., Newbury, Aug. 20, 1782, an officer is convicted under this Article for charging a regimental court with partiality in a case tried by it.

Violation of special Paragraphs of the Army Regulations, as of—Par. 57, in failing to report address when on leave of absence;[40] Par. 850, in addressing a communication direct to the Secretary of War instead of through proper military channels;[41] Pars. 993 and 994, in arresting and confining in the guard-house a medical officer for a trivial offence;[42] Par. 504, in showing disrespect to a sentinel by interfering with him, or setting at naught his authority and attempting to disarm him;[43] Par. 731, in taking, as quartermaster, receipts from employees for money not actually paid them;[44] Par. 743, in gambling as a disbursing officer;[45] Par. 744, in being, as a quartermaster, interested with civilians in a sale to the United States of quartermaster stores;[46] also, in receiving presents for the transaction of public business;[47] Par. 746, in contracting for and purchasing, as quartermaster, public stores from persons in the military service;[48] Par. 1440, in transferring a pay ac-
1133 count before the pay was due;[49] also Violation of the recruiting regulations, (Art. LXXI, A. R.,) in making improper enlistments.[50]

In cases of enlisted men. Special neglects or violations of duty on guard, as—Omission to challenge, in time of war;[51] Allowing or suffering prisoners to escape;[52] Bringing whiskey into guard-house;[53] Improperly relieving sentinels, by non-commissioned officer of the guard;[54] Mutilating the guard book.[55]

Escape while in confinement under arrest, or under sentence.[56]

Attempt to desert.[57] Making preparations to desert.[58]

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[40] G. O. 43 of 1832.

[41] G. C. M. O. 84 of 1882; Do. 18 of 1886. And see similar cases in Do. 28 of 1880; Do. 116, Dept. of the East, 1884.

[42] G. O. 251 of 1863; Do. 59, Dept. of the South, 1862.

[43] G. O. 9, Fifth Mil. Dist., 1870. And see case in G. O. 3, Army of the Potomac, 1861; also Hough, 635.

[44] G. C. M. O. 52 of 1867. Offences of this nature are now expressly made punishable in Art. 60.

[45] G. C. M. O. 553 of 1865; Do. 66 of 1875. And see G. O. 5 of 1829; Do. 104 of 1833.

[46] G. C. M. O. 6 of 1867.

[47] G. O. 22, Northern Dept., 1865.

[48] G. C. M. O. 89 of 1866.

[49] G. C. M. O. 64 of 1867; Do. 31 of 1887. And see G. O. 110, Fifth Mil. Dist., 1869; G. C. M. O. 42, Dept. of Texas, 1884.

[50] G O. 18, Dept. of the East, 1864.

A common form of charge against *Cadets* is—Violation of a certain Paragraph of the Regulations for the Military Academy. This is really a charge under Art. 62; the term, "to the prejudice of good order and military discipline," being understood if not expressed.

[51] G. O. 1, Dept. of N. Mex., 1864; Do. 13, Dept. of the Pacific, 1863.

[52] G. C. M. O. 56 of 1877; Do. 53 of 1879; Do. 42 of 1882; Do. 4 of 1883; Do. 29, 38, 53, 55, of 1891; Do. 4 of 1892, (charged as a violation of Sec. 1360, Rev. Sts.;) Do. 62 of 1893; Do. 33, Dept. of the Mo., 1883; Do. 7, 16, 28, 31, Id., 1884; Do. 63, 64, Dept. of Cal., 1884.

[53] G. O. 90, Fifth Mil. Dist., 1869, G. C. M. O. 7, Dept. of the Platte, 1875.

[54] G. O. 11, Dept. of Alaska, 1868.

[55] G. C. M. O. 123, Dept. of the Mo., 1872.

[56] G. C. M. O. 84, Dept. of the Mo., 1873, Do. 40, Id., 1889; Do. 29, Dept. of the Platte, 1875. And see the cases, in the following Orders, of escape or attempted escape by prisoners at the Leavenworth Military Prison—G. C. M. O. 66 of 1890; Do. 65, 67, 71, 77, 95, 101, of 1891; Do. 53, 61, of 1892; Do. 24, 26, 30, 64, 79, 82, 85, 94, of 1893.

[57] G. C. M. O. 20, Dept. of the Platte, 1875. All *attempts* to commit military offences, or attempts to commit civil crimes cognizable at military law, are properly charged under this Article.

[58] G. C. M. O. 62 of 1892.

Failing to appear on duty with a proper uniform, or appearing with dirty or torn clothing, &c.;[60] Being offensively unclean in person.[60]

Failing to appear, or appearing drunk, before a court-martial, as an
1134 accused or as a witness;[61] Giving false testimony before a court-martial,[62] or suborning or conniving at false testimony by another;[63] Attempting to suborn a witness;[64] Attempting to intimidate one who was to be a material witness by a threatening letter;[65] Refusing to testify at all as a witness.[66]

Gambling by non-commissioned officers with enlisted men in the guard-house,[67] or in barracks,[68] or allowing them to gamble.[69] Gambling by one soldier with another.[70] The conducting, by an enlisted man, of a gambling house or table at or near a military post for soldiers to play at.[71]

Straggling on the march.[72]

Malingering, or self-maiming.[73] Maiming of another soldier.[74]

1135 Cruel or injurious treatment of his horse by a mounted soldier, or of any public animal by any soldier.[75]

Malicious destruction of property of civilians.[76]

Neglect by a non-commissioned officer to cause to be punished or tried soldiers under his command who have destroyed or appropriated property of civilians.[77]

By lawless conduct causing himself to be arrested, tried and convicted by the civil authorities, thus depriving the United States for a considerable period of the services due under his enlistment.[78]

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[59] G. O. 84, First Mil. Dist., 1869.

[60] G. C. M. O. 43, Dept. of the Platte, 1873.

[61] G. O. 49, Dept. of the Lakes, 1868; Do. 58, Dept. of the Cumberland, 1868; Do. 149, Fifth Mil. Dist., 1869; G. C. M. O. 7, Dept. of the Platte, 1874.

[62] G. C. M. O. 16, 66, of 1879; G. O. 22, Second Mil. Dist., 1867; Do. 33, Third Id., 1867; Do. 155, Fifth Id., 1869; Do. 6, Dept. of the East, 1869; Do. 41, Dept. of the South, 1870; Do. 7, Dept. of the Gulf, 1874; Do. 48, Dept. of the Platte, 1867; Do. 3, Id., 1869; Do. 1, Id., 1871; G. C. M. O. 73, Id., 1873; Do. 146, Dept. of the Mo., 1868; Do. 53, Dept. of Texas, 1872; Do. 6, Id., 1874; Do. 8, 17, Id., 1875; Do. 48, Dept. of Cal., 1874. A leading case of alleged "False swearing, to the prejudice of good order and military discipline," is that of Cadet Whittaker, in G. C. M. O. 18 of 1882. And see later cases (charged as "perjury,") in G. C. M. O. 16, 39, of 1892; Do. 62, Div. Atlantic, 1890.

[63] G. C. M. O. 27 of 1886; Do. 16 of 1892.

[64] G. O. 48, Dept. of the Platte, 1867; G. C. M. O. 48, Dept. of Cal., 1874.

[65] G. C. M. O. 13, Dept. of Texas, 1876.

[66] See *ante*—Chapter XVII, p. 309.

[67] G. C. M. O. 8, Dept. of Texas, 1874.

[68] G. C. M. O. 39, Dept. of the Mo., 1890.

[69] G. C. M. O. 30, Dept. of the Platte, 1886.

[70] G. C. M. O. 111, Div. Atlantic, 1890.

[71] See G. O. 7, Div. Pacific, 1888; G. C. M. O. 131, Dept. of the Platte, 1889; Do. 111, Div. Atlantic, 1890.

[72] G. C. M. O. 357 of 1864; Do. 28 of 1888; G. O. 27, Dept. of Dakota, 1868.

[73] G. C. M. O. 29, Dept. of the Mo., 1869; Do. 86, Id., 1882; Do. 171, Dept. of the East, 1871; Do. 10, Dept. of the Gulf, 1872; Do. 18, Dept. of Texas, 1873; Do. 20, 23, 52, Id., 1874; Do. 1, 3, Id., 1875; Do. 105, Dept. of the East, 1884; Do. 5, Dept. of Cal., 1893; Hough, 637.

[74] G. O. 38, Dept. of Dak., 1874; G. C. M. O. 86, Dept. of Texas, 1770; Do. 36, Dept. of the Platte, 1871; Do. 23, Id., 1893; Do. 103, Dept. of the Mo., 1881. These were all cases of biting off a portion of the *ear*, and therefore not mayhem at common law. See "Fifty-Eighth Article—Mayhem," *ante*, p. 676.

[75] G. C. M. O. 513 of 1865; Do. 67 of 1879; Do. 48 of 1882; Do. 95 of 1886; Do. 61 of 1888; Do. 75 of 1893; Do. 57, Dept. of the Mo., 1873; Do. Do. 100, Id., 1882; Do. 5, Dept. of Texas, 1873; Do. 7, Id., 1874; Do. 29, Dept. of Cal., 1873; Do. 12, Id., 1875; Do. 100, Id., 1884; Field G. O. 1, Id., 1867; G. O. 15, Dept. of Dakota, 1868. And see case of cruelty to a dog, in G. C. M. O. 35 of 1892.

[76] G. C. M. O. 33, Dept. of Arizona, 1887.

[77] G. C. M. O. 16, Dept. of the Mo., 1891.

[78] G. C. M. O. 12, Dept. of the East, 1894.

Disorderly conduct in a town, &c., inducing arrest by the civil authorities.[79]

Assaulting persons and damaging property on a railway train near a military post.[80]

Misconduct at target practice.[81]

Not giving proper attention to his lessons at the post school.[82]

Neglect of duty by private of hospital corps in caring for patients.[83]

Failing by a hospital steward to put up prescriptions correctly.[84]

Refusing to submit to treatment in hospital necessary to render him fit for duty.[85] Refusing to submit to a necessary and proper operation directed by the surgeon in charge of hospital.[86]

1136 Careless or wanton discharge of fire-arm, so as to endanger man or animal.[87]

Assuming by a soldier to be a corporal in the recruiting service, and acting as such in the enlisting of recruits, &c.[88]

Falsely personating and acting as an officer.[89]

Writing, and publishing in a newspaper, statements grossly defaming and misrepresenting the military service.[90]

Writing an improper complaining letter to the colonel of the regiment without first presenting his grievance to his company commander.[91]

Combining and holding meetings in a spirit of insubordination against superior authority.[92]

Inciting, by a sergeant, the men of a company to insubordination, by incendiary circulars.[93]

Abusing or maltreating his wife, in the presence of other soldiers at a military post.[94] Similarly assaulting any woman.[95]

In uniform and in the presence of other soldiers, disturbing the services at church of the "Salvation Army," and assaulting those who ejected him.[96]

Failing to properly deliver the mail, [97] or opening the mail,[98] by a soldier detailed as mail carrier.

Engaging, by a non-commissioned officer, in a public sparring exhibition at a liquor saloon.[99]

Illegally introducing liquor into the Indian country.[100]

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[79] G. C. M. O. 74 of 1892.
[80] G. C. M. O. 10 of 1893.
[81] G. C. M. O. 58, Div. Atlantic, 1887.
[82] G. C. M. O. 8, Dept. of Cal., 1893.
[83] G. C. M. O. 43, Dept. of the East, 1893.
[84] G. C. M. O. 50, Dept. of Texas, 1873. And see G. O. 54, Dept. of Washington, 1863.
[85] G. C. M. O. 92 of 1891.
[86] G. O. 17, Dept. of the Platte, 1893.
[87] G. C. M. O. 147, Dept. of the Mo., 1868; Do. 26, Id., 1872; Do. 76, Id., 1873; Do. 24, Dept. of Texas, 1876; Hough, 638.
[88] DIGEST, 70.
[89] G. C. M. O. 479 of 1865.
[90] G. C. M. O. 52, Dept. of Columbia, 1881.
[91] G. C. M. O. 40, Dept. of Cal., 1874.
[92] See G. C. M. O. 62, Dept. of Texas, 1873.
[93] G. C. M. O. 41, Dept. of the Platte, 1893.
[94] G. C. M. O. 10, Dept. of the Platte, 1881; Do. 70, Dept. of Arizona, 1887. (Wife and daughter.)
[95] G. C. M. O. 31, Dept. of the East, 1893; Do. 7, Dept. of the Platte, 1876; Do. 106, (H. A.,) 1866; Do. 131, Id., 1893.
[96] G. C. M. O. 15, Dept. of the Platte, 1893.
[97] G. O. 17, Dept. of Dakota, 1874.
[98] G. C. M. O. 42 of 1878; G. O. 26, Dept. of N. Mexico, 1864.
[99] G. C. M. O. 88, Dept. of Cal., 1884.
[100] G. C. M. O. 8, Dept. of the Mo., 1889.

1137 Through carelessness setting fire to the forest in a National Park.[1]

Joining and parading with an association of Fenians, reported to be in armed hostility to a nation at peace with the United States.[2]

All such acts, (not classed as "crimes," nor made punishable in previous Articles,) as, in a case of an officer, would be within the description of Art. 61; as, for example,—Falsifying morning report book, company clothing book, muster-rolls, &c., by a company clerk, hospital steward, &c.;[3] Falsification of discharge papers and forgery of signatures of officers to same;[4] Forging the name of an officer to a pass or furlough,[5] order on the post trader [6] or check on the post exchange, ration return,[7] &c.; Uttering a forged check;[8] Obtaining a pass on a false pretence;[9] Embezzlement of private property,[10] or of post exchange funds,[11] or other misappropriation or fraud [12] not included in Art. 60; Unauthorized selling of company rations;[13] Corruptly obtaining money from civilians for pretended commissions for post exchange;[14] Making false statements to an officer in regard to matters of duty and the like;[15] Preferring

1138 false charges against an officer or soldier;[16] Dishonorable non-payment of a debt;[17] Borrowing property of another soldier and not returning same;[18] Obtaining money on false pretences from other soldiers;[19] Violating a pledge given to a commanding officer, (in consideration of a release from arrest or the withdrawal of charges,) not to drink intoxicating liquor during the remainder of a term of enlistment or other period.[20]

Any *attempt*, not consummated, to commit a military offence or crime cognizable by court-martial.[21]

Any insubordinate, drunken, or disorderly conduct, resistance to arrest, violence toward a non-commissioned officer or soldier, breach of standing orders, non performance or evasion of duty, &c., committed in camp, garrison, &c., and not specifically made punishable in some other Article of War.

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[1] G. C. M. O. 21, Dept. of Cal., 1892.

[2] G. O. 54, Dept. of the East, 1867.

[3] G. C. M. O. 50, Dept. of the Platte, 1874; Do. 31, Id., 1875; Do. 11, Dept. of Texas, 1876.

[4] G. C. M. O. 52 of 1892.

[5] G. C. M. O. 224 of 1865.

[6] G. C. M. O. 36, Dept. of the Mo., 1870; Do. 7, Dept. of the Platte, 1873; Do. 15, Id., 1894; Do. 45, Dept. of Texas, 1875.

[7] G. C. M. O. 36 of 1866.

[8] G. C. M. O. 85 of 1892.

[9] G. C. M. O. 54 of 1890.

[10] G. C. M. O. 9, Dept. of the Platte, 1874; Do. 28, Dept. of Arizona, 1880.

[11] G. C. M. O. 7, Dept. of Cal., 1894.

[12] G. C. M. O. 57, Dept. of the Platte, 1891.

[13] G. C. M. O. 16 of 1889.

[14] G. C. M. O. 48 of 1893.

[15] G. C. M. O. 79, Dept. of Texas, 1873; Do. 16, 42, Id., 1874; Do. 14, Dept. of the Platte, 1872; Do. 35, Id., 1875; Do. 25, Dept. of the Gulf, 1875.

[16] G. O. 16, Mountain Dept., 1862.

[17] G. O. 36, Dept. of the Platte, 1868; Do. 37, Id., 1871. The act, however, should be such as to affect military discipline. The mere non payment of a debt to a citizen is not sufficient. G. C. M. O. 36 of 1883. As to when indebtedness by a soldier is chargeable as an offence—see G. C. M. O. 14, Dept. of Arizona, 1888.

[18] G. C. M. O. 50, Dept. of the Platte, 1872.

[19] G. C. M. O. 74 of 1889; Do. 60, Dept. of the Mo., 1860.

[20] G. O. 63, Dept. of Dakota, 1872; Do. 30, Dept. of the Gulf, 1875; G. C. M. O. 32, Id., 1876; Do. 65, Dept. of the Mo., 1869; Do. 8, Dept. of the Platte, 1876; Do. 30, Id., 1875; Do. 48, Id., 1873; Do. 6, 7, Id., 1872; G. O. 36, Id., 1871.

[21] An attempt to commit *suicide* is charged as an offence under this Article in G. C. M. O. 16, Dept. of the Columbia, 1892. And see Do. 23, Id.

And, now, *fraudulent enlistment*, as provided in the Act of July 27, 1892.[22]

**PROCEDURE—Charge.** This particular is sufficiently comprised under the general subject of the Charge as considered in Chapter X. It may be repeated that, while the usual and approved form of the charge is, (as given in the Appendix,)—"Conduct to the prejudice of good order and military discipline," this form is not an essential; and that, however the charge may be worded, if charge and specification taken together make out a substantial averment of an act which, while not representing an offence punishable under a specific Article, at the same time clearly directly impairs or injuriously affects good order
1139 and military discipline, the whole will constitute a sufficient pleading of a crime, neglect or disorder under Art. 62.[23]

**Finding.** It has already been sufficiently indicated in the Chapter on the Finding, that, while the established usage of the service has fully sanctioned the finding of guilty of "conduct to the prejudice of good order and military discipline" under a charge of a violation of any Article making punishable a specific offence, the reverse, *viz.* the finding of a specific offence under a general charge framed upon Art. 62, would obviously be wholly unauthorized and invalid.

**Punishment.** The discretionary power of punishment conferred upon the court by this Article is peculiarly appropriate in view of the manifold forms and shades of offences constantly brought to trial under it.[24] The *maximum* punishments, however, for certain of the offences here chargeable, (in cases of enlisted men,) have been fixed by the President in G. O. 21 of 1891, amended by G. O. 16 of 1895, under the authority of the Act of Sept. 27, 1890.

In imposing a term of imprisonment or fine, upon the conviction of a "crime," the court, as an aid to the exercise of a due discretion, may well take into consideration the measure of the penalty of this nature imposable for a like offence under the statutes of the United States or the local law. As recognized, however, by the Supreme Court in *Ex parte* Mason,[25] a court-martial may in a proper case considerably exceed this measure, (keeping of course within the legal *maximum*, if any,) while adding, if deemed expedient, other penalties—such as discharge, dismissal and forfeiture of pay—of a military character.

It may be remarked in conclusion that where a court-martial, under a charge of a violation of a specific Article prescribing a mandatory penalty, has found the accused guilty of "conduct to the prejudice of good order and military discipline" only, it will, in general, in its sentence, naturally and
1140 properly affix a less severe punishment than that designated in the specific Article. This, however, is, of course, not legally obligatory.

**FRAUDULENT ENLISTMENT.** By the recent enactment of July 27, 1892 ch. 272, sec. 3, it was provided—"*That fraudulent enlistment, and the receipt of any pay or allowance thereunder, is hereby declared a military offence, and made punishable by court-martial under the 62d Article of War.*"

**Nature of the offence.** Prior to this legislation, fraudulent enlistment was not, in the opinion of the author, triable by court-martial, for the reason that the fraudulent representations, &c., in which the offence consisted must have been preliminary and made as an inducement to the enlistment, and so before it was consummated, and while therefore the individual was still a

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[22] See FRAUDULENT ENLISTMENT, *post*.

[23] DIGEST, 72; G. O. 23, Dept. of the Lakes, 1869.

[24] The discretion "must be a reasonable one, consistent with usage and custom." Samuel, 689. "The punishment is indeterminate, because, in most cases, the guilt may be much aggravated or diminished by attendant circumstances." O'Brien, 165.

[25] 105 U. S., 700. And compare King *v.* Suddis, 1 East, 306.

*civilian* and not constitutionally amenable to such trial.[26] A statute assuming to make mere fraudulent enlistment so triable would not remove the objection, since a statute cannot do away with a constitutional incapacity or confer jurisdiction where the constitution denies it. But the receipt of "pay" or an "allowance" under an enlistment knowingly fraudulent *is* an offence, because the pay, &c., is not received till the enlistment has been completed and the party is actually in the military service. It is thus the receipt of pay or of an allowance, (as an allowance of clothing or rations, for it is not considered that "allowance" means necessarily pecuniary allowance,) which is the gist of the legal offence and which in fact constitutes it. A person who has procured himself to be enlisted by means of false representations as to his status is not, *before* having received pay or an allowance, or *until* he receives one or the other, amenable to military trial. And the Act would be more correctly worded thus—*The receipt of any pay or allowance under a fraudulent enlistment is hereby declared, &c.*

**Definition of Fraudulent Enlistment.** It has been decided under the Act by the Secretary of War that the court-martial before which this offence is brought to trial shall be a *general* court-martial,[27] and it is enjoined that the enactment "be fully explained to every applicant presenting himself for
1141 enlistment."[28] And the offence is officially defined as follows—"A fraudulent enlistment is an enlistment procured by means of a wilful 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."[29]

**Instances of the offence.** A considerable number of cases of alleged fraudulent enlistment have already been brought to trial, and generally to conviction, under the statute of 1892. The various acts set forth in the specifications as constituting the offence have been as follows:—Concealment by the party of the fact of his having been discharged by sentence;[30] Concealment of the fact that he had been discharged with "bad" character or "without a character,"[31] Concealment of the fact that he had been discharged "without honor;"[32] Concealment of the fact of discharge for disability;[33] Concealment of the fact of discharge as a rejected recruit;[34] Concealment of the fact of discharge for previous fraudulent enlistment;[35] Concealment of the fact of discharge by purchase within less than one year prior to the enlistment;[36] Concealment of an existing physical disability;[37] Concealment by the party of the fact that he was a deserter;[38] Concealment of the fact that he had been confined under sentence in the Military Prison;[39] Concealment of the fact

[26] See DIGEST, 71–2; G. C. M. O. 9, Dept. of Texas, 1874.
[27] Circ. No. 13, (H. A.,) 1892.
[28] Circ. No. 11, (H. A.,) 1892. And see Do. No. 2, Id., 1893.
[29] Circ. No. 13, (H. A.,) 1892.
[30] G. C. M. O. 108 of 1892; Do. 10, 14, 25, 26, 31, 32, 37, 47, 55, 57, 62, 66, 76, 87, 88, 90, 91, 95, of 1893; Do. 39, 49, of 1894.
[31] G. C. M. O. 5, 60, 113, of 1893; Do. 9, 32, 44, of 1894.
[32] G. C. M. O. 81 of 1893.
[33] G. C. M. O. 109 of 1892; Do. 42, 55, 115, of 1893; Do. 35 of 1894.
[34] G. C. M. O. 81 of 1893; Do. 14 of 1894.
[35] G. C. M. O. 61, 71, 87, of 1893; Do. 34, 44, 49, of 1894.
[36] G. C. M. O. 83 of 1893. And see G. O. 81 of 1890.
[37] G. C. M. O. 109 of 1892; Do. 80, 92, 96, of 1893.
[38] G. C. M. O. 50, 100, of 1893; Do. 51 of 1894; Do. 23, Id., (Case of concealment of a desertion from the navy.)
[39] G. C. M. O. 102 of 1892. Do. 77, 117, of 1893; Do. 3, 28, of 1894.

that he had been convicted of felony by a civil court and sentenced to the
1142 penitentiary;[40] Falsely representing that he was fully twenty-one years of age;[41] Falsely representing that he was a single man;[42] Inducing his acceptance, though a minor, by presenting a false written consent purporting to be signed by his father.[43] The concealment of fact or false representation is not unfrequently accompanied by the giving of a *false name.*

**Charge.** The charge for this offence may be expressed as—"Conduct to the prejudice of good order and military discipline," or "Violation of the 62d Article," or, preferably, "Fraudulent Enlistment, in violation of the 62d Article," (or "to the prejudice of good order and military discipline.")

Fraudulent enlistment has sometimes been charged as consisting in an enlisting "without a regular discharge" from a previous enlistment,[44] the offence expressly made punishable by Art. 50. But this offence, as has heretofore been pointed out,[45] is a form of *desertion*, and is erroneously charged as "fraudulent enlistment," or otherwise than as "desertion."[46]

**PROOF.** The alleged false representations, concealments, &c., of the party, on his applying for enlistment, may be proved by the recruiting officer or noncommissioned officer to whom the statements were made, or other inducements were addressed, or by a soldier or other person present at the time. The falsity or fraud will be established by the official record of the discharge of the accused, or the record of his trial and sentence, or by the records of the Military Prison, by medical testimony, by the testimony of persons cognizant of his age or of the fact that he is a married man, &c. The receipt of pay, or of an allowance pecuniary or other, being the gravamen of the offence, must be clearly shown by the testimony of the recruiting officer, paymaster, &c. Proof of identity will generally also be required, and this, if denied, must also be established beyond a reasonable doubt by the evidence of persons who know or recognize the accused.

1143 **PUNISHMENT.** The maximum punishment for the offence of fraudulent enlistment has, by the direction of the President, under the authority of the Act of September 27, 1890, been fixed in G. O. 30 of April 3, 1893, as follows—"When a soldier has procured himself to be enlisted by false representation, or by concealment of a fact, in regard to a prior enlistment or discharge, or in regard to his conviction of a civil or military crime, the limit of punishment shall be dishonorable discharge, with forfeiture of all pay and allowances, and confinement at hard labor for one year. In other cases of fraudulent enlistment the limit shall be dishonorable discharge, with forfeiture of all pay and allowances, and confinement at hard labor for six months."

With the exception of Art. 99, ARTICLES 63 TO 121 inclusive have all been fully considered under appropriate heads in previous Chapters.

## XXVIII. THE NINETY-NINTH ARTICLE AND SECTIONS 1228, 1229, 1230, 1245, AND 1252 REV. STS.

[Dismissal and Restoration of Officers.]

"ART. 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*

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[40] G. C. M. O. 60 of 1893.
[41] G. C. M. O. 104 of 1892; Do. 73, 110, 128, of 1893.
[42] G. C. M. O. 30, 39, 71, 73, 78, 128, of 1893; Do. 40 of 1894.
[43] G. C. M. O. 109 of 1893.
[44] See cases in G. C. M. O. 11, 73, 77, 105, of 1892.
[45] *Ante*—FIFTIETH ARTICLE, p. 652.
[46] Some countenance to the contrary view has erroneously and probably inadvertently been given by the language of G. O. 30 of 1893, fixing the maximum punishment for fraudulent enlistment.

*of peace no officer shall be dismissed, except in pursuance of the sentence of a court-martial, or in mitigation thereof.*

"SEC. 1228. *No officer of the army who has been or may be dismissed from the service by the sentence of a general court-martial, formally approved by the proper reviewing authority, shall ever be restored to the military service, except by a reappointment confirmed by the Senate.*

"SEC. 1229. *The President is authorized to drop from the rolls of the Army for desertion any officer who is absent from duty three months without leave; and no officer so dropped shall be eligible for reappointment. And no officer in the military or naval service shall in time of peace be dismissed from service, except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof.*

1144 "SEC. 1230. *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.*

"SEC. 1245. *When any officer has become incapable of performing the duties of his office, he shall be either retired from active service, or wholly retired from the service, by the President, as hereinafter provided.*

"SEC. 1252. *When the board finds that an officer is incapacitated for active service, and that his incapacity is not the result of any incident of service, and its decision is approved by the President, the officer shall be retired from active service, or wholly retire from the service, as the President may determine. The names of officers wholly retired from the service shall be omitted from the Army Register.*"

NINETY-NINTH ARTICLE.

**HISTORY.** This Article is made up of two separate enactments. Its first clause consists of a provision taken from Article 11 of 1806, and which had previously appeared in the Articles of 1776 and 1786; the only material change made in the phraseology by the later statute being that, in view of the adoption meanwhile of the Constitution, the term "by order of the President" was substituted for the previous form, "by order of Congress."

The second clause of the Article is the provision, (so far as it relates to the Army,) of the Act of July 13, 1866, c. 176, s. 5, which was expressed as follows:—"*No officer in the military or naval service shall, in time of peace,*[47] *be dismissed from service except upon and in pursuance of the sentence of*
1145 *a court-martial to that effect, or in commutation thereof.*" This provision is repeated also in Sec. 1229, Rev. Sts., above cited, and is there more correct than as expressed in the Article, the word "commutation," not "mitigation," being the proper legal term to employ in such connection.

**THE TWO MODES OF DISMISSAL DISTINGUISHED.** The two modes of discharge or dismissal of officers specified in the Article are quite distinct in

[47] It was held by the Supreme Court in McElrath *v.* U. S., 102 U. S., 426, that as the recent war was not fully terminated nor peace established prior to Aug. 20, 1866, this statute did not affect the legality of a summary dismissal ordered by the President between the date of the Act and Aug. 20 following.

their nature. A dismissal imposed by sentence of court-martial, (or in commutation thereof,) is a *punishment*—a penalty incurred by law upon a conviction of a criminal offence. A dismissal or discharge ordered by the President in the first instance, on the contrary, is not a punishment but a *removal from office*. "A penalty," says Attorney General Cushing,[48] "is the result of a legal process. Dismissal from office belongs to a different class of administrative or political considerations, resting in the mere executive discretion of the President."

Any dismissal, indeed, where resorted to because of offences or misconduct of the officer, has the moral effect of punishment, in that it not only deprives the party of that which is valuable to him but affixes a reproach upon his reputation. The latter, however, is by no means an essential incident of an executive dismissal,[49] since—as was frequently done toward the end of the late war—an officer may be dismissed because his services are no longer required, by reason of a cessation of hostilities or other cause inducing a reduction of the military force. The separation from the service in the latter class of cases is indeed ordinarily designated "discharge" or "muster out," while the term dismissal is rather reserved for those instances which involve disgrace. But whatever be the name applied to it, or the grounds of or circumstances attending it, the exercise of the executive will is, in all the cases, the same act *in law*, the authority exerted being simply that of a divestiture of office.

That the summary dismissal is wholly distinct from and independent of the other species, *viz.* dismissal as a punishment by *sentence*, is illustrated by the fact that the President, like the British sovereign, has repeatedly exercised the authority to dismiss by order, not only after a court-martial, having
1146 passed upon the acts of the party and tried him for his offences, has imposed upon him a minor punishment, but after such a court has *acquitted* him altogether.[50] And so, after a court of inquiry,[51] or an examining board[52] has rendered a favorable report upon his case. And that such exercise of power is entirely legal has been repeatedly affirmed by the authorities.[53]

**DISMISSAL BY SENTENCE.** This subject has already been fully considered in Chapter XX, treating of SENTENCE AND PUNISHMENT.

**DISMISSAL BY ORDER—As heretofore resorted to.** The summary dismissal or discharge of officers of the army and navy has been from the earliest

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[48] 7 Opins. At. Gen., 251.

[49] See Samuel, 627–8; Hough, (P.) 425, 428.

[50] "The royal prerogative of summary dismissal is in nowise controlled or affected by the circumstance of an officer having been previously acquitted by a court-martial or having received only a lenient sentence for the conduct in question." Prendergast, 238. And see Id., 209, 236. Among the most marked instances in the British service were those of Admiral Herbert and Rear Admiral Munden, (1 McArthur, 109, 111; 2 Brod. & Bing., 151,) and General Fowke, (4 Campbell's Admirals, 84.) In the first two cases the officers were dismissed after having been acquitted by military tribunals; in the latter case the action was taken after a sentence of suspension for one year. And see instances reported in James, pp. 72, 231, 290, 334, 345, 492, 498.

In our army, cases of summary dismissal after *acquittals* are published in G. O. 327, 385, of 1863; G. C. M. O. 33, 38, 109, 184, 278, of 1864; Do. 129 of 1865;—after sentences imposing minor punishments, in G. O. 330, 377, of 1863; G. C. M. O. 42, 144, 156, 159, 280, 293, of 1864; Do. 70, 299, of 1865.

[51] 4 Opins. At. Gen., 1.

[52] 13 Opins. At. Gen., 3.

[53] See 44 Opins. At. Gen., 1, 611; 12 Id., 421; 1 McArthur, 109; Prendergast, 236–239; Clode, 1 M. F., 168.

period, a prerogative of the British sovereign. "Commissions in the army," says Prendergast, "being held at the sole will and pleasure of the Crown, a royal mandate or order is at any time sufficient for the summary discharge of an officer from the service. without the formality of a court-martial or a court of inquiry, or the assignment of any reason whatsoever."[54] In this
1147 country, the power, having been employed by Congress antecedently to the adoption of the Constitution,[55] was subsequently exercised by its successor in the executive department of the government, the President, from the period of the debate of 1789 on the subject, in the House of Representatives, down to the passage of the Act of 1866, already cited as the original of the second clause of Art. 99.[56]

Prior to the late war, indeed, summary dismissals or discharges of officers of the army by the order of the President, though from time to time resorted to, were not frequent.[57] But during the civil war—especially between July 1861 and October 1865—these dismissals and discharges were numerous; about one hundred and fifty, of officers of all grades,[58] and for varied causes,[59] being

[54] Page 235. The same author adds, (p. 239,)—"A military officer cannot by law hold his commission or any military employment, free from his liability to summary dismissal by the Crown." In Lieut. Poe's case it was held by the Court of King's Bench, "that the King had the exclusive uncontrolled prerogative of dismissing any officer or soldier whom he pleased, with or without a court-martial." Simmons § 750, note. So—"an officer in the army or navy of the United States does not hold his office by contract, but at the will of the sovereign power." Cremshaw *v.* U. S., 134 U. S., 99.

[55] See instances of the exercise of the power by Congress, in 1 Jour. Cong., 357; 2 Id., 204, (a dismissal of twelve lieutenants of the navy;) 3 Id., 421. In the last case, that of Maj. Gen. Charles Lee, the Resolution follows the form of words employed in the British service, the officer being informed that "Congress has no further occasion for his services in the Army of the United States." See, further, 2 Jour. Cong., 45, where Congress directs General Washington to dismiss such of "the French gentlemen in the army" as he may find on investigation to be "unworthy of commissions or unable to render service in the military line."

[56] See cases in G. O. 35 of 1821; Do. 23 of 1831; Do. 97 of 1833; Do. 37 of 1836; Do. 18 of 1838; Do. 51 of 1840; Do. 34 of 1841; Do. 14 of 1845; Do. 4, 18, of 1853; Do. 6 of 1856. And see Gen. Gratiot's case, (of Dec. 4, 1838,) in 5 Opins. At. Gen., 234; also remarks of Nott, J., in Street *v.* U. S., 24 Ct. Cl., 247–8.

[57] Atty. Gen. Clifford, writing in 1847, observes, (4 Opins., 612,) of the power under consideration, that it "has the sanction of immemorial usage in England and of more than half a century in the United States."

The power of course pertains to the President alone; a military commander cannot exercise it. An order of summary dismissal issued in the name or by the direction of the Secretary of War is presumed to be the order of the President. See 12 Opins. At. Gen., 421; McElrath *v.* U. S., 12 Ct. Cl., 202; DIGEST, 370, 690.

[58] Two being cases of general officers—Twigga and Spears. See G. O. 5 of 1861; G. C. M. O. 267 of 1864. In the case of Twigga the ground of dismissal is recited to be—"for his treachery to the flag of his country in having surrendered, on the 18th of February, 1861, on the demand of the authorities of Texas, the military posts and other property of the United States in his Department and under his charge."

[59] Of these grounds, so far as recited—(in some cases the causes are not specified)—the following, (taken both from General and Special Orders,) are among the principal:—Disloyalty, tender of resignation in the face of the enemy, tender of resignation under grave charges or on improper grounds, desertion, absence without leave, disobedience of orders, neglect of duty, cowardice, disgraceful surrender and other misbehavior before the enemy, drunkenness, sending a challenge, embezzlement, twice drawing pay, fraudulent transactions, lying, dishonorable or unbecoming conduct, unauthorized publication of an official report, procuring or suffering one's self to be taken prisoner, pretending to be wounded, feigning sickness, self-caused disability, irregular and improper conduct as member of a court-martial, incompetency, inefficiency, being "troublesome," being "an alarmist," being in Washington without proper authority, violation of the sovereignty of a friendly State by arresting a deserter in Canada and bringing him away within the United States.

1148 published in the General Orders,[60] and upwards of fifteen hundred in the Special Orders, of the War Department.[61] In the great majority of cases, no trial or investigation by a military court had preceded the action taken. In a considerable number, however, there had been a previous trial, and either a dismissal had been imposed by the sentence, which, because of the disapproval of the convening authority, or of some legal defect in the proceedings, had 1149 been rendered inoperative;[61a] or—as already noticed—an acquittal or a minor penalty had been adjudged, when, in the opinion of the Executive, an absolute separation from the service should have been the result.

**OPERATION OF AN ORDER OF DISMISSAL—When it takes effect.** An order of dismissal can legally take effect only *upon notice*. In other words, till the party is personally and officially notified that he has been dismissed, he is not dismissed in fact or in law. Where the summary dismissal is announced in a General Order, which, when received at his post or station, is publicly promulgated to the command, the presumption will in general be that the officer became informed of the dismissal on the day of such promulgation—a presumption subject to be rebutted by proof that he was at the time absent by authority and thus could not have been notified.[62] In general, however, an officer summarily dismissed is regularly notified of his dismissal by having an official copy of the order of dismissal delivered or transmitted to him personally; the dismissal taking effect on the day of the delivery or receipt. Where indeed such a delivery or receipt is rendered impracticable by some exigency of war or the service, a considerable period may elapse before the officer can be notified and the dismissal become operative. Thus if, at the date of the dismissal, or before information of the same has reached him, he has been taken prisoner, and is in the hands of the enemy, the dismissal cannot, as a general rule, take effect until, having reported, upon exchange, to his proper commander, or having otherwise been brought within the scope of the authority of the government, he becomes officially advised of the action taken: till then he is not divested of his office or its emoluments.

**Extent of its effect.** An executive order of dismissal, being simply a divestiture of office, cannot *per se* work a disability, or deprive the officer of any right

[60] See G. O. 5, 45, 47, 63, 66, 87, 93, 102, 103, 110, of 1861; Do. 15, 33, 35, 42, 54, 66, 96, 106, 115, 117, 120, 125, 131, 136, 137, 144, 156, 161, 183, 195, 196, 197, 199, 209, 211, 215, 217, of 1862; Do. 4, 11, 12, 15, 19, 23, 27, 31, 32, 39, 44, 59, 60, 68, 75, 89, 93, 94, 115, 119, 120, 186, 180, 183, 187, 189, 201, 209, 210, 229, 234, 261, 263, 264, 270, 299, 327, 330, 356, 377, of 1863; Do. 117, 304, of 1864; G. C. M. O. 10, 11, 28, 33, 38, 42, 43, 53, 109, 123, 144, 156, 159, 184, 267, 278, 280, 293, of 1864; Do. 61, 70, 71, 89, 123, 129, 261, 299, 349, 566, of 1865. In a few of the cases the dismissal was originally ordered by a military commander, but subsequently ratified and adopted by the President; the original action having of course no legal effect, but amounting to a recommendation merely.

[61] As these orders are very numerous, and not readily accessible to students, it is not worth while to cite them. Among the discharges summarily ordered therein a considerable proportion are of volunteer officers adversely reported upon by examining boards, officers failing to appear when summoned before such boards or before investigating commissions, supernumerary officers, &c. In some instances the dismissal took the form of a summary *muster-out*.

Here may be noted the mention, in the Rebellion Record, vol. V, p. 28, of the dismissal, June, 1862, of a surgeon of the army, for neglect of the sick and wounded, and, Id., p. 66, August, 1862, of twelve officers for having advised their regimental commander to surrender his post.

[61a] See G. O. 32, 68, 75, 93, 94, 115, 180, 183, 187, 189, 201, 209, 210, 229, 234, 261, 264, 270, 299, of 1868; G. C. M. O. 10, 11, 28, 38, 43, 53, 267, of 1864; Do. 71, 89, 261, of 1865.

[62] DIGEST, 370, 545. And see, similarly, as to the taking effect of a *sentence* of dismissal, Chapter XX—"Dismissal."

other than his right to the office as such. Thus such a dismissal, (except where Congress otherwise specifically enacts,[63]) involves no *legal disability* to re-enter the military service either by commission or by enlistment, or to be employed in any branch of the public service. Nor can it affect vested rights to
1150 *pay*, &c. Thus it has been held by the Judge Advocate General,[64] (applying to the case an opinion of Atty. Gen. Mason,[65]) that an order by which an officer was dismissed *with forfeiture of pay due*, was, as to such forfeiture, illegal and unauthorized; the officer having a vested right in all the emoluments accruing to the office, so long as he holds it and up to the day on which he ceases to hold it, which cannot be divested except by the sentence of a court-martial imposing such a forfeiture as a *punishment*. And as an attempt to do indirectly what may not be done directly, can have no legal sanction, it was further held by the same authority that a dating back of an order of dismissal to a day prior to that on which it was really issued, or a declaration in an order that the same was to take effect as of a prior day, could not operate to affect the right of the officer to pay for the period between such day and that on which the order was in fact made or he was duly notified of it.

**PROHIBITION OF EXECUTIVE DISMISSALS IN TIME OF PEACE.—ITS CONSTITUTIONALITY.** The provision of the Act of July 13, 1866, embraced in Sec. 1229, Rev. Sts., and in the second clause of Art. 99, is the first instance, since the organization of the government under the Constitution, in which Congress has expressly prohibited the exercise by the President of the power of removal from office. Upon a provision divesting the Executive of a function so long and largely exercised, the question naturally arises whether the same is *constitutional*. In considering this question, the nature and quality of the power itself, as asserted and maintained, will be clearly illustrated.

**The debate of 1789.** The subject is relieved of difficulty by the almost uniform concurrence of the authorities. All point to the debate in the House of Representatives of the first Congress, of May and June 1789, as having practically settled the question both of the existence and the extent of the power.[66] This was a debate upon certain proposed Acts, "to establish the State, War and Treasury Departments," in each of which was introduced a provision to the effect that whenever the Head of the Department should
1151 be "*removed from office by the President*," the "Chief Clerk" in the two former cases, and the "Assistant" in the latter case, should have the charge and custody of the records, &c.

The adoption of this provision was strenuously contested; a main objection being that, inasmuch as the heads of the departments were, according to the Constitution, to be *appointed* by the President, by and with the advice and consent of the Senate, the concurrence of that body—the Constitution being silent on the point—should properly also be deemed essential to their *removal;* and that therefore the power of removal could not legally be vested in the President alone. But after a protracted debate in which Mr. Madison was conspicuous in support of the Acts, as framed and passed, it was finally determined "in favor of declaring the power of removal to be in the President," and the several measures, having received the approval of President Wash-

[63] As it has in Sec. 1229, Rev. Sts., hereafter considered.

[64] DIGEST, 369.

[65] 4 Opins., 447.

[66] See 4 Elliot's Debates, 350–404, 1 Gales' Annals, 372–383, 455–591; Benton's Debates, 86–90, 102–108; 2 Marshall's Washington, 162.

ington, were duly enacted, *viz.* on July 27, August 7, and September 2, 1789, respectively.[67]

The argument of the affirmative of the debate was that, while the Constitution contained no express grant of the function of removal from office, or specific provision in regard to the matter, it vested in the President the whole executive power of the Government, and that the authority to remove was intrinsically and necessarily a part of the executive power, without which it could not be fully or efficiently exercised. "I conceive," said Mr. Madison, "that if any power whatsoever is in its nature executive, it is the power of appointing, overseeing, and controlling," (as by removal from office if deemed expedient,) "those who execute the laws."[68] Fisher Ames, in combating the notion that it would be dangerous to determine that the power was vested in the President, observed:—"It will be found that the nature of the business" (of removal) "requires it to be conducted by the head of the Executive; and I believe it will be found even then that more injury will arise from not removing improper officers than from displacing good ones."[69] Mr. Boudinot
1152 expressed himself as "certain from the nature of things, that it was not the intention of the Constitution to prevent the President from removing an officer who was found to be wholly unfit or incapable of doing his duty."[70] Mr. Madison also asserted the view that—"inasmuch as the power of removal is of an executive nature, and not affected by any Constitutional exception, it is beyond the reach of the legislative body."[71]

**Subsequent rulings.** In the course of his remarks Mr. Madison further declared—"The decision that is at this time made will become the permanent exposition of the Constitution."[72] In point of fact the result of this debate has ever since been treated by writers on the subject as a contemporaneous interpretation of the Constitution, not merely as to civil officers but equally as to military and naval officers, the appointment of both classes being authorized by the same constitutional provision. This exposition has been since repeatedly illustrated by the authorities. Thus in the early case in Pennsylvania of Commonwealth *v.* Bussier,[73] Tilghman C. J. refers to the question under consideration in the following terms:—This question "engaged the attention of the Congress of the United States soon after the formation of the Federal Constitution, by which the President nominates and appoints by and with the advice and consent of the Senate. There was some plausibility in the argument that the tenure of officers should be at the pleasure of the President and Senate, because the President could not appoint without the consent of the Senate and the Constitution is silent as to the power of removal. Yet it was determined with general approbation that the pleasure of the President was the tenure of office. A main reason for this opinion was that the President, being vested with the supreme executive power, was bound to carry the laws into operation, which can only be done through the intervention of officers. If these officers are not removable at his pleasure, he is relieved from that responsibility to which it is for the public good to hold him. An officer is not appointed for his

[67] 1 Stats. at Large, 28, 49, 65.

[68] 1 Gales' Annals, 463. In U. S. *v.* Guthrie, 17 Howard, 307, McLean, J. observes:—"In this discussion in Congress, Mr. Madison * * * considered the removal from office was an executive power, and that Congress could not restrict its exercise."

[69] 1 Gales' Annals, 476.

[70] Idem, 376.

[71] Idem, 464.

[72] Idem, 495.

[73] 5 Sergt. & Rawle, 461, (1820).

own sake but for that of the public. If he misbehaves, the sooner he is
1153 removed the better, because the country suffers every moment that he continues in office."

In 1839, in the case of *Ex parte* Hennen,[74] the Supreme Court of the United States, in remarking that—"the Constitution is silent with respect to the power of removal from office, where the tenure is not fixed," adds—generally—that, "in the absence of all constitutional provision or statutory regulation, it would seem to be a sound and necessary rule, to consider *the power of removal as incident to the power of appointment.*" The court then goes on to observe that "it was very early adopted as the practical construction of the Constitution," and has since "become the settled and well understood construction" of that instrument, "that the power of removal was vested in the President *alone.*"

In 1842, in an opinion[75] relating to a *naval* officer who had been "stricken from the rolls" by the President, it was declared by Atty. Gen. Legaré that—"it is now too late to dispute the settled construction of 1789. It," (the authority to remove,) "is, according to that construction, from the very nature of executive power, absolute in the President, subject only to his responsibility to the country, (his constituent,) for a breach of such a vast and solemn trust." And he continues,—"it is obvious that if necessity is a sufficient ground for such a concession in regard to officers in the civil service, the argument applies *a multo fortiori* to the military and naval departments." Referring to the action taken in the case before him, he concludes—"I have no doubt, therefore, that the President had the constitutional power to do what he did."

In 1847, in the case of Surgeon Du Barry of the *army*,[76] Atty. Gen. Clifford, in commenting upon the debate of 1789, says:— "The power was finally affirmed to be in the President alone by a majority of both houses of Congress, after great deliberation and perhaps one of the ablest discussions in the history of the country. That decision was acquiesced in at the time, and has since received the sanction of every department of the government." He then goes on to show that there is no essential difference between the cases of mili-
tary and those of civil officers, "much the largest class of whom," he
1154 observes, "are appointed under that clause of the Constitution from which the power of the President is derived to appoint the officers of the army and navy.[77] * * * No such distinction," he continues, "was taken in the debate on either side. On the contrary, it was maintained that the power of removal extended to every officer in the government except the judiciary. The plain inference to be drawn from the whole discussion leads irresistibly to the conclusion that the construction adopted was intended to reach every officer appointed by the President, except the judges of the federal courts."[78] He further instances the fact that—"the form of a military commission, in general use, expressly describes the tenure of office and very clearly recognizes the doctrine of

[74] 13 Peters, 258, 259. And see Blake *v.* U. S., 103 U. S., 231.

[75] 4 Opins., 1.

[76] 4 Opins., 609–613.

[77] And see 8 Opins., 231.

[78] It is noticed in this opinion, (p. 613,) that the only writer who holds that the power of executive dismissal is limited to cases of civil officers is De Hart. [See his "Military Law," p. 228–243.] "It is sufficient," says Mr. Clifford, "to remark that the weight of authority on this point is altogether against the views of this author. The construction of 1789 is too forcibly fixed in principle and has been too long established in practice to be shaken by any elementary writer however respectable, and the attempt to limit and qualify its application to the officers in the civil service has been wholly unsuccessful." So, Mr. Cushing, (8 Opins., 230,) refers to De Hart as not entitled to consideration upon the present subject.

1789: '*This commission to continue in force during the pleasure of the President of the United States for the time being.*'"

In a later opinion [79] Atty. Gen. Cushing expresses himself as follows:—"I am not aware of any ground of distinction in this respect, (the liability to be deprived of their offices at the will of the President,) so far as regards the strict question of law, between officers of the army and any other officers of the government. As a general rule, with the exception of judicial officers only, they all hold their commissions by the same tenure in this respect. Reasons of a special nature may be deemed to exist why the rule should not be applied to military in the same way it is to civil officers, but the legal applicability to both classes of officers is, it is conceived, *the settled construction of the Constitution.* It is no answer to this doctrine to say that officers of the army are subject to be deprived of their commissions by the decision of a court-martial. So are civil officers by impeachment. The difference between the two cases is in the form and
1155 mode of trial, not in the principle, which leaves unimpaired, in both cases alike, the whole constitutional power of the President." And, with reference to the case submitted to him, he adds:—"I am therefore of opinion that the President had the constitutional power to remove Mr. Lansing," (a military storekeeper,) "from office."

The same Atty. Gen., in a subsequent opinion,[80] incidentally observes, speaking of the President—"The power of removal, and the absolute right to exercise it according to his conscience, like the power of appointment, he holds by the Constitution."

In a third opinion,[81] Mr. Cushing reviews at length the subject under consideration, as illustrated by the authorities; shows that, in regard to civil officers, the construction of the Constitution is "*fixed, as all admit, past change;*"[82] and, holding that no difference exists in the application of the power to military or naval officers, concludes—generally—that "the power to remove is inherent in the executive power to nominate, as conferred on the President by the Constitution."

More recently—since the late war—Atty. Gen. Browning, in an opinion [83] in the case of an army officer who had been summarily dismissed by the President, notwithstanding an acquittal by court-martial, observes:—"The authority of the President to dismiss an officer from the military or naval service has been fully and elaborately considered by several Attorneys General. They have, in every instance where the question arose, asserted that the authority was derived from the Constitution, and that its exercise was sanctioned by the
1156 settled construction of that instrument and the uniform practice of the executive branch of the government." He then reviews some of the rulings of his predecessors, and, referring to the act of July 17, 1862, by which the President is "authorized and requested to dismiss and discharge" officers

[79] Opins., 5–6.

[80] 7 Opins., 251.

[81] 8 Opins., 230–232.

[82] Mr. Cushing here adds:—"I say *past change*, for the result of the earnest discussion of the question in the Twenty-third Congress, when the subject was revived for the very purpose, would appear to be decisive on that point." It was in this Congress that Mr. Clay offered, to a pending bill for restricting the executive patronage, an amendment declaring that, in cases of officers appointed by the President by and with the advice and consent of the Senate, the power of removal should be exercised only in concurrence with the Senate. This proposition was supported in an elaborate speech, but the amendment was subsequently withdrawn and was not renewed. See Gales and Seaton's Cong. Deb., vol. XI, part I, pp. 455, 513–524; 2 Mallory's Life and Speeches of Clay, 244; 2 Colton's Speeches of Clay, 11–12.

[83] 12 Opins., 424–426.

of the army and navy, for cause,[84]—comments thereon as follows:—"This provision did not, in my opinion, clothe the President with a new power, but gave an express legislative sanction to the exercise of a power incident to the high official trust confided to him."[85]

The leading commentators on the Constitution have expressed themselves to the same general effect in regard to the debate of 1789 and its result. Thus Sergeant writes[86]—"It was determined by Congress that the power of removal belonged to the President by virtue of the clause in the Constitution vesting in him the executive power, and other parts of that instrument, and this construction has since prevailed."

A similar view is expressed by Story[87] in regard to the legislation of 1789, and Kent refers to it in the following terms:[88]—"This amounted to a legislative construction of the Constitution, and it has ever since been acquiesced in and acted upon, as of decisive authority in the case. It applies equally to every other officer of government appointed by the President and Senate, whose term of duration is not specially declared. It is supported by the weighty reason
that the subordinate officers in the executive department ought to hold at
1157 the pleasure of the head of the department, because he is invested generally with the executive authority, and every participation in that authority by the Senate was an exception to a general principle, and ought to be taken strictly. The President is the great responsible officer for the faithful execution of the law, and the power of removal was incident to that duty, and might often be requisite to fulfill it. This question * * * may now be considered as firmly and definitely settled, and there is good sense and practical utility in the construction."

**Conclusion.** It will appear from this review that the construction of the Constitution in favor of the executive power of removal, however doubtfully arrived at in the beginning,[89] had, prior to the legislation of 1866, (incorporated in Art. 99,) become firmly established by the acceptation and judgment of the legal authorities and the continued and unquestioned practice of the executive department. It would certainly be the reasonable conclusion that an executive power thus confirmed could not be divested or restricted by Congress without a transcending of its constitutional authority, and that the view of Mr. Cushing, in his argument as Attorney General in U. S. *v.* Guthrie[90]—that "nothing but an amendment of the Constitution could take from the President this power"—was founded in good reason.[91] The political history of the enact-

[84] The enactment specifies—"for any cause which, in his" (the President's) "judgment, either renders such officer unsuitable for, or whose dismission would promote, the public service." According to the cause stated, therefore, the dismissal would have the effect either of a mere discharge, or of a discreditable separation.

[85] That this provision of 1862 was "simply declaratory of the long established law," see 15 Opins. At. Gen., 421; also Blake *v.* U. S., 103 U. S., 234.

As to *other* "declaratory provisions which neither enlarge nor diminish the constitutional power of the President"—see 8 Opins., 233.

With the opinions of Attys. Gen., cited in the text, see 2 Opins., 67, and 12 Id., 4, where the general power to dismiss is recognized by Mr. Wirt and Mr. Stanbery. The power was repeatedly affirmed by Judge Advocate General Holt, in his opinions during the war.

[86] Const. Law, 373.

[87] 2 Com. on Const. § 1537, note.

[88] 1 Com., 310. And see Rawle on the Const., 287, 2 Marshall's Washington, 162.

[89] It was carried in the House of Representatives by thirty-four votes against twenty, but in the Senate only by the casting vote of the Vice-President. The Federalist opposed it—see No. 77. And see also the views of Story in 2 Com. § 1539.

[90] 17 Howard, 288.

[91] But that Congress may by law limit and restrict the power of removal of the "inferior officers" appointed by heads of departments—see Perkins *v.* U. S., 20 Ct. Cl., 438.

ment of 1866,—the fact that it was intended as a check upon President Johnson by a Congress toward which he occupied an antagonist position,—is still
1158 remembered.[92] In the light of this history, while the existing law is of course binding till repealed or authoritatively determined to be unconstitutional, it is rather to be respected as an expression of the sentiment of Congress that dismissals, without trial, of army and navy officers, are in general inexpedient in time of peace, than as an exercise of the legislative power "to make rules for the government and regulation of the land forces." And, in this connection, it may be noted that now, as at the date of the opinion of Atty. Gen. Clifford above cited, it is still declared in the commissions of military officers, as issued from the War Department, that the same are "*to continue in force during the pleasure of the President of the United States.*"

**EFFECT OF THE RULING IN BLAKE'S CASE.** Until recently it had been generally supposed that the legislation of 1866, (admitting its constitutionality,) operated absolutely to prohibit the removal from office, in time of peace, of an officer of the army, (not subject to retirement as presently to be noted,) by any form of proceeding except the sentence of a court-martial.[93] In 1880, however, in the case of a chaplain of the army,[94] it was held by the Supreme Court that the statute of 1866, in declaring in substance that the President should not summarily dismiss officers, meant simply that "he alone" should not exercise this power; there being, as it was considered, in this legislation "no intention to deny or restrict the power of the President, *by and with the advice and consent of the Senate*, to displace them" (*i. e.* officers of the army and navy) "by the appointment of others in their places." It was therefore specifically held that—"The President has the power to supersede or remove an officer of the army or the navy, by the appointment, by and with the advice and consent of the Senate, of his successor."[95] Under this ruling, the President, if determining to remove an officer of the army without trial,
1159 (or after a trial which has not resulted in his dismissal,) has but to nominate to the office an eligible person "*vice* A. B. removed:" if the Senate concur in the nomination, the removal of the incumbent is completed.

The case of Blake has been affirmed and followed in several later adjudications.[96]

**SEC. 1229, REV. STS.—DISMISSAL BY DROPPING FOR DESERTION.** The provision in the last clause of this section, authorizing the President to drop from the rolls of the army, as deserters, officers who have been absent without leave for three months, is an incorporation into the Revised Statutes

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[92] See Blake's Case, *post*. In this connection should be noticed the "Tenure of Office Act" of March 2, 1867, (the provisions of which, as amended by the Act of April 5, 1869, are incorporated in Secs. 1767 *et seq.* of the Rev. Sts.,) by which the concurrence of the Senate is made necessary to the absolute removal of *civil* officers. This measure also was adopted during the same period of political excitement—when the President and Congress were at variance—as was the Act referred to in the text, and, as to the question of its constitutionality, is subject to a similar criticism. See the reference to it by Atty. Gen. Evarts, in Rollins' case, 12 Opins., 445–6, 449.

[But the "Tenure of Office Act" has now been repealed by the Act of March 3, 1887, c. 353—24 Stats. at Large, 500.]

[93] See Street *v.* U. S., 24 Ct. Cl., 247–8.

[94] Blake *v.* U. S., 103 U. S., 231.

[95] And see McElrath *v.* U. S., 102 U. S. 426; Keyes *v.* U. S., 109 U. S., 336. Cooley, Prins. Const. Law, 437.

[96] See Keyes *v.* U. S., 109 U. S., 336; U. S. *v.* Corson, 114 U. S., 619; Runkle *v.* U. S., 122 U. S., 558; Crenshaw *v.* U. S., 134 U. S., 99; Mullan *v.* U. S., 140 U. S., 240.

of the main portion of s. 17, Act of July 15, 1870, c. 294;[97] a further portion, relating to the forfeiture of pay by the officer dropped, being embraced in the subsequent Sec. 1266.

The dropping from the rolls here authorized, while a form of summary dismissal, is distinguished from the executive dismissal already considered as consisting in law in a removal from office. This latter is a constitutional function; the authority to drop is a special power[98] conferred by Congress for the purpose of relieving the army of a useless member who has himself practically abandoned it,[99] and the treasury from the obligation of paying for services no longer rendered: further, in making the officer dropped ineligible for reappointment, Congress attaches to his status a disqualification not involved in the case of an officer dismissed under the general constitutional authority to divest office.

This distinction has been illustrated by the ruling of the Judge Advo-
1160 cate General,[100] followed by a concurrent ruling, (in the same case,) of the Attorney General,[1] to the effect that an officer who has been dropped from the rolls under Sec. 1229 is not entitled to apply for a trial under Sec. 1230, (presently to be noticed;) the latter section applying only to cases of officers summarily dismissed under the general power of removal of the Executive.

Under this statute there had been dropped, up to January 1, 1895, twenty-three officers.

**SECS. 1245 AND 1252, REV. STS.—DISMISSAL BY "WHOLLY RETIRING."** These Sections, (taken from s. 17 of the Act of August 3, 1861, c. 42,) are introduced under this Title as exhibiting a special authority vested in the President to summarily dismiss officers, found to be incapacitated for active duty by causes not incidental to the military service, by what is called "wholly" retiring—an awkward term, since all retired officers are wholly retired, but meaning here dropping altogether from the army; the names of the parties being, as is provided in the latter section, thenceforth "omitted from the Army Register."[2]

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[97] This is the only *general* statute on the subject. A previous Resolution of Congress, of May 5, 1870, had authorized the President to drop from the rolls two particular officers named. In a Res. of July 27, 1868, Congress had itself dropped six lieutenants for unauthorized absence from duty.

[98] "The Act of 1870 was intended to give to the President a fresh grant of power, to be exercised * * * independent of the Acts of 1865 and 1866." Newton *v.* U. S., 18 Ct. Cl., 444.

[99] That the officer dropped leaves the service in a *dishonorable status,* see Circ., No. 4, (H. A.,) 1891.

[100] DIGEST, 374.

[1] Lieut. Newton's Case, 17 Opins., 13. It was held by the Attorney General in this opinion that—a trial by court-martial was not essential to the ascertainment of the fact of the absence specified in the statute, but that the President might determine such fact from the official records of the War Department; that the order, (issued upon such determination,) dropping the officer under the statute, was final and conclusive—a decision from which there was no appeal; and that the President, having issued it, was, as to that case, *functus officio* and not empowered thereafter to "review, annul, affirm, or reverse, his own adjudication," and that it could not be revised or reversed by a successor of his in office; that the fact that the order was made under a misapprehension of facts could not change its legal effect; that the order did not require the sign manual of the President, but that it was simply sufficient that it was issued by the Secretary of War "by the direction of the President;" that neither the Act of March 3, 1865, nor that of July 13, 1866, (Secs. 1230 and 1229, Rev. Sts.,) applied to cases under the enactment authorizing the dropping of officers. [And see Newton *v.* U. S., 18 Ct. Cl., 444.]

[2] Officers wholy retired become at once civilians, and, as such, cannot be readmitted to the army except by a new appointment. DIGEST, 666; Miller *v.* U. S., 19 Ct. Cl., 339; McBlair *v.* U. S., Id., 528; Fletcher *v.* U. S., 26 Id., 542; 19 Opins. At. Gen., 202.

The authority here conferred might with reason be regarded as having been divested in 1866 by the operation of the Act of July 13 of that year, heretofore considered, by which the President was prohibited from dismissing officers in time of peace. In practice, however, the Act of 1866 was not treated as
1161 having such effect, cases of officers removed by being "wholly retired" being published in nearly all the Army Registers between 1866 and 1874, when the provision of 1861 was re-enacted in the Revised Statutes. Forming now a portion of the same general Act as does the provision, (of Sec. 1229 and Art. 99,) containing such prohibition, and not being repugnant thereto, it is (like the enactment relating to the dropping of officers for desertion,) to be regarded as of equal force with that provision, to the general rule indeed established by which it may, (also like the said enactment,) be viewed as constituting a special exception.

**SEC. 1230, REV. STS.—TRIAL FOR OFFICERS SUMMARILY DISMISSED.** This provision, which is s. 12 of the Act of March 3, 1865, c. 79, has already been fully considered in Chapter VI.[3] It provides for persons removed by executive act from military office[4] a formal hearing, and a remedy in case injustice is found to have been done them. Under existing law, however,—in view of the prohibition of such dismissals, in time of peace,—this enactment is operative only in time of war.

**SEC. 1228, REV. STS.—RESTORATION OF DISMISSED OFFICERS.** This section, which, as illustrating the effect of the dismissal of an officer of the army, is in a measure a complement of Art. 99, is the Act of Congress of July 20, 1868, c. 185, not substantially modified.

**CASES OF DISMISSAL BY SENTENCE.** This Act was described in its title as "declaratory" of the existing law in regard to officers dismissed by court-martial. That it was declaratory *in fact* of the law as it had existed from the beginning of the government under the Constitution, is indicated by the uniform rulings of the Attorneys-General prior to its date.[5] These rulings are to the effect that the only legal mode of restoring to office in the army one who has been duly dismissed therefrom by the sentence of a military court, is by
1162 the exercise of the appointing power of the Executive. This, for the reason that the dismissal separates the officer fully and finally from the military service and makes him a private citizen, and that no such citizen can be endowed with a military office except in the way pointed out in the Constitution, *viz.* upon a nomination to the Senate confirmed by that body.[6]

Opinions of Attorneys General, &c. Of the rulings referred to, on this subject, some of the principal will be cited—as follows:

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[3] *Ante*, p. 60. The leading case under this provision is Lieut. Newton's. 17 Opins., 13; 18 Ct. Cl., 435.

[4] That it does not apply to cases of officers dropped for desertion under Sec. 1229, Rev. Sts., see DIGEST, 374, (1879,) and subsequent opinion of Atty. Gen. in 17 Opins.; 13, (1881.)

[5] And see, later, U. S. *v.* Corson, 114 U. S., 621.

[6] That the concurrence of the Senate is requisite may be stated as a general principle almost without qualification, since the exceptions thereto are so few. The Constitution, however, provides that Congress *may*, by statute, "vest the appointment of inferior officers"—a term understood to include army officers in general: see 10 Opins. At. Gen., 450—"in the President alone, in the courts of law, or in the heads of departments;" and in rare cases Congress has been held to have vested *in the President alone* the power to appoint officers of the army. See 10 Opins., 450; also opinion of Judge Advocate General, (in DIGEST, 150,) sustained by the Court of Claims in Collins *v.* U. S., 14 Ct. Cl. 568, the ruling in which was affirmed in the Same Case in 15 Id., 22.

Thus, in an opinion given in 1843, in the cases of two naval officers, Lieut. Whitney and Passed Midshipman Moorhead,[7] who had been dismissed by sentence, Atty. Gen. Nelson, in referring, first, to the judgment pronounced in the former case, as harsh, proceeds as follows:—"But I know of no revisory power by which that sentence can now be rescinded, annulled, or modified. It has been passed upon by the competent authority from whose decision the law has provided no appeal. It must, therefore, forever stand as the judgment of the court. The effect of the judgment, it is true, may be removed; not, however, in virtue of any authority to reverse the court's sentence, but in the exercise of the power of appointment with which the Constitution has clothed the President. No case has been brought to my notice in which an officer once dismissed has ever been restored to the service otherwise than by nomination by the Chief Magistrate and confirmation by the Senate, where the grade of the appointment was within the control of their joint action; and if such a case has
1163 occurred, I should not hesitate to declare it to be in direct repugnance to the Constitution and the laws, and to every principle applicable to their just and safe construction."

As to the case of the other officer named, this—the Attorney General remarks—"stands precisely, as far as the law is concerned, upon the same footing. The facts disclosed by the record show it to be one in which the sentence pronounced and executed was peculiarly harsh and severe. The proceedings of the court held in his case I do not deem it necessary particularly to discuss. I have no difficulty, however, in stating that they were exceedingly irregular. Testimony, manifestly illegal, was admitted, whilst that which was legal was ruled to be inadmissible. But still I do not perceive how those irregularities can be regarded as annulling the judgment pronounced.[8] They might have been appealed to as reasons why the revisory power, when called to act upon the proceedings, should not have approved the finding and sentence of the court; but that approval having been signified, they cannot avail wholly to avoid everything that has been done. The judgment of the tribunal created by the law has been pronounced and carried into effect, and the officer upon whom it operated was thenceforth unquestionably out of the service. This judgment I hold now to be irreversible. If Mr. Moorhead is restored to the service, it must be through the power of appointment, which the President will exercise according to his own sense of the exigency of the case."

In a later opinion,[9] the same authority observes:—"I know of no power by which an officer once out of the service can be brought back to it other than that of appointment by the President." And in a further case[10] he describes the position of such an officer as being—"from the time of his dismissal to that of his new appointment," that of "a citizen having no connection with the public service."

In a subsequent instance—that of the case of Lieut. Devlin of the marine
1164 corps[11]—Atty Gen. Cushing refers as follows to the conclusiveness of a sentence of dismissal of an officer, when duly approved by the President as the proper reviewing authority:—"The decision of the President of the United States, in cases of this sort, is that of the ultimate judge provided by the Constitution and laws. Like that of any other court in the last resort of law,

[7] 4 Opins., 274. It need hardly be remarked that the same rule must necessarily apply to all commissioned officers whether of the navy, army, or marine corps.

[8] That mere irregularities in the record, not affecting the legal validity of the proceedings, cannot authorize the setting aside of the sentence—see further, 4 Opins. At. Gen., 170; 7 Id., 104; 10 Id., 65, 67; 14 Id., 449.

[9] 4 Opins., 306.

[10] Id., 318.

[11] 6 Id., 370.

it is final as to the subject matter. There is one, and but one, legal question which would be competent in this case after the final decision of the President upon it; namely that of nullity of the proceedings, as being, for instance, *coram non judice*, or, for other cause, absolutely void *ab initio*."

That the result is the same where a department or army commander is the proper reviewing officer, authorized by law to confirm and execute the sentence of dismissal, (as he may be, in time of war, under Art. 106,) is indicated in a further opinion of the same Atty. Gen., in Capt. Howe's case.[12] "As the general in command," he observes, "affirmed the sentence, and it has been carried into execution, there is now no longer any power competent to review and reverse that sentence." And he adds,[13] that the President has no "rightful authority to review and reverse the sentence of a court pronounced in a case within its jurisdiction, duly approved by the revising power, and actually carried into full and complete execution."

In a subsequent opinion—in the case of Capt. Downing of the navy [14]—the same Atty. Gen. describes the effect of a sentence of dismissal, duly confirmed and executed, in the following terms:—"The dismissal thus became a consummated fact, and incapable of being recalled by the President, so that, if" this officer "were to be restored to the navy, it could only be done by a new appointment. In this condition of things, and in the present stage of the case, no question can be raised on the proceedings of the court, save the purely technical one of nullity of sentence for want of jurisdiction."

More recently,[15] Atty. Gen. Williams, referring to an army officer who had been cashiered by sentence, says of him that he "is out of the army as
1165 much as if he had never been in it." And in a later case [16] he more fully delineates the status of a duly dismissed officer of the army, as follows:—"His previous connection with the service having ceased, he thereupon became a civilian, and in a legal point of view he can be regarded as standing on no different ground relatively to an appointment to such rank or position than that occupied by any civilian who may never have been in the army. If it would be contrary to the law of the military service to appoint the one thereto, so it would be to appoint the other."

As a further reference—Atty. Gen. Evarts [17] clearly states the law in regard to an officer of the army dismissed by sentence, in remarking that, after such sentence "is duly confirmed and executed ,the dismissed officer cannot be reinstated by means of a pardon or in any other manner than by a new appointment and confirmation by the Senate. This is because the execution of the judgment in effect abrogates the officer's commission and entirely dissolves his connection with the service, placing him in exactly the same situation relatively thereto which he occupied previous to his original appointment." [18]

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[12] 6 Opins., 514. And see 10 Id., 66.

[13] 6 Opins., 507.

[14] 7 Id., 99.

[15] 14 Opins., 449.

[16] Id., 502.

[17] 12 Opins., 548. The same doctrine has recently been repeated by Atty. Gen. Brewster, in Gen. Porter's case, (Opin. of March 15, 1882,) where indeed, in stating that the particular officer, having become, by dismissal, a civilian, can be restored to the army only by a reappointment, he adds that such reappointment must be authorized by special Act of Congress, because the Army Regulations require that "*appointments to the rank of General shall be made by selection from the army.*" [In a further opinion in this case, of June 23, 1884, it was held by the same authority that an Act of Congress requiring or authorizing the appointment to a military office of a *particular person designated by name* was unconstitutional, mainly as assuming to limit and control the appointing power of the President.]

[18] To a simlar effect see the recent case of Vanderslice *v.* U. S., 19 Ct. Cl., 480; Runkle *v.* U. S., Id., 397.

**Conclusiveness of approved sentence of dismissal.** The extracts thus given illustrate most fully the principle of the conclusiveness of a legal sentence of dismissal adjudged by a military court, when the same has been once duly passed upon and approved by the final authority provided by the code and thereupon executed.[19] In such an instance the law, having in view the
1166 imperative necessity for certain and speedy punishment in the military service, has provided no appeal from the decision and order of the final reviewing officer, (whether President, or—in time of war—military commander,) who, as it is expressed by Mr. Cushing, is thus the "ultimate judge" in the case.[20] The sentence of dismissal being once approved and executed—and we have heretofore seen that it becomes executed upon *notice* to the officer of the act of approval or confirmation, officially given—the absolute separation of the party from the military service is a *fait accompli*. The President's, (or military commander's,) authority over the sentence or proceedings of the court, as the final reviewing officer and judge designated by the code, is exhausted, and he is without the power to recall or modify his action. Moreover, as a pardon cannot affect an executed punishment, the President, as the pardoning power under the Constitution, cannot any more do away with the effect of the sentence than he could in the other capacity devolved upon him by the 106th Article. This has already been pointed out in the extract from the opinion of Mr. Evarts, and is illustrated by the Supreme Court in *Ex parte* Garland,[21] where it is said—"A pardon does not restore an office forfeited." Thus the party sentenced is placed in precisely the position of any other civilian who has never been in the army at all. Except in the mode provided by Art. II, Sec. 2, § 2 of the Constitution, he cannot be reinstated in or restored to the Army.[22]

**Illegal restorations, &c., by orders.** Such being the law on this subject, the appropriateness of the title of the Act of 1868, in describing it as a statute *declaratory of the existing law*, is clearly perceived. That this legislation was, further, most timely—was in fact needed—is shown by the practice
1167 which had grown up in the latter part of the war of making an executive order do the duty of a constitutional appointment, and thus of ignoring the principles of law governing the filling of offices in the army, as well as those determining the effect of the judgments of courts-martial.

The extent to which this practice had been carried can only be appreciated by consulting the published General Orders,[23] of the War Department, especially during the years 1865 to 1867 inclusive. Here will be found order after order in which the *legal* and *executed* sentences of military tribunals were assumed to be set aside, and the officers, duly dismissed thereby, to be thereupon restored to, or redetached honorably from, the army. In some of these cases the officer, (who upon the execution of his sentence has become a civilian,) is

[19] In some of the opinions cited, the fact that the dismissal was executed under a *former* President is referred to as illustrating the absence of authority in the existing Executive to reopen the case. See 4 Opins., 170; 5 Id., 384; 6 Id., 507, 514; 10 Id., 65. This fact, however, cannot affect the question of the legal power. See 11 Opins., 22. A sentence of dismissal is as fully executed, and as completely beyond the reach of the reviewing authority or the pardoning power, on the day after that on which it takes effect, as at any subsequent time, however long, thereafter.

[20] And see 12 Opins., 21.

[21] 4 Wallace, 381. And see Vanderslice *v.* U. S., 19 Ct. Cl., 480.

[22] See, further, in this connection, Report, 868 of the Judiciary Committee of the Senate, of March 3, 1879, 45 Cong., 3d Ses.; 17 Opins. At. Gen., 297; 18 Id., 18; 19 Id., 202, 609; U. S. *v.* Corson, 114 U. S., 619.

[23] A large number is also to be found in the Special Orders.

"reinstated in," or "restored" or "returned to" his former office and rank;[24] in others he is "honorably discharged" from, or "mustered out" of, the military service;[25] in others his resignation is accepted, (or permitted to be tendered,) as of the date generally of the preceding dismissal.[26] In the majority of these Orders the sentence is declared to be "revoked;" in others it is "set aside" or "annulled." In one it is "vacated," in another "voided," in others "modified"—to honorable discharge. In several the sentence, once duly approved by a competent commander, (and executed,) is again reviewed and "disapproved;" in some the pardoning power is applied, and the executed sentence "remitted" or the individual "pardoned."

It need hardly be observed that the action in *all these cases* proceeded upon a misconception of law and of the executive function, and was wholly without legal authority. Those Orders which, in assuming to "revoke" or "set aside" a regular and valid sentence, declared the party to be "honorably discharged" or "mustered out," or announced that his resignation was ac-
1168 cepted, were equally illegal with those which professed to reinstate him as an officer, since to discharge or muster out as an officer one who is a civilian, or to permit him to resign as such, it is necessary first to put him back into the army.

**Restorations, &c., by legislation.** It is thus perceived that the statute of 1868, in recalling the military department of the government within its proper province, and in reaffirming the rule of law governing cases of the class under consideration, was a judicious and opportune measure. Upon its enactment, the practice above indicated was presently discontinued, and the more recent cases of a disregard of the organic law in the particular under consideration are not cases of executive orders but of statutory enactments by Congress. Thus, by an Act of March 3, 1873, c. 250, the Secretary of War was "authorized and directed to restore" a party named,—who, as a captain in the veteran reserve corps, had been dismissed by sentence in March, 1865, (since which time that corps had ceased to exist,)—"to his position as such captain, and grant him an honorable muster-out as of the date on which he was dismissed." Again, by an Act of June 9, 1874, c. 273, the Secretary of War was "authorized and directed to give to" a party, who, as a captain of a regular regiment, had been dismissed by sentence in June, 1870, "an honorable discharge from the service of the United States, to date" as of the date of his dismissal. Still further, by an Act of June 23, 1874, c. 499, it was provided—"That the Secretary of War be and is hereby directed to amend the record of," (a lieutenant named who had been dismissed by court-martial in July, 1870,) "so that he shall appear on the rolls and records of the army for rank as if he had been continuously in service."

These provisions were all at variance with the provisions of the Constitution relating to appointments.[27] Congress has no power, of itself, to restore

[24] See G. O. 81, 116, of 1863; G. C. M. O. 378, 540, 550, 630, 675, of 1865; Do. 9, 160, 171, 201, 206, of 1866; Do. 75, 81, 90, 97, 105, of 1867; Do. 46 of 1868; Do. 19 of 1870.

[25] See G. C. M. O. 559 of 1865; Do. 3, 21, 64, 65, 80, 81, 93, 99, 122, 133, 161, 172, 180, 205, 207, 221, of 1866; Do. 17, 20, 86, 88, 89, of 1867; Do. 2, 78, of 1868; Do. 44 of 1869.

[26] G. O. 27 of 1865; G. C. M. O. 271, 629, of 1865; Do. 16, 225, of 1866; Do. 26 of 1867.

[27] See, on the subject of this class of legislation, the case of Wood *v.* U. S., 15 Ct. Cl., 151, in which the principle that appointments to office cannot be made by Congressional enactment is illustrated in the case of an army officer. That an army officer on the retired list, who accepted and entered upon a consular office, and thus, under Sec. 1223, Rev. Sts., vacated his military office, cannot be restored to it by the mere operation of a subsequent Act of Congress, is properly held by the Attorney General in 19 Opins., 609.

1169 to the Army a legally dismissed officer, or—since, to do so, it must first restore him to it—to grant him an honorable discharge from it. Nor has it any authority to empower the President or Secretary of War to do either,—except, indeed, in so far as it may authorize a restoration by a new *appointment* under Art. II of the Constitution. As to the Act last above cited, of 1874, it is to be remarked that the same was held by the Attorney General to have been wholly inoperative, at least for the purpose for which it was apparently designed.[28] "The Act in question," he observes, "seems to proceed upon the idea that the obliteration of the Army records, as therein provided for, will *ipso facto* restore" the party "to the office from which he was dismissed. This idea is in conflict with the Constitution of the United States." The party, "in pursuance of the sentence of a duly organized court-martial was discharged from the Army in 1870, and since that time his relations to it have been like those of any other private citizen. Any mistake by this tribunal, not involving its jurisdiction, does not affect the validity of its proceedings. Congress cannot annihilate a fact by causing the record-evidence of its existence to be destroyed; nor can Congress constitutionally appoint a private citizen a lieutenant, colonel, or general in the Army. The appointing power is vested by the Constitution 'in the President, by and with the advice and consent of the Senate,' except where it is vested by law in the courts or the heads of Departments."[29]

**RESTORATION OF OFFICERS DISMISSED BY ORDER, &c.** In connection with the specific subject of the Section under consideration—
1170 the restoration of officers dismissed by *sentence*—it may well be noticed that the same constitutional principle and the same rule of law apply equally and alike to cases of officers dismissed or separated from the military service by summary order or in any other legal and authorized manner.

**Rulings on the subject.** Thus an officer dismissed by *summary order* of the President, (at a time when that form of removal from office had not been prohibited by statute,) was as fully and completely made a civilian as where dismissed by sentence, and could not therefore be restored by a new order revoking the original order, but by a reappointment alone. This also has been uniformly held by the Attorneys General, who have also noticed that the justice or injustice of the dismissal was an immaterial circumstance. Thus in the case of Surgeon Du Barry of the navy,[30] dismissed by executive order without trial, it was observed by Attorney General Legaré, as follows:—"He was clearly out of the service by a lawful and valid, however harsh, (and even it may be unfair,) exercise of the appointing power. If he has been restored, it has not been by avoiding the act dismissing him, for that could not be done. It

[28] 14 Opins., 448. The effect which *is* given to the Act in the opinion is certainly a remarkable instance of a liberal construction.

[29] A more recent instance of exceptional and objectionable legislation of this class was the Act of March 15, 1878, by which the President was authorized to "annul and set aside the findings and sentence" of a general court-martial by which an officer had been legally dismissed from the military service, and to "place him on the retired list of the army." A later and even more extraordinary instance was that of the Joint Resolution of March 3, 1879, by which the Secretary of War was "required to order a military court-martial or court of inquiry to inquire into the matter of the dismissal" of a certain officer named; "said court to be fully empowered to confirm or annul the action of the War Department by which said" officer was "summarily dismissed the service" in 1863; the "findings" of the court "to have the effect of restoring" said officer "to his rank, with the promotion to which he would be entitled if it be found that he was wrongfully dismissed, or to confirm his dismissal if it be otherwise found"!

[30] 4 Opins., 124. And see the general observations applicable to either form of dismissal, already cited from 14 Id., 502.

was beyond the power of the Executive. All that the President can do, in such cases, is to repair any wrong done by a new appointment." And, in a further opinion in the same case,[31] another Attorney General, Mr. Clifford, says:—"No process of reasoning or fiction of law will enable his counsel to escape from the fact that, during all this time," (the period during which the order of dismissal was in operation,) "he was a private citizen, holding no commission under the authority of the United States." In a later opinion,[32] Mr. Cushing places the two forms of dismissal upon the same footing as respects the power of the Executive to rehabilitate or relieve the officer; and in a more
1171 recent case,[33] of an officer of the army dismissed by order and subsequently sought to be restored by a second order assuming to revoke the former, Mr. Browning, citing as authority Attorney General Nelson's opinion, already quoted, in the case of the two naval officers dismissed by *sentence*, holds that the relations of an officer to the service being "dissolved" by an executive order of dismissal, "a revocation of the order dismissing him cannot work his restoration;" in other words, that the order of so-called revocation is a simple nullity and wholly futile, revoking nothing.

The only counter authority known to exist on this point is that of the Court of Claims in the early case of Smith *v.* United States,[34] in which it was held that where an executive order was issued revoking a previous summary order of dismissal in the same case, the prior order "was revoked from its inception and altogether;" that "all its consequences were annulled;" and that the officer was to be viewed as having been in office continuously during the entire interval between the date of the order of dismissal and that of the revocation, and entitled to full pay for such period. This eccentric and mistaken doctrine, however, though repeated in some other of the earlier cases passed upon in that court,[35] was finally abandoned by the same in McElrath's case,[36] and the correct doctrine as there held has been reaffirmed in later rulings.[37]

Cases of officers otherwise separated from the army. The principle thus illustrated is the same, and the same rule is to be applied, where, in any legally authorized mode or form *other than* by summary order of dismissal, the officer is separated from the military service. As, for instance, where he is discharged by the Executive, not as an original act, but under and by reason of a
1172 public statute expressly requiring such discharge.[38] So, where he is "*dropped*" under Sec. 1229,[39] or "*wholly retired*"[40] under Sec. 1252, of

[31] 4 Opins., 604.

[32] 8 Opins., 235.

[33] 12 Id., 427. And see DIGEST, 371, 607–608. It follows that any orders of the War Department, in which valid summary dismissals have been revoked, were, so far, unauthorized and legally inoperative. See cases in G. C. M. O. 637 of 1865; Do. 76 of 1866.

[34] 2 Ct. Cl., 206. The fact, to which importance was attached in this case,—that the original order was unjust and that the revoking order was made to right the wrong done,—was really wholly immaterial.

[35] Winters *v.* U. S., 3 Ct. Cl., 136; Barnes *v.* U. S., 4 Ct. Cl., 216; Montgomery *v.* U. S., 5 Ct. Cl., 93.

[36] McElrath *v.* U. S., 12 Ct. Cl., 202; affirmed in 102 U. S., 426.

[37] Palen *v.* U. S., 19 Ct. Cl., 389; Montgomery *v.* U. S., Id. 370; Miller *v.* U. S., Id., 338; Mimmack *v.* U. S., 97 U. S., 426; U. S. *v.* Corson, 114 U. S. 619.

[38] See 5 Opins. At. Gen., 101; also 8 Id., 223.

[39] A parallel case is that of a cadet of the Military Academy, discharged upon the recommendation of the Academic Board under Sec. 1325, Rev. Sts. The President cannot, by revoking the order of discharge, restore the cadet, though the Board may recommend it. 17 Opins. At. Gen., 67.

[40] See the principle applied to a case of a "wholly retired" officer in McBlair *v.* U. S., 19 Ct. Cl., 528; also in Miller *v.* U. S., Id., 338.

the Revised Statutes, already considered; or where he has vacated his military office, under Sec. 1226, R. S., by the acceptance of a diplomatic or consular office.[41] And so, where the officer has *tendered his resignation* and the same has been duly *accepted:* here also it has been held by Attorney General Evarts,[42] that, upon such acceptance, the officer is "out of the service as completely as if he had never been in it," and "that he can only be restored to it by a new appointment made conformably to the Constitution;" further, that an order assuming to revoke an acceptance of a resignation, after the same had once taken effect, is of no legal validity. And so with a permission given to an officer to withdraw a resignation once duly accepted;[43]—no such act can have any effect to restore the officer.

**RESULT.** The result of this general examination of the subject is, that in all cases where an officer of the army is legally separated from the military service, and remanded, as he must thereupon at once be, to the status of a civilian,—whether this be effected by sentence of general court-martial, summary order, dropping, retiring, acceptance of resignation, vacating of office by operation of law, or otherwise,—the mode pointed out in Section 1228 of the Revised Statutes, and in Art. II, Sec. 2, § 2, of the Constitution, is the only legal mode by which he can be restored to the army; that any other mode, whether re-
1173 sorted to by the executive or legislative department of the government, is in derogation of the Constitution and wholly futile;[44] that it in no manner affects the application of the general principle that the dismissal may have been quite unwarranted by the facts or grossly unjust; and that the only exception to such application is where the original dismissal was absolutely illegal and therefore inoperative—as where, the dismissal having been by sentence, the proceedings of the court, from defect of constitution, want of jurisdiction, or otherwise, were rendered null and void. Such case, however, is really no exception, since here there has been no dismissal in law.

## XXIX. THE ONE HUNDRED AND TWENTY-SECOND, ONE HUNDRED AND TWENTY-THIRD, AND ONE HUNDRED AND TWENTY-FOURTH ARTICLES.

[Relative Right of Command, Relative Rank, &c., of Different Classes of Officers.]

"ART. 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.*

"ART. 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*

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[41] 19 Opins. At. Gen., 609.

[42] Capt. Mimmack's case, 12 Opins., 555; Do. 14, Id., 262; 19 Id., 350. See also this case reported in 10 Ct. Cl., 584, where a similar result is reached upon quaint reasoning, and in 97 U. S., 426, where the previous rulings are affirmed. These rulings have been still later reaffirmed in the cases of Bennett *v.* U. S., 19 Ct. Cl., 379; Turnley *v.* U. S., 24 Ct. Cl., 317. And see 14 Opins., 499. In a subsequent opinion, (18 Opins., 311,) it was held that a resignation offered, and rejected at the time, cannot subsequently be accepted so as to separate the officer from the army. To effect this, there must be a *new* tender and acceptance.

[43] 19 Opins. At. Gen. 350.

[44] See—generally—the opinions of the Attorney General in Gen. Porter's case, in 17 Opins., 297; 18 Opins., 18.

*volunteers commissioned in, or mustered into said service, under the laws of the United States, for a limited period.*

"ART. 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*
1174 *such militia officers may be older than the commissions of the said officers of the regular or volunteer forces of the United States.*"

ONE HUNDRED AND TWENTY-SECOND ARTICLE.

**ORIGIN.** The original of this provision, as taken from a corresponding British Article, is found in Art. 25, Sec. XIII, of the code of 1776. It first appears, however, in its present form, in the 62d Article of 1806.

**CONSTRUCTION—"If upon marches, guards, or in quarters."** This somewhat antiquated form of expression, which might well be dropped altogether from the Article, or be replaced by some simpler and more comprehensive term, is no doubt intended to cover all occasions of duty where different corps of the military force would be likely to meet for joint service, whether upon a campaign against an enemy, or when quartered together at a garrison or military post in time of peace. The term "guards" is deemed to refer particularly to grand, brigade, or picket guards, in the field in time of war.

**"Different corps of the Army."** As in Art. 82, heretofore considered, the term "corps" is regarded as used here in a general sense, as extending to any separate and distinct arm or branch of the service comprised in the existing military establishment. The description "different corps of the army" is therefore construed as embracing, on the one hand, the infantry, cavalry, and artillery, and, on the other hand, the various departments, &c., or individual officers, included under the general term *staff*—a term which will be more particularly defined hereafter.

Further, the word "corps," as here employed, is interpreted as meaning not only an organized body or complete portion of the force, but any officered detachment however small, or even single officer, representing such an organization or portion.[45] It has already been noticed[46] that the term "different corps" in Art. 82 is held to allow of the same application.

**"Happen to join or do duty together."** This phrase is evidently
1175 intended to comprehend not only occasions where different corps are employed together upon some specific duty under express orders, but where, by the chances of an engagement, a march, or other incident of the service, such corps come to meet and combine in any military operation or movement, or in the occupation of the same camp, garrison, or post. A mere fortuitous and temporary meeting, where the two or more separate bodies or detachments do not in fact combine, and where no occasion arises for the assumption of a single command over the whole, is of course not contemplated.

**"The officer highest in rank by commission shall command the whole,"** &c. This means the officer who is highest or senior in rank by the commission under which he is at the time serving.[47] He may possess a commission in a higher rank than that in which he is actually serving, but it will not be available for conferring command under the circumstances contemplated by the Article.

[45] See Circ. 3, Dept. of Va. & No. Ca., 1865.
[46] Chapter XXII—"Construction of Art. 82."
[47] See O'Brien, 51, 55.

Thus a captain may also be a colonel by brevet, but unless he has been specially assigned to duty according to this brevet rank,[48] and is serving at the time under that assignment, he cannot claim any right of command pertaining to such rank.

The provision of the Article is also operative where the original commander of the mixed command absents himself or is disabled by wounds or illness. In such case the Article devolves the command upon the next senior line officer present, as his successor.[49]

**"Of the line of the Army."** The term "line of the Army" is susceptible of being interpreted as intending Regulars or U. S. forces as distinguished from State or other local troops; an officer of the line of the army thus being one who holds his commission under the authority of the United States as distinguished from one who holds it by the appointment of a Governor or other local authority. This interpretation receives support from the fact that during the Revolutionary war the term *line* was frequently employed in the laws and proceedings of Congress to indicate the military contingent of a particular
1176 State—as the "Pennsylvania line," the "New Jersey line," the "Virginia line,"[50] while in referring to the regular army, or the army as a whole, the term "line of the army" or "continental line" was sometimes used.[51]

The authoritative construction, however, of the word "line" in this Article has been that it is employed simply as distinguished from *staff*, and for the purpose of excluding staff officers from the right of command, and devolving it upon the officers of the regular and volunteer regiments, &c., in the situations described. This construction was arrived at in Surgeon Finley's case, published in General Orders, No. 51 of 1851, in which the proper interpretation of this Article was directly involved, and the question under consideration very fully discussed; the view thereon of the President being announced by the Secretary of War as follows:—"His opinion is that these words * * * are used to designate those officers of the Army who do *not* belong to the Staff, in contradistinction to those who do, and that the Article intended, in the case contemplated by it, to confer the command exclusively on the former."[52] Among the

[48] Under Sec. 1211, Rev. Sts., as now restricted by Act of March 3, 1883, providing that officers shall be so assigned "only when actually engaged in hostilities."

[49] See G. O. 14, Dept. of the Ohio, 1865.

[50] The "Virginia line" is also referred to in the later Acts of Aug. 10, 1790, and June 9, 1794.

[51] See III Jour. Cong., 132, 572, 705, where this line and the line or lines of a State or States, are directly contrasted.

[52] This opinion is cited and adopted as a "satisfactory exposition" of the term *line*, in Scott's Military Dictionary, p. 358. Prior to the date of the Order, O'Brien, (p. 50,) had similarly interpreted the Article. "Staff officers," he says, "are not merely excluded from command, but are subject to the orders of the senior officers of the line without regard to the relative rank of either. A colonel of the staff would be subject to the orders of a captain of the line, if the latter were the senior officer on duty."

The definition of "*the line*" by English writers partakes of both the meanings attributed to the term in the text. Thus James, (Mil. Dict.,) writes—"This term is frequently used to distinguish the regular army of Great Britain from other establishments of a less military nature. All numbered or marching regiments are called the line. * * * The French say '*troupes de ligne,*' which term corresponds with our expression, Army of the Line or Regulars." He adds, however, that "the true import of *line* in military matters means that solid part of an army which is called the main body and has a regular formation from right to left." Stocqueler, (Mil. Encyc.,) defines the line to be—"the numbered succession of the ordinary regiments of the regular army, excluding special or local corps." Campbell, (Dict. of Mil. Science,) describes the line as—"an expression used to distinguish the regular regiments of the British Army from other corps." And see Burns' Mil. and Naval Technological Dict.—"Ligne." Duane, (an American writer,) who follows James, says in his Mil. Dict.—"The marines, militia, and volunteers do not come under the term." The present prevailing and familiar construction, however, of the term *line* is as given in the text.

1177 grounds for this conclusion are stated the following:—that "the command of troops might frequently interfere with their" (staff officers') "appropriate duties;" that "the officers of some of the staff corps are not qualified by their habits and education for the command of troops;" and that "officers of the staff corps seldom have troops of their own corps serving under their command, and if the words 'officers of the line' are understood to apply to them, the effect would often be to give them command over the officers and men of all the other corps when not a man of their own was present—an anomaly always to be avoided where it is possible to do so."

In support of this ruling it is declared in the Order that the term *line* is employed almost uniformly elsewhere in the public laws as "correlative and contradistinctive" to *staff*. A case referred to, (as occurring in the same statute,) is that of Art. 74 of 1806, in which the phrase—"in the line or staff of the Army," is used as a comprehensive description of the military establishment in general. Other cases are cited from a series of Acts between 1813 and 1847. It is however to *prior* Acts—*i. e.* to legislation had by Congress between the adoption of the Constitution in 1789 and the enactment of the code of 1806—that reference should especially be had in this connection, and such legislation is in fact found to present repeated instances in which the term "line of the Army" is employed to designate the line as distinguished from the staff.[53]

**THE LINE AND STAFF OFFICERS OF THE PRESENT ESTABLISHMENT, DISTINGUISHED.** The *line* officers proper of the army as
1178 now organized comprise all the officers—colonels, lieutenant colonels, majors, captains and lieutenants—of the existing five regiments of artillery, ten regiments of cavalry, and twenty-five regiments of infantry; *line* being thus substantially equivalent to *regimental*. In the late war it included the officers of the volunteer regiments as part of the Army of the United States.[54] Such officers, however, are line officers, in the sense of the Article, only when acting or serving as such: a line officer detailed upon staff duty ceases for the time to be a part of the line.

The *other* officers of the establishment,—with the exception of a single class yet to be specified,—are those designated as *staff* officers; this description comprising—(1) the officers of the "*General Staff*," *i. e.* the staff of the President as Commander-in-chief,[55] consisting of the heads and members of the different staff "corps" or "departments," on duty in the War Department at Washington or at the headquarters of military Divisions or Departments, or other stations; (2) the officers of the *personal* staffs of commanding generals, consisting of the aids-de-camp, (and military secretary to the Lieut. General,) allowed by statute.

**LINE AND GENERAL OFFICERS DISTINGUISHED.** The excepted class above indicated are the *general officers* of the army, (other than those at the

[53] See Acts of March 3, 1791, s. 5; March 5, 1792, s. 7; May 30, 1796, s. 3, 12, 13; March 3, 1797, s. 2; May 28, 1798, s. 6; July 11, 1798, s. 2; July 16, 1798, s. 3, 4; March 16, 1802, s. 3, 4; February 28, 1803, s. 2. And see also earlier instances in 3 Jour. Cong., 273; 4 Id., 165.

It may be noted here that the word "line" was sometimes employed in the early statutes in another and more specific sense, to indicate a separate and distinct arm or portion of the forces. Thus—"the line of major generals," (3 Jour. Cong., 202;)—"the line of infantry in the army of the United States," (Id., 560;)—"the line of artillerists and engineers," (Act of July 16, 1798, s. 9;)—"the lines of artillerists, light artillery, dragoons, riflemen and infantry, respectively," (Act of June 26, 1812, s. 5).

[54] See *ante*, Chapter VIII, p. 87.

[55] Stocqueler, (Mil. Encyc.,) defines "Staff," (*i. e.* what is known with us as the "General Staff,") as—"the body of officers intrusted with the general duties of the army in aid of a Commander-in-chief." And see DIGEST, 430.

head of the staff corps,) now (January 1, 1865,) consisting of three Major Generals, and six Brigadier Generals.[56] These officers, commanding as they do both staff and line, and charged as they are with duties and responsibilities incident to a supervision of both staff and line service, are themselves clearly no more line than staff officers,[57] and are therefore not included in the description "of the line of the Army" employed in the Article. Command, however, being of the very essence of their rank and office, a construction of the Article which would exclude them from command, under the circumstances therein specified, would involve an absurdity. No such construction, however, is required, for the reason that this is evidently a class of officers *not contemplated by the Article at all*, but quite outside of and beyond its application. It thus follows that their right of command, upon occasions of the coöperating of bodies of troops, is in no manner affected by the Article, but is to be determined, in the absence of any special assignment, (*i. e.* "unless otherwise specially directed by the President,") by the established military rule of superior rank and seniority. In other words, as remarked by the Secretary of War, in the Order above cited,[57a] the Article was designed to meet only cases where, upon the uniting of different corps, there is present "*no common superior*" of the line officers commanding the several detachments. If indeed, he adds, "there be a Major General or Brigadier General present, the case contemplated by the Article does not exist: no question can arise as to the right of command, because the general officer, not belonging to any particular corps, takes the command by virtue of the general rule which assigns the command to the officer highest in rank."

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**ASSIMILATED CASES—MARINE CORPS OR MILITIA.** By the terms of the Article, line officers of the Marine Corps, when "detached for service with the Army," as indicated in Art. 78, and line officers of Militia, when mobilized and serving with it under a call by the President, are assimilated to officers of the army proper, so far as respects the right of command.

But here it is to be observed that the provision as to militia officers is to be taken as subject to the provision of Art. 124,—that when such officers are "employed in conjunction with the regular or volunteer forces of the United States," they shall "take rank next after all officers of the like grade in said forces," notwithstanding that their commissions may be older than those of the officers referred to. Thus a captain of regulars or volunteers would be entitled to the command in preference to a captain of militia with whom he was joined in service, though the commission of the latter bore an earlier date: a captain of militia, however, would of course take precedence of and command a lieutenant of regulars or volunteers under the same circumstances. The two Articles—the 122d and the 124th—are, as they stand, somewhat contradictory; but, being parts of the same statute, it is necessary to give that force to the provisions of each which they would have if they constituted but one section in which the second appeared in the form of a proviso to the first.

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### One Hundred and Twenty-third Article.

**ORIGIN.** This statute, which first appears as an Article of war in the existing revised code of 1874, is a concise form of a provision of sec. 2 of the Act

[56] By a recent Joint Resolution of Feb. 5, 1895, the grade of Lieutenant General was temporarily revived in the army.

[57] In a few of the early statutes—(see Acts of March 5, 1792, s. 7; March 3, 1795, s. 10)—fixing the pay of the army, the officers are classed under the two heads of "General Staff" and "Regimental;" the *general* officers being named under the former. This classification, however, subsisted for but a brief period.

[57a] G. O. 51 of 1851.

of March 2, 1867, c. 159; which section, omitting the last clause, (which provides that the Act shall not apply to the militia,) enacted as follows:—"*That in all matters relating to pay, allowances, rank, duties, privileges, and rights of officers and soldiers of the army of the United States, the same rules and regulations shall apply without distinction for such time as they may be or have been in the service, alike to those who belong permanently to that service and to those who, as volunteers, may be or have been commissioned or mustered into the military service under the laws of the United States for a limited period.*"

That portion of this section which refers to the "pay and allowances of officers and soldiers" is incorporated in Sec. 1292, Rev. Sts.[58]

**EFFECT AND SPIRIT.** This Article, recognizing the principle that officers and soldiers of *volunteers* in the U. S. service are a constituent part of the Army which Congress is authorized by the Constitution to raise and support,[59] and that, except as to their term of service, no legal distinction exists between them and the officers and soldiers commonly designated as "regulars," places specifically the officers of both contingents upon precisely the same footing as to precedence, command, and all other rights and duties attached or pertaining to rank or office. The term "rules and regulations" is viewed as employed in the statute in a general sense, and as intended to embrace all
1181 laws, army regulations and orders by which the rights and privileges of the members of the military establishment are defined and fixed.

**A tribute to the Volunteers.** The statute of 1867, as now represented by this Article and by Sec. 1292, Rev. Sts., is really a tribute to the services of the volunteer forces during the late war. Prior to this legislation, a discrimination, as to rank and precedence, in favor of regular officers over officers commissioned by State authority, which had been initiated by the Resolution of Congress of Nov. 4, 1775,[60] and Art. 2 of Sec. XVII of the code of 1776 had been continued in Art 98 of the code of 1806, which remained in force pending the war. But during this exigency, from the first *levée en masse* to the end of the rebellion in 1866, the volunteer element of the national army had become so vastly augmented as not only greatly to exceed all others, but finally, so far as the enlisted men were concerned, to comprise practically the efficient fighting force.[61] The public services of this class of troops had been in proportion to their numbers. Without them the rebellion could never have been suppressed or the sovereignty of the United States re-established. At the same time the *militia* proper, though valuable as far as they went, and especially at the outset of the war, had been shown to be a far less considerable and available element of our military strength.

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[58] In 15 Opins., 332–3, the Attorney General, in referring to the original provision of 1867 as having "undergone very material modification in the revision of the Statutes," observes that "part of it appears in Sec. 1292, R. S.," and "part of it also in the 123d Article."

[59] *Ante*, Chapter VIII, p. 87.

[60] This is in full as follows:—"*Resolved*, That the officers on the continental establishment shall, when acting in conjunction with officers of equal rank on the provincial establishment, take command of the latter and also of the militia; and the officers of the troops on the provincial establishment shall, when acting in conjunction with the officers of the militia, take command and precedence of the latter of equal rank, notwithstanding prior dates of commissions."

[61] Gen. R. B. Ayres, who commanded a large portion of the regular force in the late war, testified on the Warren Court of Inquiry, with reference to the state of his command at the date of the battle of Five Forks, fought at the end of the war, on April 1, 1865, as follows:—"Q. Had you any of the regulars of your division here? A. No; the regulars had been buried. I had regulars—what were known as the regular division, before I went into the battle of Gettysburg. I left one-half of them there, and buried the rest in the Wilderness. There were no regulars left."

Hence the justice, at the termination of hostilities, of placing upon the statute book an enactment testifying to the worth and importance of the volunteer forces by putting an end to the previous discriminations against them, and
1182 assimilating them in every respect, while remaining in the Army, to the most favored class of the military,[62] and, further, by providing that at any future period of war or public danger, when their employment should be authorized by Congress, they should enter and remain in the Army on the same footing and with the same rights as the permanent establishment.

**APPLICATION OF THE ARTICLE.** It is manifest from its terms, and has indeed been specifically so held by the Judge Advocate General[63] and the Attorney General,[64] that the Article is operative only at a period when regular and volunteer officers are serving together in the army as "distinctive classes of commissioned officers." The Article has therefore no *present* application; and now that all claims of officers of the army to pay, rank, &c., by virtue of their volunteer service, are practically settled, the principal significance of the statute is that which attaches to its history.

### One Hundred and Twenty-fourth Article.

**ORIGIN AND EFFECT.** The origin of this provision is to be found in the Resolution of Congress of November 4, 1775, cited under the 123d Article, and in Art. 2, Sec. XVII of 1776, reenacted in Art. 98 of 1806. Its effect is to subordinate militia officers, as to precedence, relative rank, and relative right of command, to officers both of regulars and volunteers, on all occasions of their serving jointly with the latter. As contained in the present Article, this provision is but a reiteration of the law which, existing from the initiation of the Government, has classed the militia as the inferior element of the available military strength of the nation.[65]

**DETERMINATION OF RELATIVE RANK UNDER THE FOREGOING ARTICLES.** Questions of relative rank arising under the three
1183 preceding Articles can—it may be remarked—be determined by military superiors, courts-martial, courts of inquiry, &c., only by a reference to the Army Register, or—where the rank is not stated or does not fully appear therein—to the date of the commission or appointment under which the officer is at the time serving. Claims for higher relative rank, or for priority in rank, not assigned to them by the Register, have not unfrequently been raised by officers, (especially of the staff corps,) and in some instances with good reason and justice. Such claims have in certain cases been adjusted by the Secretary of War, (after a reference sometimes to Boards of Officers for report and opinion;) but, commonly, involving, as their settlement must in general do, questions as to vested rights of others than the claimants, the latter have been referred to Congress for the relief sought. That such claims cannot be adjudicated by military courts or commanders, is quite clear. For this reason, and because the same are usually determined not by fixed principles but by the facts and circumstances of each particular instance, this class of questions will not here be discussed.

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[62] And see Art. 124, where regular and volunteer officers are assimilated in their relations to *militia* officers.

[63] Digest, 636.

[64] 15 Opins., 333.

[65] As already indicated, the Act of March 2, 1867, c. 159, s. 2, in assimilating volunteers to regulars, as to their rights and privileges, takes care by an express proviso to exclude the *militia* from any such relation.

## XXX. THE ONE HUNDRED AND TWENTY-FIFTH, ONE HUNDRED AND TWENTY-SIXTH, AND ONE HUNDRED AND TWENTY-SEVENTH ARTICLES.

[Disposition of Effects of Deceased Officers and Soldiers.]

"ART. 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.*

"ART. 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.*

"ART. 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,*
1184 *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.*"

These Articles will be considered together.

**ORIGINAL AND OTHER PROVISIONS.** The substance of these Articles is traced by Samuel [66] to the ordinances of the Tudors and Stuarts.[67] He notes the fact that at an early period *courts-martial* were invested with a peculiar probate jurisdiction in the matter of the administration of the estates of military persons,[68]—a jurisdiction of which a vestige is perceived in the requirement of our own original Articles on the subject, that the inventory of a deceased officer's effects should be made "before the next regimental court-martial."

In the existing British law, the specific provisions from which ours were taken have some time disappeared from the military code, having been superseded by a separate Act of Parliament, *viz.* the 26th and 27th Vict., c. 57, of July 21, 1863, known as the "Regimental Debts Act," in aid of which separate Regulations were issued by the Crown on April 22, 1881.[69]

In our law, the matter of the disposition of the effects of deceased military persons formed the subject of Arts. 68 and 69 of 1775, Arts. 1 and 2 of Sec. XV of 1776, and Arts. 94 and 95 of 1806.

The Articles under consideration are supplemented by regulations contained in Arts. XIII and XXII of the Army Regulations.

**APPLICATION OF THE ARTICLES.** These Articles, doubtless enacted with a view mainly to instances of officers or soldiers dying either in active service in war, or at remote posts or strictly military stations, were apparently intended to apply to cases of officers of *regiments* and soldiers of organized *companies*. They are, however, directory, only, and, by liberal construc-
1185 tion, are operative in cases of any other officers serving, at their decease, in the field or with a "post or garrison" command. So where soldiers who die when similarly serving are not members of a company, it will be within the spirit of Art. 126 for the commanding officer, whether or not a company commander, to proceed as therein specified.

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[66] Pages 656, 657. And see Clode, 1 M. F., 213.

[67] See Art. 59 of the Code of James II, in Appendix. Similar provisions were also contained in the Articles of the Earl of Essex, of 1642, and those of Charles II, of 1666.

[68] O'Brien, (p. 157,) repeats Samuel.

[69] The Act and Regulations are to be found in the Manual, pp. 633–652.

It need not affect the substantial application of the Articles that the officer or soldier deceases when temporarily *absent* from his regiment, company, &c. Such cases appear to be contemplated by pars. 82 and 151 of the Army Regulations.

The cases to which the Articles are least adapted to apply are such as those of officers or soldiers of staff corps, or aids of generals, serving at Washington, at Division or Department headquarters, or at stations which are not military posts, and officers or soldiers on the retired list. In such and similar instances, the estate, real and personal, of the deceased, while, if necessary, it may properly be placed in temporary charge of an officer of the command, will, regularly, presently be disposed of according to the laws of the State, Territory, or District, in which the party deceased or resided, or in which the property may be situate or held.

**THE DUTIES ENJOINED.** These consist in the securing of the effects, the making and transmitting of an inventory, the taking care of the property, and the accounting for and delivery of the same to the proper legal representative. A further duty is devolved upon the officer in charge of the effects, to turn them over, in the event of his absenting himself from the command, to the commanding officer.

Securing the effects. The term "secure" properly means to collect and take into safe possession. The officer designated for the duty will thus take charge forthwith of such articles of property as were in the personal possession of the officer or soldier at his decease, as also of such as, being in the possession of others, are voluntarily surrendered, or may be reached by means of an order requiring their delivery or if necessary by the use of military force. He may also, as is remarked by O'Brien,[70] receive money *voluntarily paid* in satis-
1186 faction or partial satisfaction of debts due the deceased. But the officer is merely performing a military duty; *he is in no sense an administrator.* He has therefore no authority to institute an action at law for the recovery of a debt due the estate or property withheld therefrom:[71] should he assume such a responsibility, he might render himself personally liable for the amount involved, in whole or in part, as an "executor *de son tort*"[72]—a result which the Articles clearly could not have contemplated.

The effects indeed which are required to be secured are such as are "then in camp or quarters." As to the meaning of these words, as employed in the corresponding British Articles, Hough[73] cites an opinion, given in 1819, by the law officers of the Crown, to the effect that the term refers only to movables or money actually found in quarters, "and not to effects, debts, or money in the hands of third persons." The officer will thus fully perform his strict duty under the Articles if he simply "secure" the immediate tangible personal effects of the deceased.[74]

**Making and transmitting the inventory.** The inventory is of course a detailed list of the specific effects of the deceased—clothing, furniture, valuable papers, jewelry, arms, animals and all other articles of personal property left by him in camp or quarters at his death. It should be subscribed by the officer making it, in his official capacity; and, in compliance with the direction of Art. 126, the inventory of the effects of an *enlisted man* should be made and executed

[70] Page 157.

[71] See Samuel, 659; O'Brien, 157.

[72] An executor *de son tort*, (or *of his own wrong,*) is one who, by intermeddling without legal authority with the estate, subjects himself to the liability of a regular legal representative.

[73] Page 556.

[74] As to the proceedings on the death of an officer charged with *public* property or money, see par. 85, Army Regulations.

"in the presence of two other officers," who also will properly affix their names to the paper as witnesses.

Directions as to the making up and forwarding of inventories are contained in pars. 83 and 151 of the Army Regulations.

Taking care of the property. "Care" means properly the safe custody and preservation of the articles as secured. The officer, not being an adminis-
1187 trator, is not authorized to pay, out of the effects, any debts of the deceased, or even the expenses, (if such are incurred,) of his funeral:[75] if he does so, he subjects himself to a personal liability for the pecuniary amount thus diverted.[76] The question of the authority to *sell* property in any case will be referred to under the next head. The period during which the *care* of the specific effects is in general to be exercised is limited by the Regulations[77] to "two months" in the case of an officer; in the case of an enlisted man it is evidently contemplated that it will be brief.[78]

Accounting. Art. 127 enjoins that "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." The legal representative of a deceased officer or soldier is the executor, if any, nominated by him in his will,[79] or—where there is no will, or no such nomination—the administrator appointed by the proper judge of probate, surrogate, or other authorized official. The representative must of course have been duly qualified, and the officer will not ordinarily be justified in surrendering the property to a person assuming to be the legal representative of the deceased, except upon his exhibiting formal letters testamentary granted to him by competent authority.

The words "or the proceeds thereof," which do not appear in the earlier forms of the Article, are deemed to have reference primarily to the proceeds of the sales, directed or authorized by pars. 84 and 152 of the Regulations to be resorted to after a certain interval, provided that legal representatives
1188 do not meanwhile appear. Otherwise, *i. e.* pending such interval, a sale should not be made except in an extreme instance. Where indeed, on account of some military movement or other emergency, the property, or any part of it, cannot be removed or longer cared for, or where it is perishable in its nature and cannot be kept without serious damage, the Article may be regarded as authorizing its sale and conversion into money in the interest of those entitled. The officer in charge, however, should not in general resort to a sale, other than as indicated in the Regulations, without the approval of the proper commander.

In duly turning over the specific effects or their proceeds to the administrator or executor, the military agent is discharged of his responsibility. He will properly of course take formal receipts in full for the articles or moneys delivered.[80]

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[75] As to the transportation of remains, burial, and payment of expenses of burial, see G. O. 29 of 1891, amending pars. 86, 155, A. R.

[76] "It would be at the private responsibility of the officer, if he further intermeddled with the estate of the deceased than he is of necessity authorized by the Articles, in the particulars ordained." Samuel, 659. In Memo., Dept. of the Columbia, March 23, 1873, Gen. Canby observes that the officer in charge, being "a *quasi* administrator, may properly make such expenditures as may be necessary to prevent waste or loss until the effects are taken charge of by the family, or a legal administrator is appointed." But, as we have seen, the officer is in fact not an administrator nor assimilated to one, and he could not in general therefore make such expenditures except at his own risk.

[77] Par. 84.

[78] See par. 152.

[79] As to the effect of testacy, see *post*.

[80] See par. 154, A. R.

**THE EFFECT OF TESTACY.** It may be observed in conclusion that the mere fact that the deceased officer or soldier has left a *will*, is not, (as has already been indicated,) to be regarded as dispensing with the proceedings prescribed by the Articles. Even if the will be only a *nuncupative* one,[81] 1189 a legal representative must in general be appointed and qualified before the estate can be disposed of or distributed. If indeed the deceased has bequeathed his property, (being of material value,) to a comrade or friends in the same command, and such command is so situated that the legatee or some other person present may, with but slight delay, obtain from proper authority the right to administer, it may perhaps be superfluous to resort to the precautions pointed out in the Articles. But even in such a case it will be rare that the local law will allow so speedy an issue of letters testamentary as to do away with the necessity of securing the effects in the manner indicated by the military code.

## XXXI. THE ONE HUNDRED AND TWENTY-EIGHTH ARTICLE.

[Reading and Observance of the Articles of War.]

"ART. 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.*"

**PREVIOUS FORMS.** Art. 101 of 1806 was substantially identical with the present form of this provision. A previous Article—No. 1 of Sec. XVIII of 1776—was to a similar effect, except that the reading was required to be done "once in every two months." A like requirement was contained in the corresponding British Article of 1765. It was required in the Code of Gustavus Adolphus that the articles "be read every month publicly before every regiment, to the end that no man shall pretend ignorance."

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[81] A "nuncupative" will, (from the Latin *nuncupare*, to name or pronounce orally, or without writing,) is an oral declaration of a bequest of his personal property, made *in extremis*, in the presence of witnesses or a witness, by an officer or soldier in actual military service, or by a mariner at sea. [In some States it is specially authorized to be made by other persons on occasions of mortal illness.] Nuncupative wills, which are said to have been first permitted by Julius Cæsar to his Roman soldiers, were, at an early period, adopted from the civil by the common law, and have been generally recognized and sanctioned by modern statute. The term—"in actual military service," commonly employed in the statutes on the subject, has been construed to mean on some duty associated with positive danger, as at a battle, or during a hostile movement or expedition in time of war. The fact appearing that the declaration was made upon an occasion of this character, and also that the party, being conscious and in sound mind, made it as his will, or with the *animus testandi*, and in expectation of death,—the formalities usually required for the authentication of written wills are dispensed with in the proof of the nuncupative will. The same is therefore established simply by the testimony of the person or persons present who heard the words of direction and can faithfully repeat them or their substance. There need have been but a single witness, and he need not have been specially requested to act as such by the testator. But, as it is observed by Blackstone, the act of nuncupation "must not be proved at too long a distance from the testator's death, lest his words should escape the memory of the witnesses." For particulars of the history and law of nuncupative wills, see Redfield on the Law of Wills, c. 6, s. 2; 1 Jarman on Wills, 130–1; 2 Black. Com., 500–1; Swinburne on Wills, part 1, § 14. Prendergast, 227–231; Clode, 1 M. F., 212; Hubbard *v.* Hubbard, 4 Seld., 196; *Ex parte* Thompson, 4 Bradf., 154; Prince *v.* Hazelton, 20 Johns., 501; Dockum *v.* Robinson, 6 Fost., 372; Gould *v.* Safford's Estate, 39 Vt., 498. It may be added that the policy of the law which sustains nuncupative wills will also often sustain *written* wills, executed by officers or soldiers and seamen under the circumstances above indicated, but without the formalities prescribed by statute—as, for example, wills not attested by the requisite number of witnesses. [See the above authorities.]

1190 **EFFECT.** This Article, which is a complement of the provision of Art. 2, requiring that the Articles "shall be read to every enlisted man at the time of, or within six days after, his enlistment,"[82] enjoins a further reading at fixed intervals as a regular ceremonial of the service. It is clear that where the reading is not thus reiterated, the ordinary soldier can hardly be expected to remain familiar with all the requirements of the code.[83] In some instances during the late war, where the reading had been neglected in a command, it was ordered that the Articles, or at least the principal ones, be read oftener than here prescribed, viz. once a week,[84] or—in one case[85]—twice a week. Sentences of soldiers tried by court-martial have not unfrequently been mitigated for the reason that the accused had not been sufficiently made acquainted with the Articles;[86] and the failure properly to read them on the part of commanders has been denounced as a military offence.[87] Certainly if the *reading* is not performed according to the first part of the Article, the *observance* of and *obedience* to the code required by the concluding clause can scarcely, especially in a command of which the components have been materially changed within the period indicated, be fully ensured.

It may be added that where there are enlisted men in a command who are but imperfectly acquainted with the English language, a complete compliance with the injunction of this Article will require that the Articles be not only read to them but, where necessary, specifically explained.

1191 XXXII. CONCLUDING PROVISION—SEC. 1343, REV. STS.

[Trial and Punishment of Spies.]

"SEC. 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 encampments 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.*"

**EARLIER FORMS.** Our military codes prior to that of 1806 contained no provision for the punishment of spies, nor was any contained in the British code from which our earliest Articles were derived. The first legislation in this country on the subject was the Resolution of the Continental Congress, of Aug. 21, 1776, as follows:—"*Resolved, That all persons, not members of, nor owing allegiance to, any of 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 of any of them, shall suffer death, according to the law and usage of nations, by sentence of a court-martial, or such other punishment as such court-martial shall direct.*"[88] This was the law in force during the Revolu-

[82] And note the injunction of Art. 1, that "every officer shall, before he enters upon the duties of his office, subscribe these Rules and Articles."

[83] G. O. 20, Dept. of the Mo., 1861.

[84] G. O. 12, Army of the Potomac, 1861. Do. 41, Dept. of the Ohio, 1866.

[85] G. O. 26, Dept. of the South, 1864. In this Order it was added—"one reading to be on Sunday, and, where practicable, by the chaplain."

[86] G. O. 31, Dept. of the East, 1868; G. C. M. O. 73, Id., 1872; Do. 25, Dept. of Texas, 1874; Do. 2, Dept. of Arizona, 1888. And see G. O. 23, Army of Occupation, W. Va., 1861; Do. 49, Dept. of the Susquehanna, 1864.

[87] G. O. 14, Dept. of the Ohio, 1865. See case of Lt. Col. Broughton, (Simmons § 621,) charged with falsely certifying on the monthly returns of his regiment, "that he had read the articles of war to the men under his command."

[88] 1 Jour. Cong., 450. It was further "*Ordered*, That the above Resolution be printed at the end of the Rules and Articles of War."

tionary war, and at the time of the trials of Major André, Lieut. Palmer, and others hereinafter mentioned.

The next specific enactment,[89] that of 1806, formed the concluding provision of the code of Articles of war of April 10 of that year, being in fact sec. 2 of the same Act of Congress. It provided:—"*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 of any of them, shall suffer death according to the law and usage of nations, by sentence of a general court-martial.*"

1192 This statute, except in so far as to confine the trial of spies to *general* courts and to make the death penalty obligatory in all cases of conviction, did not materially modify the original form. Citizens—as noticed in the case of Smith *v.* Shaw in 1814[90]—remained still unamenable for the crime of the spy.

The law continued without change till the period of the late rebellion, when the Article of 1806, being inadequate to the conditions of the exigency, was amended by the Act of Feb. 13, 1862, c. 25, s. 4, so as to read as follows:—"*That in time of war or rebellion against the supreme authority of the United States, all persons who shall be found lurking as spies, or acting as such, in or about the fortifications, encampments, posts, quarters, or headquarters of the armies of the United State, or any of them, within any part of the United States, which has been or may be declared to be in a state of insurrection by proclamation of the President of the United States, shall suffer death by sentence of a general court-martial.*"

By this provision, the jurisdiction for the trial of the specific offence was extended for the first time to citizens of the United States; the general term "all persons" being now evidently left unqualified for the purpose mainly of embracing the class which would naturally furnish the greatest number of offenders, *viz*, officers and soldiers of the confederate army and civilians in sympathy therewith.

The jurisdiction indeed was confined to offenses committed in parts of the United States declared to be in insurrection.[91] This restriction, however, was soon done away with, and the jurisdiction made general—*i. e.* applicable to offences committed anywhere in the United States, or in another country during a foreign war—by the Act of March 3, 1863, c. 75, s. 38. This enactment, (which made the crime cognizable also by military commission,) was expressed in the form and terms retained in the existing law—Sec. 1343,

1193 Rev. Sts., above cited. While the provision of 1863 did not expressly refer to that of 1862, as amended or repealed, it clearly entirely superseded it.

**DEFINITION OF SPY—NATURE AND PROOF OF THE OFFENCE.** A spy is a person who, without authority and secretly, or under a false pretext, contrives to enter within the lines of an army for the purpose of obtain-

[89] Meanwhile a Resolution of Feb. 27, 1778, had declared that any "inhabitant of these States," who, by giving intelligence, &c., should aid the enemy in the killing or capturing of loyal citizens, should "suffer death by the judgment of a court-martial, as a traitor, assassin, or spy." 2 Jour. Cong., 459. The designation—"spy," however is inaccurately employed in this connection.

[90] 12 Johns., 265. And see Elijah Clarke's Case, (1813,) Maltby, 35; Lousilller's Case, Guyarré, Hist. of La., vol. IV, p. 605; *Ex parte* Milligan, 4 Wallace, 44; G. O. 39, Dept. of the Mo., 1863.

[91] See case, in G. O. 39, Dept. of the Mo., 1863, of an alleged spy, whose offense was committed in Missouri prior to the date of the statute next to be mentioned, and in which it was properly held that the court-martial ordered for the trial had no jurisdiction of the offender.

ing material information and communicating it to the enemy; or one who, being by authority within the lines, attempts secretly to accomplish such purpose.[92] The information is commonly such as relates to the numbers or resources of the enemy, the state of his defences, the positions of his forces, military or naval,[93] their proposed movements or operations, and the like. The *clandestine* character of his proceedings and the deception thus practised constitute the gist or rather aggravation of the offence of the spy.[94] The statute refers to him as "lurking;" and Halleck describes him as "*insinuating himself* among the enemy." The concealment is in general contrived by his disguising himself by a change of dress,[95] by assuming the enemy's uniform,[96] by coloring the hair,[97] removing the beard or wearing a false one, assuming a false name,[98] &c.; as also by false representations, by personating another individual,[99] or by any other false pretence or form of fraud. During the recent war the majority of the persons tried and convicted as spies were officers or soldiers
1194 of the enemy's army, who, in penetrating our lines, had abandoned their proper uniform for the dress of a civilian;[100] and it was held that such an officer or soldier, discovered thus disguised, was in general to be treated, not as a prisoner of war, but as being *prima facie* a spy.[1] This presumption, however, might—it was ruled[2]—be rebutted by evidence that the party had come within the lines for a comparatively innocent purpose—as to visit his family; or, having been detained within the lines by being separated from his regiment, &c., on a retreat, had changed his dress merely to facilitate a return to the other side.[3] In such a case indeed the clearest proof would properly be required before accepting the defence.

But to be charged with the offence of the spy, it is not essential that the accused be a member of the army or resident of the country of the enemy: he may be a citizen or even a soldier of the nation or people against whom he offends, and, at the time of his offence, legally within their lines.[4] So he may either be an emissary of the enemy[5] or one acting of his own accord.

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[92] Project of Brussels Conference, Art. 19; Bluntschli § 629; Halleck, Int., Law., 460; Lieber, Instructions, G. O. 100 of 1863, § 88, Manual of Mil. Law, 270; G. O. 13, Dept. of the Mo., 1861; Do. 39, Id., 1863; Do. 23, Dept. of Kans., 1864.

[93] Note the case of Samuel Stacy, arrested in July, 1813, by Commodore Issac Chauncey of the Navy, for spying upon our fleet at Sackett's Harbor, and giving information to the enemy. *In re* Stacy, 10 Johns., 328.

[94] Authorities cited in last note; also DIGEST, 708; G. O. 174 of 1862; Do. 74, Dept. of the Ohio, 1863.

[95] In a case in G. O. 92, Dept. of the Ohio, 1864, a female spy, when arrested, was disguised as a man.

[96] Cases of "Col. Williams" and "Lieut. Dunlop" of the Confederate army. VII Rebellion Record, 6, 287.

[97] Case of S. B. Davis *alias* Willoughby Cummings. See DIGEST, 709.

[98] See cases in G. C. M. O. 215 of 1864; G. O. 24, Dept. of the East, 1865, (case of Kennedy;) Do. 92, Dept. of the Ohio, 1864; also Andrés case, Printed Trial, Philad., 1780; 2 Chandler Crim. Trials, 157.

[99] Case of Williams and Dunlop, *ante*, who personated a Colonel and Major of our army sent to inspect outposts.

[100] See cases in G. O. 267, 269, of 1863; Do. 5, 41, of 1864; G. C. M. O. 93, 152, 248, of 1864, G. O. 57, Middle Dept., 1863; Do. 3, Dept. of the Ohio, 1864; Do. 14, Dept. of the East, 1865, (case of Beall;) DIGEST, 709. So, Major André was disguised in a suit of clothes belonging to Joshua Hett Smith. 2 Chandler, C. T., 185.

[1] See Lieber's Instructions § 83; DIGEST, 708; G. O. 30, Dept. of the Mo., 1863; Do. 21, Middle Dept., 1863; Do. 23, Dept. of Va. & No. Ca., 1863; Do. 74, Dept. of the Ohio, 1863; Do. 10, Dept. of the Tenn., 1863; Do. 23, Dept. of Kans., 1864.

[2] DIGEST, 706. And see G. C. M. O. 110 of 1864.

[3] See case in G. O. 59, Dept. of the Susquehanna, 1864.

[4] See case in G. O. 26, Dept. of Va. & No. Ca., 1864, of a soldier of the *federal army* convicted as a spy.

[5] Thacher, Mil. Jour., 195, refers to "three emissaries from the enemy," tried and hanged as spies in New Jersey in 1780.

Beside the coming within the hostile lines without authority, being in disguise,[6] making false representations, &c., a most significant circumstance going to fix upon the suspected person the *animus* of the spy is the concealment of important papers or written information,[7] or the destruction or attempted destruction
1195 by him, upon being detected, of letters, dispatches, or other writings in his possession, containing information for the enemy.[8] So, of the presenting of forged or false orders purporting to be issued by the commander of the army to which the spy pretends to belong.[9] Another suspicious circumstance is an attempt to *bribe* the arresting party to allow him to proceed.[10]

But to prove him to be a spy, it is not necessary that the accused should be shown to have communicated, or even to have obtained, the desired information, or any information whatever.[11] The fact that he was "lurking" or "acting" *with intent* to obtain material information, to be communicated by himself or another to the enemy, is all that is required to complete the offence.[12]

Further, it is not necessary that the spy should be within the lines without authority.[13] One who, being legally admitted under a *flag of truce*, abuses his privilege by secretly collecting facts for the use of the enemy, renders himself liable to the punishment of the spy.[14] Such was the situation in the case of André, who, moreover, held a *passport* from Arnold. But this could not protect him from being treated as a spy, since, having been given by one who was in criminal complicity with him, it was null and void as a safe-conduct.[15]

1196 **MERE OBSERVATION OF THE ENEMY NOT THIS OFFENCE.**

It need scarcely be added that the mere observing of the enemy, with a view to gain intelligence of his movements, does not constitute the offence in question, for this may be done, and in active service is constantly done, as a legitimate act of war. As remarked in the Manual—"An officer in uniform, however nearly he approaches to the enemy, or however closely he observes his motions, is not a spy, and though taken, while thus observing, 'within the zone of operations of the enemy's army,' must be treated as a prisoner of war."[16]

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[6] In G. O. 10, Dept. of the Tenn., 1863, General Grant orders that guerillas or southern soldiers, "caught within our lines in Federal uniform, or in citizen's dress, will be treated as spies."

[7] Thus André carried official returns of the forces and state of the defences at West Point, concealed in his boots. In May, 1863, a "Miss Hozier" of Suffolk, Va., was arrested while attempting to pass our lines and reach Richmond. Concealed "in the handle of her parasol" were diagrams and papers describing the fortifications near Suffolk, and giving the strength of their garrisons. VI Rebellion Record, 77.

[8] Case in DIGEST, 709 § 3. A well-remembered instance is that of Daniel Taylor, who, upon his apprehension, after the capture of Forts Montgomery and Clinton, in October, 1777, swallowed a silver bullet which contained a dispatch from Sir Henry Clinton to Burgoyne.

[9] Williams and Dunlop, (see *ante*,) presented forged orders purporting to be signed by Gen. Rosecrans and Adjt. Gen. Townsend.

[10] This was a feature in the case of André.

[11] Lieber's Instructions § 88.

[12] See the definitions above cited; also case in G. O. 92, Dept. of the Ohio, 1864.

[13] See G. O. 346 of 1863.

[14] Lieber's Instructions § 114.

[15] See Halleck, 408. A false passport given for the purpose of concealing the identity of the party was a feature in the case of Kennedy. G. O. 24, Dept. of the East, 1865.

[16] Page 270. So Halleck, (p. 406,)—"The term *spy* is frequently applied to persons sent to reconnoitre an enemy's position, his forces, defences, &c., but not in disguise or under false pretences. Such, however, are not *spies* in the sense in which that term is used in military and international law." And see Project of Brussels Conference, Art. 22. A species of *quasi* "monomania" for discovering spies in persons who are not such has sometimes been observed in modern armies. Bluntschli § 629; Do. French version by Lardy--*id.*

Observing the enemy from a *balloon* is no more criminal than any other form of reconnoissance.[17]

**OFFENDERS WHO ARE NOT SPIES.** The nature of the crime of the spy may be further illustrated by indicating certain classes who, though guilty of a *violation of the laws of war*, and punishable therefor, are not chargeable as spies. Thus one who passes the lines without authority as a mere *letter carrier*, is not a spy;[18] nor is one who merely violates the rule of non-intercourse by trading with the enemy, or who simply gives intelligence to the enemy in violation of Art. 46. And so one who comes secretly within the lines with a view to the destruction of property, killing of persons, robbery, and the
1197 like, is not *as such* a spy.[19] Further, a person who without authority passes through the lines as a *bearer of dispatches* from one post or force of the enemy to another,[20] is *as such* not to be treated as a spy but to be held as a prisoner of war.[21]

**JURISDICTION.** A spy, under capture, is not treated as a prisoner of war but as an outlaw, and is to be tried and punished as such. Under the law of nations and of war, his offence is an exclusively military one, cognizable only by military tribunals.[22] In our law, as we have seen, an express statute has, since August, 1776, made this crime triable by court-martial, and since March, 1863, jurisdiction of the same has been given also to the military commission, a species of tribunal to be considered in PART II of this treatise.

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[17] Project of Brussels Conference as cited in last note; also Manual, Inst. Int. Law, Part II, 24; and Hall, (Int. Law,) 464. Note the interesting case, cited by Bluntschli §632 *bis*, of the Englishman, Worth, captured after leaving Paris in a balloon, in October, 1870, and brought before a German court-martial and acquitted.

[18] See cases in G. O. 39 of 1864, of persons erroneously charged as spies, who were simply arrested in our lines with letters from persons in Virginia, &c., to persons in Baltimore and elsewhere. Persons arrested carrying letters *to* enemies, however, would not be liable to be charged as spies, if they were letter-carriers merely.

[19] In the leading cases of Beall and Kennedy, though the accused were charged and convicted, *inter alia*, as *spies*, their offences were rather those of violators of the laws of war as "prowlers," (Lieber's Instructions § 84,) or guerillas; the crimes of Beall consisting mostly in seizing and destroying steamers and their cargoes on Lake Erie, and attempting to throw passenger trains off the track in the State of New York, in September and December, 1864; and the principal crime of Kennedy being his taking part in the attempt to burn the City of New York by setting fire to Barnum's Museum and ten hotels on the night of Nov. 25th, 1864. (G. O. 14, 24, Dept. of the East, 1865; Printed Trials, New York, 1865.)

[20] See Lieber's Instruction § 99. It was held in the late war that carrying communications between the confederate government in Richmond and its agents *in Canada*, did not entitle the party to be treated as a legitimate bearer of dispatches. DIGEST, 709.

[21] In the Manual, Inst. Int. Law § 24, it is declared—"Persons belonging to a belligerent armed force are not to be considered spies on entering, without the cover of a disguise, within the area of the actual operations of the enemy." And so of "messengers who openly carry official dispatches." Or, as it is expressed in the Project of the Brussels Conference, (Art. 22,)—"Military men and also non-military persons, carrying out their mission openly, charged with the transmission of dispatches either to their own army or to that of the enemy, shall not be considered as spies if captured."

See cases of persons charged as spies, but held not shown to be such and therefore entitled to be treated as prisoners of war—in G. O. 174 of 1862; Do. 228, 243, 346, of 1863; Do. 7, Army of the Potomac, 1864. Daniel Strong, executed as a spy at Peekskill, in 1777, was more properly chargeable with the distinct offence of enlisting men within our lines in violation of the laws of war. On his apprehension, "enlisting orders were found sewed in his clothes." Thacher, Mil. Jour., 74. So the case of Daniel Taylor, (*ante*,) was not properly a case of a spy but of a bearer of dispatches in violation of the laws of war.

[22] Smith *v.* Shaw, 12 Johns., 257; *In re* Martin, 45 Barb., 142; Do. 31 How. Pr., 228.

It has always been legal, however, and would still be so in time of war
1198 notwithstanding the statute, to proceed *summarily without trial* against spies; and in some of our earlier cases—that of André, for example[24]—the investigation was had, not by a court-martial, but by a court of inquiry or board ordered for the purpose, upon whose report, if to the effect that the accused was found to be a spy, the death penalty was presently executed.[25] Modern codes, however, call for a *trial* of the offender. Thus in the Manual of the Institute of International Law, of 1880, one of the most complete of the *projets* of the laws of war, it is said (§ 25)—"To guard against the abuses to which accusations of acting as a spy give rise in time of war, it must clearly be understood that—"*No person accused of being a spy can be punished without trial.*"

**Special principles.** A military court, in passing upon a case of an alleged spy, is to be governed not only by the ordinary rules of evidence but by the principles established by the usages of war as recognized in the law of nations. Of the latter there are to be noticed two jurisdictional principles peculiarly applicable to cases of spies, to wit:—

1. A spy, to be triable and punishable as such, must be taken *in flagrante delicto*, or rather before he succeeds in getting through the lines and returning to the territory or army of his own nation or people. If he thus makes good his return without being arrested, the jurisdiction for his offence does not attach but lapses, and if, subsequently to such return, he is taken prisoner in battle or otherwise captured, he is not liable to trial or punishment for the original offence.[26]

2. Further, a spy, to be punished as such, must be brought to trial and
1199 convicted during the existence, *i. e.* before the end of, the war.[26] Thus, in the case of Robert Martin, above cited, it was held that as the alleged offender had not been arrested as a spy till after the surrender of the Confederate armies and the termination of hostilities,[27] he was not subject to trial by a military tribunal; and he was accordingly discharged on *habeas corpus* from the custody of the military authorities. But, as will be noticed in a subsequent part of this treatise,[28] this second principle is not peculiar to the case of the spy alone, but applies to other cases of persons offending in time of war against the laws of war.

**PUNISHMENT.** By the law of nations the crime of the spy is punishable with death,[29] and by our statute this penalty is made mandatory upon conviction. Such penalty may be executed either by shooting or hanging. The sentence "to

[24] So, in the case of Thomas Shanks, G. O. Army Headquarters, June 3, 1878.

[25] As to the form of investigation in André's case, see Chapter XXIV, "COURTS OF INQUIRY."

[26] Project of Brussels Conference, Art. 21; Manual, Inst. Int. Law § 28; Lieber's Instructions § 104; *In re* Martin, *ante;* DIGEST, 710; G. O. 24, Dept. of the East, 1865, (Kennedy's case.) But he will be liable upon such re-capture, to be subjected to a closer surveillance. Bluntschli § 633. In Kennedy's case the point is properly taken that for an alleged confederate spy to have escaped, without arrest, into Canada, (where there were agents of his government,) was not such a *return* as to have discharged him from liability to trial and punishment for his offence.

[27] *In re* Martin, 45 Barb., 142; Do. 31, How. Pr., 228; Wells, Jur. of Courts, 577.

[27] This was the view of the court at the time. As a matter of fact, the war, at the date of Martin's arrest, (December, 1865,) had not yet ended—according to the subsequent rulings of the Supreme Court, heretofore cited. See under FIFTY-EIGHTH ARTICLE, *ante*, p. 669.

[28] Part II—"Jurisdiction of the Military Commission."

[29] Vattel, Book III, p. 179; Manual, 270; Halleck, 406, 407; Lieber sec. 88; Smith *v.* Shaw, *ante; In re* Martin, *ante;* G. O. 13, Dept. of the Mo., 1861; Do. 23, Dept. of Kans., 1864.

be shot" was in a few instances imposed during the late war;[30] but, in the great majority of cases, the form of death by hanging, as the more ignominious and severe,[31] was adjudged. In some instances, women, (who, by reason of the natural subtlety of their sex, were especially qualified for the *rôle* of the spy,) were sentenced to be hung as spies, though in their case this punishment was rarely if ever enforced.[32] In a considerable proportion of the other cases
1200 the capital punishment adjudged was executed, and commonly on the next day or within a brief period after the approval of the proceedings.[33]

It may be observed, however, that the extreme penalty is not attached to the crime of the spy because of any peculiar depravity attaching to the act. The employment of spies is not unfrequently resorted to by military commanders, and is sanctioned by the usages of civilized warfare;[34] and the spy himself may often be an heroic character. A military or other person cannot be required, by an order, to assume the office of spy; he must *volunteer* for the purpose;[35] and where so volunteering, not on account of special rewards offered or expected, but from a courageous spirit and a patriotic motive, he generously exposes himself to imminent danger for the public good and is worthy of high honor.[36] Where indeed a member of the army or citizen of the country assumes to act as a spy against his own government in the interest of the enemy, he is chargeable with perfidy and treachery, and fully merits the punishment of hanging;[37] but—generally speaking—the death penalty is awarded this crime because, on account of the secrecy and fraud by means of which it is consummated, it may expose an army, without warning, to the gravest peril; and, as Vattel[38] observes, "*puisque l'on n' a guères d'autre moyen de se garantir du mal qu'ils peuvent faire.*"

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[30] G. O. 174 of 1862; Do. 346 of 1863; Do. 39, Dept. of the Mo., 1863; Do. 4, Dept. of Ky., 1865.

[31] See Halleck, 407; G. O. 107, Dept. of the Mo., 1863.

[32] See cases in G. O. 208, Dept. of the Mo., 1864; Do. 92, Dept. of the Ohio, 1864, in which the death sentence was "disapproved." Other cases of females tried as spies are contained in G. O. 43, 93, 121, Middle Dept., 1864; Do. 102, Dept. of Va. & No. Ca., 1864; Do. 14, Dept. of the Mo. 1865.

[33] As in the case of André and that of Palmer (see *post*). And compare case in G. O. 8, Mid. Mil. Dept., 1865, also case in Do. 92, Dept. of the East, 1864, where it is announced by Gen. Dix that a certain class of alleged spies will, upon conviction, "be executed without the delay of a single day." In a case in G. O. 58, Dept. of Va. & No. Ca., 1864, it was ordered that the sentence of hanging be executed as near as practicable to the place of the arrest, "for the purpose of the example."

[34] Vattel, Book III, p. 179; Halleck, 406.

[35] Halleck, 406, 409; Manual, 270.

[36] Note the circumstances of the case of Capt. Nathan Hale. Halleck, 407.

[37] In the case in G. O. 26, Dept. of Va. & No. Ca., 1864, of a U. S. soldier convicted as a spy, the accused was sentenced to be hung, and the sentence was approved and executed. Lieut. Palmer, whose sentence was so summarily executed by Gen. Putnam in 1777, was an American who had taken a commission in the service of the enemy.

[38] Book III, p. 179.

# AMENDMENTS TO THE CODE.

WHILE no general revision of our Code of Articles is necessary, or, it is believed, desirable, yet, as indicated in the course of this Chapter, the same would, in the opinion of the author, be materially simplified and improved by a few amendments, such as the following:

1. By repealing or dropping as obsolete, superfluous, or otherwise undesirable to be retained—Arts. 1, 25, 29, 30, 52, 53, 54, 55, 76, 87 and 100, and perhaps also Arts. 64 and 94.

2. By consolidating Arts. 5 and 14, and by omitting from Arts. 6 and 14 so much as prescribes the penalty of disability to hold office, &c.

3. By so modifying Art. 45 as to make it read—"Whosoever relieves the enemy with arms, ammunition, supplies, money, *or other thing*," &c.

4. By omitting from Art. 60 the last clause, making officers and soldiers amenable to military trial after they have become civilians.

5. By re-placing Art. 62, (which specifically includes offences "not mentioned in the *foregoing* Articles,") in its former position, viz. *after* the present Art. 69, *i. e.* after all the other Articles which provide for the punishment of designated offences, and renumbering accordingly.

6. By adding to Art. 74 the words—"who shall prosecute in the name of the United States," and dropping Art. 90 altogether.

7. By amending Art. 86, so as to enlarge the power of courts-martial to punish for contempt, especially in cases of witnesses refusing to testify.

8. By so modifying Art. 113, that it shall be in harmony with Arts. 104 and 109 and with the practice as indicated in Par. 1041, A. R.

9. By inserting in Sec. 1361, Rev. Sts., after the words "sentence of court-martial, the words—*and not yet duly discharged from the military service.*

1202 10. By doing away with the requirement of the Army Regulations that evidence of *previous convictions* shall be laid before the Court, and requiring that such evidence shall be submitted to the Reviewing Commander. [See p. 388.]

11. By amending the existing law so as to allow of the simplifying of the present code of *maximum punishments*, and the restricting of such code to cases of desertion and a few other of the graver crimes only. [See p. 395.]

## Part II.—THE LAW OF WAR.

1203 **DEFINITION AND DIVISION OF THE SUBJECT.** In PART I has been considered MILITARY LAW PROPER, or that law, almost wholly enacted or written, by which the Army is governed at all times, in peace as well as in war. As to a few particulars only such as are referred to under Arts. 45, 46, 52, and the statute relating to the offence of the spy, for example—has the subject of the Law of War, now to be examined, been heretofore touched upon.

By the term LAW OF WAR is intended that branch of International Law which prescribes the rights and obligations of belligerents, or—more broadly—those principles and usages which, in time of war, define the status and relations not only of enemies—whether or not in arms—but also of persons under military government or martial law and persons simply resident or being upon the theatre of war, and which authorizes their trial and punishment when offenders. Unlike Military Law Proper, the Law of War *in this country* is not a formal written code, but consists mainly of general rules derived from International Law, supplemented by acts and orders of the military power and a few legislative provisions. In general it is quite independent of the ordinary law. "On the actual theatre of military operations," as is remarked by a learned judge,[1] "the ordinary laws of the land are superseded by the laws of war. The jurisdiction of the civil magistrate is there suspended, and military authority and force are substituted." Finding indeed its original au-
1204 thority in the war powers of Congress and the Executive, and thus constitutional in its source, the Law of War may, in its exercise, substantially supersede for the time even the Constitution itself[2]—as will be hereinafter indicated.

The Laws of War, as a distinct canon of the Law of Nations, have of late years, beside their discussion in special treatises, been, collectively or in part, formulated in a series of authoritative publications to which frequent reference will be made. Of these the principal are Lieber's "Instructions for the Government of the Armies of the United States in the field," (1863;[3]) the Geneva Convention (of 1864) "for the amelioration of the condition of the Wounded in arms in the field;" the Project of the Brussels Conference of 1874; and the "Manual of the Laws of War on Land," prepared by the Institute of International Law. (1880.) Of these the first was a most comprehensive

[1] Field, J., in Beckwith *v.* Bean, 98 U. S., 293.

[2] Thus in Varner *v.* Arnold, 83 No. Ca., 210, it is said by the court, referring to the Constitution pending the late civil war—"Its voice was hushed and its power suspended, amid the din of arms." And see New Orleans *v.* The Steamship Co., 20 Wallace, 393, cited under head of "Military Government—Magnitude of the power," *post.* And compare 1 Bishop, C. L. § 57; Whiting's War Powers, 49; Binney, "The Privilege of the Writ of Habeas Corpus."

[3] Published in G. O. 100 of the War Department, of April 24, 1863. Lorimer, Institutes of the Law of Nations, vol. 2, p. 303, refers to these Instructions as having "served as a basis for most of the subsequent compilations."

system, but the two last had the great advantage of coming after the experiences of the Austro-Prussian and Franco-Prussian wars.[4]

The present subject will be considered with reference principally to the exercise of military authority and jurisdiction under the laws of war, as illustrated by the practice of modern wars, and especially by that of our late civil war, in which, owing to the magnitude of the contest and the considerations of policy and humanity involved, belligerent rights were conceded to the enemy much as in the case of a foreign war.[5]

1205 The subject will be divided as follows:

I. The Law of War as affecting the rights of our own people.

II. The Law of War as affecting intercourse between enemies in general.

III. The Law of War as specially applicable to enemies in arms.

IV. The status of Military Government, and the laws of war thereto pertaining.

V. The status of Martial Law, and the laws of war applicable thereto.

VI. Trial and punishment of offences under the law of war—the Military Commission.

VII. Military authority and jurisdiction under the Reconstruction Acts of 1867.

## I. THE LAW OF WAR AS AFFECTING THE RIGHTS OF OUR OWN PEOPLE.

**THE TAKING OR DESTRUCTION OF PERSONAL PROPERTY.** Whether and to what extent our armies, in advancing, retreating, or operating within our own territory, in time of war, may lawfully take or destroy private property of our own citizens is a question of *necessity*. Where there exists an urgent necessity or an immediate danger, the chief commander, (for such action cannot lawfully be initiated by an inferior,[6]) may be warranted in appropriating, for the use of his army, supplies, material, buildings, animals, vehicles, &c., required for its subsistence, clothing, medical treatment, shelter, transportation, &c., or for its defence against the enemy, or in seizing or destroying such or other property to prevent its falling into the hands of the enemy or being availed of by him for attack or defence. The circumstances, however, must be urgent; the exigency immediate, not contingent or remote. Otherwise the taking, &c., is not a legitimate act of war, is not justified by the laws of war, and the

1206 commander giving the order and those acting under him are trespassers, and it is they, and not the United States, who are liable in damages to the injured party.

The law has thus been settled in repeated adjudications, especially in suits growing out of the late war, in the majority of which, however, the taking, &c., was held warranted by the circumstances of the exigency.[7]

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[4] With these may be mentioned the Declaration of St. Petersburg of 1868, as to the use especially of explosive projectiles in war; also Les Lois de la Guerre—Appel aux Belligérants et à la Presse, Gand, 28 Mai, 1877. These codes or *projets* have been set forth in sundry of the modern treatises on International Law. They are most fully published by Lorimer, vol. 2, Appendix, 303–428.

[5] See The Ouachita Cotton, 6 Wallace, 521, and other cases cited under "Licenses to Trade," "Prisoners of War," &c., *post*. "It belongs exclusively to the political departments of the lawful government to determine, in cases of civil war, what rights shall be accorded to the belligerents, or what acts of the rebellious government shall be recognized and to what extent." Latham *v.* Clarke, 25 Ark., 594.

[6] See Terrill *v.* Rankin, 2 Bush., 453; Hogue *v.* Penn., 3 Id., 663; Branner *v.* Felkner, 1 Heisk., 228; Worthy *v.* Kinamon, 44 Ga., 297; Huff *v.* Odom, 49 Id., 395.

[7] See U. S. *v.* Pacific R. R., 120 U. S., 227, 239; U. S. *v.* Russell, 13 Wallace, 623; Holmes *v.* Sheridan, 1 Dillon, 351, (a case of the taking of beef cattle from a contractor;) Farmer *v.* Lewis, 1 Bush, 66; Dills *v.* Hatcher, 6 Id., 606; Branner *v.* Felkner, 1 Heisk.,

In cases of *property taken* from our own people, by the military authorities, for the use of the troops, and used by them, where the necessity for the taking has been clearly shown, the courts of the United States, in view of the constitutional provision that private property shall not be taken for public use without due compensation, have given judgment in favor of the owner against the United States for the proper value of the things appropriated. In such cases indeed there is an implied contract to pay the reasonable worth of the supplies. Where, however, property of citizens has been *destroyed or damaged*, in an emergency arising in the course of legitimate military operations against an enemy, the owner, as it has repeatedly been adjudged, has no claim upon the government, (or upon the official who exercised authority in the case;)—such losses being classed as among the inevitable accidents and misfortunes of war for the happening of which no government or person can be held re-
1207 sponsible.[8] It has thus been ruled with reference to dwellings and their contents, other buildings, bridges, crops, &c. In some instances indeed *Congress* has specially indemnified the citizen.

But where private property has been taken or destroyed in the absence of a justifying emergency, so that there can be no right of action against the United States,—in such case the commander, by whose order the seizure, &c., was made, is held to be a trespasser and liable in damages to the owner. The leading case on this subject in our law is that of Harmony *v.* Mitchell,[9] in which judgment was given against Lieut. Col. D. D. Mitchell, commanding a Missouri regiment of Colonel Doniphan's command, on account of the appropriation, at Chihuahua in 1847, during the war with Mexico, of horses, mules, wagons and goods belonging to the plaintiff, a trader, at a time when the same, though important for facilitating the operations of the army, were not necessary for its use, and were not in danger of falling into the hands of the enemy, then more than two hundred miles distant and not advancing.

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228; Yost *v.* Stout, 4 Cold., 205; Taylor *v.* R. R. Co., 6 Id., 646; Bryan *v.* Walker, 64 No. Ca., 141; Koonce *v.* Davis, 72 Id., 218; Wellman *v.* Wickerman, 44 Mo., 484; Bowles *v.* Lewis, 48 Id., 32; Williamson *v.* Russell, 49 Id., 185—(cases of the taking of property mostly for the use of the army;) Drehman *v.* Stifel, 41 Mo., 184, (a case of the taking and occupying of a brewery as a means of defence of the city of St. Louis;) Smith *v.* Brazelton, 1 Heisk., 44; Parham *v.* The Justices, 9 Ga., 341—(cases of using land, timber, &c., for purposes of a camp or fortification;) Stafford *v.* Mercer, 42 Ga., 556; Ford *v.* Surget, 46 Miss., 130—(cases of destroying private cotton to prevent its falling into the hands of the enemy.) And see Hawkins *v.* Nelson, 40 Ala., 553; Terrill *v.* Rankin, 2 Bush, 453; Sellards *v.* Zomes, 5 Id., 90; Taylor *v.* Jenkins, 24 Ark., 342; Thomasson *v.* Glisson, 4 Heisk., 615; Clark *v.* Mitchell, 64 Mo., 564; McLaughlin *v.* Green, 50 Miss., 453.

[8] U. S. *v.* Pacific R. R. Co., 120 U. S., 227, and cases cited; Mitchell *v.* Harmony, *post;* Beasley *v.* U. S., 21 Ct. Cl., 225; Vattel, book III, c. 15, § 232; Bluntschli § 662.

[9] I Blatchford, 549. The judgment of $90,806.44 damages, awarded upon the trial in the U. S. Circuit Court, was affirmed in the Supreme Court, (Mitchell *v.* Harmony, 13 Howard, 115;) the principle of the ruling being expressed by Taney, C. J., as follows:—"There are without doubt occasions in which private property may lawfully be taken possession of, or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer, charged with a particular duty, may impress private property into the public service or take it for public use. Unquestionably, in such cases, the government is bound to make full compensation to the owner; but the officer is not a trespasser. But we are clearly of opinion that in all these cases the danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. It is impossible to define the particular circumstances of danger or necessity in which this power may be lawfully exercised. Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified."

The law, as laid down in this case, is illustrated by the later instance, occurring in 1857, of the impressing into the service of the United States by Colonel A. S. Johnson, in command of the Utah expedition, of the teams and property of certain freighters,—in which judgments were rendered in favor of these parties against the United States for the value of the property taken.

The military orders made and executed in this instance evidently
1208 "were," observes Attorney General Bates,[10] "the wise and proper precautions of an officer to protect his own force and prevent his enemy from being strengthened;" and he holds that these orders and acts of Col. Johnson were "justified by military necessity," thus contrasting the case with that of Harmony *v.* Mitchell, as adjudged.[11]

A material difference between the cases of Mitchell and Johnson was that the claims of the freighters in the latter were, by legislation of Congress, referred to the Court of Claims for adjudication—which left little more to that Court than to assess the value of the property taken. It may be added, as to Mitchell's case, that it was clearly a hard one, and, by special Act of March 11, 1852, he was relieved of the judgment against him, which was assumed and paid by the United States.

**ARREST AND RESTRAINT OF PERSONS.** The Laws of War authorize the arrest, trial and punishment of such of our own people as may become chargeable with relieving or communicating with the enemy, carrying on illicit trade or intercourse, or other violation of those Laws. The liability and disposition of such offenders has already been in part considered under the 45th and 46th Articles of War, and will be further discussed in treating of the jurisdiction and powers of the MILITARY COMMISSION. The restraints which may be exercised over the citizen will also enter into the consideration of the subject of MARTIAL LAW.

## II. THE LAW OF WAR AS AFFECTING INTERCOURSE BETWEEN ENEMIES IN GENERAL.

**RULE OF NON-INTERCOURSE.** The principle here to be noticed is simply that of the absolute non-intercourse of enemies in war. As frequently reiterated in the rulings of the Supreme Court, not merely the opposed military forces but all the inhabitants of the belligerent nations or districts become, upon the declaration or initiation[12] of a foreign war, or of a civil war, (such as was
1209 the late war of the rebellion,) the enemies both of the adverse government and of each other,[13] and all intercourse between them is terminated and

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[10] 10 Opins. At. Gen., 23.

[11] See Irwin *v.* U. S., 23 Ct. Cl., 149; U. S. *v.* Irwin, 127 U. S., 125; 10 Opins. At. Gen., 21.

[12] As to what constitutes such declaration or initiation, see *ante;* "Fifty-Eighth Article," Part 1, p. 668.

[13] Vattel, 321; Manning, 166; Dana's Wheaton § 345; 1 Kent, Com., 55; Halleck, 357; Jecker *v.* Montgomery, 18 Howard, 112; White *v.* Burnley, 20 Id., 249; Prize Cases, 2 Black, 666; Mrs. Alexander's Cotton, 2 Wallace, 274; The Venice, Id., 418; Coppell *v.* Hall, 7 Id., 542; Texas *v.* White, Id., 700; Lamar *v.* Browne, 92 U. S., 194; Ford *v.* Surget, 97 Id., 594; Dow *v.* Johnson, 100 Id., 164. "In the state of war nation is known to nation only by their armed exterior; each threatening the other with conquest or annihilation. The individuals who compose the belligerent States exist, as to each other, in a state of utter occlusion. If they meet, it is only in combat. War strips man of his social nature." The Rapid, 8 Cranch, 160. (Johnson, J.)

This view, however, is strongly combated by Bluntschli (§ 531). "Die Privaten," he writes, "als solche sind bei diesem Streite nicht unmittelbar betheiligt, sie sind nicht Kreigs- und nicht Process-parteien, und eben desshalb nicht Feinde im eigentlichen und vollen Sinn des Worts."

interdicted.[14] Hence the general rule that, pending the war, all domestic, social, and business relations are forcibly severed; all interchange, however personal and intrinsically harmless, is forbidden; no new contracts or engagements can be entered into; existing partnerships and joint undertakings are dissolved, and existing contracts and pecuniary obligations are suspended,[15] and "the courts of each belligerent are closed to the citizens of the other."[16]

1210 **ENFORCEMENT AND VIOLATION OF THE RULE.** The drawing of strict army lines, the patrolling, with troops or armed vessels, of the territory, rivers, &c., intervening between the belligereuts, and the establishment of military posts upon main routes of travel and of blockades of important ports, while measures defensive and offensive as against the hostile forces, are also efficient means for the enforcement of this rule of non-intercourse. Infractions of this rule, by selling to, buying from or contracting with enemies, furnishing them with supplies, corresponding, mail carrying, passing the lines without authority, &c., are *violations of the laws of war*, more or less grave in proportion as they render material aid or information to the enemy or attempt to do so, and, as will hereafter be illustrated, are among the most frequent of the offences triable and punishable by *military commission.*

**EXCEPTIONS TO THE GENERAL RULE—LICENSES TO TRADE.** By the custom of war, however, certain exceptions have come, from necessity or considerations of policy or humanity, to be admitted to the general rule of non-intercourse. Among the more familiar of these exceptions are the use of flags of truce, the entering into armistices, cartels, or other conventions, and the exchange of prisoners of war. These will be noticed under the next Title, as relating to the carrying on of war and the treatment of captives.

A more distinctive exception is the licensing of trading between belligerents. Early in our late civil war, which, because of its great proportions, was assimilated to a foreign war, and in which, as has been remarked, belligerent rights were conceded by the United States to the Confederate forces,[17] an Act of Congress of July 13, 1861, c. 3, s. 5, in supplementing the law of war by specifically interdicting commercial intercourse with the insurrectionary States, yet authorized the President in his discretion to license such intercourse in particular instances when deemed conducive to the public interests. Such licenses being exceptional, it was held by the Supreme Court that they were to be strictly
1211 construed;[18] also that no authority other than the President could grant a

[14] "Interdiction of trade and intercourse, direct or indirect, is absolute and complete by the mere force and effect of war itself." Prize Cases, 2 Black, 688. And see the other authorities cited in last note; also Woolsey § 117; Schooner *v.* Patriot, 1 Brock, 421; The Julia and Cargo, 1 Gallison, 603; The Sea Lion, 5 Wallace, 630; The Ouachita Cotton, 6 Wallace, 521; Hanger *v.* Abbott, Id., 535; McKee *v.* U. S., 8 Id., 163; U. S. *v.* Lane, Id., 195; U. S. *v.* Grossmayer, 9 Id., 72; Montgomery *v.* U. S., 15 Id., 395; Hamilton *v.* Dillin, 21 Id., 73; Mitchell *v.* U. S., Id., 350; Desmare *v.* U. S., 93, U. S., 612; Brown *v.* Hiatt, 1 Dillon, 372 and 15 Wallace, 184.

[15] Hoare *v.* Allen, 2 Dallas, 102; Foxcraft *v.* Nagle, Id., 132; Manning, 176; and cases cited in the two preceding notes. But "war does not confiscate debts or property for the benefit of debtors, but only suspends the right of action." Caldwell *v.* Harding, 1 Lowell, 329. As to the unlawfulness of the act of drawing bills by or upon enemies during the late war, see Britton *v.* Butler, 9 Blatchford, 457; Williams *v.* Mobile Sav. Bk., 2 Woods, 501; Woods *v.* Wilder, 43 N. Y., 164; Lacy *v.* Sugarman, 12 Heisk., 354. That exceptions to the general rule stated in the text may be admitted in cases of prisoners of war drawing bills for subsistence furnished them by enemies, (or for their ransom,) see Antoine *v.* Morehead, 6 Taunton, 237; Halleck, 359; DIGEST, edit. of 1868, p. 292.

[16] Brown *v.* Hiatt, 15 Wallace 184.

[17] Dow *v.* Johnson, 100 U. S., 158; Stevens *v.* Griffith, 111 U. S., 51; Freeland *v.* Williams, 131 U. S., 416; U. S. *v.* Pacific R. R., 120 U. S., 233.

[18] The Reform, 3 Wallace, 632; McClelland *v.* U. S., 21 Id., 98; Cutner *v.* U. S., 17 Id., 617; Millar *v.* U. S. 8 Ct. Cl., 487; Cone *v.* U. S., Id., 421.

license, so that licenses to trade with enemies assumed to be given by military commanders were "nullities."[19] By later legislation of July 2, 1864, the Secretary of the Treasury was empowered, with the approval of the President, to purchase, "for the United States," the products of insurrectionary States, which, it was provided, should be sold and the proceeds paid into the Treasury.

## III. THE LAW OF WAR AS SPECIALLY APPLICABLE TO ENEMIES IN ARMS.

**RIGHTS AND OBLIGATIONS OF WARFARE IN GENERAL.** The conduct of war between civilized belligerents is required by modern usage to be governed by certain general principles—such as the following:

I. That war is waged against the State as a belligerent only, and not against the individual citizens or subjects.[20] Except where unavoidable, in the course of legitimate operations, private individuals and non-combatants are not to be involved in injury to life, person, or property.

II. That the operations of war are to be carried on only by the legitimate military forces of the State.

III. That only legitimate weapons and means of warfare are to be employed.

IV. That all truces and conventions are to be observed strictly and in good faith.

V. That prisoners of war are to be treated with humanity and exchanged without unreasonable delay.

VI. That each belligerent shall duly punish all persons within his lines who may be guilty of violations of the laws of war.

**I. WAR PROPER.—1. Immunity of private individuals and non-**
1212 **combatants.** The State is represented in active war by its contending army, and the laws of war justify the killing or disabling of members of the one army by those of the other in battle or hostile operations. In such operations would be included, with us, Indian hostilities. Thus, in May, 1891, under the ruling of the U. S. District Court for South Dakota, the Indian chief "Plenty Horses" was acquitted by a jury of the alleged murder of an officer of our army, on the ground that the killing was legitimate as being incidental to a state of war then pending. But it is forbidden by the usage of civilized nations, and is a crime against the modern law of war, to take the lives of, or commit violence against, non-combatants and private individuals not in arms, including women[21] and children[22] and the sick, as also persons taken

[19] The Ouachita Cotton, 6 Wallace, 521; Coppell *v.* Hall, 7 Id., 542; McKee *v.* U. S., 8 Id., 163.

[20] "Operations of war must be directed exclusively against the forces and the means of making war of the hostile State, and not against its subjects, so long as the latter do not themselves take any active part in the war." (Brussels Conference, Original Project, Gen. Prins. § II.) Only "die Kriegführenden Staten sind Feinde im eigentlichen Sinn." Bluntschli § 531. And see Same, *ante*, p. 776, note. "Ich führe Krieg mit den französichen Soldaten und nicht mit den französichen Bürgern."—Proclamation of the German Emperor on entering France in 1870. And see Woolsey, (6th ed.,) 220–1.

[21] A grave instance of this crime, consisting in the outraging of women, was that charged to have been committed by the British forces, at the capture of Hampton, Va., in July, 1813. See Report of Com. of the Ho. of Reps., of July 31, 1813, Am. State Papers, Mil. Affairs, vol. 1, pp. 375–381.

[22] In Art. 5, (Sec. V,) of the Articles of Charles I, (taken from Art. 97 of Gustavus Adolphus,) it is prescribed that—"No man shall presume to * * * tyrranize over any churchmen, schollers, or poore people, women, maides, or children, upon paine of death, or other such punishment as in a strict Councell of Warre shall be awarded."

prisoners or surrendering in good faith.[23] Another class who are to be exempt from violence, or seizure as prisoners, are the surgeons, assistants and employees charged with the care and transport of the wounded on the field and the attendance upon them in field ambulance or hospital. Persons of this class

"enjoy the rights of neutrality, provided they take no active part in the
1213 operations of war."[24] Of this description are the persons who are employed under the rules of the Geneva Convention and wear its distinctive badge.[25] Inhabitants of the country, who in good faith bring aid to the wounded in the field or assist in their care, are included in this protection.[26] Camp-followers, though they may be made prisoners, are to be treated as non-combatants, so long as they abstain entirely from offensive acts. Sick or wounded officers or soldiers taken in the field or in hospital, are prisoners of war, and entitled to receive the same treatment as members of the capturing army similarly disabled.[27]

The observance of the rule protecting from violence the unarmed population is especially to be enforced by commanders in occupying or passing through towns or villages of the enemy's country.

All officers or soldiers offending against the rule of immunity of non-combatants or private persons in war forfeit their right to be treated as belligerents, and, together with civilians similarly offending,[28] become liable to the severest penalties as violators of the laws of war.

**2. Disposition of property.** By the *strict* law of war, all effects of the enemy, whether taken in battle or seized in his territory or elsewhere during the war, and whether belonging to his government or to individual subjects, become the absolute property of the capturing belligerent, who may use or dispose of the same at his discretion.

**Public property.** This right of title and appropriation, as will be seen in considering the question of the government of occupied country of the enemy, does not in general apply to his lands or real property, but it covers all the other

effects of the State—funds, money-securities, munitions, supplies, means
1214 of transport,[29] &c. All such may be seized and utilized, without reserve, for the prosecution and purposes of the pending hostilities and status.

Such property may also be, at will, *destroyed;* and this right extends to the factories, mills, foundries, warehouses, depots, offices, or other buildings in which

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[23] Dana's Wheaton § 343; Halleck, 426, 429; Lieber, Inst. § 22, 37, 44. "It is forbidden to mutilate or kill an enemy who has surrendered at discretion, or is disabled." Manual, Laws of War, Part II, § 9. And see, to a similar effect, Project, Brussels Conference, Art. 13; Bluntschli § 585. A marked instance of a conviction of the alleged unlawful taking of the life of a disabled enemy after he had practically surrendered was that, published in G. C. M. O. 505 of 1865, of the killing of Brig. Gen. R. L. McCook, in Alabama, in 1862. But the capital sentence in this case was subsequently in effect remitted by an order directing that the offender be held as a prisoner of war. See G. C. M. O. 204 of 1866. Compare State *v.* Gut, 13 Min., 341. The "Fort Pillow Massacre," or the putting to death, on the capture of Fort Pillow, in Tennessee, in April, 1864, by Forrest's command, of several hundred of the garrison, white and black, after they had surrendered, was a crime—the extremest of that period—against the laws of civilized warfare.

[24] Original Project, Brussels Conference, Ch. VII § 38. Hall, p. 338, refers to them as "neutralised."

[25] "Croix rouge sur fond blanc." Geneva Convention, Art. VII.

[26] "Les habitants du pays qui porteront secours aux blessés seront respectés et demeureront libres." Geneva Convention, Art. V.

[27] Modern codes forbid declarations "that quarter will not be given," in war. Manual, Laws of War, § 9; Project, Brussels Conference, Art. 13. It is also "forbidden," in the Manual § 19, "to strip and mutilate the dead lying on the field of battle."

[28] Case of Gurley, in G. C. M. O. 505 of 1865.

[29] White *v.* Red Chief, 1 Woods, 40.

munitions of the enemy may be manufactured, stored, &c.;—all or any such may be destroyed to deprive the enemy of their benefit, or cripple him in the prosecution of hostilities, or where their demolition may be required for purposes of defence.[30] But from any such disposition are to be exempted all public institutions of a civil character, such as capitols, state-houses, buildings of the departments of the government, court-houses, churches, colleges, schools, libraries, hospitals and asylums, as well as museums and collections of art and science and historical monuments. All such edifices, and in general their contents, should be spared from destruction or desecration by an army on the march, or upon the capture or attack of a town.[31] The destruction by burning of the Capitol and President's House, at Washington, by the British forces in 1814, was a proceeding such as the modern law of war would condemn as wanton and without justification.[32]

1215 **Private property—Its seizure.** As to this species of property, the strict war right of seizure has been very materially qualified by modern usage. Private property, (whether of individuals or private corporations,) is now in general regarded as properly exempt from seizure except where suitable for military use or of a hostile character.[33] Thus supplies or material available as military stores, munitions, or means of transport, which are required for his army, or would be serviceable to the enemy, may always be appropriated by a belligerent, when in private as well as when in public possession. In our late civil war the capture of private property of enemies (valuable or useful for public purposes) was authorized "without regard to the status of the owner,"[34] and it was declared to be the duty of the military, as of the naval forces at sea, to take and hold such property on behalf of the government.[35] In deference,

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[30] During the late civil war a considerable number of *salt-works* were destroyed in the enemy's country by the federal forces. See Rebellion Record, vol. VI, pp. 10, 11, 12, 24, 41; vol. VII, pp. 11, 33, 311; vol. VIII, pp. 49, 419.

[31] Vattel, 368; 1 Kent, 93; Halleck, 456; Dana's Wheaton § 346. Compare Executive Order of July 22, 1862. Note also Arts. 97 and 98 of the Code of Gustavus Adolphus, (and Art. 5, Sec. V, of Charles I, derived therefrom,) making punishable the firing or despoiling of churches, hospitals, schools, colleges and mills. And see Christian Co. Ct. *v.* Rankin, 2 Duvall, 502, a case in which two confederate soldiers were held liable for damages for assisting, though under the orders of a superior, in the destruction by burning of the court-house of Christian County, Ky.

"All destruction of or intentional damage" to such institutions is "forbidden unless it be imperatively demanded by the necessities of war." Manual, Laws of War, Part II, 53. "All necessary steps should be taken to spare as far as possible buildings devoted to religion, arts, sciences and charity, hospitals and places where sick and wounded are collected, on condition that they are not used at the same time for military purposes." Project, Brussels Conference, Art. 17. The plundering, by the British at New York, in 1776, of the City Hall Library, and of the Yale College Library in 1779 by Tryon's command, were acts of vandalism which would scarcely be possible at this day.

[32] Halleck, 456; Woolsey § 131; Dana's Wheaton § 351. And see opinion of the Court of Inquiry in the case of Brig. Gen. W. H. Winder, commander of the American forces, of February, 1815. The act was emphatically denounced at the time in the British House of Commons by Sir James Mackintosh. Hansard, Parl. Deb., vol. XXX, 526.

[33] See Dana's Wheaton § 346; 1 Kent, Com., 91 Woolsey § 129; Halleck, 456; U. S. *v.* Klein, 13 Wallace, 137; Dow *v.* Johnson, 100 U. S., 167; Gates *v.* Goodloe, 101 Id., 612.

[34] Lamar *v.* Browne, 92 U. S., 194. "What shall be the subject of capture, as against the enemy, is always within the control of every belligerent." Id., 187.

[35] Lamar *v.* Browne, *ante*, 187, 194, 196. In an "Executive Order," dated "War Department, Washington, July 22, 1862," it was ordered, among other things, as follows:—"That military commanders within the States of Virginia, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas and Arkansas, in an orderly manner, seize and use any property, real or personal, which may be necessary or convenient for their several commands for supplies, or for other military purposes; and that while property may be destroyed for proper military objects, none shall be destroyed in wantonness or malice." And see G. O. 154, Army of the Potomac, 1862, containing directions for carrying out this Order.

however, to "the humane maxims of the modern law of nations, which exempts private property of non-combatant enemies from capture as booty of war,"[36] Congress, (which is empowered by the Constitution to "make rules concerning captures on land and water,") by special legislation, during the war, provided for the conversion of all captured private property, (except such as had been "used," or "was intended to be used, for waging or carrying on war
1216 against the United States, such as arms, ordnance, ships, steamboats, or other water craft, and the furniture, forage, military supplies, or munitions of war,")—which was not required for public use, into money, and the deposit of the proceeds in the Treasury, subject to the claims of the original owners and their recovery of the same, on proof of loyalty to be made within a certain prescribed period.[37] The subject of the capture of *cotton*, which was the article chiefly disposed of under this legislation, will be more appropriately considered in treating, under the next Title, of enemy property in territory permanently occupied.

But all the captures recognized as legitimate in our law and practice have been captures for, and by the authority of, the United States. No taking for private use or gain has been allowed,[38] but such taking has been regarded as a grave military offence in violation of the 42d or other Article of war. The spoil or booty sometimes permitted to European armies, of property seized on the battle-field or at the storming of a fortified place,[39] would not be recognized as legal in our law,[40] but property thus captured would be considered as within the spirit if not the letter of the 9th Article, which provides that stores taken from the enemy shall accrue to the United States.[41]

It is to be added that private property subject to seizure should be taken under the orders of a competent commander or specially authorized public agent. Inferior officers or soldiers seizing of their own will such property act without authority and are trespassers, liable as such in damages to the owners.[42]

1217 The subject of the exacting of money or other private property of enemies, by way of *contribution* to the support of the government or army, or of *indemnity* to individuals, will be more appropriately considered under the next Title.

**Private Property.—Its destruction.** The wanton *destruction* of private property is even less favored than its indiscriminate seizure. Thus the Project of the Brussels Conference, declares that the laws of war, in disallowing "to belligerents an unlimited power as to the choice of means of injuring the enemy," forbid all destruction of private property "which is not imperatively required by the necessity of war."[43] Such destruction may indeed be justified where resorted to in furtherance of the legitimate operations of war. Thus,

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[36] U. S. *v.* Klein, *ante;* Lamar *v.* Browne, *ante*, 194.

[37] Act of March 12, 1863, known as the "Captured and Abandoned Property Act." And see the latter provision of the Act of March 3, 1871, c. 116, s. 2, for the reimbursement of *loyal* citizens for "stores, supplies, &c., taken or furnished during the rebellion for the use of the army of the United States, in States proclaimed in insurrection."

[38] U. S. *v.* Klein, *ante;* Lamar *v.* Browne, *ante;* Decatur *v.* U. S., Devereux, 110; Branner *v.* Felkner, 1 Heisk., 228; Moran *v.* Smell, 5 West Va., 26; Halleck, 462–4.

[39] See Vattel, (Chitty's edition,) 366; Dana's Wheaton § 346; 1 Kent, Com., 92; Halleck, 457, 462.

But this is not now favored. Thus it is declared by the Brussels Conference, (Project, Art. 18,)—"A town taken by storm should not be given up to the victorious troops to plunder." So; in the Manual of the Institute (§ 32,)—"It is forbidden to pillage even in the case of towns taken by assault."

[40] See Witherspoon *v.* Farmers' Bank, 2 Duvall, 497.

[41] "NINTH ARTICLE," Part 1, ch. XXV.

[42] Lewis *v.* McGuire, 3 Bush, 202; Branner *v.* Felkner, 1 Heisk., 228.

[43] Art. 13. And see Manual of the Laws of War § 32.

such property may be destroyed where otherwise it would fall into the hands of the enemy by whom it would be utilizable for the maintenance of his army or other military purpose;[44] or where it is serving as a shelter or defence to the enemy; or where its use is required in the construction of military works; or where it interrupts the fire of the guns of a fort or battery. But the extent of the destruction must be limited by the requirements of the exigency. Thus while the burning of isolated private dwellings or buildings may, in rare and exceptional cases, be excused by an emergency of war, the firing of a town or village, unless accidentally caused by its being involved in an engagement or other legitimate hostile operation,[45] is an inexcusable act in violation of the laws of war, not justifiable even by way of retaliation. Such were the burnings at Charlestown, Mass., at New London, Fairfield, Norwalk, Danbury and Stonington, Conn., and at Kingston, New York, by the British, in the Revolutionary war. The burning or partial burning of the town of Chambersburg, Pa., 1218 on July 30, 1864, during the late civil war, was also an instance of such an act.[46]

The rule inhibiting the destruction of private property applies indeed with peculiar force where open towns and villages in the enemy's country become the scene of an engagement or of active operations. It is laid down by modern codes that such places are not to be attacked at all unless defended; and that if the same are bombarded, fair warning should first be given by the attacking commander.[47] If some buildings must be burned, blown up, or pulled down, special care should be taken that those which may be occupied as hospitals or in which the wounded are cared for, should not be involved. The Geneva Convention, (Art. V,) provides—"*Tout blessé recueilli et soigné dans une maison y servira du sauvegarde.*"

**II. THE FORCES BY WHICH WAR IS TO BE WAGED.** It is the general rule that the operations of war on land can legally be carried on only through the recognized armies or soldiery of the State as duly enlisted or employed in its service. Such, with us, are the forces which are designated in our Constitution as army or land forces and militia; the former including regulars, volunteers and drafted men, as also marines when associated with the land forces;[48] the latter being State troops called into the service of

[44] It is on this ground that the *raids* of the civil war were justified; as, for example, that of Gen. Sheridan's army, in the Shenandoah Valley, in 1864. See Draper's History of the War, vol. 3, p. 411; Manning, Commentaries on the Law of Nations, p. 139.

[45] As in the cases of the burning of public property by the orders of Gen. Hardee, on the evacuation of Charleston, and by the orders of Gen. Ewell, on the evacuation of Richmond, in the late war, to prevent such property falling into the hands of the national forces; when the incidental destruction of the large amount of private property which was involved, was claimed to have been inevitable.

[46] See full account in Moore's Rebellion Record, vol. II, pp. 537–544. As to the burning of Columbia, So. Ca., on February 17, 1865, it is the conclusion of the author, upon the testimony, that this, though perhaps initiated in the burning of the cotton, by the orders of Gen. Hampton, cannot fairly be fixed upon any responsible commander of either the Federal or the Confederate army, but was probably the work of irresponsible persons, by whom—for purposes of plunder or mischief—it was caused to spread and become general. On this question the student may be referred to the printed "Testimony," in the State Department, of the "British and American Mixed Commission," vol. 14, Claims 103, 292, &c.; Howard's Report on British-American Claims, pp. 49, 433–512; Gen. Sherman's Report on the Campaign of the Carolinas, of April 4, 1865; Letter from Gen. Hampton to Hon. Reverdy Johnson, U. S. Senate, of April 21, 1866, published in the "Southern Historical Papers," vol. 7, pp. 156–158; Paper by Col. Jas. Wood Davidson, in same vol., p. 185; also Papers in vol. 9, p. 202, vol. 10, p. 109, and vol. 12, p. 238, of the "Southern Historical Society."

[47] Project of Brussels Conference. Arts. 15, 16; Manual of Laws of War § 32, 33.

[48] See Sec. 1621, Rev. Sts.; the Seventy-Eighth Article of War; Ch. VIII, *ante*.

1219 the United States.[49] We have in our armies no *civil* branch such as is found in the more elaborate military establishments of foreign countries;[50] all our officers being alike commissioned and our soldiers alike enlisted in the military service as such.

**IRREGULARS**—"Guerillas." Irregular armed bodies or persons not forming part of the organized forces of a belligerent, or operating under the orders of its established commanders, are not in general recognized as legitimate troops or entitled, when taken, to be treated as prisoners of war, but may upon capture be summarily punished even with death. Such parties have made their appearance on the skirts of armies in all wars. The cowboys and skinners of our Revolution, the guerilleros of the Mexican war,[51] the Russian bashi-bazouks, the Italian *condottiere*, and the French *francs-tireurs* in the Franco-German war,[52] have been classified in this category.

The government of a belligerent, however, has sometimes sanctioned the employment of such troops and claimed for them the rights of prisoners, as being contingents of their armies. Thus the Confederate "partisan rangers," though their actual service was apparently sometimes scarcely within the pale of legitimate warfare,[53] were asserted by their government to be a
1220 "part of the regular provisional army of the Confederate States."[54]

Where indeed the opposing belligerent is unwilling to accept a certain force of its enemy as entitled to the rights of regular troops, it is open to it to announce that it will not so recognize them.

But a species of armed enemies whose employment in a military capacity was not and could not be justified were the so-called "guerillas" of our late civil war.[55] These were persons acting independently, and generally in bands,

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[49] Ch. VIII, *ante*—"The Militia, &c."

[50] "The armed force of a State comprehends—1. The Army properly so-called, including militia; 2. National Guards, Landsturm, and all corps which satisfy the following requirements—(a) That of being under the direction of a responsible leader; (b) That of wearing a uniform or a distinctive mark, which latter must be fixed, and capable of being recognized at a distance; (c) That of bearing arms openly." Manual, Laws of War § 1, 2. And see to a similar effect, Project, Brussels Conference, Art. 9. These provisions also recognize, as forming "part of the armed forces of the State," the population of a territory not yet occupied by the enemy, who, on his approach, spontaneously take up arms to resist the invading army, "even though, owing to want of time, they have not organized themselves militarily."

[51] See G. O. 372, Hdqrs. of Army, 1847. After the battle of Cerro Gordo, guerilla warfare became in fact a systematic mode of prosecuting hostilities sanctioned by the Mexican government. Compare Halleck, 438.

[52] According to the German view, which apparently did not then recognize the *levée en masse*. See Hall, 402, 447, 450; Creasy, 476–478, 489; Edwards, "With the Germans in France," 204–208, 278; also Bluntschli § 570, 570 *bis*.

[53] In an order of June 17, 1862, Maj. Gen. Hindman, Comdg. Trans-Miss. Dist., calls upon "citizens not subject to conscription" to organize into "independent companies of mounted men or infantry, as they prefer, arming or equipping themselves." Pay and allowances are promised, and they are "to be governed by the same regulations as other troops." Their purpose is stated to be—"to cut off Federal pickets, scouts, foraging parties and trains, and to kill pilots and others on gunboats and transports." V Reb. Rec., 540. In the same year, Col. J. D. Imboden, in publicly announcing that he is raising a regiment of "partisan rangers," declares—"My purpose is to wage the most active warfare against our brutal invaders and their domestic allies; to hang about their camp and shoot down every sentinel, picket, courier, and wagon driver we can find." Reb. Rec., Comp. vol., 757.

[54] Letter of Geo. W. Randolph, Secretary of State, Confederate States, to Hon. John B. Clarke, C. S. Senate, July 16, 1862. And see Act of Confederate Congress of Feb. 17, 1864.

[55] Called "guerilla-marauders" in the act of July 2, 1864, c. 215, and the 105th Article of war. They were also styled, in different localities, "bushwhackers," "jayhawkers," "regulators," &c. Prof. Lieber, (Inst. § 82, 84,) refers to them as "high-

within districts of the enemy's country or on its borders, who engaged in the killing, disabling and robbing of peaceable citizens or soldiers, in plunder and pillage, and even in the sacking of towns, from motives mostly of personal profit or revenge.[56] Not being within the protection of the laws of war, they were treated as criminals and outlaws, not entitled upon capture to be held as prisoners of war, but liable to be shot, imprisoned, or banished, either summarily where their guilt was clear or upon trial and conviction by mili-
1221 tary commission. Numerous instances of trials, for "Violation of the laws of war," of offenders of this description, are published in the General Orders of the years 1862 to 1866.[57]

A modern belligerent would certainly be justified in refusing to recognize as legitimate forces any contingent in its enemy's army of uncivilized combatants who would not be likely to respect the laws of war—such as were the Indians employed in our early history.[58]

A complete code would further, in the author's opinion, discountenance the employment by one belligerent of any considerable body of *mercenaries*, subjects of a foreign government with which the other belligerent was at peace.

**III. WEAPONS AND MEANS OF WARFARE—Projectiles, &c., not approved.** The weapons in legitimate use in war change with the progress of inventive science. The list of legitimate weapons has been increased in modern times, as by the mitrailleuse or machine gun, the repeating rifle, the tor-
1222 pedo and sundry new explosives. An illegitimate weapon of war would be one which, in disabling or causing death, inflicted a needless, unusual and unreasonable amount of torture or injury and the deliberate use of such a weapon would properly be treated as a violation of the laws of war. In the Declaration of St. Petersburg of 1868, it was agreed by the powers concerned "to renounce, in case of war among themselves, the employment, by their military or naval forces, of any projectile of less weight than 400 grammes, which

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way robbers or pirates" and "armed prowlers." In his "Guerilla Parties," Miscellaneous Writings, vol. 2, p. 277, he more fully defines this class, distinguishing them from *partisans*, &c.

[56] As in the cases of Olathe, Ks., (V Reb. Rec., 73;) Shawnee, Ks., (VI Do., 4;) Shawneetown, Ks., (VII Do., 3;) Lawrence, Ks., (Do., 43;) Charleston, Mo., (VIII Do., 1;) Mayfield, Ky., (Do., 51.) And see V Do., 46, 50, 67, 78; VI Do., 75; XI Do., 469.

[57] Some of the more marked of the numerous cases of Guerillas, sentenced to death for homicides or other violence in the late war, are found in G. O. 135, 267, 382—of 1863; Do. 23, 41, (six cases,) 52, 62, 71; G. C. M. O. 87, 93, 98, 110, (eight cases,) 153, 198, (Jessie A. Broadway,) 202, 208, 209, 210, 211, 215, 216, 218, 219, (Jourdan Moseley,) 246, 250, 276, 302—of 1864; Do. 51 of 1866; G. O. 93, Dept. of the Ohio, 1864, (seven cases;) Do. 32, Northern Dept., 1865; Do. 51, Dept. of the Mo., 1864, (John D. Mulkey;) Do. 12, Dept. of Tenn., 1865, (Champ Furguson;) Do. 7, Id., 1866; Do. 22, Dept. of the Tenn., 1865; G. C. M. O. 3, Dept. of Ky., 1865, (Jerome Clark *alias* Sue Mundy;) Do. 4, Id., Do. 24, Id., (Tobe Long *alias* Columbus M. Biassee;) Do. 26, 27, Id.; Do. 108, Id., (Henry C. Magruder;) Do. 11, Id., 1866, (Samuel O. Berry.)

Among the principal cases of persons of this class capitally sentenced for the seizure, burning, or destruction, of steamboats, buildings, railroad trains and bridges, telegraph lines, &c., were those of Robt. Louden, (G. O. 41 of 1864,) Wm. Murphy, (G. C. M. O. 107 of 1866,) John Y. Beall, (G. O. 14, Dept. of the East; 1865,) Robt. C. Kennedy, (Do. 24, Id.,) T. E. Hogg, (Do. 52, Dept. of the Pacific, 1865;) also cases in G. O. 12, 15, 19, Dept. of the Mississippi, 1862.

In this connection may also be noted the following Orders in which guerilla warfare is especially denounced by Department Commanders: G. O. 13, Dept. of the Mo., 1861; Do. 30, Id., 1863; Do. 13, Dept. of Kans., 1862; Do. 23, Id., 1864; Do. 19, Dept. of the Cumberland, 1862; Do. 56, Dept. of W. Va., 1865; Circ., Id., Dec. 9, 1864; G. O. 7, Dept. of the South, 1866; Do. 17, Id., 1867; G. C. M. O. 90, War Dept., 1866; Do. 28, Dept. of Ky., 1865.

[58] Compare—as to the employment in 1870, by Napoleon III, of the *Turcos*—Bluntschli § 559; Edwards, p. 295.

is explosive, or is charged with fulminating or inflammable substances." By the Manual of the Institute of International Law, it is "forbidden to use arms, projectiles, or substances, calculated to inflict superfluous suffering or to aggravate wounds, particularly projectiles" such as are discarded by the Declaration of St. Petersburg.[59] In the Brussels Conference it was proposed to condemn specifically the use of "projectiles filled with powdered glass."[60] General Grant, in his Memoirs,[61] censures the use by the enemy, at Vicksburg in 1863, of "*explosive musket balls*" as producing "increased suffering without any corresponding advantage to those using them." The "*copper balls*" employed by the Mexicans opposed to Gen. Taylor's army, which are described as "very poisonous in their effect, especially in that hot climate,"[62] were subject to the same condemnation. Woolsey[63] writes—"A copper bullet poisoning its wound, a detachable lance head, a barbed bayonet, would all be illegal."

**Use of poison.** Any resort to poison as a means of taking life or inflicting injury upon an enemy must be without sanction. Thus the Institute[64] inhibits the use of "poison in any form," and the Brussels Conference[65] "the use of poison or poisoned weapons." The infecting of wells or springs of drinking water, or of provisions likely to fall into the enemy's way, and which
1223 were in fact partaken of by his troops as intended, would constitute a marked violation of the laws of war. A poisoning by the enemy of articles of food abandoned by them in evacuating a military post in Arkansas in 1862, as a result of which lives were destroyed, is commented upon by Maj. Gen. Halleck in a General Order, as a grave instance of unlawful warfare.[66]

**Other treacherous or insidious means.** So a resort to the employment of assassins,[67] or other violent or harmful and secret method which cannot be guarded against by ordinary vigilance, is interdicted by civilized usage.[68] Thus it would be unlawful to display deceptively the national colors of the enemy, or a flag of truce, or the brassard of the Geneva Convention, or other emblem by which the real character and operations of troops or hostile persons would be concealed, to the enemy's detriment.[69] So it has been held not to be lawful to deceive designedly an enemy by being disguised in the uniform of his army;[70] and soldiers captured, when for a deceitful purpose so disguised, within the lines of the opposing forces, are not entitled to be treated as prisoners of war, but may be shot without trial,[71] or if tried be sentenced to death in the

[59] Part II, 9.

[60] Sec. I, ch. III, § 12. And see Bluntschli § 558.

[61] Vol. I, p. 538.

[62] Jenkins, History of the Mexican War, p. 240.

[63] Int. Law, p. 213.

[64] Part II § 8. And see Bluntschli § 557.

[65] Art. 13.

[66] "Forty-two officers and men of one of our regiments were poisoned by eating these provisions. One brave officer and several men have died, and others have suffered terribly from this barbarous act—an act condemned by every civilized nation, ancient and modern." G. O. 49, Dept. of the Mo., 1862.

[67] Woolsey, 239; Halleck, 400; Dana's note to Wheaton § 343; Project, Brussels Conference, Art. 13; Manual, Laws of War § 8.

[68] Vattel, 361; Woolsey § 127; Dana's Wheaton § 343; Halleck, 399; Lieber, Inst. § 70.

[69] Lieber, Inst. § 65; Manual, Laws of War § 8; Project, Brussels Conference, ch. III. § 13. And see G. O. 16, Dept. of the Cumberland, 1863.

[70] Project, Brussels Conference, Art. 13; Manual, Laws of War § 8. *Contra*, see Phillimore, Commentaries on International Law, vol. 3, p. 155. Bluntschli (§ 565) would sanction this *ruse* if employed *before* a battle.

[71] Lieber, Inst. § 63, 101; Project, Brussels Conference, Art. 13; G. O. 16, Dept. of the Cumberland, 1863; Do. 10, Dept. of the Tenn., 1863. In the latter Order, General

1224 same manner as spies.[72] The offence of the spy, heretofore considered,[73] is itself a marked instance of a prohibited act of this class.

**Secretly entering the lines.** A similar though less aggravated offence against the laws of war is that of officers, soldiers, or agents, of one belligerent who come secretly within the lines of the other, or within the territory held by his forces, for any unauthorized purpose other than that of the spy, as, for example, for the purpose of recruiting for their army, obtaining horses or supplies for the same, holding unlawful communication, &c.,—a class of offences of which instances were not unfrequent in the border States during our late civil war.[74]

**Ruses de guerre.** The rule under consideration does not of course inhibit expedients not involving treachery. Thus it is permitted to surprise and prevail over an enemy by feints of attack, pretended retreats or other movements, false demonstrations, fictitious dispatches allowed to be intercepted, and the like. "Stratagems," it is declared by the Brussels Conference,[75] "and the employment of means necessary to procure intelligence respecting the enemy or the country, are considered as lawful means." One of such means would be the open inspection of an enemy's camps, &c., from a *balloon*.[76]

**IV. TRUCES AND CONVENTIONS.** "Military Conventions," prescribes the Institute,[77] "made between belligerents during war, such as armistices and capitulations, must be scrupulously observed and respected." Or, as it is expressed in the Appel of 1877—"*Les parlementaires sont inviolable.*" A gross instance of a breach of the laws of war would be the taking advantage of a temporary truce between the armies to seize or kill individuals of the enemy or make an attack upon his forces. Of this class was the offence of the Modoc Indians, who during a truce and conference between their tribe and our 1225 army in the course of hostilities in Northern California, in April, 1873, took the lives of Brig. Gen. Canby and Rev. E. Thomas, a "peace commissioner." In regard to this crime, it was observed by the then Attorney General,—"All the laws and customs of civilized warfare may not be applicable to an armed conflict with the Indian tribes upon our Western frontiers, but the circumstances attending the assassination of Canby and Thomas are such as to make their murder as much a violation of the laws of savage as of civilized warfare, and the Indians concerned in it fully understood the baseness and treachery of their act."[78]

**Capitulation.** This is an agreement for the surrender of an army, or of a fortified place, of which the terms are settled by the belligerent commanders. In the Project of the Brussels Conference[79] it is prescribed that "these conditions should not be contrary to military honor." That is to say, conditions involving unnecessary disgrace or ignominy should not be insisted upon. Private

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Grant, referring to confederate soldiers thus disguised in our uniforms, announces that they "will not be treated as organized bodies of the enemy, but will be closely confined and held for the action of the War Department."

[73] See cases in G. C. M. O. 110, 250, of 1864.

[73] Ch. XXV.

[74] See cases of recruiting by enemies within our lines in violation of the laws of war, in G. O. 114, 397, of 1863; G. C. M. O. 155, 249, of 1864; Do. 4 of 1866; G. O. 18, 34, 43, 44, 45, Middle Dept., 1864; Do. 25, Dept. of the Mo., 1864; Do. 153, 200, Dept. of the Ohio, 1863.

[75] Art. 14.

[76] Compare the case of Worth, referred to in Part I, p. 769, note.

[77] Manual, Laws of War, § 5.

[78] 14 Opins. At. Gen., 249. These Indians were all sentenced to be hung: the sentences were executed in the cases of Captain Jack, the chief, and three others, and in the two other cases commuted to imprisonment for life. G. C. M. O. 82 and 84, of 1873.

[79] Art. 46,

effects should not be required to be surrendered, and officers are generally allowed to retain their swords. In the capitulation between Gens. Grant and Lee, of April, 1865, in providing for the surrender of military property, it is added—"This will not embrace the side arms of the officers, nor their private horses nor baggage."[80]

A capitulation is of course subject to be disapproved and annulled by the Government of either commander. Thus the Sherman-Johnston capitulation of April, 1865,[81] was repudiated by the Government at Washington because of its assuming to deal with *political* issues.

**Armistice.** This is an agreement, "general or local"—*i. e.* applicable
1226 to the whole army, or only to a particular body of troops or district—for the suspension of military operations in war. Its duration is usually fixed; and official notice of its period and other terms is properly given without delay to all those whom it may concern. During its pendency, neither party—in the absence of a special condition authorizing it—may engage in any military work, operation, or movement, at least upon the immediate theater of war; or, under its cover, execute a retreat.[82] If violated by one of the parties, the other is entitled to terminate it, and its violation by private individuals subjects them to punishment under the laws of war and to a liability to indemnify an aggrieved party for losses sustained.[83]

The offence of violation of an armistice may consist in an act in contravention of the terms of the agreement, or in an act wholly inconsistent with the status of suspension. In the Mexican war, (1847,) a violation of the laws of war was, as claimed by Gen. Scott, committed by Santa Anna, in his strengthening the defences of the city of Mexico, during an armistice and in disregard of one of its expressed conditions.[84]

**Flags of truce, and their abuse.** Convention or communication between enemies is usually initiated by flag of truce. The law of nations extends an inviolability to an authorized person presenting himself with the white flag, and this inviolability covers the other persons by whom he may properly be accompanied—as a flag-carrier, trumpeter or drummer, and guide or interpreter.[85] While the persons admitted with a flag of truce should, so far as practicable, be restricted to such only as are necessary for the purposes of the flag, it was not unusual in our civil war for considerable numbers of other persons—as prisoners of war, refugees, and individuals specially privileged to pass the lines—to be forwarded and received under this protection.

The inviolability of the flag extends also to persons who may bear or accompany it without authority from a proper military superior, provided the
1227 irregularity of the presentation is waived by their being admitted within the lines—as in the case of deserters or persons escaping from the enemy.[86]

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[80] See reference by Bluntschli (§ 699), to the capitulations in the Franco-German War, 1870–71. Specially favorable terms were granted to the garrison of Belfort, on account of their brave and protracted defence.

[81] See G. O. 52, Dept. of the South, 1865, publishing Special Field Orders, Mil. Div. of the Miss.; Draper, Hist. Am. Civil War, vol. 3, p. 608.

[82] Bluntschli § 691.

[83] Project, Brussels Conference, Art. 52.

[84] Scott's Autobiography, p. 504. And see Grant's Memoirs, vol. I, p. 148.

[85] See Project, Brussels Conference, Art. 43, Manual, Laws of War, § 27, 28.

[86] "At Corinth, Miss.," (May, 1862,) "four hundred Germans from a Louisiana regiment, who had been sent out from the rebel camp on outpost duty, came into the National lines in a body with white flags on their guns, and gave themselves up as deserters." Rebellion Record, vol. V, p. 1. Similarly, in January, 1863, three hundred "conscript rebel soldiers" came into the federal lines at Murfreesboro, Tenn., and

Admission by flag of truce is not a *right;* the bearer of a flag, though duly delegated, is not *entitled* to be permitted to enter the lines; nor is the commander to whom the flag is sent "obliged to receive its bearer under all circumstances."[87] He may indeed, if he deems it expedient, give previous notice to the enemy that he will not receive any flags, or none within a certain designated period.[88] So he may warn off a particular flag when exhibited; but, without such warning, to fire upon the flag, or offer violence to the bearer, is a violation of the laws of war than which none has been more summarily visited upon the offender, or has induced more serious consequences. Thus, in Navarino Bay, in October, 1827, the firing by a Turkish ship upon an English boat bearing a flag of truce, and killing of an officer, brought on—war not having yet been declared—the battle of Navarino, which resulted in the extinction by the allies of the Turkish fleet, and the independence of Greece.

The flag being admitted, the commander may resort to such precautions as may be necessary to prevent the party from taking undue advantage of their privilege.[89] A representative of the opposing army thus received is indeed bound to act with strict good faith, and if by any illicit proceeding he abuses the confidence of the enemy, his inviolability is forfeited. A bearer of a flag of truce who employs the same for an illegitimate purpose, as for the purpose of observing the enemy's position, numbers, &c.; or who, having been halted with his flag outside the lines, obtains access within them by means of false representations; or, when admitted within the lines, avails himself of the opportunity to make secret communications, or to take notes, is liable to be detained and held for trial and punishment under the laws of war.[90] Trials for this class of offences have been indeed of rare occurrence in our wars.[91]

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**V. PRISONERS OF WAR.** Modern sentiment and usage have induced in the practice of war few changes so marked as that which affects the status of prisoners of war. The time has long passed when "no quarter" was the rule on the battlefield, or when a prisoner could be put to death by virtue simply of his capture. It is now recognized that—"Captivity is neither a punishment nor an act of vengeance," but "merely a temporary detention which is devoid of all penal character."[92] Or, as Lieber states it,[93]—"A prisoner of war is no convict; his imprisonment is a simple war measure." As it is concisely expressed

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"voluntarily surrendered themselves, declaring their attachment to the Union and requesting the privilege of taking the oath of allegiance." Id., vol. VI, p. 41. In August, 1864, General Grant reports from City Point, Va., that the enemy are "now losing from desertions (and other causes) at least one regiment per day." In the Annual Report of the Secretary of War for 1865, (page 1252,) it is stated that, between January and May, 1865, there were received, at Chattanooga, 2,596 deserters from the confederate army, and at Nashville 2,751. These deserters usually gained admission by some form of flag of truce as above indicated.

[87] Manual, Laws of War § 29.

[88] Project, Brussels Conference, Art. 44.

[89] Project, Brussels Conference, Art. 44; Manual, Laws of War § 30.

[90] As to the use and abuse of flags of truce, see Halleck, 674; Lieber, Inst. § 111–114; G. O. 16, Dept. of the Cumberland, 1862; Do. 42, Dept. of the Gulf, 1863; also a recent G. O., No. 43 of 1893, prepared in the Judge Advocate General's Office, publishing instructions to be observed in the Dispatch and Reception of Flags of Truce.

[91] See a case in G. O. 5, Dept. of W. Va., 1864, in which an officer of the confederate army was charged with violating a flag of truce by exhibiting such a flag on the south side of the Potomac at Harper's Ferry, in February, 1862, and thus inducing the flag of truce boat to be sent across the river in charge of a U. S. military employee, whom he thereupon caused to be fired upon and killed. The accused was convicted and sentenced to be hung. The proceedings, however, were disapproved by the reviewing authority on the ground that the personal guilt of the accused was not sufficiently established, and he was ordered to "be reported to the Commissary General of Prisoners as a prisoner of war."

[92] Manual, Laws of War, Part II—"Of Prisoners of War."

[93] Miscellaneous Writings, vol. 2, p. 293.

in the Appel of 1877—"*Le but de leur capitivité ne doit pas être de les punir, mais de les garder.*"

In regard to the custody and disposition of such prisoners the following principles and rules may be said to be established.

1229 **1. Persons entitled to rights of prisoners of war.**[94] The class of persons entitled upon capture to the privileges of prisoners of war comprises members of the enemy's armies, embracing both combatants and non-combatants, and the wounded and sick taken on the field and in hospital. It should comprise also civil persons engaged in military duty or in immediate connection with an army, such as clerks, telegraphists, aeronauts, teamsters, laborers, messengers, guides, scouts, and men employed on transports and military railways—the class indeed of civilians in the employment and service of the government such as are specified in our 63d Article of War as "Persons serving with the armies in the field." Camp-followers, including members of soldiers' families, sutlers, contractors, newspaper correspondents, and others allowed with the army but not in the public employment, should, when taken, be treated similarly as prisoners of war, but should be held only so long as may be necessary. In the words of the Institute,[95]—"Persons who follow an army, without forming part of it, can only be detained for so long a time as may be required by military necessity." Of the non-combatants of an army, those composing the staff of the hospitals and ambulances—viz. medical officers, hospital stewards and attendants, employed in the care and transport of the wounded and sick, with chaplains or priests, are considered, under the Geneva Convention, as entitled to the benefit of neutrality, while in the exercise of their functions.[96] For so long, therefore, they are not to be disposed of as are the mass of prisoners of war, but are to be left for the time to the performance of these duties. In our late civil war neither medical officers nor chaplains were held as prisoners of war, but on capture were forthwith "unconditionally" discharged.[97]

1230 **2. Their treatment.**[98] A prisoner of war, as it is expressed by

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[94] The according by the United States to the forces of the insurrectionary States, during the late civil war, the right, (with other belligerent rights,) of being held and treated as prisoners of war, upon capture, has already been referred to. See on this subject—Williams *v.* Bruffy, 96 U. S., 77; Ford *v.* Surget, 97 Id., 594; Dow *v.* Johnson, 100 U. S., 164; Brown *v.* Hiatt, 1 Dillon, 372; Phillips *v.* Hatch, Id., 571; U. S. *v.* Wright, 5 Philad., 599.

[95] Manual § 22. See Lorimer, vol. 2, 65, as to "Correspondents of the Press."

[96] Arts. II, III; Manual, Laws of War § 13, 14.

[97] G. O. 60, 90, of 1862; Do. 190 of 1864.

[98] On this subject note the significant Art. XXIV of the Treaty between the United States and Prussia, of 1785, containing regulations in regard to the treatment of prisoners of war, which, Bluntschli, Introduction, p. 38, observes, have since become "*allgemeines Recht.*" This Article provides that—"to prevent the destruction of prisoners of war by sending "them into distant and inclement countries, or by crowding them into close and noxious "places, the two contracting parties solemnly pledge themselves to each other, and to the "world, that they will not adopt any such practice; that neither will send the prisoners "whom they may take from the other into the East-Indies, or any other parts of Asia or "Africa, but that they shall be placed in some parts of their dominions in Europe or "America, in wholesome situations; that they shall not be confined in dungeons, prison-"ships, nor prisons, nor be put into irons, nor bound, nor otherwise restrained in the use "of their limbs; that the officers shall be enlarged on their paroles within convenient "districts, and have comfortable quarters, and the common men be disposed in canton-"ments open and extensive enough for air and exercise, and lodged in barracks as roomy "and good as are provided by the party in whose power they are for their own troops; "that the officers shall also be daily furnished by the party in whose power they are with "as many rations, and of the same articles and quality, as are allowed by them, either in "kind or by commutation, to officers of equal rank in their own army; and all others shall "be daily furnished by them with such ration as they allow to a common soldier in their "own service; the value whereof shall be paid by the other party on a mutual adjustment "of accounts for the subsistence of prisoners at the close of the war; * * * that each

Lieber,[99] "is the prisoner of the government, not of the captor." Or—as the Institute gives it[100]—"Prisoners of war are at the disposal of the enemy government, not of the individuals or corps which have captured them." They are therefore to be treated with humanity and with the consideration befitting their public relation.[1] Even when retaliatory measures may be resorted

1231 to in regard to them, no disproportionate severity should be practised. As prescribed in our Army Regulations[2]—"Each shall be treated with the regard due to his rank." The Government is charged with their maintenance, which includes food, clothing if necessary, and proper lodging and medical attendance.[3] The belligerents may well unite in an agreement covering the particulars of the maintenance of their prisoners. In the absence of such an agreement, they are in general to be placed, according to the Brussels Projet,[4] on the same footing as regards food and clothing as the troops of the Government who made them prisoners. The Manual of the Institute prescribes more specifically that, "in default of agreement between the belligerents on this point, prisoners are given such clothing and rations as the troops of the capturing State receive *in time of peace*."[5] Lieber[6] says, generally,—"Prisoners of war shall be fed upon plain and wholesome food whenever practicable." In our late civil war it was *ordered*, by the Secretary of War, that prisoners of war "receive for subsistence one ration each without regard to rank,[7] and"—it is added—"the wounded are to be treated with the same care as the wounded of the Army. Other allowances to them will depend on conventions with the enemy. * * * The Commissary General of Prisoners," (an officer created and appointed for the purposes of the maintenance, care, custody, paroling, &c., of prisoners of war,[8]) "will establish regulations for issuing *clothing* to prisoners."

1232 If the captor is without the means of subsisting his prisoners, he should release them on parole. In the early part of our late war, prisoners were sometimes paroled under such circumstances. Thus in June, 1862, sixteen hundred U. S. soldiers, taken by the enemy at the battle of Pittsburg

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"party shall be allowed to keep a commissary of prisoners, of their own appointment, "with every separate cantonment of prisoners in possession of the other, which commissary "shall see the prisoners as often as he pleases, shall be allowed to receive and distribute "whatever comforts may be sent to them by their friends, and shall be free to make his "reports in open letters to those who employ him; but if any officer shall break his parole, "or any other prisoner shall escape from the limits of his confinement after they shall "have been designated to him, such individual officer or other prisoner shall forfeit so "much of the benefit of this article as provides for his enlargement on parole or canton-"ment."

[99] Instructions § 74.

[100] Manual § 61. And see Project, Brussels Conference, Art. 23.

[1] As to the treatment in general of prisoners of war, see Vattel, 353; Manning, ch. VIII; Woolsey § 128; Halleck, 430, 437; Lieber, Inst. § 56, 72–80; G. O. 190 of 1864; Do. 23, Dept. of Kans., 1864; Circ., Office, Com. Gen. of Prisoners, April 20, 1864; Pars. 1297, 1298, 1302, 1305, 1309, A. R. of 1881.

[2] Par. 1297, A. R. of 1881.

[3] Note in this connection the yearly appropriation by Congress—the last is that of February 12, 1895—for "maintenance and support of the Apache Indian prisoners of war."

[4] Art. 27.

[5] Part II § 69.

[6] Inst. § 76.

[7] The daily army ration at this time consisted of the following—"One pound and a quarter of beef, or three-quarters of a pound of pork, eighteen ounces of bread or flour, and at the rate of ten pounds of coffee, fifteen pounds of sugar, two quarts of salt, four quarts of vinegar, four ounces of pepper, four pounds of soap, and one pound and a half of candles, to every hundred rations." Sec. 1146, Rev. Sts.

[8] This office was no sinecure; the number of prisoners captured and held during the war by the federal forces being 227,570—a number since only exceeded by that of the prisoners taken by the Germans in the Franco-German war, which amounted, according to Bluntschli, (§601), to 11,160 officers and 386,885 soldiers.

Landing, were received at Nashville, Tenn., having been paroled by the Confederate authorities "in consequence of their being unable to feed them."[9] A belligerent should be permitted to maintain, or assist in maintaining his soldiers held as prisoners by the enemy, when the latter cannot adequately subsist them. In 1865, by the order of the Secretary of War, "large quantities of provisions and clothing" were sent, through our Agent of Exchange at Fort Monroe, to Richmond, to be distributed to the federal soldiers there held as prisoners of war.[10]

The camp or station at which prisoners are held till exchanged or paroled should be a healthful site, and reasonable opportunities for exercise and recreation should be afforded therewith.[11] It is declared by the Institute[12] that prisoners of war "can be *confined* in a *building* only when such confinement is indispensable for their safe detention." In our civil war, it was ordered that—"sick and wounded prisoners of war will be collected at hospitals designated under the instructions of the Surgeon General for their exclusive use, so far as practicable."[13]

We have seen that the status of war justifies no violence against a prisoner of war as such, and subjects him to no penal consequence of the mere fact that he is an enemy. For a commander to disembarrass his army of the presence and charge of prisoners of war by taking their lives would be a barbarity which
1233 would be denounced by all civilized nations.[14] Where a captive entitled to be treated as a prisoner of war is put to death, or where unlawful, unreasonably harsh, or cruel, treatment of prisoners is practised or permitted by one belligerent, the other may, as far as legally permissible, *retaliate;*[15] and any individual officer resorting to or taking part in such act or treatment is guilty of a grave violation of the laws of war, for which, upon capture, he may be made criminally answerable.[16] Two leading examples of such jurisdiction in our late

[9] V Reb. Rec., 23.

[10] Annual Report of Secretary of War for 1865, p. 1075.

[11] See Lieber, Inst. § 75; Project, Brussels Conference, Art. 24; also Bluntschli § 601, condemning certain treatment of prisoners in our civil war. It may be remarked that the most authoritative condemnation of the treatment to which the prisoners of war at Andersonville were subjected in 1864, was that pronounced by the confederate surgeons—Drs. J. C. Bates, G. G. Roy, A. Thornburg, F. G. Castien, B. J. Head, G. S. Hopkins, and G. L. B. Rice. (Trial of Capt. Henry Wirz.)

[12] Manual, Part II § 66.

[13] Par. 1302, A. R., 1881.

[14] In 1 Jour. Cong., 404, the Continental Congress denounces the killing of our soldiers, when surrendered as prisoners of war, by Indians in the service of the British, near Montreal, in May, 1776, as a "gross and inhuman violation of the laws of nature and nations." A similar crime in the instance of the massacre of American prisoners of war, taken at the River Raisin, Ky., in January, 1813, by the British forces under Col. Proctor, is especially denounced in the Report of the Committee of the Ho. of Reps., dated July 31, 1813, published in American State Papers, Military Affairs, vol I, p. 339. And see Brackenridge, Hist. War of 1812, pp. 91–93. On the other hand, Marion's men, of the American army in the Revolutionary war, are charged, (in common with their opponents,) with taking the lives of prisoners of war captured by them, "even contrary to agreements of surrender." Simm's Life of Marion, 165, (cited by Prof. Lieber in his "Guerilla Parties.")

It would hardly be supposed that such barbarities could be repeated in our day, and they certainly could not be in any civilized warfare. But see the reports of the atrocious treatment of prisoners of war and of non-combatants by the Turks, as also, in some localities, by the Russian "irregulars," (as Cossacks and bashi-bazouks,) during the war of 1877–8—as published by Mackenzie, "Nineteenth Century," p. 409; Oilier, "History of the Russo-Turkish War," vol I, p. 34, 35, 419; Norman, (Times Correspondent,) "Armenia and the Campaign of 1877," p. 190, 407; "The War Correspondence of the Daily News," vol. 2, p. 85–87, 165–166, 191–195, 521–530.

[15] See *post*—"Enforcement of the Laws of War."

[16] Lieber, Inst. § 59.

war were the cases of Captain Henry Wirz[17] of the confederate army, and his employee James W. Duncan,[18] who, on being themselves taken prisoner at
1234 the end of the war, were brought to trial by military commission, respectively at Washington in the fall of 1865 and at Savannah in March, 1866, for cruel treatment and unlawful killing of prisoners of war under their charge at Andersonville, Georgia, and, on conviction, were sentenced, the one to be hung, and the other to imprisonment at hard labor for fifteen years.

Prisoners of war are not to be deprived, upon capture or while held as prisoners, of the private property in their possession, except such as is intended for or adapted to military use—as arms, ammunition, or horses.[19] Other personal effects are considered, and remain, their own property.[20] To deprive them, for example, of their proper clothing, or of such necessary articles as their watches, would be illicit and punishable. But large sums of money, "found and captured in their train," cannot, observes Lieber,[21] be claimed by them "as private property."

3. Employment. Prisoners of war cannot be required to furnish any information in regard to their own government, country, or army. Nor can they be compelled to take any part whatever in the military operations of their captor, or to perform labor or service of a military character.[22] They may however be employed to a reasonable extent, or for a proper compensation, upon other public work: according to Lieber,[23] "they may be required to work for the benefit of the captor's government, according to their rank and condition." A more modern declaration on this subject by the Institute[24] is
1235 as follows—"They may be employed upon public works which have no direct relation to the operations carried on in the theatre of war, provided that labour be not exhausting in kind or degree, and provided that the employment given to them is neither degrading with reference to their military rank if they belong to the army, nor to their official or social position if they do not so belong." Such prisoners may also be permitted to perform work for private employers, the accruing wages to be held or expended for their benefit.[25]

4. Discipline. Prisoners of war must conform to the laws, regulations and orders in force in the enemy's army, or country, and applicable to them, must requite consideration with good faith, not concealing their true names, rank,

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[17] G. C. M. O. 607 of 1865; Ex. Doc., No. 23, Ho. of Reps., 40th Cong., 2d Sess.

[18] G. C. M. O. 153 of 1866. In a third case, that of Major John H. Gee of the same army, tried at Raleigh, No. Ca., in 1866, by military commission, for violation of the laws of war in failing to take proper care of the federal prisoners of war in his charge at Salisbury, No. Ca., in 1864, and in causing the death of several of the same, the accused was acquitted.

Upon the subject of the treatment of federal soldiers when made prisoners during the late war, see, further, the official House Report, No. 5, 40th Cong., 3d Sess., (1869.)

[19] "Prisoners of war will be *disarmed* and sent to the rear." (Par. 1296, A. R., 1881.) "Prisoners' horses will be taken for the Army." (Par. 1297, Id.)

[20] Project, Brussels Conference, Art. 23; Manual, Laws of War § 64.

[21] Inst. § 72.

[22] Project, Brussels Conference, Art. 26; Manual, Laws of War, § 70. In the annual Report of the Secretary of War for 1865, p. 1079, it is stated that some eight hundred colored troops of the federal army, taken prisoner by the enemy, were put at work as laborers upon the fortifications of Mobile, in 1864—an unwarranted disposition justifying retaliation.

[23] Inst. § 76.

[24] Manual, Part II § 71. And see Project, Brussels Conference, Art. 25. Hall, (p. 344,) writes that the expenses of their maintenance "may be *recouped* by their employment on work suited to their grade and social posititon, provided that such work has no direct relation to the war."

[25] Project, Art. 25; Manual § 72.

&c.,[26] and for insubordinate or contumacious conduct must expect disciplinary measures. A prisoner, however, should not be required to undergo *confinement* unless "indispensable for his safe detention;"[27] or unless he be made the subject of a legitimate *retaliation*, as hereafter to be noticed. Escape by a prisoner of war is not an offence for which as such he is liable to punishment;[28] but as his safe-keeping is a first duty on the part of the captor, an attempt to escape may be prevented even by firing upon the prisoner after he has been summoned to halt, and in an extreme case the taking of life may be justified. But if recaptured, he is not to be punished as for an offence, but "solely in a disciplinary manner," or he may be subjected "to a stricter surveillance." If he succeed in effecting his escape, and is subsequently retaken as a prisoner of war, he cannot be punished for the escape, unless indeed he was at the time under a parole *not* to escape, "in which case he may be deprived of his rights as prisoner of war."[29]

1236 For any material violation indeed of the laws of war committed before his capture, a prisoner of war is amenable to trial and punishment after capture.[30]

**5. Exchange and Parole.** The exchange of prisoners of war is usually effected by means of a formal written agreement entered into by the opposing belligerents termed a *Cartel of exchange*. This is a convention of a solemn character, imposing an obligation "for the fulfillment of which the national faith is pledged."[31] In it are set forth the conditions upon which exchanges will be made and the times and places of the delivery of prisoners, &c.[32] Cartels usually provide—*1st*, that prisoners of the same grade shall be exchanged officer for officer and man for man; *2d*, that officers of the higher ranks may be exchanged for a certain number of individuals of a lower rank, according to a stated scale of equivalents.[33] Thus in the cartel of exchange entered into between the United States and the Confederate States in July, 1862,[34] it was stipulated that a General Commanding or an Admiral should be exchanged for an officer of equal rank, "or for sixty privates or common seamen;" and so on through the lesser grades, a Captain, for example, being declared exchangeable for an equivalent of six privates, a Lieutenant for four, and a non-commissioned officer for two. It was further stipulated that "if citizens held by either party, on charges, are exchanged, it shall only be for citizens," adding—"captured sutlers,

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[26] It was ordered, during the late war, in regard to prisoners of war, that—"any one who intentionally misstates his rank forfeits the benefit of his parole and is liable to punishment." G. O. 49 of 1863.

[27] Manual, Laws of War § 60; Project, Brussels Conference, Art. 24. The Confederate general and raider, John Morgan, was, upon capture, November 1st, 1863, confined, with officers of his command, in the penitentiary at Columbus, Ohio. He escaped with six of his officers, Nov. 27th. VIII Reb. Rec., 1, 16.

[28] "It is the duty of a prisoner to escape if able to do so." G. O. 207 of 1863. And see Bluntschli § 602.

[29] Manual, Laws of War, § 68; Project, Brussels Conference, Art. 28; Bluntschli § 609, 611, Lieber's Inst., 77, 78.

[30] "A prisoner of war remains answerable for his crimes against the captor's army or people, committed before he was captured, and for which he has not been punished by his own authorities." Lieber, Inst. § 59. And see Do., Miscel. Writings, vol. 2, p. 294, 297.

[31] U. S. *v.* Wright, 5 Philad., 599.

[32] See par. 1316, A. R. of 1881.

[33] It is remarked by Manning, Commentaries on the Law of Nations, p. 163–4, that all cartels "coincide in the principle of exchanging according to grade, with the single exception that, in 1793, the French Convention decreed that they would only exchange prisoners on the condition of exchanging man for man without any distinction as to grade."

[34] Published in G. O. 142 of Sept. 25, 1862.

teamsters, and all civilians in the actual service of either party, to be exchanged for persons in similar positions."

The modern law of war contemplates that the exchange and discharge
1237 of prisoners of war shall ensue reasonably promptly upon capture.[35] A cartel may provide for an immediate or absolute discharge, or a discharge on *parole*. The parole in its simplest form is a pledge to the effect that the prisoner will not bear arms against the government or armies of his captor during the pending war unless sooner duly exchanged. He may in general, in the absence of specific stipulation to the contrary, legally perform "internal service such as recruiting or drilling recruits,"[36] garrisoning posts not on the theatre of war, and—as it is declared in a General Order issued during the last war with Great Britain—"guarding stores and provisions of war in the interior," and "paying the troops and making purchases on account of the United States."[37] It is preferable that the cartel should indicate specifically what service may or not be performed by the prisoner under parole. Thus in the official cartel of 1862, above cited, it was prescribed as follows—"Art 4. All prisoners of war to be discharged on parole in ten days after their capture. * * * Those paroled shall not be permitted to take up arms again, nor to serve as military police or constabulary force in any fort, garrison, or field work held by either of the respective parties, nor as guards of prisons, depôts or stores, nor to discharge any duty usually performed by soldiers, until exchanged under the provisions of this cartel." And it is recapitulated—"The parole forbids the performance of field, garrison, police or guard, or constabulary duty." Under this cartel it was held by the Attorney General that the United States government would not be authorized to employ paroled prisoners in repelling an invasion or suppressing an outbreak of hostile Indians.[38]

In the capitulation agreed upon between Gens. Grant and Lee, of April 9, 1865, it was stipulated that each officer should give a parole under oath, for himself, (and also for the men under his command, when a commanding officer,) that he (and they) would not thereafter serve in the armies of the Confederate States or in any military capacity whatever against the United States of
1238 America, or render aid to the enemies of the latter, until exchanged; and that prisoners, on being paroled, should be at liberty to return to their homes. It was held by the Attorney General that this meant homes in the insurrectionary States, and that paroled prisoners could not legally return to homes in any loyal States, or publicly appear in their uniform therein, pending the war.[39]

No military person other than a commissioned officer can regularly give a parole: where the paroles of enlisted men are to be given they should be rendered by their commanding officer, for them.[40] Paroles should be specific: indiscriminate or wholesale paroling, as of troops on the battle field, or of a detachment in mass, is unauthorized.[41] Paroles must also be voluntary; they cannot be compelled: on the other hand, a prisoner cannot claim, as a right, to be admitted to parole.[42] And the engagement of a parole is always subject to

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[35] See *post*—Art. 4 of the Cartel of 1862.

[36] Lieber, Inst. § 130. See Hall, International Law, 346.

[37] G. O., Feb. 14, 1814. And see Do. 13, Dept. of the Mo., 1861.

[38] 10 Opins., 357. A paroled prisoner cannot exercise a belligerent right, and therefore cannot assume to make a capture of property, though the same be *per se* legally a subject of capture. Beck *v.* Ingram, 1 Bush, 355.

[39] 11 Opins., 204. The cessation of war and return of peace duly announced releases a paroled prisoner from his parole and from the military jurisdiction—see 12 Id., 120, 382; Lieber, "Status of Rebel Prisoners of War," Miscellaneous Writings, vol. 2, p. 298.

[40] G. O. 49 of 1863.

[41] Lieber, Inst. § 128; G. O. 49 of 1863.

[42] Project, Brussels Conference, Art. 82; Manual, Laws of War § 77. G. O. 49 of 1863.

the approval of the government, which, if it has not already committed itself by agreement on the subject, may refuse to ratify and withdraw the privilege accorded.[43] Thus the paroles allowed to be given by Burgoyne and the British and German officers of his command, which permitted them to return to their countries in Europe, were at one time disapproved by Congress and required to be recalled.[44]

Paroles tendered or taken without authority are of no validity and not entitled to be respected, and the permitting of or subscribing to such paroles is a punishable offence. In the G. O. of 1863,[45] already cited, containing "Rules in regard to paroles established by the common law and usages of war," it is said—

"The pledging of any unauthorized military parole is a military offence
1239 punishable under the common law of war." In a later Order of the same year,[46] it is further declared, by the Secretary of War, that paroles allowed by "others than commanders of opposing armies" are "in violation of General Orders and the stipulations of the cartel, and are null and void. They are not regarded by the enemy, and will not be respected in the armies of the United States. Any officer or soldier who gives such parole will be returned to duty without exchange and moreover will be punished for disobedience of orders."

Where a parole has been duly pledged, its terms must of course be scrupulously observed by the prisoner,[47] and his government, on its part, must "neither require nor accept from him any service inconsistent with the pledge." It is laid down by Lieber[48] that a breach of parole "is punished" (meaning doubtless *punishable*) "with death when the person breaking the parole is captured again." Later codes express the law in a milder form. They prescribe that prisoners liberated on parole and afterwards retaken carrying arms in the same war against the paroling belligerent "may be deprived of the rights of prisoners of war, unless"—it is added—"they have been included among prisoners exchanged unconditionally under a cartel of exchange negotiated subquently to their liberation."[49] The offence of breach of parole, which was a comparatively rare one during our civil war,[50] was so frequent during the
1240 war with Mexico that offenders were publicly threatened with hanging by General Scott, and the signing of the parole was required to be accompanied by the taking of a religious oath.[51]

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[43] A parole is given by an officer "only with the stipulated or implied consent of his own government. If the engagement which he makes is not approved by his government, he is bound to return and surrender himself as a prisoner of war." G. O. 49 of 1863.

[44] Secret Journals of Congress, vol. 1, p. 216.

[45] No. 49.

[46] No. 207.

[47] In U. S. *v.* Wright, 5 Philad., 599, it was held that his parole was binding upon a prisoner of war though a *minor;* that the fact of his minority did not entitle him to be discharged from military custody before his exchange. And see Lockington's Case, Brightly, 276.

[48] Inst. § 124.

[49] Manual, Laws of War § 78. And see Project, Brussels Conference, Art. 33.

[50] See cases in G. C. M. O. 110 of 1864; G. O. 36, Dept. of the Gulf, 1862, (case of six prisoners sentenced to death, and shot accordingly, for violating their parole by rendering service to the enemy;) Do. 6, Middle Mil. Dept., 1865; Do. 71, Dept. of La., 1865; V Reb. Rec., 57. In S. O. 231, Dept. of the Gulf, 1862, the parole of a prisoner of war is "*revoked*" on account of his having conducted a hostile newspaper.

Among the prisoners taken at Chattanooga were found a large number who had been paroled on the capture of Vicksburg. Upon inquiry, addressed by Gen. Grant to the War Department, whether he should proceed against them by ordering them shot according to the usages of war, this course was not approved on the ground that it would be "manifestly unjust to execute soldiers who had been required by their government to break their parole." VIII Reb. Rec., 16.

[51] Ex. Doc. No. 56, 1st Ses. H. R., 30th Cong.; Halleck, 438. Several Mexican officers were tried and sentenced to death for this offence. See 14 Opins. At. Gen., 251.

**Interning by a neutral.** In connection with the subject of Prisoners of War may well be noticed the usage as to the "*interning*" of troops who have avoided being made prisoners by an enemy, by taking refuge within the territory of a neutral power. "It is universally admitted," declares the Institute of International Law,[52] "that a neutral State cannot lend assistance to belligerents, and especially cannot allow them to make use of its territory without compromising its neutrality. Humanity, on the other hand, demands that a neutral State shall not be obliged to repel persons who beg refuge from death or captivity." Hence, when bodies of troops or individuals of the armies of a belligerent are driven or escape within the boundaries of a neutral neighbor—as in the case of Bourbaki's army entering Switzerland, and the contingents that crossed into Belgium after the battles on the Meuse, in the late Franco-Prussian war—such neutral does not and cannot make them prisoners, but *interns* them, *i. e.* takes charge of and holds them, with their arms and other *materiel* of war at some appointed station within its limits. At this station, which is usually one as distant as practicable from the theatre of the war, the neutral, in the absence of any special convention regulating the matter, maintains the interned troops, and, if necessary, clothes them, and renders them such medical or other aid as humanity may require—for all which it is repaid by their government at the conclusion of the hostilities. Officers of an interned force may, in the discretion of the interning State, be *paroled* on the condition of their not leaving the neutral domain without special authorization. From the restraint of internment are excepted sick and wounded persons of a belligerent army, desired to be moved across neutral territory. Of these the transport is permitted provided they are accompanied only by persons of the hospital staff, and that no *materiel* of war, (except such as is required for their actual use,) is conveyed with them.[53]

1241 We have had as yet no instances of the interning by a neutral of our troops in any of our wars, or of the interning by our own government of troops of warring neighbors.

**VI. ENFORCEMENT OF THE LAWS OF WAR.** In the event of violations of any of the laws of war above set forth, the offenders, as a matter both of justice and policy, should be brought to punishment if they can be reached. As it is expressed in the Manual of the Institute,[54]—"when infractions of the foregoing rules take place, the guilty persons should be punished, after trial, by the belligerent within whose power they are." Offenders of this class have, with us, been brought to trial by MILITARY COMMISSION, and punished with death or imprisonment.

Where the offender cannot be reached, or where, being a member of the army or subject of the government of the enemy, the latter refuses or neglects to bring him to trial, the only remedy of the belligerent against which, or against a citizen or citizens of which, the infraction of law has been injuriously committed, is by *retaliation* or *reprisal.*

**Retaliation.** Thus the unwarranted treatment of prisoners of war by an enemy may be retaliated by similar treatment of the prisoners taken from him or by the specially holding of them for such treatment.[55] As where, in our Revolutionary War, in 1776, when the British proposed to treat Maj. Gen. Charles Lee, on his being taken prisoner, as a deserter from their army, Congress caused a Lieut. Col. of that army, and five Hessian field officers, prisoners of war in our

[52] Manual, Part II, (IV.)

[53] Project, Brussels Conference, Arts. 53–56; Manual, Laws of War, § 79–83.

[54] Part III—Penal Sanction.

[55] "All prisoners of war are liable to the infliction of retaliatory measures." Lieber, Inst. § 59.

hands, to be placed in close confinement, to await the action taken in the case of Gen. Lee. So, in 1782, Captain Asgill of the British army was selected by lot, as a subject for retaliation for the unlawful killing of Captain Huddy of our army when a prisoner of war in the hands of the enemy. In 1813, forty-six English prisoners of war in our hands were placed in close confinement to abide the result in the case of the same number of Americans similarly confined by the British, a portion of whom had been sent to England for trial as alleged British subjects and deserters from the British army. In our recent Civil War,

1242 instances of similar retaliation or threatened retaliation were not unfrequent.[56] In July, 1863, for example, a striking order was made by President Lincoln as follows—"It is therefore," (after reciting the facts inducing this action,) "ordered that for every soldier of the United States killed in violation of the laws of war, a rebel soldier shall be executed; and for every one enslaved by the enemy or sold into slavery," (referring to *colored* troops of our army,) "a rebel soldier shall be placed at hard labor on the public works, and continued at such labor until the other shall be released and receive the treatment due to a prisoner of war."[57]

A form of indirect retaliation has sometimes been practiced by the seizing of subjects of the enemy as *hostages*, and holding them in confinement till indemnity is furnished for wrong done, or till offenders are surrendered for trial, &c.[58] Thus, in November, 1863, in view of the frequency of raids by the enemy's cavalry upon districts occupied in part by Unionists, and where there were no federal troops, there was issued by Maj. Gen. Grant, then commanding the Division of the Mississippi, an order in which occurs the following—"For every act of violence to the person of an unarmed Union citizen a secessionist will be arrested and held as a *hostage* for the delivery of the offender."[59] By an order of Gen. Sullivan, commanding at Harper's Ferry, of January, 1864, it was directed that, upon the conscripting into the confederate army of any inhabitant of Berkeley, Jefferson, Clarke, or Loudoun County, Virginia, "the nearest and most prominent secessionist should be arrested and imprisoned, and held until the return of such conscript."[60]

1243 Retaliation may also be resorted to for other illegitimate acts, such as the seizure and imprisonment of peaceable citizens, or the appropriation or destruction of their property.[61] It is a right, however, which will not justify

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[56] See instances in III Reb. Rec., 74; V Id., 52; VI Id., 24; VII Id., 24, 25; VIII Id., 22. In June, 1864, five general officers and forty-five field officers of the U. S. army, prisoners of war in the hands of the enemy, were brought to Charleston, So. Ca., then under bombardment by the U. S. forces, and quartered in the part of the city most exposed to the fire of their artillery. Maj. Gen. Foster, comdg. the besieging army, protested against the measure as one "unknown to honorable warfare." See the correspondence in XI Reb. Rec., 591–2.

[57] G. O. 252, War Dept., 1863.

[58] See Halleck, 673.

[59] G. O. 4, Mil. Div. Miss., 1863. And see an instance of similar action by Gen Mitchell, comdg. at Nashville, February, 1863, (VI Reb. Rec., 47;) also by Gov. Bramlette of Kentucky, January, 1864, (VIII Id., 328.)

[60] An early instance, (May, 1861,) is noted in the Rebellion Record, (vol. I, p. 79,) of the stopping of a train on the Orange and Alexandria Railroad, and holding the passengers as "hostages for the fair treatment of loyal citizens" who might fall into the enemy's hands.

[61] See cases in V Reb. Rec., 23, 26, 56, 62; VII Id., 50, 481; VIII Id., 39.

A peculiar instance which may here be cited is that which appears from S. O. 54, of Gen. Rousseau, comdg. in Alabama, of Aug. 8, 1862. On account of the killing of loyal citizens by lawless persons firing into railway trains, it is here ordered—"that the preachers and leading men of the churches, (not exceeding twelve in number,) in and about Huntsville, who have been acting secessionists, be arrested and kept in custody, and that one of them be detailed each day and placed on board the train on the road running by way of Athens and taken to Elk River and back, and that a like detail be

a resort to means or measures repudiated by civilized warfare.[62] Thus
1244 cruelty, inhumanity, or gross and unjustifiable injury, practised or done by one belligerent, will not warrant a similar proceeding, by way of retaliation, on the part of the other.

**Reprisal.** This further method, above specified, consists in the taking possession of property of the enemy or of his subjects, to be held as indemnity for injury inflicted in violation of the laws of war, or as security till a pecuniary indemnity be duly rendered.[63] The modern codes and writers upon international law agree that reprisals, especially where involving the seizure of private property, are not to be resorted to except in extreme and exceptional cases and can only be justified by necessity.[64] In the Manual of the Institute[65] it is observed—"In the grave cases in which reprisals become an imperative necessity, their nature and scope must never exceed the measure of the infraction of the laws of war committed by the enemy. They can only be made with the authorization of the Commander-in-chief. They must in all cases be consistent with the rules of humanity and morality."

We have had little occasion to resort to reprisals as such in our wars. Some indeed of the *contributions* or assessments enforced during the late war, as instanced under the next Title,[66] were rather of the nature of reprisal than of contribution proper.

## IV. THE STATUS OF MILITARY GOVERNMENT AND THE LAWS OF WAR THERETO PERTAINING.

We have considered the laws and usages of war which govern the warfare of armies when engaged in active operations against an enemy in the field. We now come to those which pertain to the powers and duties of a belligerent as a *governor*, when, with the exercise of military authority, may be coupled a function of civil administration.

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made and taken to Stevenson and back." An even stricter order of the German military authorities, in 1870, required that railway trains on the Chemin de fer de l'Est should be accompanied by "well-known and respected" inhabitants of the towns *en route*, who should be "*placed upon the engine*," and held as "hostages" to ensure the trains from attack or interruption, by francs-tireurs, &c. This order has been severely criticized, (see, for example, Bluntschli § 600,) but was certainly not without some justification.

[62] See Halleck, 444–5; G. O. 20, Dept. of Va., 1861; Do. 49, Dept. of the Mo., 1862.

It may here be noted that, in the opinion of the author, the soundest, under the law of war, of the grounds advanced for the trial and sentence of the so-called "Emperor" Maximilian of Mexico, was his decree of Oct. 3, 1865, to the effect that all Juarists, *i. e.* supporters of the existing republican government, taken with arms in their hands should be treated as bandits. (See D'Hericault, "Maximilien et Le Mexique," pp. 310, 335–6.) His own treatment, therefore, by the government of Juarez, when, after the departure of the French army, it came into power, was but a form of *retaliation*. It may be added that, upon the capture of Maximilian with his generals Miramon and Mejia, the U. S. Government made some attempt to induce their being treated as prisoners of war. Its dispatch on the subject, (Mr. Seward, Sec. of State, to L. D. Campbell, Minister, April 6, 1867,) was, however, never actually presented.

In connection with the subject of retaliation, the student may be referred to G. O. 54, 59, 60, 111, A. & I. G. O., Richmond, 1862, in which the Government of the Confederate States authorized and directed retaliatory proceedings on account of action taken by certain federal commanders in the late war; also Joint Resolution of the Confederate States Congress, "on the subject of retaliation," of May 1, 1863, incited mainly by the Proclamations of the President of the United States, in reference to the emancipation of the slaves, of Sept. 22, 1862, and Jan. 1, 1863.

[63] Other forms of reprisal, at international law, are enumerated by Bluntschli § 500.

[64] Project, Brussels Conference, General Principles, V; Id., Sec. IV; Woolsey § 118; Hall, 352.

[65] Part III § 86. And see Project, Brussels Conference, Sec. IV § 69–71.

[66] MILITARY GOVERNMENT—"Exaction of Contributions," *post*.

1245 **MILITARY GOVERNMENT DEFINED—DISTINGUISHED FROM MARTIAL LAW.** By *military government* is meant that dominion exercised in war by a belligerent power over territory of the enemy invaded and occupied by him and over the inhabitants thereof. By most writers, prior to the appearance of the dissenting opinion of Chase, C. J., in *Ex parte* Milligan,[67] this species of government was designated in general terms as "martial law," and thus was confused with or not properly distinguished from the *martial law proper*[68] exerted at home under circumstances of emergency, and yet to be considered. In the case referred to, the Chief Justice describes Military Government as a form of "military jurisdiction to be exercised by the military commander under the direction of the President, in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within states and districts occupied by rebels treated as belligerents." Martial Law, on the other hand, he defines as an authority called into action, when the public danger requires it, in a locality or district, not of an enemy's country, but of the United States, and "maintaining adhesion to the general government."

Military government—as the term is here employed—is thus a government exercised over the belligerent or other inhabitants of an enemy's country in war foreign or civil; *martial law* over our own immediate fellow citizens, who, though perhaps disaffected or in sympathy with the public enemy, are not themselves belligerents or, legally, enemies. The *occasion* of military government is war;[69] the occasion of martial law is simply public exigency which, though more commonly growing out of pending war, may yet present itself in time of peace. The *field* of military government is enemy's country; the field of martial law our own country or such portion of it as is involved in the exigency.

1246 Military government is further distinguished from martial law in that, unlike the latter as commonly instituted, it calls for no formal proclamation or declaration of its inauguration, but exists simply as a consequence of the hostile occupation.[70] A proclamation or public notice to the inhabitants, informing them of the extent of the occupation and of the powers proposed to be exercised, is a customary measure,[71] but one not essential to the initiation of the status or jurisdiction.

**AUTHORITY FOR MILITARY GOVERNMENT—ITS GENERAL EFFECT.** The authority for military government is the fact of occupation. Not a mere temporary occupation of enemy's country on the march, but a settled and established one. Mere invasion, the mere presence of the hostile army in the country, is not sufficient. There must be a full possession, a firm holding, a government *de facto*.[72]

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[67] 4 Wallace, 141. Subsequently indeed to the date of this opinion, the name "martial law" was sometimes, I think inaccurately, applied to the status of military government in the insurrectionary States. See U. S. *v.* Diekelman, 92 U. S., 520.

[68] Upon this point, see also MARTIAL LAW, *post.*

[69] That military government may legally be continued *in bello nondum cessante* equally as *in flagrante bello*, see Texas *v.* White, 7 Wallace, 400; Dow *v.* Johnson, 100 U. S., 168. And see also the subject of the military government under the Reconstruction Laws, *post.*

[70] Jeffries *v.* State, 39 Ala., 655; G. O. 2, Dept. of the Miss., 1862.

[71] Manual, Laws of War, § 42.

[72] "The government of the conqueror being *de facto*, and not *de jure*, it must always rest upon the fact of *possession*. * * * Not only must the possession be actually acquired, but it must be *maintained*." Halleck, 780. And see Id., 798; The Venice, 2 Wallace, 277. "A territory is considered to be occupied when, as the result of its invasion by an enemy's force, the State to which it belongs has ceased to exercise its ordinary authority within it, and the invading State is alone in a position to maintain order." Manual, Laws of War, § 41.

But it is not necessary that the country should be actually *conquered*. Thus, within a week after their entrance into France, in August, 1870, the Germans had inaugurated

Military government, thus founded, is an exercise of sovereignty, and as such dominates the country which is its theatre in all the branches of administration.[73] Whether administered by officers of the army of the belligerent, or by civilians left in office or appointed by him for the purpose, it is the government of and for all the inhabitants, native or foreign, wholly superseding the local law and civil authority except in so far as the same may be permitted by him to subsist. Civil functionaries who are retained will be protected in the exercises of their duties.[74] The local laws and ordinances may be left in force, and in general should be, subject however to their being in whole or in part
1247 suspended and others substituted in their stead—in the discretion of the governing authority.[75] How such discretion shall be exercised will in general depend mainly upon the previous political relations of the belligerent powers, upon the present temper of the inhabitants and their officials, and upon the ability of the latter to preserve order and maintain justice. It may indeed happen that because of the incapacity of the local authorities to afford protection to the peaceable portion of the community, a strict military government may become a necessity.[76] It is indeed a chief duty of the commander of the army of occupation to maintain order and the public safety, as far as practicable without oppression of the population,[77] and as if the district were a part of the domain of his own nation. On the other hand, the people of the country, having passed under the authority of the occupying belligerent, are bound to render obedience to any new laws or edicts which he may impose. And in this compliance they will be protected by their own courts upon a subsequent resumption of authority by their government.[78]

Instances in our history of military government are presented in our Revolutionary war during the occupancy by the British of Boston, New York
1248 and Philadelphia; at Castine, Maine, when taken and held by the British in 1814–15;[79] and in the provinces of Mexico in the course of the conquest of the same by our forces in 1846–7.[80] It was however during the late civil war, which, by reason of its exceptional proportions, was assimilated to

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a civil administration for the government of Alsace and Lorraine, which could not be said to be as yet conquered. (Edwards, "The Germans in France," p. 45.) Strasburg, for example, was not surrendered till September 27th.

[73] "A victorious State takes the place of the sovereign of the vanquished." Manning, Commentaries on the Law of Nations, p. 135.

[74] Project, Brussels Conference, Art. 4; Manual, Laws of War, § 45.

[75] U. S. *v.* Rice, 4 Wheaton, 246; Fleming *v.* Page, 9 Howard, 614; Cross *v.* Harrison, 16 Id., 164; Leitensdorfer *v.* Webb, 20 Id., 177; *Ex parte* Milligan, 4 Wallace, 141; Texas *v.* White, 7 Id., 400; Coleman *v.* Tenn., 97 U. S., 517; Kimbal *v.* Taylor, 2 Woods, 38; Rutledge *v.* Fogg, 3 Cold., 554; Hefferman *v.* Porter, 6 Id., 391; Murrell *v.* Jones, 40 Miss., 566; Jeffries *v.* State, 39 Ala., 655; State *v.* Hall, 6 Baxter, 3; Halleck, 776, 781, 798, 815; Projcet, Brussels Conference, Art. 3; Manual, Laws of war § 44. In Ketchum *v.* Buckley 99, U. S., 190, the Supreme Court, (citing Williams *v.* Bruffy, 96 U. S., 176,) say—referring to the local administration in the insurrectionary States—"It is now settled law in this court that, during the late civil war, the same general form of government, the same general law for the administration of justice and the protection of private rights, which had existed in the States prior to the rebellion, remained during its continuance and afterwards. As far as the acts of States did not impair or tend to impair the supremacy of the national authority, or the just rights of the citizens, under the Constitution, they are in general to be treated as valid and binding."

[76] As in the instance of our occupation of Mexico in 1847. See G. O. 237, Hdqrs. of the Army, 1847.

[77] A conquered people are not to be "wantonly oppressed." Johnson *v.* McIntosh, 8 Wheaton, 589.

[78] U. S. *v.* Rice, 4 Wheaton, 254.

[79] U. S. *v.* Rice, 4 Wheaton, 246; Thorington *v.* Smith, 8 Wallace, 9; U. S. *v.* Hayward, 2 Gallison, 501.

[80] Fleming *v.* Page, 9 Howard, 614; Cross *v.* Harrison, 16 Id., 164; Leitensdorfer *v.* Webb, 20 Id., 177.

an international war,[81] that Military Government was more generally and variously exercised, and its nature more fully illustrated than at any previous period of our history.

**ITS TERM.** The status of military government continues from the inception of the actual occupation till the invader is expelled by force of arms, or himself abandons his conquest, or till, under a treaty of peace, the country is restored to its original allegiance or becomes incorporated with the domain of the prevailing belligerent. In the last case, the termination of hostilities does not necessarily put an end to the military government but this may be continued till adequate provision has been made for bringing the country under the civil governmental system of its new sovereign. Such was in substance the ruling of our Supreme Court in regard to the provisional government of New Mexico, acquired by our arms in 1846.[82]

**BY WHOM EXERCISED.** Chief Justice Chase[83] describes military government as "exercised by the military commander under the direction of the President, with the express or implied sanction of Congress." Congress having, under its constitutional powers, declared or otherwise initiated the state of war, and made proper provision for its carrying on, the efficient prosecution of hostilities is devolved upon the President as Commander-in-chief. In this capacity, unless Congress shall specially otherwise provide, it will become his right and duty to exercise military government over such portion of the country of the enemy as may pass into the possession of his army by the
1249 right of conquest. In such government the President represents the sovereignty of the nation, but as he cannot administer all the details, he delegates, expressly or impliedly, to the commanders of armies under him the requisite authority for the purpose. Thus authorized, these commanders may legally do whatever the President might himself do if personally present, and in their proceedings and orders are presumed to act by the President's direction or sanction.[84]

**MAGNITUDE OF THE POWER—ITS LIMITATION.** The power of military government thus vested in the President or his military subordinates is a large and extraordinary one, being subject only to such conditions and restrictions as the law of war, in defining the particulars to which it may extend, imposes upon the scope of its exercise. As it is expressed by the Supreme Court, the governing authority "may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exerted in such cases save those which are found in the laws and usages of war. * * * *In such cases the laws of war take the place of the Constitution and laws of the United States as applied in time of peace.*"[85] The nature and ex-

[81] Prize Cases, 2 Black, 636; New Orleans *v.* Steamship Co., 20 Wallace, 393; Coleman *v.* Tenn., 97 U. S., 517; Dow *v.* Johnson, 100 Id., 164; Brown *v.* Hiatt, 1 Dillon, 372; Phillips *v.* Hatch, Id., 571.

[82] Leitensdorfer *v.* Webb, 20 Howard, 176.

[83] In *Ex parte* Milligan, 4 Wallace, 141.

[84] Cross *v.* Harrison, 16 Howard, 164; Hamilton *v.* Dillin, 21 Wallace, 73; Mechs. Bk. *v.* Union Bk., 22 Id., 276; Gates *v.* Goodloe, 101 U. S., 617; Clark *v.* Dick, 1 Dillon, 8; Porte *v.* U. S., Devereux, 108; Griffin *v.* Wilcox, 21 Ind., 386; Hefferman *v.* Porter, 6 Cold., 391. "The general officers of the army in the field are under the actual or implied direction of the President in all their movements." Allen *v.* U. S., 27 Ct. Cl., 90.

[85] New Orleans *v.* Steamship Co., 20 Wallace, 394. "This language, strong as it may seem, asserts a rule of international law, recognized as applicable during a state of war." Daniel *v.* Hutcheson, 86 Texas, 61. That the power is measured and restricted only by the laws of war, see, also, Sargeant on the Const., 330; 1 Kent, Com., 306; Flanders, Expos. of Const., 169, 184; Little *v.* Barreme, 2 Cranch, 170; State *v.* Fairfield, Com. Pleas, 15 Ohio St., 377.

tent of these powers will be illustrated in considering the details of their exercise.

**FEATURES OF THE EXERCISE OF MILITARY GOVERNMENT—APPOINTMENT OF EXECUTIVE OFFICIALS.** While the conquering belligerent may, if he see fit, abstain from changing the machinery of the civil government of the enemy's country, he may, on the other hand, find it necessary or expedient, in view of the condition of the country, to appoint for the same competent civilians or military persons as commissioners, governors, mayors, sheriffs, secretaries of state, collectors of customs, &c., who, upon his nomination and under his orders, will legally supersede the existing officials and so far administer the government. As observed by the Supreme Court in the case last cited[86]—"The conquering power has a right to displace the pre-existing authority, and to assume, to such extent as it may deem proper, the exercise by itself of *all the powers and functions of government.* It may appoint all the necessary officers, and clothe them with designated powers, larger or smaller, according to its pleasure. It may prescribe the revenues to be paid, and apply them to its own use or otherwise."

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In the leading case of Cross *v.* Harrison,[87] the Supreme Court affirmed the legality, "under the law of arms and the right of conquest," of the civil government established, pursuant to the orders of President Polk, by Gen. Kearney, in 1847, in Upper California, then in the possession of our forces as a conquered Mexican province. This government consisted mainly of military officers appointed to act as civil officials, to wit: Col. R. B. Mason, 1st Dragoons, as Governor, 1st Lieut. H. W. Halleck, Engineer Corps, as Secretary of State, Capt. J. L. Folsom, A. Q. M., as Collector of Customs, &c. Col. Mason was succeeded by Bvt. Brig. Gen. B. Riley, who continued military governor till December 20, 1849, the date of the ratification and adoption of the first constitution of California.

In the later case of Leitensdorfer *v.* Webb,[88] the provisional civil government established by Gen. Kearney, in taking possession of New Mexico in 1846, was held, by the same Court, to have deposed the pre-existing municipal government, and to have been legally administered during the period of the possession of the country as a conquered province.

During the recent war the appointment by the President, of Andrew Johnson, Edward Stanley and Geo. B. Shepley, as "military governors" of Tennessee, North Carolina and Louisiana, in March, May and June, 1862, respectively;[89] and, in 1865, of Messrs. Holden, Sharkey, Johnson, Hamilton, Parsons, Perry and Marvin as "provisional governors" of North Carolina, Mississippi, Georgia, Texas, Alabama, South Carolina and Florida respectively,[90]—presented further examples of an exercise, by the prevailing belligerent, under the laws of war, of the power to govern hostile states held by

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[86] New Orleans *v.* Steamship Co., *ante.* And see State *v.* Hall, 6 Baxter, 3.

[87] 16 Howard, 164. And see Fleming *v.* Page, 9 Id., 614, as to the authority of the collector appointed by the military commander at Tampico.

[88] 20 Howard, 176.

[89] See Rutledge *v.* Fogg, 3 Cold., 554, affirming the constitutionality of the appointment of the military governor of Tennessee.

[90] The authority of the President to establish these provisional governments during the war is affirmed in Texas *v.* White, 7 Wallace, 400. And see Handlin *v.* Wickliffe, 12 Id., 173; Scott *v.* Billgerry, 40 Miss., 119; McClelland *v.* Shelby Co., 32 Texas, 17; Shorter *v.* Cobb, 39 Ga., 291; Shaw *v.* Carlile, 9 Heisk., 603.

The mere fact of the "appointment by the President of a military governor for the State did not of itself change" the local laws or procedure, as, for example, the "general laws then in force for the settlement of the estates of deceased persons." Ketchum *v.* Buckley, 99 U. S., 190.

his armies. In New Orleans, in 1862, the department commander repeatedly appointed civilians, or detailed military officers, to fill municipal offices.[91]

**APPOINTMENT OF JUDGES AND CREATION OF COURTS.**[92] In the instance referred to in Leitensdorfer *v.* Webb, above cited, a part of the provisional government established in New Mexico by the commander of the invading army, and held legal and operative by the Supreme Court, was "a judicial system" consisting of a superior or appellate court, and circuit courts, whose jurisdiction was also specifically defined.[93]

1252 In the late civil war there was established at New Orleans by the President, by an order of October 20, 1862, a civil court entitled the "Provisional Court of Louisiana," with both civil and criminal jurisdiction.[94] The authority of this court to hear and determine a cause in admiralty was sustained by the U. S. Supreme Court in The Grapeshot;[95] and its judgment for the recovery of a mortgage debt of $80,000, and execution issued for the sale of the mortgaged premises, were by the same court recognized as valid in Burke *v.* Miltenberger.[96] As to its jurisdiction of crimes, this appears maintained in an extended opinion of its judge, Hon. C. A. Peabody, in the cases of U. S. *v.* Reiter and Louis, charged with murder and arson.[97]

The Supreme Court, further, in Mechs. & Traders' Bank *v.* Union Bank,[98] affirmed the legality of a judgment rendered by another war-court—the "Provost Court of New Orleans," (established by the Department Commander in 1862,[99] in an action for the recovery of a loan of $130,000.

Other Provost Courts, with a jurisdiction assimilated in general to that of justices' or police courts, were established from time to time by military commanders during the war; as—for example—The "Provost Court of the Department of the Gulf,"[100] a "Provost Court for the Department of Virginia,"[1] a "Provost Court for the State of Texas,"[2] a "Provost Court of the Department of Arkansas,"[3]

Provost Courts for the Posts of Vicksburg and Natchez,[4] "Superior" and

1253 "Circuit" Provost Courts in Sub-Districts of the Department of the

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[91] S. O. 167, 210, 243, 491, Dept. of the Gulf, 1862. And see—as to the appointment of a mayor, &c., by these orders—New Orleans *v.* The Steamship Co., 20 Wallace, 387.

As to the exercise of the power of appointment of civil officials, as most freely resorted to under the military government established by the Reconstruction Laws, see Title VII, *post.*

[92] As it is said in State *v.* Hall, 6 Baxter, 3—"He" (the "conquering power") "may adopt the tribunals of justice already existing, or abolish them and create others in their stead."

[93] These courts "displaced and superseded every previous institution of the vanquished or deposed political power which was incompatible with them." Leitensdorfer *v.* Webb, *ante.* As to the courts established by the British upon their occupation of New York in 1776–7, see Jones, History of New York, vol. 2, p. 120.

[94] The order further appointed a person named as judge of the court, and empowered him to appoint a prosecuting attorney, marshal and clerk for the same; these appointments "to continue during the pleasure of the President, not extending beyond the military occupation of the city of New Orleans, or the restoration of the civil authority in that city and in the State of Louisiana." An interesting account of this Court is to be found in Moore's Rebellion Record, vol. X, pp. 341–346.

[95] 9 Wallace, 129. And see New Orleans *v.* Steamship Co., *ante.*

[96] 19 Wallace, 519. And see Burke *v.* Tregre, 22 La. An., 629.

[97] 13 Am. Law Reg., 534. And see Hefferman *v.* Porter, 6 Cold., 391.

[98] 22 Wallace, 276. See this case also in 25 La. An., 387.

[99] By G. O., Dept. of the Gulf, of May 1, 1862.

[100] G. O. 45, Dept. of the Gulf, 1863.

[1] G. O. 41, Dept. of Va., 1863.

[2] G. O. 6, Dept. of the Gulf, 1864.

[3] G. O. 12, Dept. of Ark., 1865.

[4] G. O. 31, Dept. of Miss., 1865.

South,[5] "Post Provost Courts" in the Department of South Carolina,[6] a Provost Court at Alexandria, Va., whose jurisdiction was confined to cases in which colored persons were interested.[7]

The proceedings in civil cases of a further war-court, established by the Department Commander in Memphis in 1863, designated a "Civil Commission," has been the subject of judicial examination, and its jurisdiction has been sustained by the courts of Tennessee.[8]

To cite a further instance—a "Court of Conciliation," consisting of three "Arbitrators," was established by Maj. Gen. Halleck at Richmond in 1865,[9] the function of which mainly was to adjudicate actions of debt "where the contracts were made upon the basis of confederate currency," which, it is added, "now has no legal existence."

As to this class of courts, it is to be said in general—that it is not only within the power of the commander, but, "for the security of persons and property and for the administration of justice,"[10] it often becomes his duty, to establish the same; that they are as legally authorized as any other courts of the land;
1254 and that their orders, decrees and records are entitled to the same full faith and credit as those of any other lawfully constituted tribunals.[11]

As illustrating the authority and jurisdiction of the courts established by military power during the occupation of the enemy's country in the late war, the remarks of Chief Justice Chase in his Address to the Bar, at Raleigh, No. Ca., in June, 1867, may well be cited, as follows:—"The national military authorities took the place of all ordinary civil jurisdiction or controlled its exercise. All courts, whether state or national, were subordinated to military supremacy, and acted, when they acted at all, under such limitations and in such cases as the commanding general, under the directions of the President, thought fit to prescribe. Their process might be disregarded and their judgments and decrees set aside by military orders. * * * The military tribunals, at that time, and under the existing circumstances, were *competent to the exercise of all jurisdiction, criminal and civil, which belongs under ordinary circumstances to civil courts.*"[12]

The civil court, as a branch of the civil government under the law of war and conquest, should—it need hardly be repeated—properly be established by

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[5] G. O. 102, Dept. of the South, 1865; S. O. 9, State of So. Ca., 1866.

[6] G. O. 37, Dept. of So. Ca., 1866.

[7] G. O. 103, Dept. of Washington, 1865. As to Provost Courts under the Reconstruction Laws, see under Title VII, *post*.

[8] Hefferman *v.* Porter, 6 Cold., 391; State *v.* Stillman, 7 Id., 341.

[9] By G. O. 5, Div. of the James, May 3, 1865. It is declared in this Order that—"The fees charged will be simply sufficient to pay its expenses. Any surplus will be given to the poor. * * * No fees will be charged to the poor. * * * In its decisions the court will be governed by the principles of equity and justice. All alike, white and colored, will be allowed the benefit of its jurisdiction. All proceedings will be simple and brief, and directed solely to ascertaining and securing exact justice." By G. O. 10, Id., the jurisdiction of the court was extended to the counties of Henrico and Chesterfield; and by G. O. 114, Id., (Gen. Terry,) to the entire Dept. of Va., "as to suits by loyal owners to recover possession of real or personal property, sold or disposed of by authority of the confiscation laws of the confederate government."

An instance of a similar special court, called a "commission," consisting of three Mexicans as "Arbitrators," to determine an old litigated controversy as to the rights of two citizens to certain land, was established, in the Mexican war, by Gen. Wool, in G. O. 516 of his Command, of 1847.

[10] The Grapeshot, 9 Wallace, 129.

[11] For further recognition of the authority of these war-courts, see Handlin *v.* Wickliffe, 12 Wallace, 173; Lanfear *v.* Mestler, 18 La. An., 497; Taylor *v.* Graham, Id., 656; Scott *v.* Billgerry, 40 Miss., 119; Murrell *v.* Jones, Id., 565; also Cooley, Prins. Const. Law, 44, 87; Whiting, War Powers, 277.

[12] Chase's Decisions, 133.

the commander of the army of occupation. An *inferior* officer cannot in general be authorized to exercise such right of sovereignty.[13]

**RESTRICTIONS UPON COURTS.** As incidental to the power last considered, the President or army commander, in establishing new courts, or—especially—where he leaves the existing courts in operation, may impose upon the same such restrictions as to jurisdiction or procedure as he may deem requisite for the protection of loyal citizens, as well as of military persons or employees of the government. Specific instructions to this effect were given to
1255 commanders by the President in an order issued from the War Department near the close of the war.[14] Previously, however, orders had been made from time to time in the military departments, with a view to the extending of similar protection against suits, prosecutions, or criminal process, as also against oppressive sales on execution, foreclosures, &c.[15] Proceedings had also been prohibited or suspended as against other special classes of persons; as, for example, suits, on the part of the original owners, against purchasers of confiscated property,[16] and for rent against lessees of captured or abandoned estates.[17] Subsequently to the General Order above cited, to wit, pend-
1256 ing the period of the execution of the Reconstruction Laws, a similar course of action was quite generally pursued by the district commanders, as will hereafter be specified.

**REQUISITIONS.** An occupying army will ordinarily find it essential to resort in a greater or less degree to the country for the means of its maintenance. In that case the articles needed should not be simply seized as by an army on the march or in the field, but if practicable formal requisition for the same should be made by the officer commanding upon the civil authorities,

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[13] Snell *v.* Faussatt, 1 Washington, 271; 11 Opins. At. Gen., 86, 149.

[14] G. O. 3 of Jany. 12, 1866. This order is in full as follows:—

*"To protect loyal persons against improper civil suits and penalties in late rebellious States.*

Military Division and Department Commanders, whose commands embrace, or are composed of, any of the late rebellious States, and who have not already done so, will at once issue and enforce orders protecting from prosecution or suits in the State or Municipal Courts of such States, all officers and soldiers of the armies of the United States, and all persons thereto attached, or in anywise thereto belonging, subject to military authority, charged with offences for acts done in their military capacity, or pursuant to orders from proper military authority; and to protect from suit or prosecution all loyal citizens or persons charged with offences done against the rebel forces, directly or indirectly, during the existence of the rebellion, and all persons, their agents or employees, charged with the occupancy of abandoned lands or plantations, or the possession or custody of any kind of property whatever, who occupied, used, possessed, or controlled the same, pursuant to the order of the President, or any of the Civil or Military Departments of the Government, and to protect them from any penalties or damages that may have been or may be pronounced or adjudged in said Courts in any of such cases; and also protecting colored persons from prosecutions in any of said States charged with offences for which white persons are not prosecuted or punished in the same manner and degree." And see the detailed General Order, No. 2, Dept. of Washington, 1866, issued pursuant to the same; also ruling approving same in State *v.* Cheek, 25 Ark., 206.

[15] See G. O. 15, 113, Dept. of the Gulf, 1863; Do. 34, Dept. of the Mo., 1864; Do. 113, 124, Dept. of Va., 1865; Do. 38, Dept. of Fla., 1865; Do. 76, Dept. of La., 1865; Do. 3, Dept. of So. Ca., 1865; Do. 7, Id., 1866; Do. 21, Dept. of Texas, 1866. In a few cases orders were issued prohibiting arrest or imprisonment for debt in general. G. O. 3, Dept. of Ala., 1865; and compare Do. 10, Second Mil. Dist., 1867, cited under Title VII, *post*. Magistrates, attorneys, or parties initiating or carrying on prohibited proceedings were made liable to arrest and punishment. See G. O. 113, 124, Dept. of Va., 1865.

[16] G. O. 9, Dept. of Washington, 1866.

[17] G. O. 31, Dept. of the Gulf, 1864.

or upon the individuals possessing them. Such requisitions should be resorted to only for the supply of necessaries, and should not be excessive in amount. As it is expressed in the Manual of the Institute—"Supplies in kind (requisitions) demanded from districts or individuals must correspond to the generally recognized necessities of war, and must be proportioned to the resources of the country."[18] Due receipts—it is prescribed—should be given for all articles requisitioned where payment is not made at the time, in order that a future claim for payment may be properly evidenced.[19] Requisitions have never been so generally resorted to as by the Germans in the Franco-Prussian war: they were commonly addressed to the mayor of the commune, and covered a great variety of articles, whether required in large or small quantities: receipts were invariably given.[20]

**EXACTION OF CONTRIBUTIONS.** As a further feature of Military Government, the commander of the occupying army, according to the weight of authority, is authorized by the laws and usages of war to exact pecuniary "*contributions*" from the conquered.[21] In the language of the Brussels
1257 Conference, contributions may be imposed "only upon the order or on the responsibility of the General in chief, or of the superior civil authority established in the occupied territory." They may indeed be required by commanders of armies on the march, or in temporary possession of the country, but it is in general by virtue of an established occupation, or of a conquest for the time accomplished, that a formal contribution is called for or expected. Such contributions as have been exacted in nearly all the European wars, and conspicuously in the conquests of the English in India, are generally expressed to be for the purpose of defraying the expenses of the war. A contribution may also be levied for the paying of the cost of the military government itself during the period of occupation. Or it may be justified as a penalty imposed upon the conquered nation for having initiated hostilities in violation of treaty or otherwise without legitimate excuse; or as a commutation for the plunder to which the population would otherwise be subject, or a compensation for the protection of life and property and the preservation of order under circumstances of difficulty; or as a mulct for the commission by the troops or people of the invaded country of acts specially injurious to the occupying army or to the persons under its protection.[22]

Contributions are generally exacted not from individuals but from the enemy government, or from communities in the mass—as from separate districts, towns, &c., and through the local authorities. Thus upon the conquest of Mexico in 1847, Gen. Scott levied assessments, "for the support of the American military occupation," upon the nineteen States of that Republic, in sums from $5,000 to

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[18] Part II, 56. And see Woolsey, (6th ed.,) 220.

In a General Order of the Dept. of the Ohio, issued by Gen. Halleck, in 1862, it was directed that such requisitions should "be made as light as possible, and should be so distributed as to produce no distress among the people."

[19] See Project, Brussels Conference, Art. 42; Manual, Laws of War § 60; Lieber, Inst. § 38 and other authorities cited in last note.

[20] See Edwards, The Germans in France, p. 49–50. "The only officers who possessed the right of issuing requisitions were generals and commanders of detached corps." Id., p. 51.

[21] Fleming *v.* Page, 9 Howard, 614. Cross *v.* Harrison, 16 Id., 189; Hamilton *v.* Dillin, 21 Wallace, 73; Clark *v.* Dick, 1 Dillon, 8; Lewis *v.* McGuire, 3 Bush, 202; Halleck, 458, 460. That an inferior officer cannot, of his own authority, exercise this right see Lewis *v.* McGuire. Bluntschli (§ 654) is the principal authority *contra*.

[22] The numerous contributions levied by German commanders in France, in 1870–1, were in the majority of cases *fines* imposed for acts of this description.

$668,332, the latter being the amount levied upon the Capital.[23] Previously,
1258 in March of the same year, at Monterey, Gen. Taylor had made and enforced an assessment upon the inhabitants of Tamaulipas, New Leon and Coahuila, by way of indemnification for the pillage and destruction of his wagon trains.[24]

In the case of Fleming *v.* Page,[25] the Supreme Court recognized as legal the establishing by the military commander of a custom house at Tampico, upon its occupation in 1847, and the levying through the same of duties on the foreign commerce of the country as "a mode of exacting contributions from the enemy to support our army," and therefore a legitimate war measure or "weapon of war." So, later, in Cross *v.* Harrison,[26] the same Court recognized as valid the authority of the President to impose, at San Francisco in 1847, through the military commander, "duties on imports and tonnage as military contributions for the support of the government and of the army."

In some instances special assessments have been resorted to for particular objects not of a military character, or for the benefit of classes or individuals. General Butler, as department commander, in 1862, levied about $700,000 upon individuals and corporations, (alleged to have aided and abetted the enemy,) for the benefit of the "destitute poor" of New Orleans;[27] and it has been held that a subsequent commander, in 1864, was authorized in levying a tax of five dollars *per* bale on cotton brought into that city, to be applied to hospital, sanitary and charitable purposes.[28] By an order of Gen. Halleck, made at St. Louis, (G. O. 24 of 1862), the class of persons in sympathy with the enemy were assessed "for the benefit of the southwestern fugitives," and the seizing of property, if necessary to enforce payment, was directed. By an order of the Provisional Governor of Tennessee, of Dec. 13, 1862, a similar class of persons in Nashville were assessed for the support of the destitute families of persons who had been conscripted into the confederate armies. In a later order issued by Gen-
1259 eral Grant, dated "In the Field, Chattanooga, Tenn., Nov. 5, 1863,"[29] stringent directions were given for the indemnifying of "Union families" and "Union refugees," (who had suffered from raids or been driven from their homes,) by means of "assessments" to be made upon "secessionists of the neighborhood." Similarly, by an order of the commander at Memphis in 1863,[30] resident enemies, having property, were required to contribute to the support of refugees driven within our lines by "insurrectionary violence." And by a subsequent order from the same source[31] assessments were levied upon a similar class of persons to *indemnify* loyal individuals for damages suffered by reason of the seizure or destruction of their property by parties engaged in illegal warfare. In some instances also the contribution was exacted with a view to the compensation or relief of the families of loyal citizens or of soldiers whose lives

[23] G. O. 287, 395, Hdqrs. of Army, 1847. Scott states in his Autobiography, (p. 582,) that there actually came into his hands "about $220,000," of which $102,000 was expended for the benefit of the soldiers, and $118,000 was sent to Washington for the purposes of the founding of an Army Asylum—the present "Soldiers' Home." Strictly, this latter, as being in the nature of an investment of the contribution for the *profit* of the Government, was not a legitimate use of the funds. See *post*, p. 833.

[24] Jenkins, Hist. of Mexican War, 243.

[25] 9 Howard, 614.

[26] 16 Howard, 189.

[27] G. O. 55, 105, S. O. 247, Dept. of the Gulf, 1862. [As to other measures for the benefit of the *poor* of this command, see G. O. 19, 20, 21, 25, 30, 35, 55, 104, and S. O. 82, 166, 244, 246, Dept. of the Gulf, 1862.]

[28] DIGEST 470–1. And see Hamilton *v.* Dillin, 21 Wallace, 73.

[29] G. O. 4, Div. of the Miss., 1863.

[30] G. O. 101, Sixteenth Army Corps, 1863.

[31] G. O. 128, Id.

had been taken by guerillas or the like.[32] For all contributions formal receipts should be given.[33]

In the more modern European wars, the payment of the principal contribution or indemnity exacted is generally made one of the conditions of peace and as such provided for in the treaty. Thus by the treaty between Austria and Prussia, at the end of the "Seven Weeks' War," of 1866, there was agreed to be paid by the former to the latter a contribution of forty million thalers. About half of the expenses of the war incurred by Prussia are said to have been covered by the contributions exacted from the defeated States, which, with that conceded by Austria, included ten million thalers from Saxony, thirty million guiden from Bavaria, eight million florins from Würtemberg, six million gulden from Baden, the same amount from the City of Frankfort, and three million florins from Hesse-Darmstadt. The more recent treaty
1260 between the German empire and France, at the close of the war in 1871, stipulated for a payment, within three years, by France, of an indemnity of five milliards of francs, which was secured by the occupation by the German forces, till the payment of the final instalment, of six departments in the north and east of France and the fortress of Belfort.

By the treaty of San Stefano, at the end of the Russo-Turkish war, March, 1878, the Sublime Porte became bound to reimburse the Emperor of Russia for the expenses of the war, by the payment of an indemnity of 1,410,000,000 roubles, for the greater part, however, of which sum, the Emperor, "in consideration of the financial embarrassment of Turkey," consented to "substitute" certain "territorial cessions" enumerated, but subsequently reduced by the treaty of Berlin.

China, which, at the close of the war with the English and French in 1860, was subjected to a contribution of two millions sterling and a further payment of one hundred thousand pounds to the families of the murdered captives, has recently, April, 1895, in her treaty with Japan, been required to render to the latter a war indemnity of 200,000.000 taels, made payable in six years, and secured by the occupation of certain territory.

The lesser contributions required in modern times by commanders of European armies have usually been in the nature of taxes or fines levied commonly after the manner and form of the assessments prescribed by the local law.[34]

**SEIZURE AND APPROPRIATION OF PROPERTY—Public Real Property.** It is the general rule that in war no mere occupation, however firm, operates to transfer the title of land, as territory, to the occupying power; that this passes only when the right of conquest is *confirmed* by treaty.[35] The belligerent in possession thus ordinarily acquires and enjoys, prior to the peace, only the usufruct of immovable property. An exception may exist in the case of the capture of a special tract which had been acquired and used by the enemy for hostile purposes.[36] A further exception has been recognized as growing out of the *event* of our late civil war. Thus, in the case of
1261 the premises, in Alabama, of certain iron works, purchased by the Con-

[32] G. O. 159, Dept. of the Mo., 1864; Do. 147, Dept. of the Gulf, 1864; Do. 6, Dept. of the Cumberland, 1864. In G. O. 3, Dist. of the Mo., 1862, Gen. Schofield assesses upon "rebel sympathizers" in Missouri the sum of $5,000 for every soldier or Union citizen killed, and of $1,000 to $5,000 for every one wounded, by "lawless guerilla bands raised or sustained by" such sympathizers, and directs that the "full value of property destroyed or stolen" by similar agencies be collected from the same class.

[33] Project, Brussels Conference, Art. 41; Manual, Laws of War § 60.

[34] Project, Brussels Conference, Arts. 5, 41; Manual, Laws of War § 58.

[35] 1 Kent, Com., 110; Halleck, 447; Hall, 494; Project, Brussels Conference, Art. 7; Manual, Laws of War § 52.

[36] U. S. *v.* A Tract of Land, 1 Woods, 475.

federate States for military uses in 1863, and captured by the federal forces in March, 1865, it was observed by the Supreme Court.[37]—"Conquered territory is usually held as a mere military occupation until the fate of the nation from which it is conquered is determined; but if the nation is entirely subdued, or in case it be destroyed and ceases to exist, the right of occupation becomes permanent, and the title vests absolutely in the conqueror." And it was adjudged that the premises and property in question became, at the end of the war, vested in the United States and could legally be disposed of thereby, for the reason that the government of the Confederate States had then wholly ceased to exist—become extinct.

**Special exemptions.** As in the event of an invasion,[38] so, and *a fortiori*, upon the established occupation of the country of an enemy, the premises and buildings of public establishments devoted to religious, charitable, educational, literary or sanitary purposes, and the like, are by the common law of war, exempt not only from seizure, but unless necessity requires it, from use, in the exercise of the military government. If such buildings are required for the sick or wounded, such use should continue only during the emergency. Any unnecessary injury done such institutions, or to historical monuments or collections, or works of science or art, is interdicted and should be severely punished.

**Personality of the enemy.** As to personal property of the enemy's government, the occupying belligerent may appropriate any valuables or material which have been in the use of the enemy, or are usable, for war purposes, such as moneys, arms and other munitions, supplies, means of transport, or other movable property. The modern codes specify that railway plant and stock, telegraph lines, steam or other vessels, (whether belonging indeed to the enemy government or to corporations or individuals,) may not, unless the necessities of war require it, be destroyed, but should be restored at the
1262 conclusion of hostilities.[39] Their disposition, however, if of sufficient importance, would properly be provided for in the treaty of peace and settlement.

**PRIVATE PROPERTY.** Except as already indicated, and subject to such taxes or contributions as the dominant authority may impose, all innocent private property of the individual inhabitants of an enemy's country occupied and held under military government, including moneys, securities, rents and proceeds, debts, and personal and household effects, remain, under the modern law of war, exempt, as a general rule, from seizure or adverse use, and the possession thereof by the private owners is to be respected. A still stricter rule should be applied here than where the district is invaded merely, not occupied. In a *civil* war, however, the property of persons known to be disaffected will not always be treated as innocent. Thus in some instances during

[37] U. S. *v.* Huckabee, 16 Wallace, 414.

[38] See *ante*, page 780.

[39] Project, Brussels Conference, Arts. 5, 6; Manual, Laws of War § 50, 51, 55.

Note, in this connection, the legislation of July 31, 1862, by which Congress empowered the President to take possession of all the Railroad and Telegraph lines in the United States for military purposes, and the order of the Secretary of War of May 25, 1862, announcing the taking possession of the same by the President, and directing "that the respective Railroad Companies, their officers and servants, shall hold themselves in readiness for the transportation of troops and munitions of war, as may be ordered by the military authorities, to the exclusion of all other business." The Companies here mainly had in view were those whose lines traversed enemy's country or communicated with it. At the end of the war they were fully reinvested in the possession and control of their property, and were in general settled with and paid by the United States for the government transportation furnished by them.

our late civil war the rents of buildings belonging to disloyal owners, absent within the enemy's lines, were collected and appropriated to public purposes, by the orders of the occupying commander. An example of such an order was that given by General Grant to General Sherman, in August, 1862, in regard to the collection of such rents at Memphis, Tenn., the lawfulness of which was subsequently affirmed by the U. S. Supreme Court.[40] The amount of all such rents paid into the U. S. Treasury was, as officially reported, nearly four hundred thousand dollars.[41]

1263 The above general rule, however, of the law of nations, is subject to an exception where private property is actually required to supply the needs of the troops of the occupying army. The belligerent right of appropriation under such circumstances, observes the Supreme Court in Dow *v.* Johnson,[42] is "not extinguished by the occupation of the country, although the necessity for its exercise is thereby lessened." *A fortiori* such property may be taken where employed by the owner in unlawful trade and intercourse,[43] or where used, or intended or held subject to be used, for the support or assistance of the enemy. Such, for example, were the *rents* above referred to, which were seized as a precautionary measure to prevent their accruing to the enemy's benefit. But especially such was the *cotton* so frequently seized by the national forces in the territory of the insurrectionary States during the civil war. The proceeds of this cotton was indeed the principal resource of the enemy for the prosecution of the war and the maintenance of the confederacy, and, though belonging to private individuals, it was repeatedly held by the Supreme Court to have been "hostile property and a legitimate subject of capture"—"as much so as the military supplies and munitions of war it was used to obtain."[44]

1264 In deference, however, to "the humane maxim of the modern law of nations which exempts private property of non-combatant enemies from capture as booty of war,"[45] Congress by special legislation, during the war,[46] provided for the conversion of such cotton and all other captured private property into money and its deposit in the Treasury, subject to the claims of the original owners and their recovery of the same on proof of loyalty. The proceeds of the captured cotton thus sold and paid into the Treasury amounted to about fifteen millions

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[40] In Gatea *v.* Goodloe, 101 U. S., 612. As to these, see reference, *post.*

[41] The exact amount, as it appears from the Annual Report of the Secretary of the Treasury for 1866, was—$392,004.41. In his Report of Nov. 28, 1894, the Chief of Miscellaneous Division, Treasury Department, states the aggregate of *all* rents received at $613,284.96.

[42] 100 U. S., 107.

[43] Halleck, 496; Mitchell *v.* Harmony, 13 Howard, 133.

[44] Whitfield *v.* U. S., 92 U. S., 170. "That cotton, though private property, was a legitimate subject of capture, is no longer an open question in this court." U. S. *v.* Anderson, 2 Wallace, 404; U. S. *v.* Padelford, 9 Id., 540; Haycraft *v.* U. S., 22 Id., 81. "It was the foundation on which the hopes of the rebellion were built. It was substantially the only means which the insurgents had of securing influence abroad. In the hands of private owners, it was subject to forced contributions in aid of the common cause. Its exportation through the blockade was a public necessity. Importing and exporting companies were formed for that purpose. It is not too much to say that the life of the Confederacy depended as much upon its cotton as it did upon its men. If they had had no cotton, they would not have had, after the first year or two, the means to support the war. To a very large extent it furnished the munitions of war and kept the forces in the field. It was therefore hostile property and legitimately the subject of capture in the territory of the enemy." White, C. J., in Lamar *v.* Browne, 92 U. S., 194. And see Mrs. Alexander's Cotton, 2 Wallace, 404; Radich *v.* Hutchins, 95 U. S., 213; Young *v.* U. S., 97 Id., 58; Briggs *v.* U. S., 143 U. S., 346. In Coolidge *v.* Guthrie, Flippin, 97, it was held that an action would not lie against a military officer for the taking of cotton *jure belli.*

[45] U. S. *v.* Klein, 13 Wallace, 137.

[46] By the so-called "Captured and Abandoned Property Act" of March 12, 1863.

of dollars; that of other miscellaneous property to nearly three millions. Of the proceeds of the cotton there was returned to owners or claimants an amount of upwards of ten millions of dollars under the legislation referred to.[47]

In closing this subject it should be remarked that a non-combatant, who yields obedience in good faith to the occupying power, is entitled to protection against plunder or the levy of irregular contributions.[48] And of course private property cannot properly be impressed, or taxes or contributions be assessed, except for public purposes. Private effects or funds cannot be taken merely "to speculate upon or to increase the wealth or capital of the State."[49]

It is also to be noted that the right, under Military Government, to appropriate the private property of enemies for any purpose is to be regarded as materially modified where, upon a permanent or continued occupation, an increased measure of protection to person and property has been *guaranteed*.[50] So, where a commander, in occupying a country or town of the enemy, has formally pledged the government to the holding inviolate of the rights of property of individuals, the seizure of private property by the military authorities will not be recognized as legal.[51] Thus an order given by Gen. Banks, commanding at New Orleans in 1863, for the taking possession for military
1265 use of moneys belonging to enemies on deposit in banks of that city, was held by the Supreme Court to have been unauthorized for the reason that Gen. Butler, by his proclamation, on first occupying the city, of May 1, 1862, had given an express pledge of the character indicated.[52]

**COMPULSORY EMPLOYMENT AND TREATMENT OF INHABITANTS.** As a general rule, the inhabitants of territory occupied by an enemy cannot be compelled against their consent to take part in military operations of offence or defence against their own government or army. Nor can they be required (except by way of penalty for an offence, or to secure their good conduct), to take an oath of allegiance or of obedience to the existing military government, or to the government of the enemy nation.[53] Emergencies, however, may arise, when the population may properly be impressed to perform labor, or render *quasi* military service, for the purposes of the occupying belligerent; but such service cannot properly be extended to bearing arms as soldiers. Thus in the Franco-Prussian war the French peasants were frequently required by the German military authorities to work on the roads and on the railways, especially the Eastern Railway, and to serve as drivers, their carts being at the same time requisitioned. By a General Order issued by the military commander at Memphis in 1863, district, division and brigade commanders were required to impress all able-bodied persons so as to fill up regiments and batteries to their maximum.[54] A similar order, (G. O. No. 4,) was made in the same year by the commander of the Department and Army of the Tennessee. As to any of such persons as may have been *enemies*, this action was not sanctioned by the laws of war.

The treatment of the citizens of the district under military government should further, as it is declared by modern codes, be especially characterized

[47] See Report of the Chief of Miscellaneous Division, Treasury Department, Nov. 28, 1894.

[48] Lewis *v.* McGuire, 3 Bush, 202.

[49] Taylor *v.* Nashville, &c., R. R., 6 Cold., 646.

[50] Gates *v.* Goodloe, 101 U. S., 615; The Venice, 2 Wallace, 258.

[51] Planter's Bk. *v.* Union Bk., 16 Wallace, 483. Compare the proclamation issued by Gen. Scott at Jalapa, May 11, 1847, in which it is declared that the army "will respect private property and persons and the property of the Mexican church." Scott's Autobiography, p. 549.

[52] Planter's Bk. v. Union Bk., *ante*.

[53] Project, Brussels Conference, Art. 36; Manual, Laws of War § 47, 48.

[54] G. O. 157, Sixteenth Army Corps, 1863.

by a respect shown for their domestic affairs, their family relations and the exercise of their religion. Thus, in the Manual of the Institute,[55] it is said—"Female honor, religious beliefs and forms of worship must be respected. Interference with family life is to be avoided." It was an alleged dis-
1266 regard of the religious scruples of the natives by the British in India which was the immediate cause of the disastrous Sepoy rebellion of 1857.

Some *special features* of the exercise of Military Government in our wars may here be noticed.

**POLICE REGULATIONS.** Gen. Scott, in occupying Mexico, made provision in one of his principal orders[56] for establishing a Mexican civil police to act in conjunction with the army. The organization of a local police force in some districts of the South was also provided for in orders during the late war.[57]

Of the regulations of police ordained by commanders in that war the most frequent were the *quarantine* regulations, established generally at seaports occupied by our forces,[58] pursuant to a direction of the President.[59] Regulations were also imposed by way of restriction upon local traders, especially those trading by boats on the great rivers connecting States, as the Ohio[60] and Mississippi;[61] as also upon persons carrying on business injurious to the military service—such as dealers in liquor[62] and in military clothing.[63] Other regulations made provision in regard to the passes which should be required for passing the lines,[64] or for traveling through disturbed parts of the country;[65] also in regard to passengers embarking upon and landing from vessels, who were required to be furnished with passports, to have their baggage examined and to be deprived of the arms in their possession.[66] Others regulated
1267 the use of railroads and of telegraph lines.[67] By an order of the Provost Marshal at St. Louis in August, 1861, the wearing of concealed weapons was inhibited to any persons except the military and the regular police. By orders issued by the Department Commander in August, 1862, the population of New Orleans, (with some exceptions,) were required to be disarmed.[68] By an order of the Department Commander at the same place, of July, 1863, assemblages of persons not expressly authorized are forbidden, bar-rooms and places of business are required to be closed at 9 o'clock, p. m., and it is directed that no persons not belonging to the military or police force shall be allowed to be on the streets after that hour. By an order of December, 1863, the City Gas Company of Norfolk, Va., having sealed up its works, the same were taken possession of by the occupying military authorities and the lighting of the city at night caused to be resumed.[69]

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[55] § 49. And see Project, Brussels Conference, Art. 38.

[56] G. O. 287, Hdqrs. of Army, 1847.

[57] See G. O. 129, Sixteenth Army Corps, 1863; Do. 43, Dept. of No. Ca., 1865.

[58] See G. O. 15, Dept. of No. Ca., 1866; Do. 4, 24, Dept. of So. Ca., 1866; Med. Dctr. O., Id., April 1, 1866; G. O. 11, Dept. of the Carolinas, 1866; Do. 12, 15, Dept. of Ala., 1866; Do. 20, Dept. of Fla., 1866; Do. 21, Dept. of La., 1866; Do. 10, 12, 13, Dept. of Texas, 1866.

[59] G. O. 15 of 1866.

[60] G. O. 26, Dept. of the Ohio, 1861.

[61] See the G. O., Dept. of the Gulf, for 1864 especially.

[62] G. O. 31, Dept. of So. Ca., 1865.

[63] G. O. 162, Sixteenth Army Corps, 1863.

[64] G. O. 56, Army of the Potomac, 1861; Do. 27, Id., 1862; Do. 10, Dept. of the South, 1863.

[65] G. O. 22, Dept. of N. Mex., 1864.

[66] G. O. 35, Dept. of the Pacific, 1864; Do. 5, 18, Id., 1865.

[67] G. O. 8, 36, 57, Dept. of No. Ca., 1865.

[68] It is stated by Parton, ("Gen. Butler in New Orleans," p. 463,) that about 6,000 arms were surrendered under these orders.

[69] VIII Reb. Rec., 28.

**REGULATION OF LABOR.** The matter of the regulating of labor was mostly restricted to cases of freedmen or colored persons brought by the chances of war within military protection and care. The President, in freeing, by his Proclamation of January 1, 1863, all persons held as slaves in the insurrectionary States and districts, recommended to them "that, in all cases when allowed, they labor faithfully for reasonable wages," and further authorized that they be "received into the armed service of the United States." Under this proclamation and repeated legislation of Congress, a large number of such persons were employed in connection with our armies, and some one hundred and forty regiments of colored troops were organized. It was, however, mainly under the Act of March 3, 1865, "to establish a Bureau for the relief of Freedmen and Refugees," by which abandoned and confiscated lands in the insurrectionary States were set apart and assigned "for the use of loyal refugees and freedmen," (and under the appropriations for the support of this Bureau, continued till 1869,) that the matter of the regulation of labor became an incident of *military government*. At localities on the coasts of South
1268 Carolina, Georgia and Florida, especially, was such regulation directed by military commanders, and frequent General Orders were issued by them relating to the government, subsistence and employment of the classes of persons indicated in the statute.[70]

**REQUIREMENTS AS TO OATHS OF ALLEGIANCE.** Upon the occupation of hostile country during the late war, the taking and subscribing of an oath of allegiance to the United States were not unfrequently required of inhabitants regarded as disaffected and likely to be hostile, as also of citizens before they were permitted to act or resume their functions as civil officers, attorneys, jurors, &c., or to trade, vote, &c.[71] One of the most pointed of the orders of this description was G. O. 4, Division of the James, 1865, issued by Gen. Halleck during the military government of Richmond in April of that year.[72]

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[70] See, for example, Gen. Sherman's Order, Hilton Head, Feb. 6, 1862; G. O. 6, Dept. of the Cumberland, 1863; Do. 112, Middle Dept., 1864; Do. 23, Dept. of the Gulf, 1864; Do. 23, Id., 1865; Do. 34, Dept. of the Miss., 1865; G. O., Dept. of No. Ca., 1865, *passim*. See also G. O. 9, Dist. of Fla., 1865, in which Gen. Newton establishes a "system of labor" throughout Florida to prevent vagrancy. As an instance of another sort of labor regulation—G. O. 65, Dept. of the Mo., 1864, prohibits combinations of workmen designed to defeat the manufacture of things needful for military use.

[71] See G. O. 41, 42, Dept. of the Gulf, 1862; Do. 29, 41, Dept. of the Mo., 1862; Do. 3, Dept. of the Miss., 1862; Do. 53, 59, Middle Dept., 1863; Do. 49, Dept. of Va. & No. Ca., 1863; Do. 65, Sixteenth Army Corps, 1863; Do. 4, Div. of the James, 1865; Do. 38, Dept. of Ala., 1865. In the G. O. cited of the 16th Corps, *all* citizens are required to register, enroll, and take the oath, under penalty of being sent south. By an order of the commanding officer at Nashville, of April, 1863, all whites over eighteen are required to subscribe the "oath of allegiance or non-combatants' parole, or to go south." By an order of April, 1862, Andrew Johnson, Provisional Governor of Tennessee, declares vacant the offices of the mayor of Nashville and other officials who refused to take the oath of allegiance, and appoints persons to fill them till the next election. In the G. O. cited of the Dept. of Va. & No. Ca., the official acts of civil officers not taking the oath are declared void. In G. O. 49, Id., transfers of property by persons who have not returned to their allegiance are forbidden and declared to be without legal validity. The administering of the oath was generally devolved upon the Provost Marshal, whose duty it was also made to arrest persons who violated their oath.

Deserters from the enemy were also required to take the oath before they could be released from arrest or employed. See G. O. 4, Dept. of the Ohio, 1864.

[72] This Order is in full as follows:

"I. Clerks of courts of records in Richmond and Petersburg will be permitted to resume their functions on taking the oath of allegiance.

II. All attorneys, counsellors, advocates and proctors, and others licensed to practice a particular profession, trade or business; the presidents, directors and officers of all corporations, and all persons availing themselves of the benefit of General Order

1269 **REGULATION OF ELECTIONS.** Beside requiring voters to take an oath of allegiance,[73] the Commander administering military government may, in proper cases, order elections to be held,[74] and where disorder, fraud, or intimidation is apprehended at any election, may so regulate the conduct of the same as to secure a fair ballot and prevent breaches of the peace.[75] The subject, however, of the ordering and regulating of elections by military authority is one which, in our history, has been most fully illustrated by the special military government instituted under the Reconstruction Laws—to be adverted to hereafter.

1270 **DIRECTION OF EDUCATION OR RELIGIOUS WORSHIP.** This is an authority which, though rarely exercised, is still, in a proper case, within the powers of Military Government. An instance of an assuming of control of the subject of education is presented by an Order of 1864, in which the Department Commander appoints an army chaplain to be superintendent of public education, both for white and black children, and makes attendance at school compulsory, &c.[76] A marked instance of direction as to religious ministration is found in the General Order of the Department of Alabama, in which the Episcopal Bishop Wilmer, who had instructed the clergy of his diocese to omit from the church service the usual prayer for the President, was, with the clergy who had complied, suspended and forbidden to preach or perform divine service, and their churches were closed, till they should resume the prayer and take the amnesty oath prescribed in the President's proclamation of December 8, 1863.[77] In New Orleans, in 1862, several Episcopal clergymen were arrested and sent to New York, for confinement in Fort Lafayette, for refusing to read the same

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No. 2, in regard to trade, will be required to take the oath of allegiance to the United States. Any person in the above mentioned cities, who, without taking the oath, shall, after the first of May next, attempt to practice any licensed profession, or engage in any licensed trade or business, or shall exercise the functions of a president, director, or officer of any corporation, will be arrested. The foregoing provisions will be enforced in other parts of the State as early as practicable.

III. All persons making claims for restoration of private property, before a Provost Marshal, or any other military officer, court, or commission, will be required to take the oath of allegiance to the United States, and until the claimant takes the prescribed oath, his claim will neither be granted nor considered.

IV. All officers of customs in this Military Division are requested to give no clearances or permits to ship or land goods or other articles of trade, to any person or for the benefit of any person who has not taken the oath of allegiance to the United States.

V. No marriage license will be issued until the parties desiring to be married take the oath of allegiance to the United States, and no clergyman, magistrate, or other person authorized by State laws to perform the marriage ceremony, will officiate in such capacity until he himself and the parties contracting matrimony have taken the prescribed oath of allegiance.

VI. Any person acting in violation of these orders will be arrested, and a full account of the case reported to these Head Quarters."

[73] See under last Subject.

[74] Note, for example, the proclamation of Gen. Banks, Comdg. Dept. of the Gulf, of Jany. 11, 1864.

[75] G. O. 53, 59, Middle Dept., 1863; Do. 24, Dept. of the Gulf, 1864; Do. 141, Dept. of No. Ca., 1865; Do. 51, Dept. of Ky., 1865; Do. 21, Dept. of Fla., 1865.

[76] G. O. 150, Dept. of Va. & No. Ca., 1864. Similar action, according to Parton, ("Gen. Butler in New Orleans," p. 435,) was taken by the same commander in N. Orleans in 1862, when, it is said,—"the school system was reorganized on the model of that of Boston. A bureau of education and a superintendent of public schools were appointed."

[77] G. O. 38, Dept. of Ala., 1863. Later, in the remarkable G. O. 40, Div. of the Tenn., 1865, (published in G. O. 2, Dept. of Ala., 1866,) Gen. Thomas removed the restriction on the ground that the action of Wilmer had been practically repudiated by the people of Alabama, as manifested by their increasing loyalty to the Union.

prayer,[78] and on another occasion the churches of the city were ordered not to observe a particular day which had been designated by President Davis as a fast.[79]

Under the legislation of Congress of July 16, 1866, and the Appropriation Acts providing for the support of the "Bureau of Freedmen," &c., the "*education of the freed people*" became a feature of the Military Government exercised in the South during the latter part of the war and the Reconstruction period.

1271 **CONTROL OF PUBLICATIONS.** The Commander, in the exercise of military government, may suppress or suspend newspapers, books, or other publications by which hostility is excited against his Government or its measures in the prosecution of the war, or information or encouragement is conveyed to the enemy. In New Orleans, in 1862, the Department Commander, after interdicting a certain class of publications in his proclamation of May 1,[80] temporarily suspended several newspapers;[81] one, the "True Delta," being placed in charge of two officers of the army detailed for the purpose, who proceeded to edit it "in the interest of the United States."[82] By an order published in Memphis in 1863, Gen. Hurlbut suppressed a Chicago newspaper within his command for publishing a series of calumnious articles against the President and thus exciting disloyalty to the Government.[83] So, in an Order of the Department of Virginia of 1865, Gen. Terry ordered the Provost Marshal of his command to seize the presses, types, &c., belonging to the proprietors of one of the Richmond newspapers, and prevent its future publication, because it had styled a part of the President's amnesty proclamation as "heathenish," and a certain Act of Congress as "mean, brutal and cowardly, revoltingly absurd and atrociously unjust."[84] In a later G. O. of the same Department the same commander ordered the office of another Richmond newspaper to be closed, and the writer of an article therein, which had disparaged the memory of President Lincoln and reflected offensively upon President Johnson and his
1272 administration, to be placed in arrest.[85] In Orders of the Department of the Ohio of 1863 the circulation is interdicted of a New York and a

[78] On being released and returned to New Orleans, these clergymen were required by Gen. Banks to take an oath of allegiance as a condition to their landing; and, on their refusal to do so, they were sent back to New York. Parton, "Gen. Butler in N. Orleans," p. 484.

[79] G. O. 27, Dept. of the Gulf, 1862.

[80] See extracts from this Proclamation under next Title.

[81] To wit, the Crescent, Bee, Delta, Picayune, Daily Advocate, and Estafette du Sud,—by G. O. 17, 235, 513, and S. O. 37, 39, 42, 235, Dept. of the Gulf, 1862. And see case of Henri Dubos, arrested and imprisoned by Gen. Butler for publishing alleged seditious articles in a further newspaper of New Orleans called "The Compilateur." Dubos *v.* United States, Report of Counsel of U. S. on Proceedings of French-American Claims Commission, p. 109, and Appendix "H," containing dissenting opinion of Mr. Commissioner Aldis.

[82] Parton, "Gen. Butler in New Orleans," p. 283, 434, 435.

[83] G. O. 4, Sixteenth Army Corps, 1863.

[84] G. O. 87, Dept. of Va., 1865. In the subsequent G. O. 92 of the same Department and year, it was declared that, as the editors and proprietors had expressed regret at the publication, and given assurance that there would be no further cause of offence, (and in view of the recommendation of Governor Pierpont, &c.,) the former order had been rescinded.

[85] G. O. 119, Dept. of Va., 1865. In Do. 123, Id., it was announced that, upon a proper acknowledgment of wrong and assurance of reform, the paper had been permitted to resume.

In G. O. 27, Dept. of Pacific, 1865, Gen. McDowell, in ordering the arrest of persons who should "exult over the assassination of President Lincoln," adds—"Any *paper* so offending, or expressing any sympathy in any way whatever with the act, will be at once seized and suppressed."

Chicago newspaper as being disloyal and incendiary,[86] and the publication of "disloyal books" is prohibited,[87]—under pain of the arrest and punishment of the offenders.[88]

In an Order of the Department of the East of 1865, Gen. Dix, pursuant to instructions from the War Department, gives notice to editors and proprietors of all newspapers in his Department that "the system of correspondence with the rebel States by advertising under the head of 'Personals' or otherwise in the columns of such papers must immediately cease." And it is added that, if continued, the parties concerned will be arrested and brought to trial by military commission for a violation of the laws of war.[89]

1273 In sundry instances—to be referred to under the head of the MILITARY COMMISSION—editors and publishers, or correspondents, of newspapers have been brought to trial and sentenced to imprisonment, expulsion from the military department, &c., on account of published articles giving information to the enemy, supporting the hostile cause, discouraging volunteer enlistments, counselling resistance to the draft, &c.[90]

**RESTRAINT AND PUNISHMENT.** While the peaceable citizens of a country under Military Government are in general exempt from military arrest or restraint of the person, the governing commander[91] is authorized to apprehend and restrain all persons guilty of violations of the laws of war, hostile demonstrations, or public disorders, and in extreme cases to inflict upon them summary punishment. Thus, in the Department of the Gulf in 1862, persons of both sexes charged with disloyal or illegal acts were in several instances sent to Ship Island for confinement:[92] in another instance four persons were hung without trial for aggravated plundering and robbery.[93] In the same Department in 1863, a citizen, for violations of the trade regulations with a view to aid the enemy, was condemned by the department commander, without a trial, to a year's hard labor and a fine of $25,000.[94] And in repeated cases,—for hostile language or conduct, or for refusing to register and take

[86] G. O. 84, Dept. of the Ohio, 1863. [Revoked, pursuant to a direction of the President, by Do. 91, Id.]

[87] G. O. 87, Dept. of the Ohio, 1863. With these instances of action taken by department commanders, note the case of the suppression of the Circleville, (Ohio,) Watchman, and arrest of its editor and publisher, under an order from the War Department of June, 1862, described in Kees *v.* Tod, Whiting, War Powers, 216.

[88] See other instances noted in II Reb. Rec., 69; III Id., 31; VI Id., 61; V Id., 53; VII Id., 11, 14. Upon the occupation by the Prussians of Frankfort, in July, 1866, several of the newspapers of the City, "which had always been distinguished for strong anti-Prussian feeling, were suppressed." Hozier, vol. 2, p. 59.

[89] G. O. 10, Dept. of the East, 1865. And see reference to the subject of this Order under the "Forty-Sixth Article," *ante*, Part I, ch. XXV.

It may here incidentally be noted that in repeated cases in the northern States during the war, grand juries both of the U. S. and the State courts presented newspapers as aiders and abettors of treason; and some of these, with other publications, were excluded by the Postmaster General from the U. S. mails. Later, the offices of two newspapers of New York were temporarily closed by the Government because of their publishing what purported to be a genuine proclamation of the President of May 17, 1864, but which was in fact wholly spurious, and contained declarations calculated to convey encouragement to the enemy. See II Reb. Rec., 67, 531; III Id., 1, 18, 26, 35; IV Id., 33; XI Id., 472.

[90] See G. O. 11, Dept. of the Miss., 1862; Do. 29, Army of the Potomac, 1863; Do. 14, Northern Dept., 1865; G. C. M. O. 1, Dept. of No. Ca., 1866.

[91] That a *subordinate* cannot, of his own will, make such arrests, see Cochran *v.* Tucker, 3 Cold., 186.

[92] S. O. 150, 151, 152, 179, 180, 288, Dept. of the Gulf, 1862; Case of Henri Dubos, cited on page 815, note 81, *ante*; V Reb. Rec., 34, 38.

[93] S. O. 98, 103, Dept. of the Gulf, 1862.

[94] G. O. 36, Id., 1863.

the oath of allegiance, &c.,—persons have been summarily put outside the lines of the army or banished from the country.[95]

1274 In the great majority of cases, however, the inhabitants of States, or districts under military government during the late war, who offended against the laws of war, or were guilty of crimes or disorders, were brought to trial before *military commissions*—as hereafter to be more particularly indicated.

## V. THE STATUS OF MARTIAL LAW AND THE LAWS OF WAR APPLICABLE THERETO.

**MARTIAL LAW DEFINED.** Martial law, as the term is used in this treatise, is military rule exercised by the United States, (or a State,) over its own citizens, (not being enemies,) in an emergency justifying it. In the early Chapters the distinction has been referred to between this law and Military Law proper, the code of the soldier, with which it was formerly confused.[96] In the present PART it has already been distinguished from Military Government, the dominion exercised in war, (foreign or civil,) over the territory and inhabitants of an enemy's country upon its conquest and occupation. The term "*martial law*," has indeed not unfrequently been employed indifferently to describe any form of military control whether of our own people or of enemies. But this use, while colloquially admissible, is regarded by the author as unsatisfactory and confusing as a legal designation.

**OCCASION AND FIELD OF MARTIAL LAW.** It has been declared by the Supreme Court in *Ex parte* Milligan[97] that "martial law" is "confined to the locality of actual war," and also that it "can never exist when the

1275 courts are open and in the proper and unobstructed exercise of their jurisdiction." But this ruling was made by a bare majority—five—of the court, at a time of great political excitement, and the opinion of the four other members, as delivered by the Chief Justice, was to the effect that martial law is *not* necessarily limited to time of war, but may be exercised at other periods of "public danger,"[98] and that the fact that the civil courts are open is not controlling against such exercise, since they "might be open and undisturbed in the execution of their functions and yet wholly incompetent to avert threatened danger or to punish with adequate promptitude and certainty the guilty." It is the opinion of the author that the view of the minority

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[95] G. O. 49, 65, Sixteenth Army Corps, 1863, (and see Do. 101, Id;) Do. 73, 145, Dept. of the Mo., 1864; Do. 8, Dept. of No. Ca., 1865; also cases in VIII Reh. Rec., 27, 37, 38. In G. O. 38, Dept. of the Ohio, 1863, it is ordered generally that persons in "the habit of declaring sympathies for the enemy" will be at once arrested with a view to trial, "or sent beyond our lines into the lines of their friends."

[96] The apparent confounding of these designations by Hale and Blackstone, as indicated in Chapter V, led to a confusing of the same by subsequent writers. This confusion is still occasionally encountered, though the later authorities in general clearly define and separate the two terms. See Forsyth, Const. Law., 207–214; 2 McArthur, 33; Samuel, 185; Hough, (P.) 514; Griffiths, 20; Pipon & Col., 10; Prendergast, 8; Clode, M. L., 4, 178; Malthy, 2–4; O'Brien, 26–27; De Hart, 17; 3 Greenl. Ev. § 468; 1 Kent, Com., 376; Halleck, 373; Boyd's Wheaton, 346 d—346 e; Luther *v.* Borden, 7 Howard, 59; Tyler *v.* Pomeroy, 8 Allen, 480; State *v.* Rankin, 4 Cold., 145; Griffin *v.* Wilcox, 21 Ind., 377; *In re* Kemp, 16 Wis., 368; 1 Bishop, C. L., 44–46, 50–52, 55; Birkhimer, 1; 8 Opins. At. Gen., 365–370.

The names by which our military courts are designated—"court *martial*"—has probably had not a little to do with perpetuating the confusion referred to.

[97] 4 Wallace, 127.

[98] See Hallam, Const. Hist. Eng., vol. 1, p. 240, cited *post;* also 9 Am. Law Reg., 498.

of the court is the sounder and more reasonable one,[99] and that the *dictum* of the majority was influenced by a confusing of martial law proper with that *military government* which exists only at a time and on the theatre of war, and which was clearly distinguished from martial law by the Chief Justice, in the dissenting opinion—the first complete judicial definition of the subject.[100]

While therefore the *emergency* under which martial law is lawfully exercised may be *war;* while it is in fact during war, and because of the exigencies incident to war, that such law has most frequently been resorted to; it is not—in the judgment of the writer—war alone that may call it into existence. It may also, it is believed, legally be inaugurated at a time of "rebellion or invasion," when, as provided in the Constitution,[1] "the public safety may require" the suspension of the writ of *habeas corpus;* or at a time of the "insurrec-
1276 tion" or "invasion" of which Congress is empowered by the same instrument to provide for the suppressing or repelling;[2] or at a juncture of impending hostilities[3] or internal riot or disorder, when the laws of the United States cannot otherwise be duly enforced. At such times, whether it be essential under the Constitution that Congress shall specially authorize it, or sufficient that the President, as the official charged to faithfully execute the laws and command the armies,[4] formally proclaim it,—it may, it is considered, be initiated, in any part of the United States in which the emergency may occur, with the same legality as at a time and on the field of actual war.[5]

**ASSIMILATED TO THE STATE OF SIEGE.** As thus exercisable, martial law, in this country, resembles, and has been compared to,[6] the *state of siege* of the continental nations of Europe—a condition of domestic military rule imposed in besieged towns, as also in cities or districts during foreign or civil

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[99] Wells, in his work on the Jurisdiction of Courts, p. 575, in expressing his concurrence with the views of the minority of the judges in *Ex parte* Milligan, observes of the conclusion of the court as adopted by the majority—"This case can never become a lasting precedent." And see 1 Bishop, C. L. § 52, note, where, referring to the ruling in question, the author says—"A mere *dictum* from the bench carries no weight beyond that of its own inherent reasons." See also Id. § 64, note.

[100] See his opinion, as cited *ante*, p. 799, under the head of "Military Government Defined." A similar distinction is also taken by Atty. Gen. Cushing, (8 Opins., 368, 369,) between martial law as exercised in an enemy's country, (the "military government" of Chief Justice Chase,) and martial law as a "*domestic fact*" exercised at home. And compare Halleck, 372–3.

[1] Art. I, sec. 9 § 2.

[2] Art. I, sec. 8 § 15. Or on the occasion of the insurrection or rebellion which the President, by Secs. 5297 and 5298, Rev. Sts., is empowered to employ the land or naval forces to suppress.

[3] The martial law may be declared in places threatened with invasion or subject to incursions by the enemy, see G. O. 2, Dept. of the Miss., 1862; Do. 54, Dept. of Kansas, 1864.

[4] Art. II, secs. 2, 3.

[5] To quote again from Chief Justice Chase's definition,—it, (martial law,) is "to be exercised in time of invasion or insurrection within the limits of the United States, or, during rebellion, within the limits of States maintaining adhesion to the National Government, when the public danger requires its exercise, * * * and is called into action by Congress, or temporarily, when the action of Congress cannot be invited and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights." 4 Wallace, 141.

As to the power of the President, by virtue of his being Commander-in-chief, to exercise martial law, see further, Whiting, War Powers, 163, *et seq.;* Kees *v.* Tod, Id., 216; McCormick v. Humphrey, 27 Ind., 144. The view of Bishop, (1 C. L. § 60,) that the President posseses this power as Executive, martial law being one of the "laws" which he is required faithfully to execute—is deemed more curious than sound.

[6] 8 Opius. At. Gen., 371, 374; Halleck, 374.

war, or at periods of grave public disorder, especially those succeeding upon a state of war.[7]

1277 **AS EXERCISED UNDER BRITISH RULE.** Martial law, as such, has not been proclaimed or exercised in England since the Revolution of 1688. The Riot Act, under which the military, acting in aid of the civil authority, may attack mobs not duly dispersing, seems to have proved a sufficient provision for the suppression of such disorders as have occurred. That martial law may be resorted to in the event of actual rebellion seems to be conceded,[8] though it would appear that it would have to be expressly authorized by Act of Parliament, or at least sanctioned by a subsequent Act of Indemnity. It has been repeatedly resorted to in Ireland, as also in the colonies—notably in Lower Canada, Jamaica, Ceylon, Demerara and at the Cape of Good Hope.[9] During its exercise in Jamaica in 1867, under the proclamation of Governor Eyre, 354 persons were put to death under sentence of court-martial and 85 persons without trial; 600 persons, some of whom were women, were flogged and imprisoned; and 1,000 dwellings were destroyed by burning—all by way of punishment of alleged rebels and within a period of one month. The English authorities have differed as to the proper nature of martial law and the extent of the military control which it justifies. Thus, some have considered that it simply permits the application to the citizen of the code of the soldier; others that it places in the hands of the military commander a discretionary power to be exerted according as, and so far as, the necessities of the exigency may require.

1278 The latter view is the one which accords the more nearly with our own law and practice.[10] But as we have scarcely had occasion to employ martial law with regard to a subject and inferior race, its exercise in this country has had little in common with its mode of application in the British colonies.

**ITS FORMAL INITIATION.** Unlike Military Government, which exists as a consequence of occupation and possession of enemy's country, martial law, involving as it does a material change in the political condition of peaceful citizens and a considerable restriction perhaps of their rights or privileges, is properly and customarily (though this is not essential where the necessity is imminent) inaugurated by a formal *proclamation* of the President as Com-

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[7] As in Paris and other parts of France and in Algiers, after the Franco-Prussian war and the suppression of the Commune, in 1871.

[8] "There may, in times of pressing danger, when the conservation of all demands the sacrifice of the legal rights of the few—there may be circumstances that not only justify but compel the temporary abandonment of constitutional forms. It has been usual for all governments, during an actual rebellion, to proclaim martial law, or the suspension of civil jurisdiction." Hallam, Const. Hist. Eng., vol. 1, p. 240. "It cannot be too strongly urged that such a thing as martial law is unknown to English jurisprudence. The law of England presupposes a state of peace, and disturbers of that peace can be found guilty of treason, felony, or misdemeanor, according to circumstances. On the other hand, no judicial decisions can alter the fact that the application of military government under the law of necessity, commonly called martial law, must always exist, although it is difficult to exactly define it." Pratt, 214.

[9] Finlason, *passim;* Clode, 2 M. F., 168–174, 481–511.

[10] The two views indicated are best represented—the first by the charge of Cockburn, C. J., to the grand jury at the Central Criminal Court, in the case of Queen *v.* Nelson and Brand, (published, London, 1867;) the second by the opinions of Finlason as expressed in his various works. See his "Treatise on Martial Law," "Commentaries on Martial Law," "History of the Jamaica Case," "Report of the Case of Queen *v.* Eyre," "Review of the Authorities as to the repression of Riot and Rebellion."

mander-in-chief,[11] or *declaration* of the commanding general. A suspension of the writ of *habeas corpus* is indeed, *per se*, substantially a form of such declaration. The public notification ordinarily designates the place or district within which military authority is to be operative; setting forth also in some cases the reason or occasion for the action taken, how far and in what manner it shall affect the courts or civil administration, or the business or habits of the community, and what directions shall be observed during the continuance of the new status, the duration of which is also sometimes specified. The form of such declarations will be illustrated by the instances presently to be cited. In announcing and initiating martial law a military commander is to be presumed duly to represent his superior, the President.[12]

As held by the Supreme Court in the case of Rhode Island at the time of the Dorr rebellion of 1842, the government of a State may, when the
1279 public safety demands it, proclaim martial law within its own limits, without infringing upon the U. S. Constitution by exercising war powers delegated to Congress.[13] In a recent instance, in July, 1892, the Governor of Idaho instituted martial law within Shoshone county of that State, on the occasion of the disturbances among the miners known as the "Cœur d'Alene riots."

**ITS LIMITATIONS.** The employment of martial law has been likened to the exercise of the right *of self-defence* by an individual.[14] Its occasion and justification thus is necessity.[15] But though in general without other limit than the discretion of the commander upon whom its execution is devolved, it is not an absolute power, but one to be exercised with such stringency only as circumstances may require. The often-quoted remark that martial law is simply "the will of the general who commands the army"[16] is a description much less apposite in practice to martial law proper, or *domestic* martial law, than to that *military government of enemies*[17] heretofore considered, and with reference to which in fact the observation was originally employed by Wellington. Martial law is indeed resorted to as much for the protection of the lives and property of peaceable individuals as for the repression of hostile or violent elements.[18] It may become requisite that it supersede for the time the existing civil institutions, but, in general, except in so far as relates to persons violating military orders or regulations, or otherwise interfering with the exercise of military authority, martial law does not in effect suspend the local law
1280 or jurisdiction[19] or materially restrict the liberty of the citizen: it may

[11] When initiated in a State, it may be proclaimed by the Governor or declared by an Act of the Legislature, according as may be deemed legal or expedient under the Constitution and laws. In the case of the Dorr rebellion in Rhode Island, the General Assembly, by an Act of June 25, 1842, placed the State under martial law, and the Governor thereupon issued a proclamation announcing the fact. Luther *v.* Borden, 7 Howard, 8.

[12] Clark *v.* Dick, 1 Dillon, 8; Halleck, 380; DIGEST, 489.

[13] Luther *v.* Borden, 7 Howard, 1. It was held in 1857 by Attorney General Cushing, (8 Opins., 365,) that a Governor of a *Territory*, (in that case the Governor of Washington, then a Territory,) did not possess this power. In 1885, however, the Governor of the same Territory declared martial law therein, on the occasion of an outbreak against the Chinese residents.

[14] Hallam, Const. Hist., 240. And see Luther *v.* Borden, 7 Howard, 46; 9 Am. Law Reg., 498.

[15] 1 Kent, Com., 341, note; Hough, 535; *In re* Egan, 5 Blatch., 319.

[16] Clode, M. L., 182, 184; Finlason, Coms. on Mar. Law, 141; 8 Opins. At. Gen., 367.

[17] See U. S. *v.* Diekelman, 92 U. S., 526.

[18] G. Field O. 2, Dept. of the Ohio, 1862. G. O. 2, Div. of the Mo., 1865, p. 10; Do. 15, Div. of the Gulf, 1866.

[19] G. O. 34, Dept. of the Mo., 1861; Do. 39, Id., 1862; Do. 54, Dept. of Ark., 1864. And see Com. *v.* Palmer, 2 Bush, 570.

call upon him to perform special service or labor for the public defence, but otherwise usually leaves him to his ordinary avocations.[20]

It is a principle of the exercise of martial law that even when required to be executed with exceptional stringency and for a protracted period, it shall not be permitted to serve as a pretext for *license* or *disorder* on the part of the military; and acts of undue violence and oppression committed in its name will by the laws of war be visited with extreme punishment.[21]

It is a further principle that, while martial law is not to be inaugurated precipitately or inconsiderately, so it is to be *continued* only so long as the public exigency on account of which it was declared shall prevail.[22] It is not indeed essential to the discontinuance of such state that the original declaration of the same be formally *revoked:* when the emergency has ceased, or within a reasonable interval thereafter, the status may be deemed to have lapsed, and cannot lawfully be further continued or enforced.

**INSTANCES ILLUSTRATING THE OPERATION OF MARTIAL LAW.** The nature and operation in practice of martial law will be illustrated by a reference to the principal instances of its employment in our history.

Passing over such early cases as those of the proclamation of martial law in Boston by General Gage in June, 1775,[23] and in Virginia in November of
1281 that year by Governor Dunmore,[24] as well as the occasion of its being substantially exercised by Gen. Wilkinson, in Louisiana, at the period of the Burr conspiracy, in November, 1806,—an instance more material to be noticed in referring presently to the subject of the suspension of the writ of *habeas corpus*,—we come to the action by Gen. Jackson at New Orleans in 1814.

**As declared by Gen. Jackson at New Orleans.** This action was initiated by a proclamation of December 16 of that year, as follows:—"Major General Andrew Jackson, commanding the seventh United States military district, declares the city and environs of New Orleans under strict martial law, and orders that in future the following rules be rigidly enforced, viz: Every individual entering the city will report to the adjutant general's office, and, on failure, to be arrested and held for examination. No person shall be permitted to leave the city without a permission in writing, signed by the General or one of his staff. No vessels, boats, or other craft will be permitted to leave New Orleans or Bayou St. John without a passport in writing from the General or one of his staff, or the commander of the naval forces of the United States on this station. The street lamps shall be extinguished at the hour of nine at night, after which time persons of every description found in the streets, or not at their respective homes, without permission in writing as aforesaid, and not having the countersign, shall be apprehended as spies and held for examination."

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[20] "Martial law is elastic in its nature, and easily adapted to varying circumstances. It may operate to the total suspension or overthrow of the civil authority; or its touch may be light, scarcely felt or not felt at all by the mass of the people, while the courts go on in their ordinary course, and the business of the community flows in its accustomed channels." 1 Bishop, C. L. § 52.

[21] Despan *v.* Olney, 1 Curtis, 306; Luther *v.* Borden, 7 Howard, 1; Finlason, Coms. on Mar. Law, 61; Hough, 535; Lieber. Inst. § 4; DIGEST, 488.

[22] Queen *v.* Nelson & Brand, and Queen *v.* Eyre, Charges of Cockburn, C. J. and Blackburn J., Finlason, *passim;* Pratt, 216: Hough, 535; 1 Bishop, C. L. § 55; *In re* Egan, 5 Biatchford, 319; In the matter of Martin, 45 Barb., 145; McLaughlin *v.* Green; 50 Miss., 453; DIGEST, 489–90. "Nations are prone to introduce too soon, to extend too far, to retain too long, so perilous a remedy." Hallam Const. Hist. Eng., 240.

[23] Bancroft, Hist. U. S., vol. 7, p. 392.

[24] Id., vol. 8, p. 223.

The British forces under Maj. Gen. Pakenham were then threatening the city, and, as it is narrated[25]—"All able-bodied men, of whatever race, color, rank or condition, were compelled to serve either as soldiers or sailors. The old men and the infirm were formed into a veteran guard for the police of the town and the occupation of its forts."

The martial law status thus instituted was maintained till March 13, (the date on which news was received of the ratification of the treaty of peace,) although the British finally retreated to their fleet on January 19th. Meantime, (as is described in the history of the period,) the military authority of the General was exercised in so arbitrary a manner as to bring about a serious collision with the U. S. Judiciary. A citizen and member of the

1282 Legislature—Louis Louaillier—having published in a newspaper a remonstrance against an oppressive order for the temporary banishment from the city of the French population, was arrested and confined by General Jackson; and when Judge Hall, of the U. S. District Court, granted a writ of *habeas corpus*, directing the General to bring the prisoner before the court to be dealt with according to law, Jackson caused the Judge himself to be arrested, ("for aiding and abetting and exciting mutiny *in my camp*,") and confined at the barracks for nearly a week, when he was conducted beyond the limits of the city. Returning after the announcement of peace, the Judge cited the General before the court, adjudged him to have been guilty of a gross contempt of court, and imposed upon him a fine of one thousand dollars.[26]

1283 **As declared by Gen. Scott in Mexico.** The next instance to be noted is that of the declaration of martial law in Mexico by Major General Scott, in his General Orders of 1847,[27] in which also, (as will be hereafter more particularly indicated,) *military commissions* were first instituted for the trial of offenders. The form of the declaration here is:—"Martial law is hereby declared as a supplemental code in and about all cities, towns, camps, posts,

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[25] Parton, Life of Andrew Jackson, vol. 2, p. 61.

[26] Debates in 28th Congress in 1842–1843, vols. 12 and 13 of Cong. Globe; Hists. of Louisiana by Martin and Guyarré; Life of Jackson by Eaton; Do. by Kendall; Do. by Parton.

The comments of the Supreme Court of Louisiana in the case of Johnson *v.* Duncan, 3 Martin, 530, with reference to the martial law declared by Gen. Jackson, may here be referred to as indicating the temper of the judiciary at this time. In holding that the proclamation could not legally have the effect of suspending their functions, the court observe:—"The idea that American citizens may be left at the mercy of an individual who may in certain cases, the necessity of which is to be judged of by himself, assume a supreme, overbearing, unbounded power, is not only repugnant to the principles of any free government, but subversive of the very foundations of our own. * * * The proclamation of martial law cannot have had any other effect than that of placing under military authority all the citizens subject to militia service. It is in that sense alone that the vague expression of martial law ought to be understood among us. To give it any larger extent would be trampling upon the constitution and laws of our country." And Lamb's Case, Car. Law. Rep., 330, is cited, in which Judge Bay illustrates the horror with which martial law is commonly regarded by the judiciary, by declaring—"If by martial law is to be understood that dreadful law, the law of arms, * * * I have no hesitation in saying that such a monster could not exist in this land of liberty and freedom." On the other hand, see the views of Gen. Jackson, as expressed in his extended G. O. of March, 1815, in the case of Louaillier, tried by court-martial.

Gen. Jackson's fine was refunded to him, with interest, by Act of Congress of Feb. 16, 1844, nearly thirty years after its imposition, and only in the year before his death.

As to the action of Gen. Jackson in disregarding a writ of *habeas corpus* issued, in Florida, in 1821, by the U. S. Dist. Judge Fromentin, in the case of Col. Collava, then recently Spanish Governor of Pensacola, who had been arrested and confined by Gen. Jackson's order—see Halleck, 379; Parton, Life of Jackson, ch. XLV, p. 614. This instance is not, in a legal point of view, important.

[27] G. O. 20 & 287, Hdqrs. of the Army, 1847.

hospitals, and other places which may be occupied by any part of the forces of the United States in Mexico, and in and about all columns, escorts, convoys, guards and detachments, of the said forces, while engaged in prosecuting the existing war in and against the said republic and while remaining within the same." But, as has already been remarked,[28] this declaration, (except for purposes of *notice*,) was a superfluous and unnecessary proceeding, adding nothing to the military authority or jurisdiction, since the region and people to which it related were already subject to the *military government* incident to the conquest and occupation of enemy's country.

**As declared in the late war—Proclamations of the President.** It is the period during and immediately succeeding the late civil war that furnishes the most marked illustrations of martial law as specifically proclaimed and declared. Thus, early in the war, the comprehensive proclamation of the President of Sept. 24, 1862, made "subject to martial law" not only insurgent enemies in the insurrectionary States but also "their aiders and abettors within the United States, and all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice affording aid and comfort to rebels against the authority of the United States."[29]

1284 Further, by proclamation of the President of July 5, 1864, martial law was established in the separate State of Kentucky, (not one of the Confederate States;) the reasons for such action being set forth in the preamble as follows:—"Whereas many citizens of the State of Kentucky have joined the forces of the insurgents, and such insurgents have, on several occasions, entered the said State of Kentucky in large force, and, not without aid and comfort furnished by disaffected and disloyal citizens of the United States residing therein, have not only disturbed the public peace, but have overborne the civil authorities and made flagrant civil war, destroying property and life in various parts of that State; And whereas it has been made known to the President of the United States by the officers commanding the national armies, that combinations have been formed in the said State of Kentucky with a purpose of inciting rebel forces to renew the said operations of civil war within the said State, and thereby to embarrass the United States armies now operating in the said States of Virginia and Georgia, and even to endanger their safety:"—And it is subjoined, in conclusion, as follows:—"The martial law herein proclaimed, and the things in that respect herein ordered, will not be deemed or taken to interfere with the holding of lawful elections, or with the proceedings of the constitutional legislature of Kentucky, or with the administration of justice in the courts of law existing therein between citizens of the United States in suits or proceedings which do not affect the military operations or the constituted authorities of the government of the United States."[30]

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[28] See "Military Government Defined," *ante*, p. 799.

[29] This proclamation also suspended the privilege of the writ of *habeas corpus*. See *post*. And compare the order of the Secretary of War, "by direction of the President," published in G. O. 104, W. D., of Aug. 13, 1862, by which the writ of *habeas corpus* is suspended as to persons when about to depart from the United States, or absenting themselves from their county or State, to avoid a draft into the militia.

As to the substantial institution of a modified martial law in the District of Columbia during the civil war, compare DIGEST, 490; Birkhimer, Military Government and Martial Law, 383–4.

[30] The privilege of the writ of *habeas corpus* was also suspended by this proclamation. See *post*. As to the declaration of martial law, it was revoked in the next year, by proclamation of Oct. 12, 1865. In this connection, see G. O. 51, Dept. of Ky., 1865, and Circ. No. 3, Id., as to the classes of persons affected by martial law in Kentucky, and its operation in suspending the functions of civil courts therein.

In connection further with these two proclamations, (the only ones by which martial law was in terms declared by the President,) see other executive proclamations, noted

1285 **Action of military commanders.** Of declarations of martial law by military commanders during the late war, (some of which, for reasons already set forth, were quite unnecessary in law, the region to which they applied being under or subject to *military government*,) the following may be noticed as the principal:

(1) By an order of Maj. Gen. Fremont, commanding Western Department, dated August 14, 1861, martial law was "declared and established in the city and county of St. Louis." The order appointed Major J. McKinstry Provost Marshal, and directed that "all orders and regulations issued by him should be respected and obeyed." That officer thereupon published a proclamation in which it was recited that the power conferred upon him would be exercised only in cases where the civil law was "found to be inadequate to the maintenance of the public peace and the public safety." In a subsequent order he prohibited the wearing of concealed weapons, and later the sale or giving away of any description of fire-arms without a special permit.

Gen. Fremont was succeeded in command by Maj. Gen. Halleck in November, 1861, and by G. O. 34, Dept. of the Mo., of Dec. 26, 1861, martial law was formally declared by the latter in the city of St. Louis, and "in and about all railroads in this State," (Missouri,) "in virtue," as it was specified, "of authority conferred by the President of the United States." It was added:—"It is not intended by this declaration to interfere with the jurisdiction of any civil court which is loyal to the Government of the United States, and which will aid the military authorities in enforcing order and punishing crimes." A subsequent Gen. Order, No. 39 of 1862, reiterates that the previous declaration is not designed to affect the courts, which are to proceed as before in the exercise of their functions, or the operation of the ordinances or laws of the City or State. Later, however, the department commander was obliged to enforce more strictly the martial law status and to suspend in a measure the civil authority.[31]

1286 (2) On April 25, 1862, by G. O. 8 of the Department of the South, (including South Carolina, Georgia and Florida,) Maj. Gen. David Hunter, Department Commander, declared martial law within the Department. In a subsequent Order, No. 11 of May 9, he repeated this declaration, adding—"Slavery and martial law in a free country are altogether incompatible; the persons in these three States heretofore held as slaves are therefore declared forever free."[32]

(3) Upon the occupation by the Union forces of New Orleans in 1862, Maj. Gen. Butler, commanding Department of the Gulf, by proclamation of May 1st, placed the city and its environs under martial law. In this proclamation it was declared, among other things, that:—"All the rights of property, of what-

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*post*, suspending the issue of the writ of *habeas corpus;* also proclamation of March 17, 1865, making amenable to arrest and trial by court-martial "persons dwelling in conterminous foreign territory" who furnish arms or munitions of war to hostile Indians, "thus enabling them to war upon the settlements," &c.; also—as relating to a further incident of the same period—"Executive Order," of April 4, 1865.

[31] G. O. 63, 96, Dept. of the Mo., 1863. (Gen. Schofield.) And see further—as to this same status—Do. 87, Id.; Do. 6, Western Dept., 1861; Do. 2, Dept. of the Miss., 1862. This martial law seems to have been continued in Missouri till March 10, 1865. See G. O. 2, Div. of the Mo., 1865, p. 10–11.

[32] This Order, so far as regards slavery, was in the President's proclamation of May 19, 1862, declared to be unauthorized and void; the President, as it was expressed, *reserving the power to himself* to emancipate the slaves, when deemed necessary to exercise it. It was in fact exercised in the proclamation of January 1st following.

ever kind, will be held inviolate, subject only to the laws of the United States.[33] All the inhabitants are enjoined to pursue their usual avocations. * * * All disorders, disturbances of the peace, and crimes of an aggravated nature, interfering with the forces or laws of the United States, will be referred to a military court for trial and punishment. Other misdemeanors will be subject to the municipal authority, if it desires to act. Civil causes between party and party will be referred to the ordinary tribunals. * * * No publication of newspapers, pamphlets, or hand-bills, giving accounts of the movements of the soldiers of the United States within this department, reflecting in any way upon the United States, intended in any way to influence the public mind against the United States, will be permitted, and all articles on war news, editorial comments, or correspondence making comments upon the movements of the armies of the United States, must be submitted to the examination of an officer who will be detailed for that purpose from these headquarters. * * *

All the requirements of martial law will be imposed so long as, in
1287 the judgment of the United States authorities, it may be necessary; and while it is desired by these authorities to exercise this government mildly, and after the usages of the past, it must not be supposed that it will not be rigorously and firmly administered as the occasion calls for it."

Sundry features of this *military government*, (which continued to March 18, 1866,) have been referred to under the preceding Title.

(4) By a proclamation of Maj. Gen. R. C. Shenck, as Commander of the Middle Department, dated Baltimore, June 30, 1863, martial law was declared in Baltimore and the western counties of Maryland, as being required "as a military necessity" by reason of "the immediate presence of a rebel army within the Department and State."[34] The proclamation further specifies as follows:— "The General commanding gives assurance that this suspension of the civil government within the limits defined shall not extend beyond the necessities of the occasion. All the courts, tribunals and political functionaries of State, county and city authority, are to continue in the discharge of their duties as in times of peace; only in no way interfering with the exercise of the predominant power assumed and asserted by the military authority. All peaceful citizens are required to remain quietly at their homes and in pursuit of their ordinary avocations, except as they may be possibly subject to call for personal service, or other necessary requisitions, for military purposes or uses hereafter. All seditious language or mischievous practices tending to the encouragement of rebellion are especially prohibited, and will be promptly made the subject of observation and treatment. Traitorous and dangerous persons must expect to be dealt with as the public safety may seem to require. 'To save the country is paramount to all other considerations.'"[35]

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[33] Compare the following extract from the proclamation of May 14, 1861, issued by the same general, as commanding Dept. of Annapolis, upon his occupying Baltimore:— "Private property will not be interfered with by the men under my command, nor allowed to be interfered with by others, except in so far as it may be used to afford aid and comfort to those in rebellion against the government whether here or elsewhere, all of which property, munitions of war, and that are fitted to aid and support the rebellion, will be seized and held subject to confiscation."

[34] It was held—June, 1865—by the Judge Advocate General that, though this proclamation had never been in terms revoked, it had, at that date, ceased to be operative, the emergency having sometime ceased to exist. In the case of Mrs. Sarah Hutchins, (G. O. 115, Middle Dept., 1864,) it is alleged in the specification that the offence occurred on November 3, 1864, "in Baltimore, a place under martial law."

[35] To this declaration are appended "ORDERS UNDER MARTIAL LAW," as follows:— "ORDERS.—Until further orders, no arms or ammunition shall be sold by any dealer or other person within the city and county of Baltimore without a permit from the

1288 (5) By G. O. 17, Dept. of Kansas, 1862, the Department Commander declared martial law throughout the State of Kansas, with a view to the suppression therein of "*jayhawking.*" In G. O. 54 of the same Department, of 1864, a further proclamation was made of martial law within the State, in anticipation of the invasion of the same by the army under Gen. Price. The Order specifies that, as the status thus established is intended to continue only while danger of invasion is apprehended, the functions of the civil authorities will not be disturbed nor the proceedings or processes of the courts interrupted.

(6) In an Order of the Department of the Ohio, of 1862, martial law was declared within Jefferson county, Kentucky, (in which is the City of Louisville,) for the reason as stated that the civil authorities were unable to afford the proper protection to persons or property.[86] In a further Order of the same Department, of 1863, the commanding general, in view of the
1289 threatened advance of the forces under Gen. Morgan, declared martial law in Cincinnati, Ohio, and the cities, on the opposite bank of the Ohio River, of Covington and Newport, Kentucky. The Order required that all business be suspended, and that the citizens organize for the common defence.[87]

(7) By an order of July 31, 1863,[88] the Commander of the same department, with a view of securing to loyal citizens the free exercise of the right of suffrage at a general election, declared the State of Kentucky under martial law. It is expressly specified that—"The civil authority, civil courts, and business, will not be suspended by this order. It is for the purpose only of protecting, if necessary, the rights of loyal citizens, and the freedom of election."

(8) Some minor instances of the institution of martial law by military commanders during the war were the following: By an order of February 22, 1862, it was announced by Gen. Grant, commanding at Fort Donelson,—

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General Commanding the Military Department, or from such officer as shall be duly authorized to grant the same. Any violation of this order shall subject the party offending to arrest and punishment.

Until further orders, no person will be permitted to leave the city of Baltimore without a pass, properly signed by the Provost Marshal, and any one attempting to violate this order shall be promptly arrested and brought before the Provost Marshal for examination.

Until further orders, no one will be permitted to pass the barricades, or into or out of the city, between the hours of 10 P. M. snd 4 o'clock A. M.., without giving the proper countersign to the guard in charge.

Until further orders, no club-house or other place of like resort shall remain open, without a permission given by the General Commanding. Any attempt to violate this order will subject the club-house and property to seizure and occupation by the military, and the frequenters, who engage in or encourage such violation, to arrest.

Until further orders, all bars, coffee-houses, drinking saloons and other places of like resort shall be closed between the hours of 8 P. M. and 8 A. M. Any liquor dealer or keeper of a drinking saloon or other person selling intoxicating drinks who violates this order shall be put under arrest, his premises seized and his liquors confiscated for the benefit of the hospitals.

Until further orders, the General Commanding directs that the stores, shops, manufactories and other places of business other than apothecary shops and printing offices of daily journals, be closed at 5 P. M., for the purpose of giving patriotic citizens an opportunity to drill and make themselves expert in the use of arms."

[86] G. Field O., No. 2. See *ante* as to the proclamation, subsequent in date, of the President, declaring martial law throughout the State.

[87] G. O. 114. It is added:—"The Commanding General, convinced that no one whose services are necessary for the defence of these cities would care to leave now, places no restriction upon travel."

In the year previous—September, 1862—Gen. Wallace had placed the same three cities under martial law, on account of the threatened approach of an army under Gen. E. K. Smith. V Reb. Rec., 69. And see Id., p. 77.

[88] G. O. 120.

"Martial Law is declared to extend over Western Tennessee. Whenever a sufficient number of citizens return to their allegiance, to maintain law and order over the territory, the military restriction here indicated will be removed." By an order of the Department of the Pacific, of 1862,[39] Gen Wright substantially initiates martial law in his command. "Military commanders"—it is directed—"will promptly arrest and hold in custody all persons against whom the charge of aiding and abetting the rebellion can be sustained, and under no circumstances will such persons be released without subscribing the oath of allegiance to the United States." On June 29, 1863, on the occasion of the enemy's movement into Pennsylvania, the town of Columbia, Pa., was "placed under martial law, and Captain Samuel J. Randall, of the Philadelphia City Troop, was appointed Provost Marshal." The citizens of the town were required to "work on the intrenchments."[40]

1290 (9) A more recent instance, since the substantial conclusion of the war, was the declaration of martial law at New Orleans by the Department Commander, of July 30, 1866, resorted to on the occasion of a *riot*.[41] In another Order, of the next month,[42] it is announced that the martial law thus declared will be continued and enforced "so far as may be required for the preservation of the public peace and the protection of life and property."

(10) A still later occasion was that of a flood in the Tennessee River at Chattanooga in March, 1867, which imperilled life and property and called for unusual precautions for their protection. At the request of the civil authorities, Captain J. Kline, 25th Infantry, commanding the post, placed the city under martial law and directed the seizure and use, by the military, of boats for the purposes of the moving of household goods, &c.[43] In a communication from the mayor, of March 15th, in which the post commander is normally thanked for his services, it is said:—"Martial law, under ordinary circumstances, is distasteful to a people inclined to the pursuits of civil life; but your action in this case must meet the commendation of all right-thinking people."[44]

(11) The lawless disturbances caused by the so-called "Ku-Klux" induced a proclamation of the President, of October 17, 1871, (issued under an authority to be noticed later,) suspending the privilege of the writ of *habeas corpus*, and thus virtually initiating *martial law*, in certain designated counties of South Carolina. Similar action was taken at the same period by the State authorities in North Carolina and Tennessee.

The action of the Governors of Washington and Idaho, in declaring martial law, respectively in 1885 and 1892, has been already adverted to.

1291 These instances illustrate the nature of martial law as declared and exercised in the United States, and show that it has been resorted to not only pending a war and as a war-measure, but also by way of precaution at periods of public emergency and danger, when the civil authorities were apparently powerless to afford adequate protection to life and property.

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[39] G. O. 17.

[40] VII Reb. Rec., 19. Instances of declarations of martial law by the *Confederate* authorities are noted in IV Id., 141, 181, 216; V Id., 3, 8, 12, 76, 332.

[41] G. O. 60, Dept. of La., 1866. This Order is in full as follows:—"in consequence of the riotous and unlawful proceedings of to-day, Martial Law is proclaimed in the City of New Orleans. Brevet Major General A. V. Kautz is appointed Military Governor of the City. He will make his Headquarters in the City Hall, and his orders will be minutely obeyed in every particular. All civil functionaries will report at once to General Kautz, and will be instructed by him with regard to such duties as they may be hereafter required to perform."

[42] G. O. 15, Div. of the Gulf, Aug. 4, 1866.

[43] G. O. 12, Hdqrs., Post of Chattanooga, Tenn., March 11, 1867.

[44] "American Union" newspaper of Chattanooga, of that date.

**THE EXERCISE OF MARTIAL LAW, AS CONNECTED WITH THE SUSPENSION OF THE WRIT OF HABEAS CORPUS.** The most considerable and important part of the exercise of martial law is the making of arrests of civilians charged with offences against the laws of war. But to arrest and hold at will, or with a view to trial by a military tribunal, is practically to suspend the citizen's privilege of the writ of *habeas corpus*. On the other hand, the suspending of the writ by military authority is essentially an exercise of the power of martial law. Thus the two powers are closely connected, the one substantially including or involving the other,[45] and it becomes material to inquire whether, under the provision of the Constitution relating to the suspension of the privilege of the writ,[46] the President, or a military commander representing him, is authorized to order or effect such suspension.

In the early instance of the "Whiskey Insurrection" in Pennsylvania, in 1794–5, no suspension of the writ was resorted to: sundry of the insurgents were indeed arrested by military authority, but they were duly brought to trial before a civil court.[47]

During the Burr conspiracy of 1806, Brig. Gen. Wilkinson, commanding in Louisiana, without formally suspending the writ, suspended it in fact so far as to disregard writs issued by the local courts, and even to imprison for a brief period a county judge.[48] But in the case of two of the supposed conspirators whom Wilkinson caused to be arrested under a charge of treason, the Supreme Court of the United States, in passing upon the question
1292 of their criminality, expressed incidentally the opinion that the suspension was a power to be exercised by "*the legislature*."[49] This *dictum* was long accepted as settling that the Constitution was to be construed as empowering not the President, but Congress alone, to suspend the privilege of the writ.[50]

Early in the recent war, however, the question whether the President was not authorized to exercise the power independently of Congress was raised and considerably discussed. Upon this question having been referred by the President to the Attorney General, the latter, in July, 1861, gave it as his opinion that, while Congress alone could repeal the laws authorizing the issue of the writ, or suspend all right to or privilege of the same in general, the President was empowered to suspend the privilege in cases of particular individuals found necessary to be arrested by him during the emergency on account of complicity with the public enemy.[51] By proclamation of May 10, 1861, the President had already authorized the commander of the Union forces in Florida "to suspend there the writ of *habeas corpus*," if he found it necessary. Later, in an order[52] issued from the War Department on August 13, 1862, he sus-

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[45] *Ex parte* Field, 5 Blatchford, 82; 9 Am. L. R. 507.

[46] "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." Art. I, Sec. 9 § 2.

[47] In Shays' Rebellion in Massachusetts, in 1786, the operation of the Habeas Corpus Act was suspended by the Legislature for a limited period. 3 Hildredth, Hist. of U. S., 474.

[48] Martin, Hist. of Louisiana; Guyarré, Do.; Randall, Life of Jefferson, vol. 3; Wilkinson's Memoirs.

[49] *Ex parte* Bollman & Swartwout, 4 Cranch, 100, *per* Marshall, C. J.

[50] Johnson *v.* Duncan, 3 Mart., 532; Story, Com. § 1342.

[51] 10 Opins., 74. And see also, as concurring in the view that the President may be empowered to suspend the writ—*Ex Parte* Field 5 Blatchford, 63, *In re* Dugan, 6 D. C., 131; Halleck, 379; Whiting, War Powers, 202; Binney, "The Privilege of the Writ of Habeas Corpus under the Constitution."

[52] G. O. 104 of 1862.

pended the writ as to persons liable to draft who should absent themselves from their places of residence or from the country in order to avoid it; and subsequently, by his proclamation of Sept. 24, 1862, (heretofore cited as making subject to *martial law* all insurgent enemies, their aiders and abettors throughout the United States,) he further ordered:—"That the writ of *habeas corpus* is suspended in respect to all persons arrested, or who are now, or hereafter during the rebellion shall be, imprisoned in any fort, camp, arsenal, military prison, or other place of confinement by any military authority, or by the sentence of any court-martial or military commission."

Meantime, however, in the leading case of *Ex parte* Merryman,[53]
1293 Chief Justice Taney had held, on circuit at Baltimore, that the power to suspend the writ did not subsist in the Executive, but was a legislative function pertaining to Congress alone. The *dictum* of Chief Justice Marshall was thus reasserted as a positive ruling, and this ruling has been concurred in by a series of decisions in the United States and State courts and by other recognized authorities.[54]

Further, Congress, by an express provision of the Act of March 3, 1863, c. 81, specifically vested in the President the authority, "whenever in his judgment the public safety might require it, to suspend the privilege of the writ in any case arising in any part of the United States,"—thus impliedly asserting that the power so to authorize rested in itself alone.[55] Pursuant to this Act the President issued his proclamation of September 15, 1863, already referred to, in which he suspended the writ throughout the United States and during the existing rebellion, 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, 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 service by authority of the President of the United States; or for resisting a draft, or for any other offence against the military or naval service." It is added: "And I do hereby require all magistrates, attorneys, and other civil officers within the United States, and all officers and others in the military and naval services of the
1294 United States, to take distinct notice of this suspension, and to give it full effect, and all citizens of the United States to conduct and govern themselves accordingly."

Subsequently, under the authority of the same Act, the President, by proclamation of July 5, 1864, in declaring martial law in the State of Kentucky, suspended also the privilege of the writ of *habeas corpus* in the classes of cases specified in that proclamation, as hereinbefore set forth.[56]

The Act of 1863 expired with the termination of the rebellion in 1866, and no subsequent suspension has been ordered by the President except in the

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[53] Taney's Decisions, 246.

[54] McCall *v.* McDowell, Deady, 233; *Ex parte* Benedict, 4 West. L., M., 449; Jones *v.* Seward, 40 Barb., 563; People *v.* Gaul, 44 Id., 104; Skeen *v.* Monkheimer, 21 Ind., 1; Griffin *v.* Wilcox, 27 Id., 383; Johnson *v.* Jones, 44 Ills., 142; *In re* Kemp, 16 Wis., 359; *In re* Oliver, 17 Id., 681; 1 Bishop, C. L. § 63, 64; Cooley, Prins. Const. Law, 289; Flanders, Expos. Const., 134; 9 Am. L. R., 498.

[55] See *In re* Murphy, Woolworth, 141.

Similar legislation was resorted to by the Congress of the Confederate States by Act of Feb. 15, 1864, in which the power of suspension was expressly declared to be "vested solely in Congress." This Act is given in the Appendix.

[56] See under "Instances illustrating the operation of martial law," *ante*.

single case of the unlawful combinations of the so-called "Ku-klux" in South Carolina in 1871, in which, by proclamations of October 17 and November 10 of that year, issued in accordance with the special authority given by Congress, in the Act of April 20, 1871, c. 22, s. 4,[57] (and limited as to its exercise to the end of the next regular session of Congress,) he suspended the writ in ten counties of that State.[58]

Thus, as a general principle of law, it may be deemed to be settled by the rulings of the courts and weight of legal authority, as well as by the action of Congress and practice of the Executive, that the President is not empowered of his own authority to suspend the privilege of the writ of *habeas corpus*, and that a declaration of martial law made by him or a military commander, in a district not within the theatre of war, will not justify such suspension in the absence of the sanction of Congress. The result must be that martial law proper will in the future rarely be initiated in the United States where Congress has omitted to provide the means for rendering its exercise effectual. But, in the event of a practical exercise of the same in an adequate emergency, and of the consequent arrest and holding by military authority, in good faith and what is believed to be the full and proper performance of duty, of 1295 undoubted public enemies or other criminals, in temporary disregard of judicial process sued out for their release, it can scarcely be questioned that Congress, if it does not expressly ratify the act, will at least protect or indemnify the officers and soldiers concerned, by legislation corresponding to that enacted for a similar purpose at the close of active hostilities in the late civil war,[59] while—as then—authorizing the removal to a court of the United States of actions for damages commenced against such persons in State courts.[60]

**JURISDICTION OF OFFENCES COMMITTED BY PERSONS UNDER MARTIAL LAW.** It need hardly be remarked that martial law, lawfully declared, creates an exception to the general rule of exclusive subjection to the civil jurisdiction, and renders offences against the laws of war, as well as those of a civil character, triable, at the discretion of the commander, (as governed by a consideration for the public interests and the due administration of justice,) by military tribunals.[61] The powers and procedure of such tribunals will be considered in treating of the Military Commission. The criminal jurisdiction, however, of the civil courts is much less subject to be abridged under Martial Law proper than under Military Government.

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[57] See the orders, &c., of the President as to the employment of the military forces in making arrests under this Act.

[58] Since this case, the President has on several occasions issued proclamations warning turbulent and disorderly persons to disperse and retire to their abodes, according to the terms of Sec. 5300, Rev. Sta., but has not been forced to suspend the writ. See instances of such proclamations referred to in PART III—"I. Employment of the military in aid of the execution of the laws," note.

[59] See the remarks of Chief Justice Chase at the close of his opinion in *Ex parte* Milligan, 4 Wallace, 141. On this subject, Halleck, (p. 380,) expresses himself as follows:—"Even if it were plain that the words of the Constitution were intended to give this power *exclusively* to Congress, we think that in a case of public danger, at once so imminent and grave as to admit of no other remedy, the maxim *salus populi suprema lex* should form the rule of action, and that a suspension of this writ, by the executive and military authorities of the United States, would be justified by the pressure of a visible public necessity: if an act of indemnity were required, it would be the duty of Congress to pass it." Compare also Pratt, 216.

[60] The series of indemnity Acts here referred to were those of March 3, 1863, c. 81; May 11, 1866, c. 80; and March 2, 1867, c. 155. As to their effect, see Beard *v.* Burts, 95 U. S., 434; Beckwith *v.* Bean, 98 Id., 283; Mitchell *v.* Clarke, 110 Id., 638–640.

[61] See Cooley, Prins. Const. Law, 138.

## VI. TRIAL AND PUNISHMENT OF OFFENCES UNDER THE LAW OF WAR—THE MILITARY COMMISSION.

### AUTHORITY AND OCCASION FOR THE MILITARY COMMISSION.

1296 The Constitution confers upon Congress the power "to define and punish offences against the law of nations," and in the instances of the legislation of Congress during the late war by which it was enacted that spies and guerillas should be punishable by sentence of military commission, such commission may be regarded as deriving its authority from this constitutional power. But, in general, it is those provisions of the Constitution which empower Congress to "declare war" and "raise armies," and which, in authorizing the initiation of *war*, authorize the employment of all necessary and proper agencies for its due prosecution, from which this tribunal derives its original sanction. Its authority is thus the same as the authority for the making and waging of war and for the exercise of military government and martial law. The commission is simply an instrumentality for the more efficient execution of the war powers vested in Congress and the power vested in the President as Commander-in-chief in war. In some instances, as will presently be noted, Congress has specifically recognized the military commission as the proper war-court, and in terms provided for the trial thereby of certain offences. In general, however, it has left it to the President, and the military commanders representing him, to employ the commission, as occasion may require, for the investigation and punishment of violations of the laws of war and other offences not cognizable by court-martial.[62]

The *occasion* for the military commission arises principally from the fact that the jurisdiction of the court-martial proper, in our law, is restricted by statute almost exclusively to members of the military force and to certain specific offences defined in a written code. It does not extend to many criminal acts, especially of civilians, peculiar to time of war; and for the trial of these a different tribunal is required. A commander indeed, where authorized to constitute a purely war-court, may designate it by any convenient name; he may style it a "court-martial," and, though not a court-martial proper, it will still be a legal body under the laws of war. But to employ the same name for the two kinds of court could scarcely but result in confusion and in questions as to jurisdiction and power of punishment.

1297 Hence, in our military law, the distinctive name of *military commission* has been adopted for the exclusively war-court, which also, as will hereafter be illustrated, is essentially a distinct tribunal from the court-martial of the Articles of war.

Abroad, the court-martial is employed for the cognizance of offences not only of the officers and soldiers of the army, but also of non-military persons subjected to military authority in time of war or rebellion.[63] A late English writer, in approving the distinction established in this country between the court-martial and the military commission, observes:—"In England both descriptions of courts are called courts-martial, and the general public are consequently not able to discriminate between the two."[64]

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[62] See 11 Opins. At. Gen., 305.

[63] A recent instance is that of the trial, by a court-martial, at Barcelona, September, 1893, of the "anarchist" Pallas.

[64] Capt. Douglass Jones, Notes on Military Law, p. 3. It is nevertheless the fact that the English court-martial under military government or martial law is distinguished in martial particulars from the regular court-martial, and mainly in that it is not governed by the same rules as to its composition, or as to its power of sentence, and that it is more summary in its proceeding. See Hough, 883; Id. (P.) 516, 531, 536; Finlason, Coms. on Mar. Law, 9, 16, 44, 127, 142, 243–5; *In re* Egan, 5 Blatchford, 321. It has been characterized as a "*committee*" rather than a court. Finlason, *ante*.

In our early wars, indeed, before the distinction between the two species of court was inaugurated, cases which would now be referred to a military commission were brought to trial before special courts-martial. Such was the case of Joshua Hett Smith, tried by court-martial in 1780, under a Resolution of Congress, for assisting and combining with Gen. Arnold in his treasonable proceedings. Such too was the case of Louis Louaillier, brought to trial for being a spy, and for other offences, before a General Court-Martial convened by Gen. Jackson in New Orleans, in March, 1815. Such also were the cases of Arbuthnot and Ambrister, tried by court-martial, in Florida, in April, 1818, for inciting and assisting the Creek Indians to make war against the United States, and convicted and executed as noticed in a previous Chapter.[65]

**HISTORY OF THE MILITARY COMMISSION IN OUR LAW—Gen. Scott's "Military Commission."** It was not till 1847, upon the occupation by our forces of the territory of Mexico in the war with that nation, that
1298 the military commission was, as such, initiated. In G. O. 20 of February 19 of that year, issued from the Headquarters of the Army at Tampico, (as slightly added to by G. O. 190 and 287 of the same series,) it was announced that—"Assassination, murder, poisoning, rape, or the attempt to commit either, malicious stabbing or maiming, malicious assault and battery, robbery, theft, the wanton desecration of churches, cemeteries, or other religious edifices and fixtures, the interruption of religious ceremonies, and the destruction, except by order of a superior officer, of public or private property, whether committed by Mexicans or other civilians in Mexico against individuals of the U. S. military forces, or by such individuals against other such individuals or against Mexicans or civilians; as well as the purchase by Mexicans or civilians in Mexico, from soldiers, of horses, arms, ammunition, equipments or clothing,"—should be brought to trial before "*military commissions*."

Thus initiated, such commissions were repeatedly convened by Gen. Scott, as also by Gens. Wool and Taylor, mostly in 1847.[66] The offences tried thereby were not always confined to those specified in the Orders as above cited; such charges as "Manslaughter," "Burglary," "Picking pockets," "Carrying a concealed weapon," "Threatening the lives of soldiers," "Riotous conduct," "Attempting to pass counterfeit money," "Obtaining money under false pretences," "Fraud," "Attempt to defraud the United States," "Introducing spirituous liquor into U. S. barracks"—being also found in the G. O. promulgating the proceedings of trials.

**Gen. Scott's "Council of war."** The acts thus made punishable by military commissions were mainly criminal offences of the class cognizable by the civil courts in time of peace. A further description of offences, *viz.* those against the *laws of war*, yet remained to be provided for. For the trial and punishment of these offences there was inaugurated by Gen. Scott a
1299 separate tribunal designated as the *council of war*, not however materially differing from the military commission except in the class of cases referred to it. The principal charges referred to and passed upon by

[65] As to the action of Gen. Jackson in the case of Ambrister, see *ante*, Ch. XXI.

[66] Such commissions were ordered by Gen. Scott in G. O. 81, 83, 121, 124, 147, 171, 194, 215, 239, 267, 270, 273, 292, 334, 335, 380, 392, of 1847; Do. 9 of 1848;—by Gen. Taylor in Do. 66, 106, 112, 121, of 1847;—by Gen. Wool in Do. 140, 179, 216, 463, 476, 514, of 1847. And note, in 5 Opins. At. Gen., 55, the case of Capt. Foster, who, for the alleged murder of another officer, was put upon trial before a military commission convened in Mexico by Gen. Scott, but escaped pending the hearing. As to the occasion for and legality of these commissions, see Halleck, 783.

these courts were Guerilla warfare or Violation of the Laws of War by Guerilleros, and Enticing or Attempting to entice soldiers to desert the U. S. service.[67] The trials, however, were few; this branch of jurisdiction not then becoming fully developed.

**Military commissions in the late war.** The military commission and council of war of the Mexican war were together the originals of the Military Commission as so extensively employed during the recent war, and as recognized in our existing statute law; the two jurisdictions of the earlier commission and council respectively being *united* in the later war-court, for which the general designation of "military commission" was retained as the preferable one.[68] Coming down to the period indicated, we find several instances of military commissions convened as early as in 1861.[69] In a General Order, (No. 1,) of Jan. 1, 1862, Maj. Gen. Halleck, commanding Department of Missouri, first defined at length to his command their nature and jurisdiction as then understood; similar action was taken by other department commanders;[70] and these courts, thus introduced, soon came to be generally adopted as authorized and established tribunals for time of war and rebellion.

**Statutory recognition and provision.** Presently also they were recognized as legal courts, and their jurisdiction in some cases added to, by express statute. Sec. 30 of the Act of March 3, 1863, c. 75, the original of the present Art. 58, provided that murder, manslaughter, robbery, larceny, and certain other
1300 specified crimes, when committed by military persons in time of war or rebellion, should be punishable by sentence of court-martial *or military commission.*[71] So, sec. 38 of the same Act, in amending the previously existing statute relating to spies, provided that this class of offenders should be triable by *military commission* as well as court-martial, and this form is still retained in the military code—Sec. 1343, Rev. Sts. In the following year, by Act of July 2, 1864, c. 215, commanders of departments and armies were authorized to execute sentences imposed by *military commissions* upon guerillas. Next, by Act of July 4, 1864, c. 253, s. 6, (not now in force,) inspectors and other civil officials and employees of the quartermaster department of the army were made amenable to trial by *military commission* (or court-martial) for fraud, neglect of duty and accepting bribes. Meanwhile the Act of June 20, 1864, c. 145, s. 5 & 6, in establishing the Bureau of Military Justice, provided for the revision and recording thereby of the proceedings of *military commissions* equally as of those of other military courts, and this provision was in substance repeated in the sections of the subsequent Acts of July 28, 1866, and June 23, 1874, (Sec. 1199, Rev. Sts.,) relating to the same branch of the service. In the meantime the Act of March 3, 1865, c. 91, establishing an asylum for disabled volunteers, appropriated as one of its means of support all fines adjudged against volunteer officers and soldiers by sentence either of court-martial or *military commission*—a provision re-enacted in the subsequent statute on the same subject of March 21, 1866, c. 21, and retained in Sec. 4831, Rev.

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[67] See cases of such Councils in G. O. 181, 184, 187, 195, 291, Hdqrs. of Army, 1847; Do. 22, 35, 41, Id., 1848. G. O. 372 of 1847 relates to their composition, powers, &c.

[68] The term "council of war," as a designation for a *court,* has not since reappeared in our law or practice.

[69] G. O. 14, 20, 118, Western Dept., 1861; Do. 24, 25, Dept. of N. E. Va., 1861; Do. 68, Army of the Potomac, 1861.

[70] See, for example G. O. 23, Dept. of the Gulf, 1862; Do. 7, Dept. of Kans., 1862; Do. 87, Dept. of N. Mex., 1862; Do. 150, Dept. of the Ohio, 1863; Do. 57, Dept. of Va. & No. Ca., 1863; Do. 27, Dept. of the N. West, 1864.

[71] The words "or military commission" were, apparently inadvertently, omitted from the Article as inserted in the Revised Statutes.

Sts. A further and the latest specific authorization of the employment of the military commission as a court is found in the "Reconstruction Act" of March 2, 1867, c. 153, s. 3 & 4, to be treated of under the next Title. A pointed contemporaneous recognition of such tribunal is that of the provision of March 2, 1867, c. 155, legalizing proceedings under martial law, trials by *military commission*, &c., had during the war. A later instance occurs in s. 1 of the Act of March 3, 1873, c. 249, (now Sec. 1344, Rev. Sts.,) establishing a general military prison, (that now at Fort Leavenworth, Kansas,) for the confinement, &c., of offenders convicted before "any court-martial *or military commission*
1301 in the United States." Further statutory recognitions of the commission as a tribunal known to our law are contained in the series of Army Appropriation Acts, from that of June 15, 1864, to the most recent of March 3, 1885, in all of which, (with exceptions between 1872 and 1876,) are items of appropriation for the "expenses of courts-martial, *military commissions*, and courts of inquiry," or for the "compensation of witnesses" or "clerks and witnesses" at or before the same.

**Executive and judicial, &c., recognition.** The military commission has also been recognized as an authorized provisional tribunal in proclamations and orders of the President and in rulings and opinions of the courts and law officers of the government. It was referred to in the proclamation of September 24, 1862, as an authorized court for the trial of the offences of persons under martial law, and its proceedings and sentences have been approved and executed in and by numerous General Orders issued through the War Department, of which some of the principal will hereafter be cited.[72] The Supreme Court of the United States has acknowledged the validity of its judgments in leading cases,[73] and other courts of the United States and of the States have equally accepted it as a legal body.[74] In an important adjudication the Supreme Court of Tennessee refers to it as "a tribunal now (1870) as well known and recognized in the laws of the United States as a court-martial."[75] Further the Attorneys (and Solicitors) General have repeatedly had occasion to acknowledge its authority and support its jurisdiction;[76] as, for example, in such cases as those of the conspirators concerned in the assassination of President Lincoln,[77] of Weaver, convicted of murder by military com-
1302 mission in the Reconstruction period,[78] of the Modoc Indians concerned in the killing of Gen. Canby and Rev. E. Thomas,[79] and other less marked instances.[80]

**Frequency in the late war.** Thus sanctioned, these tribunals, pending the civil war, and down to the termination of the operation of the Reconstruction Laws, must have tried and given judgment in upwards of two thousand cases, promulgated in G. O. of the War Department and of the various military departments and armies. Of these cases the principal historically, as well as the more material in a legal point of view, have been, or will be, referred to in the course of the present PART of this work.

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[72] It is recognized in the recent G. O. 75 of 1883, which provides for the forwarding of records of military commissions, equally as of courts-martial, to the Judge Advocate General. And see, now, par. 985, A. R. of 1889.

[73] *Ex parte* Vallandigham, 1 Wallace, 243; Coleman *v.* Tennessee, 97 U. S., 509.

[74] *In re* Egan, 5 Blatchford, 319; *In re* Martin, 45 Barb., 146; *Ex parte* Bright, 1 Utah, 145.

[75] State *v.* Stillman, 7 Cold., 352.

[76] See Cooley, Prins. Const. Law, 137.

[77] 11 Opins. At. Gen., 297.

[78] 13 Id., 59.

[79] 14 Id., 249.

[80] See 5 Id., 55; 12 Id., 332.

**CONSTITUTION OF THE MILITARY COMMISSION.** In the absence of any statute prescribing by whom military commissions shall be constituted, they have been constituted in practice by the same commanders as are empowered by Arts. 72 and 73 to order general courts-martial, to wit, commanders of departments, armies, divisions, and separate brigades.[81] The President, as Commander-in-chief, may of course assemble military commissions as he may assemble courts-martial. Commanders of "districts" have sometimes, and legally under the general law of war and military government, convened these tribunals, though their commands have been less than a brigade; but such instances have been rare. The provisions of the Articles of war indicating by whom the court is to be constituted where the commander who would regularly order it is in fact the prosecutor or accuser, apply in terms only to general courts-martial, and are not *required* to be observed in the convening of the more summary tribunals under consideration. Where, however, an unreasonable delay will not thereby be caused, or the interests of the service or of the public otherwise prejudiced, such provisions may well, as a measure of justice or expediency, be observed.[82]

1303 **COMPOSITION.** Following the analogy of courts-martial, military commissions in this country have invariably been composed of commissioned officers of the army. Strictly legally they might indeed be composed otherwise should the commander *will* it—as, for example, in part of civilians or of enlisted men. The court-martial convened under martial law by Gov. Eyre, in Jamaica in 1865, for the trial of Geo. W. Gordon, was a mixed court of one military and two naval officers, and it was in regard to this court that D'Israeli observed in Parliament that—"in the state of martial law there can be no irregularity in the composition of the court, as the best court that can be got must be assembled."[83]

The *rank* of the members of a military commission is legally immaterial. In a case indeed, (which must be rare,) of a trial of an officer of the army by such a tribunal, the provision of Art. 79 as to the relative rank of the members will, if practicable, properly be regarded.

In the absence of any law fixing the *number* of members of a military commission, the same may legally be composed of any number in the discretion of the convening authority. A commission of a single member would be as strictly legal as would be one of thirteen members. In his General Orders already cited,[84] Gen. Scott directed that military commissions should be governed as to their composition, &c., by the provisions of the Articles of war prescribing the number of members, &c., for courts-martial: as to councils of war, it was specified that they should consist of "not less than three nor

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[81] As to the general rule, that military commissions are constituted and composed, and their proceedings are conducted, similarly to general courts-martial—see G. O. 20 of 1847, (Gen. Scott;) Do. 1, 7, 33, Dept. of the Mo., 1862; Do. 150, Dept. of the Ohio, 1863; Do. 27, Dept. of the N. West, 1864; 1 Bishop, C. L. § 45, 52; DIGEST, 501. As to the procedure of military courts under martial law, the English writer Pratt observes, (p. 216,)—"The forms of military law should, as far as practicable, be adhered to."

[82] See G. C. M. O. 11, Dept. of Texas, 1866.

[83] Jones, Notes on Martial Law, 11; Finlason, History of the Jamaica Case, 111. In Queen *v.* Nelson & Brand, Cockburn, C. J., commented upon the composition of this court as unauthorized—as of course it was by the law governing courts-martial proper. It appears from the report the Commissioners on the Jamaica Case, (Finlason, Hist., p. 110,) that this court had been preceded, during the same exigency, by one "consisting partly of members of the legislature." In the Demerara Case, in 1823, a militia officer, (really the head of the colonial judiciary, commissioned *pro hac vice in the militia*,) was associated with officers of the army on the court-martial which tried missionary Smith, a civilian. 2 Hansard, XI, 972.

[84] G. O. 20, 190, 287, of 1847.

more than thirteen officers." In Gen. Halleck's Order of Jan. 1, 1862, heretofor noticed, [85] it was declared:—"They" (military commissions) "will
1304 be composed of not less than three members, one of whom will act as judge advocate or recorder where no officer is designated for that duty. A larger number will be detailed where the public service will permit." In practice during the late war, while commissions were most commonly constituted with five members, there was a not unusual number, and was regarded as the proper *minimum*.[86] The court in Vallandigham's case was convened with nine members, of whom seven acted on the trial. In practice also a *separate officer* has been almost invariably detailed as *judge advocate*.[87]

**JURISDICTION—As to place.** (1) A military commission, (except where otherwise authorized by statute,) can legally assume jurisdiction only of offences committed within the field of the command of the convening commander. Thus a commission ordered by a commander exercising *military government*, by virtue of his occupation, by his army, of territory of the enemy, cannot take cognizance of an offence committed without such territory.[88] (2) The place must be the theatre of war or a place where military government or martial law may legally be exercised; otherwise a military commission, (unless specially empowered by statute,) will have no jurisdiction of
1305 offences committed there.[89] The ruling in the leading case of *Ex parte* Milligan,[90] that a military commission, which had assumed jurisdiction of offences committed in 1862 in Indiana,—a locality not involved in war nor subject to any form of military dominion,—had exceeded its powers, has been referred to under the previous Titles, where also the fields of military government and martial law have been defined. (3) It has further been held by English authorities that, to give jurisdiction to the war-court, the *trial* must be had within the theatre of war, military government, or martial law; that, if held elsewhere, and where the civil courts are open and available, the proceedings and sentence will be *coram non judice*.[91] Thus it is considered by Finlason that the trial, by a military court, of Wolf Tone in 1798, was illegal because he was tried in Dublin, outside of the region of war and martial law.[92]

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[86] G. O. 1, Dept. of the Mo., 1862.

[87] DIGEST, 501.

[88] The ruling, however, in G. C. M. O. 267 of 1865, that the proceedings of a military commission for which no judge advocate had been detailed were on that account "*illegal*," was erroneous, since whether such a tribunal shall or not be supplied with a judge advocate, is, in the absence of law on the subject, a matter in the discretion of the commander.

[89] See Finlason, Repression of Riot and Rebellion, 106; Franklyn, Outlines of Mar. Law, 85; Pratt, 216; G. O. 125, Second Mil. Dist., 1867; G. O. 20, 1847, (Gen. Scott.) In the Jamaica Case, it was held by Chief Justice Cockburn, in Queen *v.* Nelson & Brand, that Governor Eyre acted illegally in arresting Gordon at Kingston, outside the "proclaimed district," (the district placed by the Governor's proclamation under martial law,) where he would have been entitled to a jury trial in a civil court, and removing him within that district for trial and punishment before a martial court. Finlason, Hist. of the Jamaica Case; Jones, 11, 12; Franklyn, 85; Pratt, 216. In Queen *v.* Eyre, Blackburn, J., held that the removal was justifiable. Finlason, Hist. Jamaica Case; Do., Report of Case of Queen *v.* Eyre; Solicitor's Journal, vol. 12, p. 674.

[90] See Clode, M. L., 189.

[90] 4 Wallace, 2. And see Milligan *v.* Hovey, 3 Bissell, 13; Skeen *v.* Monkheimer, 21 Ind., 1; Murphy's Case, Woolworth, 141; Devlin's Case, 12 Ct. Cl., 266; Id., 12 Opins. At. Gen., 128; G. O. 7, Dept. of Kans., 1862; Do. 37, Id., 1864; Do. 115, Dept. of the Mo., 1864. Compare in this connection, the argument of Hon. J. A. Bingham, on the Trial of the Assassins of President Lincoln.

[91] See Clode, M. L., 189.

[92] Finlason, Coms. on Mar. Law, p. 4–5, 129. And see this trial, reported in 27 Howell's St. T., 615.

These rules which have their origin in the fact that war, being an exceptional status, can authorize the exercise of military power and jurisdiction only within the limits—as to place, time, and subjects—of its actual existence and operation, have not always been strictly regarded in our practice. A singular instance of their disregard during the late war is presented by the case of T. E. Hogg and his six associates, who, for the alleged offence of taking passage upon a U. S. merchant vessel at Panama, (a foreign country,) in November, 1864, with the secret purpose of subsequently seizing by force and arms the ship and cargo in the interest of the Southern confederacy, were, upon apprehension, transported to, and tried by military commission at, San Francisco, a place quite without the theatre of the war.[93]

As to time. An offence, to be brought within the cognizance of a mili-
1306 tary commission, must have been committed within the period of the war or of the exercise of military government or martial law. As in the ordinary criminal law one cannot legally be puished for what is not an offence at the time of the sentence,[94] so a military commission cannot, (in the absence of specific statutory authority,) legally assume jurisdiction of, or impose a punishment for, an offence committed either before or after the war or other exigency authorizing the exercise of military power.[95] Thus, a military commander, in the exercise of military government over enemy's territory occupied by his army cannot, with whatever good intention, legally bring to trial before military commissions ordered by him offenders whose crimes were committed prior to the occupation. So, while the jurisdiction may be continued after active hostilities have ceased, it cannot be maintained after the date of a peace or other form of absolute discontinuance, by the competent authority, of the war status. Thus, in the case, already referred to, of Capt. Foster, of the Georgia volunteers, charged with the murder of Lieut. Goff, Pa. Vols., in Mexico, pending the Mexican war, it was held by Attorney General Toucey that, the temporaray military government "having ceased by the restoration of the
Mexican authorities, neither the offence nor any prosecution for it can
1307 any longer, in contemplation of law, have existence."[96] So, where the status has been that of *martial law proper*, the jurisdiction expires with the formal revocation of the declaration of the same, or, in the absence of a formal revocation, with the complete passing off of the exigency.[97] Where trials, or proceedings for trials, founded on martial law, are pending, the

[93] G. O. 52, Dept. of the Pacific, 1865. They were all sentenced to death, but their sentences were commuted to imprisonment in a penitentiary.

[94] Com. *v.* Duane, 1 Binney, 601; Anon., 1 Washington, 84; U. S. *v.* Tynen, 11 Wallace, 88; U. S. *v.* Finlay, 1 Abbott, U. S. R., 364.

[95] See Finlason, Coms. on Mar. Law., 53; Clode, M. L., 189; Thring, Crim. Law of Navy, 42–3; Wells on Jurisdiction, 577; 12 Opins. At. Gen., 200; G. O. 26 of 1866; Do. 12, Dept. of the South, 1868; Do. 9, First Mil. Dist., 1870; DIGEST, 507. "Martial law is not retrospective. An offender cannot be tried for a crime committed before martial law was proclaimed." Pratt, 216. And see Jones, 12. The jurisdiction of such a tribunal is "determined and limited by the period (and territorial extent) of the military occupation." G. O. 125, Second Mil. Dist., 1867.

[96] 5 Opins., 55. The case of the Modoc Indians, tried, in July, 1873, by military commission after hostilities had been finally concluded, may seem to have been an exception to the general rule laid down under this head. The jurisdiction assumed by the government in this instance is defended as follows by Atty. Gen. Williams:—"Doubtless the war with the Modocs is practically ended, unless some of them should escape and renew hostilities. But it is the right of the United States, as there is no agreement for peace, to determine for themselves whether or not anything more ought to be done for the protection of the country or the punishment of crimes growing out of the war." 14 Opins., 253.

[97] See *In re* Martin, 45 Barb., 146; also Finlason, Coms. on Mar Law, 4, 5, 130, as to Crogan's case.

status should be preserved for the purposes of such trials, and till the findings, and sentences if any, are finally acted upon.

As to persons. From what has heretofore been said in regard to the application of the laws of war to enemies in arms, and their operation under a state of military government or martial law, it will have been seen that the classes of persons who in our law may become subject to the jurisdiction of military commissions are the following: (1) Individuals of the enemy's army who have been guilty of illegitimate warfare or other offences in violation of the laws of war; (2) Inhabitants of enemy's country occupied and held by the right of conquest; (3) Inhabitants of places or districts under martial law; (4) Officers and soldiers of our own army, or persons serving with it in the field, who, in time of war, become chargeable with crimes or offences not cognizable, or triable, by the criminal courts or under the Articles of war.

Of the *first* class are persons in the military service of the enemy who have been guilty of any of the descriptions of offences specified under a previous Title[98] as violations of the laws of war;—as those, for example, who have assumed the rôle of the spy, or have taken part in guerilla raids, or the killing, robbery, &c., of defenceless persons or prisoners of war, or have come within our lines to recruit soldiers or for other unauthorized purpose, or have violated a flag of truce or committed other act of treachery or perfidy, or, as paroled prisoners of war, have violated their parole.

The *second* and *third* classes embrace much the greater number of in-
1308 dividuals who, in our late war and the war with Mexico, were brought to trial before the tribunal under consideration. Among the numerous cases of persons so tried were included upwards of one hundred cases of women. The number of these offenders is illustrated by the great variety of offences and phases of offence of which they were convicted, as specified in the General Orders of the period and noticed under the next head.

The greater part of the offenders embraced in the *fourth* class have been military persons tried under sec. 30, Act of March 3, 1863, or who became amenable to military commission because of criminal offences committed in places where, by reason of war and military occupation, or of martial law, the ordinary criminal courts were closed. The others of this class were parties who became so amenable by reason of violations of the laws of war or offences of a military character, not included among the acts made punishable by the code of Articles of war. Besides officers and soldiers, there are comprised in this category camp-followers and other civilians employed by the government in connection with the army in war. Thus, in the G. O. of the period of the late war, there are found, (as tried by military commission,) sutlers, officers' servants, teamsters, persons employed on government steamers and transports, or otherwise in the quartermaster, provost marshal and other staff corps, as also individuals serving in such capacities as veterinary surgeons,[99] government detective,[100] medical cadet,[1] lieutenant in the revenue service,[2] special agent of the Treasury,[3] newspaper correspondent,[4] &c.

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[98] Title III, *ante*. That *Indians* may be included in this class, see case of Modocs heretofore referred to; also cases in G. O. 120 of 1863, G. C. M. O. 508 of 1865, and G. O. 86 of 1866—of Sioux Indians concerned in murders and other crimes committed in Minnesota in 1862. That a military commission can take cognizance of violations of the laws of war by Indians, only when their *tribe* is involved in war with the United States, see DIGEST, 505.

[99] G. O. 16, Dept. of the Mo., 1862.

[100] G. O. 51, Dept. of the Mo., 1864; Do. 6, Dept. of Va., 1866.

[1] G. O. 13, Dept. of Va. & No. Ca., 1864.

[2] G. C. M. O. 308 of 1864; G. O. 77, Dept. of Va. & No. Ca., 1864.

[3] G. O. 55, Dept. of Ala., 1865; Do. 8, Id., 1866.

[4] G. O. 29, Army of the Potomac, 1863.

**As to offences.** In the war with Mexico, as has heretofore been noticed, the tribunal known as the "military commission" was employed for the trial and punishment of the ordinary crimes such as in a state of peace would have been taken cognizance of by the criminal courts, while violations of the laws of war were referred to another tribunal designated as "council of war." In the simpler system matured in our recent war both jurisdictions were, as
1309 has been seen, united in one court for which was preferably retained the name of military commission. The offences cognizable by military commissions may thus be classed as follows: (1) Crimes and statutory offences cognizable by State or U. S. courts, and which would properly be tried by such courts if open and acting; (2) Violations of the laws and usages of war cognizable by military tribunals only; (3) Breaches of military orders or regulations for which offenders are not legally triable by court-martial under the Articles of war.

Of the offences of the *first* class, those most frequently brought to trial before military commissions during the late war, as shown by the General Orders, were murder, manslaughter, robbery, larceny, burglary, rape, arson, assault and battery, and attempts to commit the same; criminal conspiracies,[5] riot, perjury, bribery, accepting bribes, forgery, fraud,[6] embezzlement, misappropriation
1310 or other illegal disposition of public property, receiving stolen goods, obtaining money or property under false pretences, making or uttering counterfeit money, uttering false Treasury notes, breaches of the peace and disorderly conduct, keeping a disorderly house, selling obscene books, &c., malicious mischief or trespass, carrying concealed weapons, abuse of official authority by civil officials, resisting or evading the draft, discouraging enlistments, purchasing arms, clothing, &c., from soldiers, in violation of Sec. 5438, Rev. Sts., aiding desertion, &c., in violation of Sec. 5455, Rev. Sts. "*Treason*"—it may be added—was not unfrequently charged, but mostly as a name for some violation of the class next to be mentioned.

Of the *second* class, of offences in violation of the laws and usages of war, those principally, in the experience of our wars, made the subject of charges and trial, have been—breaches of the law of non-intercourse with the enemy,

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[5] Among the conspiracies of this class, or of the first and second classes combined, may be noted the following:—that of Bowles, Milligan and Horsey, convicted of conspiring together, and with other members of the so-called "Order of American Knights" or "Sons of Liberty," against the U. S. Government, and in the interest of the Rebellion, (G. C. M. O. 214 of 1865;)—that of Herold, Payne and others convicted of conspiring with John Wilkes Booth, Jefferson Davis and sundry other persons in the assassination of President Lincoln and the attempted assassination of the Secretary of State, Mr. Seward, (G. C. M. O. 356 of 1865;)—that of Capt. Henry Wirz of the confederate army, convicted of conspiring with Jefferson Davis, James A. Seddon, Howell Cobb, John H. Winder, Richard B. Winder and others, against the lives and health of Union soldiers held as prisoners of war at Andersonville, Ga., (G. C. M. O. 607 of 1865;)—that of William Murphy, convicted of conspiring with Davis, Seddon, Judah P. Benjamin and others, to burn and destroy boats on the western rivers, (G. C. M. O. 107 of 1866;)—that of the persons concerned in the resisting and defeating of the draft, especially in Carbon, Columbia, Schuylkill, Clearfield and Luzerne Counties, Pennsylvania, in 1864–5, (G. O. 23, 64, 67, 68, 69, Dept. of the Susquehanna, 1864; Do. 82, 85, Dept. of Pa., 1864; Do. 4, 6, 36, Id., 1865;)—that of G. St. Leger Grenfel and his associates, (Charles Walsh, Buckner S. Morris, R. T. Semmes and others,) convicted of an attempt to release the confederate prisoners of war at Camp Douglass near Chicago, and to lay waste and destroy that city, (G. O. 30, Northern Dept., 1865;)—that of T. E. Hogg and others convicted of being concerned in the attempt to seize the steamer Salvador at Panama, in 1864, (G. O. 27, Dept. of the Pacific, 1865).

[6] Among the various forms of *fraud* charged is that of defacing or altering the "U. S." brand on public animals, with fraudulent intent. See cases in G. C. M. O. 488 of 1865; G. O. 111, Dept. of the Mo., 1863; Do. 72, Dept. of Ark., 1864.

such as running or attempting to run a blockade;[7] unauthorized contracting, trading or dealing with, enemies, or furnishing them with money, arms, provisions, medicines, &c.;[8] conveying to or from them dispatches, letters, or other communications, passing the lines for any purpose without a permit, or coming back after being sent through the lines and ordered not to return; aiding the enemy by harboring his spies, emissaries, &c., assisting his people or friends to cross the lines into his country, acting as guide to his troops,[9] aiding the escape of his soldiers held as prisoners of war,[10] secretly recruiting for his army,[11] negotiating and circulating his currency or securities—as confederate notes or bonds in the late war,[12] hostile or disloyal acts, or publications or declarations calculated to excite opposition to the federal government
1311 or sympathy with the enemy,[13] &c.; engaging in illegal warfare as a guerilla, or by the deliberate burning, or other destruction of boats, trains, bridges, buildings, &c.; acting as a spy, taking life or obtaining any advantage by means of treachery; abuse or violation of a flag of truce; violation of a parole[14] or of an oath of allegiance or amnesty,[15] breach of bond given for loyal behaviour, good conduct, &c.;[16] resistance to the constituted military authority, bribing or attempting to bribe officers or soldiers or the constituted civil officials; kidnapping or returning persons to slavery in disregard of the President's proclamation of freedom to the slaves, of January 1, 1863.[17]

Of the *third* class are acts prohibited by express order, or in breach of military discipline, such as selling to soldiers citizens' clothing, furnishing them with liquor, introducing liquor or other forbidden articles into the camps, &c.,

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[7] See case of running the blockade and conveying munitions to the enemy, in G. C. M. O. 254, 338, 344, of 1864.

[8] In this class is included the offence, several times brought to trial, of selling contraband goods, with a view to their being carried secretly through the lines to the enemy, by other persons. See convictions in G. C. M. O. 398 of 1864; Do. 55, 57, 58, 74, of 1865.

[9] A very grave offence where the offender voluntarily offers his services as such guide. Bluntschil § 634.

[10] G. O. 55, Div. W. Miss., 1864; Do. 47, Dept. of the Mo., 1864; Do. 75, Dept. of the Ark., 1864; Do. 30, Northern Dept., 1865.

[11] G. O. 114 of 1863; G. C. M. O. 155, 249, of 1864.

[12] G. O. 135, 169, Dept. of the Mo., 1864; Do. 35,, Middle Dept., 1865. And compare Horn *v.* Lockhart, 17 Wallace, 580.

[13] G. C. M. O. 270, 273, 294, of 1864; Do. 214 of 1865, (case of Bowles, Milligan, and Horsey;) G. O. 7, Dept. of the Mo., 1862; Do. 148, Id., 1863; Do. 86, 154, Id., 1864; Do. 68, Dept. of the Ohio, 1863, (case of Vallandigham;) Do. 121, Middle Dept., 1864; Do. 24, 67, Dept. of Susquehanna, 1864; Do. 5, Dept. of N. Mex., 1864; Do. 1, Dept. of No. Ca., 1866. And see cases in the following Orders, of treating with disrespect the U. S. flag by pulling down, tearing, defacing, &c.: S. O. 70, Dept. of the Gulf, 1862; G. O. 28, Id., 1865; Do. 50, Middle Dept., 1863; Do. 50, Dept. of the Mo., 1863; Do. 8, Dept. of the Miss., 1866; Do. 26, Fourth Mil. Dist., 1867. And see remarks of Maj. Gen. Thomas in G. O. 21, Dept. of the Tenn., 1867. In this list also may be classed the cases in which the offender is charged as—"Being a bad and dangerous man," or in terms to that effect. See G. O. 229 of 1863; G. C. M. O. 304 of 1864; G. O. 19, Dept. of the Miss., 1862; Do. 34, Dept. of the Mo., 1863; Do. 41, Middle Mil. Dept., 1865; Do. 11, Dept. of Fla., 1866.

[14] Violations of parole by paroled prisoners of war are noted under TITLE III, *ante*. As to cases of violation of a parole given not to render aid or services to the enemy, see G. O. 20, Dept. of the Mo., 1862; Do. 34, 82, Id., 1863; Do. 43, Middle Dept., 1864; Do. 28, Id., 1865.

[15] See G. O. 229 of 1863; where a conviction of a violation of an oath of allegiance was disapproved on the ground that the violation consisted not in acts but in words only.

[16] G. O. 34, Dept. of the Mo., 1863; Do. 63, Sixteenth Army Corps, 1863.

[17] G. O. 7 of 1864; G. C. M. O. 146, 250, of 1864; G. O. 106, Sixteenth Army Corps, 1863; Do. 155, Dept. of No. Ca., 1865.

dealing in articles likely to reach and relieve the enemy, violating police, sanitary, or quarantine regulations, &c.[18]

1312 **Offences not cognizable.** The subject of the jurisdiction of military commissions is further illustrated by a reference to the classes of cases of which these tribunals cannot legally take cognizance.

Thus they have no jurisdiction of the purely military offences specified in the Articles of war and made punishable by sentence of court-martial; and in repeated cases where they have assumed such jurisdiction their proceedings have been declared invalid in General Orders.[19]

So, being properly criminal courts, they have no jurisdiction of private controversies between individuals relating to pecuniary obligations, the title to property, &c.[20] Such matters pertain to the province of the local courts, or to tribunals erected in their stead, and expressly invested with a *civil* jurisdiction, by the military commander.[21]

It may be added that the jurisdiction of the military commission should be restricted to cases of offence consisting in *overt acts*, *i. e.* in unlawful commissions or actual attempts to commit, and not in intentions merely.[22] Thus what would justify in war a precautionary arrest might not always justify a trial as for a specific offence.

**PROCEDURE.** In the absence of any statute or regulation governing the proceedings of military commissions, the same are commonly conducted according to the rules and forms governing courts-martial.[23] These war-courts

1313 are indeed more summary in their action than are the courts held under the Articles of war,[24] and, as their powers are not defined by law, their proceedings—as heretofore indicated—will not be rendered *illegal* by the omission of details required upon trials by courts-martial, such, for example, as the administering of a specific oath to the members,[25] or the affording the accused an opportunity of challenge.[26] So, the *record* of a military commission will be legally sufficient though much more succinct than the form adopted by courts-martial, as—for example—where it omits to set forth the testimony, or states it only in substance. But, as a general rule, and as the only quite safe and satisfactory course for the rendering of justice to both parties, a military commission will—like a court-martial—permit and pass upon objections interposed to members, as indicated in the 88th Article of war, will formally arraign

[18] See a case in G. O. 85, Dept. of the Mo., 1865, of a person tried by this court for *voting* without the qualifications required by existing Orders.

[19] G. O. 20, 190, 287, of 1847, (Gen. Scott;) G. O. 16, Dept. of the Mo., 1861; Do. 1, 18, Id., 1862; Do. 34, 56, Id., 1863; Do. 150, Dept. of the Ohio, 1863; Do. 27, Dept. of the Northwest, 1864; Do. 66, 72, Dept. of Va. & No. Ca., 1865. This rule was not always strictly observed, especially in cases of offences falling within the description of the present 45th and 46th (then 56th and 57th) Articles.

[20] State *v.* Stillman, 7 Cold., 341; G. O. 1, Dept. of the Mo., 1862; Do. 197, Id., 1864; DIGEST, 507–8.

[21] Of course a court designated as a "military commission" might legally be so invested by the commander, the mere name being immaterial; but where no such specific authority is expressly given, a military commission so called is, by the invariable usage of the service, a criminal court only.

[22] Finlason, Com. on Mar. Law, 130; G. O. 229 of 1863.

[23] Finlason, Com. on Mar. Law, 9, 141; 1 Bishop, C. L. § 45, 52; G. O. 1, 7, Dept. of the Mo., 1862; Do. 150, Dept. of the Ohio, 1863; Do. 27, Dept. of the N. West, 1864; DIGEST, 501.

[24] Hough, 383; Finlason, Com. on Mar. Law, 127.

[25] In some cases indeed proceedings and sentence have been declared inoperative because of this omission. See G. O. 91, 95, 101, 162, of 1863. They were in fact subject to disapproval but not inoperative.

[26] See case in G. O. 257 of 1863, where the omission, as indicated by the record, of this and sundry other formalities was deemed sufficient to invalidate the sentence in a capital case. It would more properly have been *disapproved*.

the prisoner, allow the attendance of counsel, entertain special pleas if any are offered,[27] receive all the material evidence desired to be introduced,[28] hear argument, find and sentence after adequate deliberation,[29] render to the convening authority a full authenticated record of its proceedings, and, while in general even less technical than a court-martial, will ordinarily and properly be governed, upon all important questions, by the established rules and principles of law and evidence.[30] Where essential, indeed, to a full investigation or to the doing of justice, these rules and principles will be liberally construed and applied.

1314 **The Charge.** In some cases the Charge has consisted merely of a designation of the offence unaccompanied by any specification: this, however, is a rare form.[31] In general a detailed specification is added precisely as in the court-martial practice. The offence, where a civil crime, is commonly designated in the charge by its legal name, as Murder, Manslaughter, Robbery, Larceny, &c.;[32] where a violation of the laws of war, by simple terms of description—as Being a guerilla, Unauthorized Trading or Intercourse with the enemy, Recruiting for the enemy within the U. S. lines, Violating a parole by a prisoner of war, &c., or simply Violation of the Laws of War, the specification indicating the species of the violation. Where the offence is both a crime against society and a violation of the laws of war, the charge, in its form, has not unfrequently represented both elements, as "Murder, in violation of the laws of war," "Conspiracy, in violation," &c.

The *specification* should properly set forth, not only the details of the act charged, but the circumstances conferring *jurisdiction*—as that a state of war existed, military government was exercised, or martial law prevailed, at the time and place of the offence: the status of the offender should also appear—as that he was an officer or soldier of the enemy's army or otherwise a public enemy, or a prisoner of war, or an inhabitant of a place or district under military government or martial law or person there serving. It is not however essential to aver facts of which the court will take judicial notice.

1315 **The Sentence.** Except in the case of spies,[33] the existing law makes no provision whatever in regard to the quality or quantity of the punishment to be adjudged by the military commission. The power of such a court to award sentence is thus practically without restriction. It is not limited to

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[27] Provided they are legally apposite. Thus a plea of the statute of limitations would *not* be, under the terms of Art. 103.

[28] Under the general terms of Art. 91, *depositions* may be received by military commissions in the cases there indicated.

[29] A military commission may also, in a proper case, punish as for *contempt*. See instances in G. O. 58, Dept. of Va. & No. Ca., 1864; G. C. M. O. 37, Fourth Mil. Dist., 1868. This, not by virtue of any statutory authority, but under its general province as a court administering the law of war.

[30] See Finlason, Com. on Mar. Law, 142; 3 Greenl. Ev. § 469; G. O. 33, Dept. of the Mo., 1862.

[31] See case in G. O. 28, Dept. of the Gulf, 1865.

A peculiar form of charge and procedure, in a case in G. O. 49, Sixteenth Army Corps, 1863, may be noticed here. The prosecution is in the nature of a proceeding *in rem*, the accused being the "Steamboat W. W. Crawford, her officers and cargo," and the specifications setting forth a trading from Memphis to places within the enemy's lines, without authority and contrary to military orders. To this charge a person named pleads, in behalf of the steamboat, &c., "not guilty," and the commission, after a hearing, finds that the boat, her officers and cargo, are not guilty, and directs that the said parties "be discharged, and released from all liabilities under their bonds."

[32] "Treason" has sometimes been employed as a general form of charge, the specification indicating some treasonable act not necessarily constituting technical treason. See G. O. 1, 88, Dept. of the Mo., 1862; Do. 150, Dept. of the Ohio, 1863; Do. 27, Dept. of N. West, 1864.

[33] Sec. 1343, Rev. Sts.

the penalties known to the practice of courts-martial, nor indeed are the strictly military penalties, such as dismissal, dishonorable discharge, suspension, &c., in general appropriate to it.[34] The punishments more usually employed have been death, imprisonment and fine. Death has commonly been by hanging.[35] Imprisonment, (ordinarily with hard labor,) has been imposed for a term of months or years,[36] (sometimes, and properly, assimilated to the term prescribed for similar offences by the local law,) for life, or during the war. In cases of men, the place designated for the imprisonment has usually been a penitentiary or a fort;[37] in cases of women, during the late war, the place selected was, in the majority of instances, the "Female Prison," at Fitchburg, Mass.;[38] 1316 the labor required of women under sentence of imprisonment was not unfrequently—"working for the benefit of Union soldiers or prisoners."[39]

Of the *fines* adjudged by military commissions during the late war, the largest were amounts of $90,000[40] and $250,000[41] imposed respectively upon two agents of the Treasury Department, on conviction of a charge of conspiring to defraud the United States out of the value of captured cotton. In a few cases the fines have been directed in the sentence to be paid to individuals, by way of indemnification for money or property stolen or injuries suffered.[42] In some other cases the accused has been required by the sentence to restore the specific money, or property, stolen;[43] in others the amount of a fine, adjudged in favor of the injured party, is directed by the sentence to remain as a lien upon the real estate of the offender till paid;[44] in others, again, it is required to be levied on the real and personal property generally, or on certain particular property of the

[34] See G. O. 20, Hdqrs. of Army, 1847; Do. 65, Dept. of Va. & No. Ca., 1865; Do. 29, Dept. of the South, 1870. Sentences of discharge or dismissal from office have, however, been adjudged in some cases; as in G. O. 308 of 1864, (a case of a lieutenant in the revenue service;) Do. 19, Dept. of N. Mex., 1862, (a citizen holding an office in the militia;) Do. 13, Dept. of Va. & No. Ca., 1864, (a case of a medical cadet.) A sentence of dishonorable discharge, imposed by a military commission in a case of a soldier convicted during the war of a crime under Art. 58, has been held authorized, by the Judge Advocate General. DIGEST, 508. In a case in G. O. 8, Dept. of Ala., 1866, an officer of the Treasury Dept. is sentenced to be disqualified to hold office under the United States.

[35] In the case of the anarchist Pallas, tried by a court-martial at Barcelona in September, 1893, the sentence was—"*to be shot with his back turned toward the firing party.*"

[36] In G. O. 39, Northern Dept., 1864, is a case of imprisonment for thirty years at hard labor. In a case of homicide in G. C. M. O. 276 of 1865, the sentence reads—"To be taken *in chains* to the military prison at Camp Chase, near Columbus, Ohio, and to be kept at hard labor with ball and chain during the war."

[37] In a few cases the commission imposes a confinement and then *suspend* it to enable the accused to enlist. See G. O. 88, Dept. of the Mo., 1863; Do. 98, Id., 1864.

[38] A "female prison" at Salem, Mass., was sometimes designated. G. O. 43, Middle Dept., 1864. In cases tried in New Orleans, hard labor in the "City workhouse," or "House of detention for females," was in some cases resorted to, (G. O. 55, Div. W. Miss., 1864; Do. 68, Dept. of the Gulf, 1865;)—in Norfolk, the Norfolk Jail, (Do. 102, Dept. of Va. & No. Ca., 1864; G. C. M. O. 17, Dept. of Va. & No. Ca., 1865.) In the case in the Order last cited, (where the conviction was for "manslaughter,") the reviewing authority, (Gen. Butler,) in designating this jail, adds—"If there is no female department there, she will begin one."

[39] G. C. M. O. 206, 240, of 1864. In a case of a woman convicted of mail carrying through the lines and other offences, "proper labor, such as working or sewing for the (other) prisoners" at her place of confinement, was ordered. G. O. 102, Dept. of Va. & No. Ca., 1864.

[40] G. O. 55, Dept. of Ala., 1865.

[41] Do. 8, Id., 1866. In both cases the commission further sentenced the party to be imprisoned for one year, and thereafter till the fine was paid.

[42] G. O. 27 of 1864; G. C. M. O. 59 of 1866; G. O. 80, Dept. of the Mo., 1863.

[43] G. O. 7 of 1864; G. C. M. O. 360, Id.

[44] G. O. 27 of 1864.

offender;[45] or it is directed that certain of his property be seized and held as security for the payment of the fine and till the same is paid,[46] or that the offender forfeit property to the amount of the fine.[47]

1317 In a few instances the accused, besides being fined, is adjudged to pay the "*cost*" of the prosecution;[48] in one case, with the fine, there is added a further sum to cover both the costs of the trial and the "*damages*" sustained by the government.[49]

In this connection may also be noticed sentences imposing *forfeitures of rights*—as the forfeiture of a license to sell liquor,[50] or the forfeiture or prohibition of the exercise of the right to sell fire-arms and ammunition,[51]—penalties generally inflicted in combination with terms of imprisonment.

A further distinct penalty not unfrequently adjudged by military commissions was *confiscation of property*. Thus, upon conviction of illegally selling liquor to soldiers, there was sometimes imposed, (with other punishment—as confinement,) a confiscation to the United States of all the liquor in possession of the accused.[52] A similar penalty was often awarded upon a conviction of attempting to smuggle through the lines, or of unlawfully trading in, medicines or other contraband articles.[53] In this class of cases the team, wagon, or boat by which the supplies were transported, was commonly also confiscated.[54] In some instances the sentence was general, confiscating all the property, or all the real or all the personal property, of the offender.[55] A further peculiar sentence of this class was that adjudged the proprietor of a newspaper by which information and encouragement had been conveyed to the enemy, *viz.*—

1318 "that the press, types, furniture and material of the printing office, be confiscated and sold for the use of the United States."[56]

Another species of punishment often imposed was *banishment* or *expulsion* beyond the military lines and within the lines of the enemy,[57] or outside of the

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[45] G. O. 50, Dept. of the Mo., 1863; Do. 25, 49, Id., 1864. And compare the action of the reviewing authority in G. O. 152 of 1865. So, in a case in G. O. 197, Dept. of the Mo., 1864, the amount of the penalty of a forfeited bond, (given for the performance of an oath of allegiance,) is directed to be satisfied from the real and personal estate of the accused and his sureties.

[46] G. O. 31, Dept. of N. Mex., 1863.

[47] G. O. 19, Dept. of N. Mex., 1862.

[48] G. O. 9, 19, Dept. of the Miss., 1862.

[49] G. O. 31, Dept. of N. Mex., 1863.

[50] G. C. M. O. 666 of 1865. And see Do. 109, Dept. of the Mo., 1864, where this prohibition is added by the reviewing authority, in a case of a second conviction of the offence of selling liquor without a license.

[51] G. O. 135, Dept. of the Mo., 1864.

[52] G. O. 9, Dist. Kans., 1862; Do. 148, Dept. of the Mo., 1863; Do. 107, Middle Dept., 1865; Do. 54, Dept. of Va., 1865.

[53] G. C. M. O. 377 of 1864; G. O. 103, Dept. of the Gulf, 1862; Do. 11, 12, 68, Id., 1865; Do. 49, 56, 66, 73, 92, 100, 151, 152, 154, Sixteenth Army Corps, 1863. And see also case in G. O. 72, Dept. of Ark., 1864, where, on conviction of appropriating public animals, the horses and mules taken from the accused were confiscated to the United States.

[54] G. C. M. O. 334 of 1864; G. O. 49, Sixteenth Army Corps, 1863.

[55] G. C. M. O. 151 of 1865; G. O. 14, 20, Western Dept., 1861; Do. 42, Dept. of the Mo., 1862; Do. 9, Dept. of the Miss., 1862; Do. 19, Dept. of N. Mex., 1862; Do. 29, Dept. of Va., 1863; Do. 179, Sixteenth Army Corps, 1863; Do. 58, Dept. of Va. & No. Ca., 1864.

[56] G. O. 11, Dept. of the Miss., 1862.

[57] G. O. 25, Army of the Potomac, 1863; Do. 29, Id., (a case of a correspondent of the New York Herald;) Do. 61, Middle Dept., 1863; Do. 63, Sixteenth Army Corps, 1863; Do. 37, 50, 56, 68, 74, Dept. of the Mo., 1863; Do. 132, Id., 1864; Do. 5, Dept. of the East, 1865.

military department,[58] or from or without the State,[59] or to a particular locality—as to a "free State," [60] or "north of Philadelphia," [61] or "north of the Ohio River," [62] or to a place "not south of New Jersey." [63] An offender claiming to be a British subject was sentenced to be banished from the United States.[64] Parties were also sentenced to remain during the war within the limits of a certain county.[65] In some cases they were required to remain in the place to which they were condemned to be sent, under penalty of being shot,[66] or imprisoned,[67] if they left it or returned. In others the sentence required that they be paroled to remain within the limits fixed; [68] and in others also to give bond to keep such parole.[69]

1319 A further and frequent sentence was *to furnish a bond* with approved security in a certain penal sum for the future good behaviour or loyal conduct of the offender. This penalty was usually required as a condition to release from military custody, either after a term of imprisonment adjudged by the same sentence, or in connection with fine, or as a sole punishment.[70]

With the requirement of the bond is often combined one to the effect that the accused *take an oath of allegiance* to the United States; the form of the sentence generally being that he be confined, or not released, till he take the oath and give the bond.[71]

Again, where bond and oath are both enjoined, the bond is sometimes required to be given for the faithful performance of the oath.[72]

A sentence to take an oath of allegiance merely, *i. e.* without the condition that the accused be not released, or be confined, till he take it, has been disapproved as an inadvisable sentence, because, if he refuses, he cannot be forced to take it, or, if he be forced, the oath will not be obligatory.[73]

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[58] G. C. M. O. 54, Dept. of Va., 1865; G. O. 14, 17, Dept. of the Tenn., 1863; Do. 73, Dept. of the Mo., 1864.

[59] G. O. 11, Dept. of the Miss., 1862; Do. 148, Dept. of the Mo., 1863. In a case in Do. 72, Dept. of W. Va., 1864, the accused is acquitted but the court *recommended* that he be required to leave the State.

[60] G. O. 56, Dept. of the Mo., 1864.

[61] G. O. 62, Middle Dept., 1864.

[62] G. O. 87, Dept. of the Ohio, 1864.

[63] G. O. 43, Middle Dept., 1864.

[64] G. O. 73, Sixteenth Army Corps, 1863.

[65] G. O. 49, 143, 148, 149, Dept. of the Mo., 1863; Do. 61, Northern Dept., 1864.

[66] G. O. 63, Sixteenth Army Corps, 1863.

[67] G. O. 61, Middle Dept., 1863; Do. 56, Dept. of the Mo., 1863; Do. 14, 17, Dept. of the Tenn., 1863; Do. 87, Dept. of the Ohio, 1864.

[68] G. O. 37, 49, 143, 148, 149, Dept. of the Mo., 1863; Do. 43, Middle Dept., 1864.

[69] G. O. 49, Dept. of the Mo., 1863; Do. 62, Middle Dept., 1864. In a case in Do. 86, Dept. of the Mo., 1864, the sentence is to take an oath of allegiance and give bond for good behavior, and on failing to do so to be removed from the State.

[70] See cases in G. O. 9, Dept. of the Miss., 1862; Do. 38, 50, 74, 80, 117, 119, 143, 148, 149, Dept. of the Mo., 1863; Do. 9, 11, 81, 83, 86, 98, 103, 113, 118, 131, 135, 144, 194, Id., 1864; Do. 49, Sixteenth Army Corps, 1863; Do. 38, Dept. of the Tenn., 1863; Do. 50, Middle Dept., 1863; Do. 39, Dept. of Kans., 1864. Even in acquitting, the Commission has sometimes directed or recommended that the accused, before being released, be required to give such bond.

[71] See G. O. 86, Dept. of the Ohio, 1863; Do. 38, Dept. of the Tenn., 1863; Do. 34, 68, Dept. of the Mo., 1863; Do. 6, Id., 1865. In a case in Do. 86, Id., 1864, the requirement is that he take the oath and give the bond, or be removed from the State.

[72] See G. O. 23, 38, 40, Dept. of the Mo., 1863. In Do. 37, Id., a bond is required for the faithful performance both of the oath and of a *parole*, also required of the accused, to remain at his residence during the continuance of the war. Oath and parole are sometimes required without any bond. Do. 23, Id.

[73] G. O. 43, Middle Dept., 1864.

**ACTION BY THE REVIEWING AUTHORITY.** The action authorized to be taken by reviewing officers upon the proceedings and sentences of military commissions is distinguished from that which may legally be taken upon the records of courts-martial, in the wider and more varied exercise of authority permitted in the former case. Thus, in disapproving, remitting, &c., findings or sentences of military commissions, the commander has frequently di-
1320 rected the release of the accused upon his entering into a bond with sufficient sureties for his good behaviour or loyal conduct in the future and in some cases also taking an oath of allegiance; or the accused has been required to take the oath and give bond for its faithful performance.[74] Bonds, oaths, or bond and oath, have even been ordered where the accused has been acquitted.[75]

In passing upon convictions, or even acquittals, it has also sometimes been ordered by the commander, in remitting the sentences or disapproving, (or even approving,) the proceedings, that the accused, on being released, be sent "beyond the lines, south," or to some particular locality at the north, under penalty—it is occasionally added—of imprisonment, &c., if he returns, or leaves the appointed place, during the war. In some instances, his release is made *conditional* upon his residing or remaining at the place indicated. In other cases the deportation is ordered in the event of his failing to take an oath or give a bond—either or both—required by the sentence.[76] Again a remission is granted on condition of the payment by the accused of a certain sum;[77] or, (where he may properly be enlisted and desires to enlist,) upon his enlisting as a soldier in our army.[78]

1321 **ACTION BY JUDICIAL AUTHORITY.** In conclusion it may be remarked that, as in the case of the judgment of a court-martial,[79] and as held by the Supreme Court in *Ex parte* Vallandigham,[80] the proceedings or sentences of military commissions are not subject *as such* to be appealed from to, or to be directly revised by, any civil tribunal.

## VII. MILITARY AUTHORITY AND JURISDICTION UNDER THE RECONSTRUCTION ACTS OF 1867.

To complete the general subject under consideration, it will be proper to give some account of the *military government* administered during the Reconstruction period of 1867–1870.

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[74] G. C. M. O. 156, 203, 251, 254, 256, 270, of 1865; G. O. 19, Dept. of the Miss., 1862; Do. 56, Sixteenth Army Corps, 1863; Do. 7, 15, 38, 50, 56, 60, 74, Dept. of the Mo., 1863; Do. 27, 88, 89, 97, 98, 104, 113, 115, 117, 118, 127, 131, 160, 172, 186, 194, 202, 268, Id., 1864. The amnesty oath, as contained in the President's proclamation of Dec. 8, 1863, is sometimes indicated instead of an oath of allegiance. G. C. M. O. 151 of 1865; G. O. 154, Dept. of the Mo., 1864.

[75] See G. O. 57, Dept. of Ark., 1864, also G. O. of Dept. of the Mo., of 1864, cited in last note.

[76] In the case of Vallandigham, (G. O. 68, Dept. of the Ohio, 1863,) the sentence of confinement in a fortress during the war was commuted by his being put beyond our military lines, under penalty of being arrested and confined according to his sentence in case of his return within the lines. In a case in G. O. 4, Dept. of the Mo., 1865, the accused is ordered to be released on taking the oath of allegiance, and on condition that he "reside in the free States north of the Ohio river, and east of the Illinois Central Railroad, not to return to Missouri during the war under pain of being imprisoned at hard labor." And see Do. 7, Id., 1863; Do. 11, 14, Id., 1865; Do. 14, Dept. of the Tenn., 1863; Do. 72, Dept. of W. Va., 1864; Do. 102, Dept. of Va. & No. Ca., 1864; Do. 149, Dept. of the Gulf, 1864; Do. 34, Dept. of Washington, 1865.

[77] As in the case of Mrs. Sarah Hutchins, (G. O. 115, Middle Dept., 1864.)

[78] G. O. 98, 144, Dept. of the Mo., 1864. And see the *sentence* in Do. 88, Id., 1863.

[79] The subject of the judicial revision of the proceedings of courts-martial has been fully considered in Vol. I, Chapter V.

[80] 1 Wallace, 243.

**THE LEGAL SITUATION.** The active hostilities incident upon the war of the rebellion having substantially ceased, the President, in the spring and summer of 1865, appointed, (as has heretofore been noticed,[81]) provisional governors for the insurrectionary States, and in 1866 proclaimed the war to be at an end. Congress was at that time in political antagonism to the President, and the question whether the proclamations of 1866 were constitutionally authorized—whether Congress rather than the President was not the power to declare the *status belli* to be terminated—was considerably disputed. The position that the action of the President was not competent to and did not put an end to such status was ably sustained in an opinion of Attorney General Hoar,[82] (hereafter to be referred to as relating to the legality of a certain trial by military commission under the Reconstruction Acts,) in which it was well argued that Congress, being invested by the Constitution with the power to declare war and suppress insurrection, was alone empowered to determine when the rebellion should be considered as finally suppressed, and the 1322 pre-existing normal condition restored.[83] This argument applied with special force to an insurrection of such magnitude as to have amounted to a civil war, and in which the insurgents had come to be treated as belligerents.

But a further claim, and one subsequently supported by the Supreme Court was, that, under the injunction of the Constitution, (Art. IV, Sec. 4,) that—"*The United States shall guarantee to every State in this Union a republican form of government,*" Congress was both authorized and required to provide, by appropriate legislation, for the restoration of the States to their normal political relations, and by such action to terminate, in law and in fact, the status of insurrection.

The ruling referred to of the Supreme Court was that made in 1868, in the leading case of Texas *v.* White.[84] It was there held that "the power to carry into effect the clause of guaranty is primarily a legislative power and resides in Congress;" that while the President was authorized, *during the continuance of the war,* to institute temporary governments in the insurgent States, such governments could be but provisional only; and that it devolved upon Congress, after having provided for the suppression of active rebellion, to take

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[81] *Ante,* Title IV—MILITARY GOVERNMENT.

[82] 13 Opins., 59.

[83] And it was urged that the Act of March 2, 1867, (presently to be cited,) was a legislative declaration by Congress that the war status was *not* terminated. Compare Perkins *v.* Rogers, 35 Ind., 124.

[84] 7 Wallace, 701. And see Rawle on the Const., 299; Cooley, Prins., 197; Do., note to 2 Story, 106.

In a later case—Raymond *v.* Thomas, 91 U. S., 712, relating to the exercise of power under the reconstruction laws by a District Commander, the Supreme Court say—"The national Constitution gives to Congress the power, among others, to declare war and suppress insurrection. The latter power is not limited to victories and the dispersion of the insurgent forces. It carries with it inherently rightful authority to guard against an immediate renewal of the conflict, and to remedy the evils growing out of its rise and progress." (Citing Stewart *v.* Kahn, 11 Wallace, 506.) "The close of the war was followed by the period of reconstruction and the laws enacted by Congress with a view to that result."

In the case of Shorter *v.* Cobb, 39 Ga., 290–297, it is well said by Brown, C. J., as follows—"When the Government succeeded in our subjugation and became a conquering power, it acquired the legal right to dictate the terms upon which the conquered States should be restored to position in the Union. And the conquered States had no appeal from the decision and no alternative but submission to the terms dictated." At the end of the war—"it became the duty of Congress, in whom not only the war power but the power to admit new States is vested by the Constitution, to interpose and re-establish and guarantee to the State a republican form of Government. * * * The reconstruction of the Government is a great political problem to be solved by the law-making power of the United States.

1323 measures for the substitution of republican governments in harmony with the Union in the place of the revolutionary ones which had been imposed upon the States.

**THE LEGISLATION RESORTED TO.** Proceedings upon such or like views of its constitutional powers,[88] Congress, on March 2, 1867, enacted the first of the Reconstruction Laws, entitled "An Act to provide for the more efficient government of the rebel States," and expressed as follows:—

"Whereas *no legal State governments or adequate protection for life or property now exists in the rebel States of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas, and Arkansas; and whereas it is necessary that peace and good order should be enforced in said States until loyal and republican State governments can be legally established: Therefore*

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, *That said rebel States shall be divided into military districts and made subject to the military authority of the United States as hereinafter prescribed; and for that purpose Virginia shall constitute the first district; North Carolina and South Carolina the second district; Georgia, Alabama and Florida the third district; Mississippi and Arkansas the fourth district; and Louisiana and Texas the fifth district.*

"SEC. 2. And be it further enacted, *That it shall be the duty of the President to assign to the command of each of said districts an officer of the army not below the rank of brigadier general, and to detail a sufficient military force to enable such officer to perform his duties and enforce his authority within the district to which he is assigned.*

"SEC. 3. And be it further enacted, *That it shall be the duty of each officer assigned as aforesaid to protect all persons in their rights of person and property, to suppress insurrection, disorder, and violence, and to punish, or cause to be punished, all disturbers of the public peace and criminals, and to this end he may allow local civil tribunals to take jurisdiction of and to try offenders, or, when in his judgment it may be necessary for the trial of offenders,*

1324 *he shall have power to organize military commissions or tribunals for that purpose, and all interference, under color of State authority, with the exercise of military authority under this act, shall be null and void.*

"SEC. 4. And be it further enacted, *That all persons put under military arrest by virtue of this act shall be tried without unnecessary delay, and no cruel or unusual punishment shall be inflicted; and no sentence of any military commission or tribunal hereby authorized, affecting the life or liberty of any person, shall be executed until it is approved by the officer in command of the district, and the laws and regulations for the government of the army shall not be affected by this act, except in so far as they conflict with its provisions:* Provided, *That no sentence of death, under the provisions of this act, shall be carried into effect without the approval of the President.*

"SEC. 5. And be it further enacted, *That when the people of any one of said rebel States shall have formed a constitution of government in conformity with the Constitution of the United States in all respects, framed by a convention of delegates elected by the male citizens of said State twenty-one years old and upward, of whatever race, color, or previous condition, who have been resident in said State for one year previous to the day of such election, except such as may be disfranchised for participation to the rebellion, or for felony at common law; and when such constitution shall provide that the elective franchise shall be enjoyed by all such persons as have the qualifications herein*

[88] See Debates in 39th and 40th Congresses, Cong. Globe, 1866–1867.

*stated for electors of delegates; and when such constitution shall be ratified by a majority of the persons voting on the question of ratification who are qualified as electors for delegates; and when such constitution shall have been submitted to Congress for examination and approval, and Congress shall have approved the same; and when said State, by a vote of its legislature elected under said Constitution, shall have adopted the amendment to the Constitution of the United States proposed by the Thirty-ninth Congress, and known as article fourteen;*[86] *and when said article shall have become a part of the Constitution of the United States, said State shall be declared entitled to*
1325 *representation in Congress, and senators and representatives shall be admitted therefrom on their taking the oath prescribed by law; and then and thereafter the preceding sections of this act shall be inoperative in said State:* Provided, *That no person excluded from the privilege of holding office by said proposed amendment to the Constitution of the United States shall be eligible to election as a member of the convention to frame a constitution for any of said rebel States, nor shall any such person vote for members of such convention.*

"SEC. 6. And be it further enacted, *That until the people of said rebel States shall be by law admitted to representation in the Congress of the United States, any civil government which may exist therein shall be deemed provisional only, and in all respects subject to the paramount authority of the United States at any time to abolish, modify, control, or supersede the same; and in all elections to any office under such provisional governments all persons shall be entitled to vote, and none others, who are entitled to vote under the fifth section of this act; and no person shall be eligible to any office under any such provisional governments who would be disqualified from holding office under the provisions of the third article of said constitutional amendment.*"

A *second* Act followed, on March 23, 1867, which related merely to the registration of voters, election of delegates to the constitutional conventions, procedure of the conventions, submission of the constitutions to the popular vote, action by Congress upon the result, &c.,—and need not be cited in this connection.

Upon the passage of the first Act, assignments were forthwith made, by the President,[87] of general officers as commanders of the five military districts, and these officers at once entered upon the exercise of their commands.

Some of these commanders having proceeded to exercise powers deemed by the President to be of questionable legality, the Attorney General, (Stanberry,) was called upon for an opinion as to the extent of their authority. In his opinion, of June 12, 1867,[88] he held in substance that, hostilities having
ceased, an Act conferring military authority over civilians was to be
1326 strictly construed; that the authority of the district commanders under the Act was restricted to measures for the suppression of violence and disorder and the protection of life and property, in other words was a police power merely, and did not extend to the exercise of civil government; that the commanders were not empowered to remove or appoint civil officers, abrogate or modify civil laws or ordinances, or interfere with the course of civil justice

[86] The *Fifteenth* Amendment, proposed to the legislatures of the several States by Congress in February, 1869, was also required to be ratified by the insurgent States not admitted prior to that date, to wit by Virginia, Georgia, Mississippi and Texas, as a condition to their admission to representation.

[87] By G. O. 10 of March 11, 1867.

[88] 12 Opins., 182. It need hardly be remarked that the Attorney General was of the same political party as the President, and represented similar views on the general subject of Reconstruction.

except in criminal cases; and that in such cases they could properly supersede the civil jurisdiction by the institution of military tribunals only in extreme emergencies. To the jurisdiction of these tribunals limitations were indicated which will be adverted to hereafter.

In view mainly of this opinion,[89] Congress, on July 19th following, pro-
1327 ceeded to enact a *third* "supplementary" statute,[90] by which full power and discretion to remove and appoint civil officers in the insurrectionary States within their commands were expressly vested in the district commanders, (and in the General of the Army,) and it was declared that the existing State

[89] Chief Justice Chase, in his Address to the Bar at Raleigh, in June, 1867, had meanwhile remarked, in reference to the Reconstruction legislation of March, that, under it, military authority existed "only to prevent illegal violence to persons and property, and facilitate the restoration of States."

[90] The only portions of the Act which are material in this connection, (the rest relating to qualifications of voters, boards of registration, &c.,) are Secs. 1, 2, 3, 4, 10, and 11, as follows:—

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, *That it is hereby declared to have been the true intent and meaning of the act of the second day of March, one thousand eight hundred and sixty-seven, entitled 'An act to provide for the more efficient government of the rebel States,' and of the act supplementory thereto, passed on the twenty-third day of March, in the year one thousand eight hundred and sixty-seven, that the governments then existing in the rebel States of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas, and Arkansas, were not legal State governments; and that thereafter said governments, if continued, were to be continued subject in all respects to the military commanders of the respective districts, and to the paramount authority of Congress.*

"SEC. 2. And be it further enacted, *That the commander of any district named in said act shall have power, subject to the disapproval of the General of the army of the United States, and to have effect till disapproved, whenever in the opinion of such commander the proper administration of said act shall require it, to suspend or remove from office, or from the performance of official duties and the exercise of official powers, any officer or person holding or exercising, or professing to hold or exercise, any civil or military office or duty in such district under any power, election, appointment, or authority derived from, or granted by, or claimed under, any so-called State or the government thereof, or any municipal or other division thereof; and upon such suspension or removal such commander, subject to the disapproval of the General as aforesaid, shall have power to provide from time to time for the performance of the said duties of such officer or person so suspended or removed, by the detail of some competent officer or soldier of the army, or by the appointment of some other person, to perform the same, and to fill vacancies occasioned by death, resignation, or otherwise.*

"SEC. 3. And be it further enacted, *That the General of the army of the United States shall be invested with all the powers of suspension, removal, appointment, and detail granted in the preceding section to district commanders.*

"SEC. 4. And be it further enacted, *That the acts of the officers of the army already done in removing, in said districts, persons exercising the functions of civil officers, and appointing others in their stead, are hereby confirmed:* Provided, *That any person heretofore or hereafter appointed by any district commander to exercise the functions of any civil office, may be removed either by the military officer in command of the district, or by the General of the army. And it shall be the duty of such commander to remove from office as aforesaid all persons who are disloyal to the government of the United States, or who use their official influence in any manner to hinder, delay, prevent, or obstruct the due and proper administration of this act and the acts to which it is supplementary.*

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"SEC. 10. And be it further enacted, *That no district commander or member of the board of registration, or any of the officers or appointees acting under them, shall be bound in his action by any opinion of any civil officer of the United States.*

"SEC. 11. And be it further enacted, *That all the provisions of this act and of the acts to which this is supplementary shall be construed liberally, to the end that all the intents thereof may be fully and perfectly carried out.*"

governments should, during their continuance, remain "*subject in all respects*" to the authority of such commanders and of Congress.[91]

**THE ACTS AS PASSED UPON BY THE COURTS.** The "Recon-
1328 struction Laws," thus enacted,[92] continued to be executed to the date—July, 1870—of the admission to representation in Congress of the last of the insurrectionary States, being in general sustained as valid legislation by the judiciary. In Texas *v.* White,[93] above cited, it was held, by the Supreme Court, of these laws generally that they were enacted by Congress in the exercise of a constitutional power; and in Mississippi *v.* Johnson,[94] and Georgia *v.* Stanton,[95] the same court refused to enjoin the President and Secretary of War respectively from carrying such laws into effect, on the ground that the power and duty conferred and imposed thereby were purely executive and political in their nature.

In the greater part of the cases adjudicated in the States affected by the Acts in question, a most liberal view—a view in some instances perhaps even too liberal—was taken of the authority thereby conveyed. Thus, in a case in Louisiana, the court say of these statutes that they "seem to clothe the commanders of districts with a paramount supervisory power over the civil jurisdiction of these States, and a controlling influence over all the administrative functions and powers of State officials."[96] In a case in Texas, the Supreme Court, in recognizing the "binding force" of the Reconstruction Acts, ob-
serve: "The orders from time to time issued by the military commander
1329 had the force and validity of law."[97] In Arkansas, the court, in sustaining the authority of the district commander to arrest and imprison a citizen, declare that his "imprisonment had the same force and effect as if he had been confined upon a proper warrant from a civil judicial tribunal."[98] In a further

[91] Of this body of legislation it is remarked by the Supreme Court of Texas, in Johnson *v.* State, 33 Texas, 570, as follows:—"The national legislature used its legitimate powers with moderation and magnanimity; endeavoring to encourage the formation of republican governments in these States, and bring the people back to a due appreciation of law, and of the liberty which is secured to the free enjoyment of every citizen under the Constitution of the United States."

[92] They were all passed over the veto of the President. Vol. 14, Stats. at Large, 429, 430; Do. 15, Id., 4, 5, 16. And see Cooley, note to 2 Story, 649–653. As to the validity and effect of this legislation, enacted in opposition to the Executive, see the recent case of Daniel *v.* Hutcheson, 86 Texas, 51, *post*.

The later supplementary enactments, of which the principal was that of March 11, 1868, relating to elections, were of inferior importance and need not be quoted.

[93] 7 Wallace, 730–731. "The power of the United States Government to impose such a rule upon the State must be recognized as fully, under the facts existing, as though Texas had theretofore been an independent sovereignty having no relation to the United States other than that usually sustained by one independent nation to another." Daniel *v.* Hutcheson, *ante*.

[94] 4 Wallace, 475.

[95] 6 Wallace, 50.

[96] State *v.* Heath, 20 La. An., 518. In the minority opinion in Welborn *v.* Mayrant, presently to be noticed, it is forcibly remarked, that under the Reconstruction Acts "the military commander was the source of power, authority and law. * * * He could annul the constitution or code in whole or in part, or he could make law by his military *fiat*, as he did. * * * This military authority reached to every corner and hamlet in the State. * * * There was in fact, in Mississippi, from 1865 to 1870, a pure, undisguised, absolute military government."

[97] Gates *v.* Johnson Co., 36 Texas 145–6. So, in *Ex parte* Warren, 31 Texas, 143, it was held that, under the Act of July 19, 1867, making the State governments "subject in all respects" to the district commanders, the commander of the 5th district was legally empowered to order that no distinction of color be made by the courts in the admission of witnesses.

[98] Belding *v.* State, 25 Ark., 315.

case in Texas,[98] it is remarked of the district commanders that "they exercised legislative power, and this power was as full, ample and complete as if exercised by a senate and house of representatives."

In other cases a more strict construction was given to the powers of the District Commanders. Thus where one of these Commanders, in 1868, issued an order not merely suspending but wholly annulling a decree of a court of chancery of South Carolina, "regularly made by a competent judicial officer in a plain case clearly within his jurisdiction, and where there was no pretence of any unfairness, of any purpose to wrong or oppress, or of any indiscretion whatsoever,"—his action was held by the Supreme Court[100] to have been void, as not warranted under the "large governmental powers" given by the Reconstruction Acts. "It was," adds the Court, "an arbitrary stretch of authority, needful to no good end that can be imagined. * * * It is an unbending rule of law that the exercise of military power, where the rights of the citizen are concerned, shall never be pushed beyond what the exigency requires." In another case, in a U. S. District Court,[1] it was held that such a Commander was not empowered to place a person in possession of a plantation held under a claim of title by another, in other words that he could not "assume to administer remedial justice between citizens." In a further case, in North
1330 Carolina,[2] it was observed by the Court—"The power conferred" (by the Reconstruction Acts) "aimed mainly at the preservation of the public peace, the repression of hostility to the re-established federal authority, and the protection of persons and property in their ordinary and legitimate pursuits. It was not intended that the quiet and regular execution of the laws in force, not hostile to the policy of the general government, should be obstructed by military interference, and still less that laws should be promulgated and enforced in the administration of internal civil government." And it was held that an order of Gen. Canby, (commanding the 2d Military District,) "that judgments for the payment of money rendered in North Carolina between 1861 and 1865 should not be enforced by execution against the person or property of the defendant," was unauthorized and inoperative—except as it could be effectuated by military force. So, in a case in Mississippi,[3] it was held that the District Commander exceeded his authority in setting aside the decision of a board of arbitrators by which a colored man was believed to have been unjustly deprived of his property.

**TERM OF THE AUTHORITY CONFERRED.** The term of continuance and authority of the *military government* established by the Reconstruction Acts was subject to be fixed by the United States only. As above observed, this government in fact subsisted in each State until the same was admitted by Congress to representation, in accordance with the legislation of 1867, and

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[98] McClelland *v.* Shelby Co., 32 Texas, 20. And see Johnson *v.* State, 33 Id., 580; Grant *v.* Chambers, 34 Id., 573.

[100] Raymond *v.* Thomas, 99 U. S., 715.

[1] Whalen *v.* Sheridan, 17 Blatchford, 9. But this ruling, (which is very briefly reported,) was made with reference to the provisions of the Act of March 2, 1867, only; those of the Act of July 19 not being taken into consideration.

[2] Varner *v.* Arnold, 83 No. Ca., 208.

[3] Welborn *v.* Mayrant, 48 Miss., 652. In the report no reasons are given for this ruling, but the counter opinion of the minority of the court is set forth at length. See *post*. In a further case, State *v.* McLane, 31 Texas, 260, it was held that "a lieutenant of a subdivision of the fifth military district had no right to order a judge to dismiss a prosecution for felony pending in court." This conclusion may have been determined by the fact that the order was given not by the district commander but by a subordinate: it is not however placed in terms on this ground. The case arose *prior* to the enactment of July 19, 1867.

thus to constitutional relations with the United States. "It was not," as remarked in a recent case, "for the people" of any State "to determine when military rule should cease, or to what extent the administration of essentially civil affairs should be continued by military power. These were questions for the decision of the dominant power holding military possession. * * *
1331 The United States had the power to determine when the political relations formerly existing should be restored, and when the provisional government should cease, and the several departments of the State government become operative under the Constitution." [4]

**MILITARY COMMISSIONS UNDER THE RECONSTRUCTION ACTS—Their legal authority and province.** The statutory provisions relating to military commissions, as authorized during the period of Reconstruction, were those contained in secs. 3 and 4 of the Act of March 2, 1887, above set forth, empowering the district commanders, when necessary to justice, to order such commissions for the trial of criminals and offenders against public peace and order; and requiring that trials be had without unnecessary delay, that cruel or unusual punishments be not inflicted, and that death sentences be not executed without the approval of the President.

From these provisions the *province* of military commissions at this juncture is seen to have been mainly to serve as *substitutes for the local courts*,[5] in cases where, in the opinion of the commander,—for the statute invested him with the sole discretion in the matter,[6]—a resort to the military jurisdiction was essential to the due administration of justice. In a few instances offences were passed upon by military commissions which would regularly have been tried by *U. S. courts* had there been any in operation;[7] but no violations of the laws of war, such as are brought to trial before commissions in time of war, were referred to these tribunals at this period. In the majority of
1332 cases indeed crimes and disorders, where without political significance, were allowed to be disposed of by the State judiciary.[8] The trials by military commission under the Reconstruction Laws were in all not much over two hundred in number.[9]

**Their jurisdiction.** This, while impugned in general terms by the opinion of Atty. Gen. Stanbery above cited,[10] was sustained by the later opinion of

[4] Daniel *v.* Hutcheson, 86 Texas, 62, 64.

[5] See DIGEST, 506–7. In this view it was ordered in the Second District, (G. O. 18 of 1868,) that the military courts convened therein be "governed by the rules of evidence prescribed by the laws of the State in which the case is tried."

[6] In the case of Weaver, the district commander was moved to the exercise of such discretion by a State judge, by whom he was requested to have the accused tried by a military court on the ground that justice could not "probably" be administered by the courts of the State. 13 Opins. At. Gen., 60–1.

[7] But offences against the laws of the U. S. were not triable by military commission in districts in which the U. S. courts were exercising their usual functions. DIGEST, 507; G. O. 164, Second Mil. Dist., 1867; Do. 12, Fourth Id., 1867. And see address of Chase, C. J., to the bar of Raleigh, June 6, 1867.

[8] Thus it was announced in the First District, (G. O. 24 of 1868,) that it was the purpose of the Commanding General—"not to interfere with the operation of the State laws as administered by the civil tribunals, except where the remedies thereby afforded are inadequate to secure to individuals substantial justice." So, in G. O. 10, Third Mil. Dist., 1868, it is said—"The Commanding General desires it to be understood that the trial and punishment of criminals is to be left to the civil authorities, so long as the said authorities are energetic, active, and do jusice to the rights of person and property without distinction of race or color." And see Do. 1, 40, Fifth Id., 1867.

[9] At some of these trials, however, a considerable number of accused were joined in the same charge and proceedings. Thus 23 were joined in the case published in G. O. 175, Fifth Mil. Dist., 1869.

[10] 12 Opins., 198, 199.

Atty. Gen. Hoar in the case of Weaver sentenced to death for murder,[11] as well as, in effect, by the rulings of the courts above cited which upheld the authority exercised by the district commanders as a form of legitimate *military government*. In the first indeed of the opinions indicated, the extent of such jurisdiction was properly held to be limited to offences committed *after* the passage of the original Act;[12] and in a case in the Second District, of a citizen brought to trial and sentenced by a military commission convened under such Act, for a crime committed *in 1864*, the proceedings were disapproved as illegal, and the prisoner was committed to the civil authorities.[13] On the other hand, as it was also properly held, such a commission could not be resorted to for the trial of offences *after* the State in which the same were committed had been admitted to representation in Congress.[14] The time
1333 and scope of the jurisdiction were thus conterminous with the period of the operation of the Reconstruction Acts.

As to *persons*, the jurisdiction of the commission, while mainly exercised over civilians,[15] was sometimes extended to cases of soldiers where their offences were such as would have been triable by the State (or U. S.) courts if in operation.

As to *offences*, those taken cognizance of by military commissions at this period were:—*first* and principally, crimes and disorders made punishable by the local or common law, such as murder,[16] manslaughter, robbery, larceny, riot,[17] "lynching,"[18] criminal conspiracy,[19] assault with intent to kill,[20] assault and battery,[21] burglary,[22] obtaining money under false representations,[23]

[11] 13 Opins., 59. In this case, the opinion—that the commission was a legally authorized tribunal and its sentence a valid judgment—was adopted by the President, and the sentence was approved. See G. C. M. O. 41 of 1869.

[12] 12 Opins., 200.

[13] G. O. 125, Second Mil. Dist., 1867.

[14] DIGEST, 507. And see case, in G. O. 12, Dept. of the South, 1868, of the alleged murderers of Geo. W. Ashburn. In the First Mil. Dist., upon the passage of the Act admitting Virginia to representation, it was ordered, (by G. O. 9 of January 27, 1870,) as follows: "All citizens who may be held by military authority for trial, either in custody or upon bail, for acts in violation of the above cited laws," (*i. e.*, Reconstruction Acts,) "will be released from custody or discharged of their bail bonds and the military prosecution dismissed. All citizens, held by military authority for trial for crimes or offences cognizable under the laws of the provisional government of the State of Virginia, will be turned over to the custody of the proper civil authorities of the county or corporation in which the crime or offence was committed."

[15] Trials of *women* were very few compared to the number of those tried during active hostilities. See cases in G. O. 130, Second Mil. Dist., 1868; G. C. M. O. 8, Fourth Id., 1868.

[16] See cases in G. C. M. O. 41 of 1869, (James Weaver;) G. O., 118, Second Mil. Dist., 1867, (Wm. J. Tolar and others;) Do. 58, 140, Id., 1868; Do. 96, Third Id., 1868; G. C. M. O. 20, 31, Fourth Id., 1867; Do. 1, 23, Id., 1868; Do. 46, 59, Id., 1869; G. O. 25, 38, Fifth Id., 1868; Do. 107, 153, 175, 211, Id., 1869; Do. 14, 27, (Chas. Green and others,) 33, 41, 53, 62, Id., 1870.

[17] G. O. 134, Second Mil. Dist., 1868; Do. 72, Third Id., 1868; G. C. M. O. 24, Fourth Id., 1867.

[18] G. O. 72, Third Mil. Dist., 1868, (Wm. Pettigrew and twelve others.)

[19] G. C. M. O. 34, Fourth Mil. Dist., 1868; G. O. 175, Fifth Id., 1869, (an alleged conspiracy of 23 persons to oppose the execution of the Reconstruction laws, resist the military authority, &c.)

[20] G. C. M. O. 6, 13, 17, Fourth Mil. Dist., 1867; Do. 14, 37, Id., 1868; G. O. 17, Fifth Id., 1868; Do. 181, Id., 1869; Do. 26, Id., 1870.

[21] G. O. 41, 69, 75, Second Mil. Dist., 1867; G. C. M. O. 27, Fourth Id., 1867; G. O. 205, Fifth Id., 1869; Do. 3, Id., 1870.

[22] G. C. M. O. 6, Fourth Mil. Dist., 1867.

[23] G. O. 8, First Mil. Dist., 1868; Do. 7, Id., 1870; Do. 41, Second Id., 1867; G. C. M. O. 14, Fourth Id., 1868.

1334 false imprisonment, malicious mischief,[34] breach of the peace and disorderly conduct,[35] embezzlement,[36] and malfeasance in office;[37] *second*, acts made punishable by U. S. statute, as purchasing arms, clothing, &c., from soldiers,[38] forgery of checks on the Treasury,[39] stealing public property,[40] &c.,; *third*, breaches of military orders regulating the selling of liquor to soldiers, forbidding the carrying of concealed weapons,[41] securing rights to colored persons, &c.[42]

**Sentence.** The punishments imposed by the sentences of these commissions were in general of the same nature as those assigned by the laws of the State, (or United States,) in similar cases, *viz.* death, imprisonment for life or for a term of years or months, and fine. The imprisonment was executed in a penitentiary, a county jail, or at a military post such as the Dry Tortugus, Ship Island, or Fort Macon. In one case[43]—of assault and battery on a colored girl—a fine imposed by the sentence was directed by the same to be paid to the injured party. In another case a justice of the peace was sentenced to be *removed from office* for taking part in the whipping of a colored person.[44] In cases
1335 of *soldiers*, convicted of criminal offences, punishments of a strictly military character, such as dishonorable discharge and forfeiture of pay, were in general disapproved.[45]

**OTHER TRIBUNALS.** The first of the reconstruction laws authorized district commanders in proper cases "to organize military commissions *or tribunals*, and the commissions above described were not in fact the only courts instituted under the laws; others also being employed for the disposition of petty offences and the regulation of the internal economy of the commands.

Thus, the District Commanders, especially in the Second and Fifth Districts, resorted also to courts designated as "*Post Courts*," ordered by the post commanders, or consisting of the post commanders themselves as police magistrates.[46]

In the First, Second and Fifth Districts, the district commanders, either directly or through the post commanders, appointed officers of their commands as *Military Commissioners*, who were clothed, severally, with the powers of justices of the peace and police judges, and directed to act where the similar

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[34] G. O. 68, Second Mil. Dist., 1868.

[35] G. O. 161, Second Mil. Dist., 1867, (obstructing a railroad;) G. C. M. O. 10, Fourth Id., 1867, (interference with registration;) Do. 26, Id., 1867, ("insulting the U. S. flag;") G. O. 234, Fifth Id., 1869, (breaking into a jail and releasing a prisoner.)

[36] G. O. 3, 15, First Mil. Dist., 1870, (by a sheriff, of money collected for taxes, &c.)

[37] G. O. 96, Third Mil. Dist., 1868, (by a deputy sheriff;) Do. 50, Id., 1868; (by an agent of the Freedmen's Bureau;) G. C. M. O. 5, Fourth Id., 1868, (ditto.)

[38] G. O. 94, Third Mil. Dist., 1867; G. C. M. O. 6, Fourth Id., 1867; G. O. 212, Fifth Id., 1869.

[39] G. C. M. O. 14, Fourth Mil. Dist., 1868.

[40] G. O. 90, First Mil. Dist., 1868.

[41] G. O. 102, 122, Second Mil. Dist., 1867; Do. 27, Id., 1868; Do. 95, Third Id., 1867.

[42] G. O. 74, Second Mil. Dist., 1867, (violation of an order of the dist. commander, in refusing to give a first-class ticket on a coast steamer to a colored woman;) Do. 94, Third Id., 1867, (do. in subjecting a colored man to a punishment—lashes—different from that prescribed for whites.)

[43] G. O. 41, Second Mil. Dist., 1867.

[44] G. O. 75, Second Mil. Dist., 1867. But in a case in Do. 50, Third Id., 1868, a punishment of *dismissal*, imposed, (with fine and imprisonment,) upon an agent of the Freedmen's Bureau, was disapproved as of questionable authority.

[45] G. C. M. O. 5, Fourth Mil. Dist., 1868; G. O. 153, Fifth Id., 1869.

[46] G. O. 25, Second Mil. Dist., 1867; Do. 4, Fifth Id., 1869.

civil functionaries failed or were unable to administer due justice.[37] Other special powers and duties were also devolved upon these officials; such, for example, as taking charge of indigent persons,[38] taking measures to prevent combinations against the reconstruction laws,[39] bringing to trial and punishment persons charged with denying rights to colored people,[40] (the courts ordered in such cases being sometimes designated as "Freedmen's Courts,") persons refusing to work on the roads, bridges,[41] &c., persons accused of
1336 intimidating voters,[42] offenders against the regulations for the registration of voters,[43] &c.; with other duties pertaining to elections and the appointment and qualifying of civil officers;[44] as also authority to suspend sales under mortgage and stay executions,[45] to adjudge *qui tam* penalties,[46] to tax costs and legal fees as in civil cases, and to admit to bail.[47]

Special courts, (of three members,) designated as *Military Tribunals*, were also constituted at posts in the Second District with authority to pass upon offences growing out of the illegal sale, manufacture, &c., of spirituous liquors, and the offence of carrying concealed weapons.[48] In some of the Districts the old *Provost Court* was continued with a limited jurisdiction similar to that of the Post Courts above mentioned.[49] In the Fourth District a *Board of Arbitration* was established for the equitable adjustment of the claims of laborers upon the crops of 1867.[50]

**EXERCISE OF CIVIL AUTHORITY UNDER THE RECONSTRUCTION ACTS.** The Act of March 2, 1867, as has been seen, authorized the district commanders "to protect all persons in their rights of person and property," and, in declaring that the existing governments of the insurgent States were not legal, added that "all interference under color of State authority with the exercise of military authority under this Act shall be null and void." The Supplemental Act of July 19, 1867, specifically empowered the district commanders to suspend or remove any civil officials and appoint other persons in their stead, (making it a special duty to remove those obstructing the execution of these Acts,) and confirmed removals and appointments made
1337 before its date. It also, as has been remarked, declared that the provisional State governments were, while they subsisted, "to be continued subject in all respects to the military commanders of the respective districts and to the paramount authority of Congress." It further provided that "all the provisions" of the several Reconstruction Acts "shall be construed liberally to the end that all the intents thereof may be fully and perfectly carried out."

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[37] G. O. 31, First Mil. Dist., 1867; Do. 65, Id., 1869; Do. 61, Second Id., 1868; Do. 4, Fifth Id., 1869. See instructions for their government in Do. 43, First Id., 1869.

[38] G. O. 51, First Mil. Dist., 1867.

[39] G. O. 61, Second Mil. Dist., 1868.

[40] G. O. 74, 75, Second Mil. Dist., 1867.

[41] G. O. 95, Second Mil. Dist., 1867.

[42] G. O. 68, First Mil. Dist., 1867; Do. 61, Id., 1869; Do. 65, Second Id., 1867.

[43] G. O. 65, Second Mil. Dist., 1867.

[44] Circ. 13, First Mil. Dist., 1867; Do., Aug. 12, Id., 1869; G. O. 33, Id., 1868; Do. 70, Id., 1869.

[45] G. O. 20, 149, First Mil. Dist., 1868.

[46] G. O. 17, Fifth Mil. Dist., 1869.

[47] Circ. 7, First Mil. Dist., 1867; G. O. 105, Second Id., 1867; Do. 4, 7, 17, Fifth Id., 1869; In the G. O. referred to of the Second Dist., the amount of the bail bond is made a lien on the personal property of the principal and his sureties.

[48] Circ., May 15 and July. 17, Second Mil. Dist., 1867; G. O. 25, 32, Id., 1867; Do. 29, Id., 1868.

[49] A special jurisdiction for the settlement of disputes between employers and employees as to their rights under military orders is devolved upon this court in G. O. 18, Second Mil. Dist., 1868.

[50] Circ. 22, 24, Fourth Mil. Dist., 1867.

Under the broad authority thus expressly and by implication conveyed, (the scope of which was recognized in the rulings of the courts heretofore cited,) many radical acts of *civil government*, both executive and legislative in their nature, were initiated by the military orders of the district commanders. Among these may be noted the following:—

**The removal and appointment of civil officers.** This power was exercised in sundry cases of important officials; as, for example, those of Governor,[51] Secretary of State,[52] and Auditor,[53] of Virginia; of Governor, Treasurer, Secretary of State and Comptroller of Georgia;[54] of Governor and Attorney General of Mississippi;[55] of Governor, Lieutenant Governor, Secretary of State[56] and Attorney General[57] of Louisiana; and of Governor[58] and Speaker of the House of Representatives[59] of Texas. It was further exercised in the cases of several State and many county and city judges,[60] and in manifold instances of
1338 mayors, aldermen, sheriffs, county clerks, justices of the peace, coroners, constables, school commissioners, and other minor municipal officers.[61]

**Supervision of the police and maintenance of law and order.** The police and constabulary of cities, towns and counties were placed under the immediate direction of the post commanders or military commissioners,[62] and in the Second District were also required to report to and obey the orders of the Provost Marshal General of the District.[63] Post commanders (and commissioners) were authorized to summon civil officials and citizens generally to aid them in the execution of their orders, and a neglect or refusal to render the required assistance was made a misdemeanor punishable by fine and imprisonment to be adjudged by a military court.[64] Assemblages of armed organizations were forbidden,[65] masked and disguised persons were directed to be arrested,[66] and the carrying of deadly weapons was prohibited.[67] On special occasions such as that of a riot at Mobile in 1867, and of the assassination, at

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[51] G. O. 36, First Mil. Dist., 1868.

[52] S. O. 68, First Mil. Dist., 1869. A military officer, Capt. G. Mallery, was appointed.

[53] S. O. 67, First Mil. Dist., 1869. Major T. H. Stanton was appointed.

[54] G. O. 8, 12, 17, Third Mil. Dist., 1868. The civil incumbents were removed for "declining to respect the instructions of the Dist. Commander, and failing to acknowledge his authority or coöperate with him." Gen. T. H. Ruger was appointed Governor, Capt. C. F. Rockwell Treasurer, and Capt. C. Wheaton Secretary and Comptroller.

[55] G. O. 23, Fourth Mil. Dist., 1868. Gen. A. Ames and Capt. J. Myers were appointed in the stead of the civil incumbents removed.

[56] S. O. 62, 192, Fifth Mil. Dist., 1867; Do. 143, Id., 1868. The appointees were civilians.

[57] G. O. 5, Fifth Mil. Dist., 1867.

[58] S. O. 105, Fifth Mil. Dist., 1867.

[59] G. O. 21, 23, Fifth Mil. Dist., 1870.

[60] See the following Special Orders removing, suspending and appointing judicial officers:—S. O. 124, First Mil. Dist., 1867; Do. 102, 117, (appointing Major H. B. Burnham Judge of the Supreme Court of Virginia,) Id., 1869; Do. 168, 183, 241, Second Mil. Dist., 1867; Do. 20, 69, Id., 1869; Do. 9, 125, 126, 164, 190, 238, Third Mil. Dist., 1867; Do. 13, 14, 41, 42, 59, 75, 83, 110, 112, Id., 1868; Do. 125, 126, 216, Fourth Mil. Dist., 1867; Do. 38, 39, 229, Id., 1868; Do. 111, 184, 191, 201, 204, 207, Fifth Mil. Dist., 1867; Do. 14, 16, 18, 44, 48, 62, 89, 95, 103, 120, 131, 148, 156, Id., 1868. See Daniel *v.* Hutcheson, 86 Texas, 51, where is recognized as *de jure* a county court appointed by a military commander.

[61] See the Special Orders of the several Military Districts, *passim*.

The term of office of these appointees was limited by the period of the military government under the Reconstruction acts. Stone *v.* Wetmore, 44 Ga., 495.

[62] G. O. 65, First Mil. Dist., 1869; Do. 12, Second Id., 1867; Do. 4, 5, Fifth Id., 1869.

[63] G. O. 34, Second Mil. Dist., 1867.

[64] G. O. 32, Second Mil. Dist., 1867.

[65] G. O. 58, Third Mil. Dist., 1868; Do. 28, Fourth Id., 1867.

[66] G. O. 15, Fifth Mil. Dist., 1868.

[67] G. O. 10, Second Mil. Distst., 1867; Do. 58, Third Id., 1868; Do. 38, Fourth Id., 1867.

Columbus, Georgia, in 1868, of a member of the Constitutional Convention, orders were issued for the more effectual suppression of disorder and violence, newspapers and public speakers were enjoined not to indulge in inflammatory
1339 language, the writing of threatening letters was denounced, &c.[68] In such and other[69] cases the civil authorities were required to co-operate with the military in the keeping of the peace and the arrest of offenders. On the other hand the military were ordered to assist the civil authorities where necessary—as in the suppression of vagrancy,[70] and in the collection of taxes when resisted by violence.[71] Such precautions were further taken as to provide that a sheriff's *posse* should not be limited to persons of his own political party,[72] and that, where freed persons were to be arrested the *posse* should in general be composed of persons of the same race or color.[73]

**Provision for the poor and the colored people, and regulation of labor.** The proceeds of licenses, forfeitures and fines were devoted to the poor; or the local authorities were required to provide for them through the proper taxes, &c., the cooperation of the military being directed:[74] special provision was also made for the support and comfort of the indigent and insane at asylums and penitentiaries.[75] No discrimination was allowed to be made against colored paupers,[76] nor against colored persons as to admission into public institutions,[77] subsistence in prisons,[78] rights in public conveyances,[79] the selection of jurors,[80] the payment of poll tax or penalties,[81] or generally as to the administration of justice of the enjoyment of the benefits intended to be secured by the Act of Congress, for the protection of persons in their civil
1340 rights, of April 9, 1866.[82] The freedmen were duly instructed as to the procedure of registration and voting,[83] and protected from intimidation and interference on the part of their employers and others.[84] The same validity and effect were required to be given to parol contracts between white and colored as to contracts between whites,[85] and provision was made that colored laborers should not be defrauded out of the just wages of their labor.[86] In the Second District post commanders were authorized to enforce the performance of labor by the citizens on the roads and bridges,[87] or to require them when expedient to serve as roadmasters and overseers.[88] In the Third District work on the highways was authorized to be exacted as a punishment for minor offences.[89]

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[68] G. O. 25, Third Mil. Dist., 1867; Do. 51, Id., 1868.
[69] See also G. O. 42, Third Mil. Dist., 1868; Circ., Fourth Id., July 29, 1867.
[70] G. O. 23, Fourth Mil. Dist., 1867.
[71] G. O. 77, Third Mil. Dist., 1867.
[72] G. O. 7, Fifth Mil. Dist., 1869.
[73] G. O. 23, Fourth Mil. Dist., 1867.
[74] G. O. 51, First Mil. Dist., 1867; Do. 164, Second Id., 1867; Circ., Id., June 17, 1867; G. O. 53, Id., 1868.
[75] See G. O. 136, First Mil. Dist., 1869.
[76] G. O. 31, Third Mil. Dist., 1868; Do. 25, Fourth Id., 1867.
[77] G. O. 31, Third Mil. Dist., 1868.
[78] G. O. 44, Third Mil. Dist., 1868.
[79] G. O. 32, Second Mil. Dist., 1867
[80] G. O. 53, 55, Third Mil. Dist., 1867; Do. 32, Fourth Id., 1869.
[81] G. O. 15, 25, Fourth Mil. Dist., 1867.
[82] G. O. 4, Third Mil. Dist., 1867.
[83] G. O. 5, 61, Fourth Mil. Dist., 1867; Do. 61, Second Id., 1868.
[84] G. O. 61, Second Mil. Dist., 1868; Do. 57, 58, Third Id., 1868; Do. 16, 55, Fourth Id., 1867.
[85] G. O. 134, Second Mil. Dist., 1867.
[86] G. O. 19, Fourth Mil. Dist., 1867.
[87] G. O. 95, Second Mil. Dist., 1867.
[88] G. O. 117, Second Mil. Dist., 1867.
[89] G. O. 69, Third Mil. Dist., 1868.

**Imposition, &c., of taxes and granting of licenses.** In several instances the District Commanders exercised the power of levying taxes,[90] and in others they remitted or suspended the collection of taxes deemed unauthorized or oppressive,[91] or reduced taxes as too heavy, extended the time for their payment, or granted exemptions from the same.[92] The granting of licenses for the sale of liquor, &c., and the application of the moneys received therefor, were also subjects regulated by military order.[93]

**Prohibitions and directions as to judicial and legal proceedings.** 1341 The civil courts were, in repeated cases, prohibited from entertaining suits or prosecutions against military persons on account of acts done under military orders,[94] (as also against citizens who could not have a fair trial because of their adherence to the Union during the war;[95] and from discharging, on *habeas corpus*, persons who were held in military custody for the reason that they could not be fairly tried by the civil tribunals.[96] Sales of land, crops, or other property, upon execution or foreclosure of mortgage, or under deeds of trust, as also suits on judgments, were suspended where unreasonable sacrifice and oppression would result.[97] In some instances rules as to jurisdiction and procedure were prescribed to the courts,[98] and directions were issued as to the qualifying of their clerks,[99] the qualifications and drawing of jurors,[100] &c.[1]

**Exercise of legislative power—Making, unmaking and modifying statute law.** The legislative power pertaining to the military government[2] was manifested by such acts of the district commanders as—enacting a formal statute "to punish obstruction of railroads," which, among other things, prescribed the death penalty for one of the forms of offence enumerated;[3] "annulling" 1342 or "rescinding" a provision of a State law imposing a poll tax, and substituting another;[4] extending an appropriation Act so as to make it apply to a further fiscal year;[5] construing so as to extend, modifying, or suspending, statutes relating to tenancies, stay of executions, recovery of debts,

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[90] As, in G. O. 139, Second Mil. Dist., 1867, a tax for the support of the provisional government of South Carolina; and, in Do. 41, Fifth Id., 69, a special county tax as a provision for the more efficient administration of justice.

[91] G. O. 92, Second Mil. Dist., 1867; Do. 232, 235, Fifth Id., 1869.

[92] G. O. 81, 102, Second Mil. Dist., 1868; Circ., Id., Oct. 9, 1867; G. O. 28, Fourth Id., 1869. See also many cases of staying, &c., the collection of taxes, in the *Special Orders* of the different Districts.

[93] G. O. 59, First Mil. Dist., 1869; Do. 32, 164, Second Id., 1867; Circ. Id., June 17, 1867; G. O. 39, Fourth Id., 1867.

[94] G. O. 134, Second Mil. Dist., 1867; Do. 45, Third Id., 1867; Do. 7, Id., 1868.

[95] G. O. 134, Second Mil. Dist., 1867; Do. 25, Fourth Id., 1867.

[96] G. O. 10, Third Mil. Dist., 1868.

[97] G. O. 10, 164, Second Mil. Dist., 1867; Do. 14, 63, Id., 1868; Do. 95, Third Id., 1868; Do. 12, 25, Fourth Id., 1867. The *Special Orders* of the Districts contain also constant and numerous directions as to staying, suspending, dismissing, disapproving, annulling and confirming of proceedings, judgments, &c., in the civil courts.

[98] G. O. 46, 97, First Mil. Dist., 1869; Do. 11, 81, Second Id., 1868; Do. 22, Fifth Id., 1870.

[99] G. O. 46, First Mil. Dist., 1869.

[100] G. O. 89, 100, Second Mil. Dist., 1867; Do. 11, Id., 1868; Do, 53, Third Id., 1867.

[1] A further Order, of the First Dist., (G. O. 71 of 1867,) directed the Supreme Court of Virginia to hold a special session on a day named. In G. O. 53, Second Mil. Dist., 1868, the civil courts of North and South Carolina were invested with jurisdiction of cases of selling liquor in violation not only of local police regulations but of *military orders*.

[2] As to the extent of this power, see citation from McClelland *v.* Shelby Co., 32 Texas, 20, *ante*.

[3] G. O. 120, Second Mil. Dist., 1867.

[4] G. O. 164, Second Mil. Dist., 1867; Do. 28, Fourth Id., 1869.

[5] G. O. 6, First Mil. Dist., 1870.

taxation, education, apprentices, granting of licenses, pilotage, shipping of hides, amnesty for offences,[6] &c. In an Order of the First District,[7] all civil officers, corporations, &c., in Virginia, required by law to make report to the legislature at its annual session, are required to make the same to the district commander.

In an Order of the Second District,[8]—the most remarkable instance in our history of the exercise of legislative authority by a military commander,—"imprisonment for debt is prohibited" except in cases of fraud; certain money judgments are forbidden to be "enforced by execution against the property or the person of the defendant;"[9] the sale of property on execution or foreclosure is suspended for one year; "all proceedings for the recovery of money under contracts, whether under seal or by parol, the consideration for which was the purchase of negroes, are suspended;" wages for labor performed in the production of a crop is made a *lien* on the crop; a "homestead exemption" is created; bail is done away with in actions *ex contractu:* "the punishment of crimes and offences by whipping, maiming, branding, stocks, pillory, or 1343 other corporal punishment,"[10] is discontinued; the punishment of death in cases of burglary and larceny, as authorized by State laws, is abolished, and graded penalties of fine and imprisonment are prescribed for such offences; the power of reprieve, pardon and remission is given to the Governors of North and South Carolina; and imprisonment for overdue taxes is inhibited. The Order concludes as follows:—"Any law or ordinance, heretofore in force in North or South Carolina, inconsistent with the provisions of this General Order, is hereby suspended and declared inoperative."[11] In an Order of the next month,[12] made by the same commander, "the remedy by distress for rent is abolished."

As another instance of legislative action may be noted the fact that, in approving and ordering into effect, as they repeatedly did, the ordinances of the constitutional conventions, the district commanders in some cases *excepted* certain provisions, and in others substituted or added provisions of their own.[13]

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[6] G. O. 149, First Mil. Dist., 1868; Do. 59, 80, Id., 1869; Do. 134, 164, Second Id., 1867; Do. 11, Id., 1868; Do. 17, 68, 139, Fifth Id., 1869.

[7] G. O. 7 of 1869.

[8] G. O. 10 of 1867.

[9] These are judgments on causes of action arising between Dec. 19, 1860, and May 15, 1865. It is added:—"Proceedings in such causes of action, now pending, shall be stayed; and no suit or process shall be hereafter instituted or commenced, for any such causes of action."

[10] See the prior act of Congress, of March 2, 1867, c. 170, s. 5, in which it is made the duty of officers of the army, &c., "to prohibit and prevent whipping or maiming of the person, as a punishment for any crime, misdemeanor, or offence," in "any State lately in rebellion," and not yet readmitted to representation in Congress.

It was held in State *v.* Kent, 65 No. Ca., 311, that this Order could have no further effect than to *suspend* the existing law as to corporal punishment; the law reviving as soon as, with the discontinuance of the military government, the Order ceased to have effect.

[11] It was mainly with reference to this Order that Atty. Gen. Stanbery, in his opinion heretofore cited, said—"He," the (Dist. Commander,) "assumes, directly or indirectly, all the authority of the State, legislative, executive and judicial, and in effect declares—'I am the State.'" The order was in fact an anticipation of the enactment of the following July, which completed the powers of the military government, and, in doing so, added the injunction that "no district commander shall be bound in his action by any opinion of any civil officer of the United States."

G. O. 10 was materially modified as to some of its provisions by G. O. 164 of the same year, issued by a subsequent commander of the district.

[12] G. O. 32 of 1867.

[13] G. O. 57, Second Mil. Dist., 1868; Do. 18, 24, 29, Third Id., 1868; Do. 10, Fourth Id., 1868.

**Appropriations from the State treasuries.** In lieu of legislatures, the district commanders not unfrequently exercised the power of appropriating moneys for the support of the civil governments of the States within their commands,[14] as also for the repairs and maintenance of asylums, penitentiaries, and other public institutions.[15]

1344 **Quarantine and sanitary regulations.** Careful and detailed quarantine regulations were issued by the different commanders,[16] and, in the Fourth District, sanitary regulations for the season of epidemics of 1867.[17]

**Miscellaneous matters.** To the acts and orders of the district commanders above enumerated may be added the following:—The prohibition of "the distillation or manufacture of whiskey or other spirits from grain;"[18] The invalidating of contracts for the manufacture, sale, &c., of intoxicating liquor;[19] The suspension of elections of officers of railroad companies in which any of the States constituting the district possessed an interest;[20] the making special provision for the arrest and trial of persons guilty of horse-stealing;[21] The making provision for the enrollment of the inhabitants of the State, (Texas,) as a force for defence against hostile Indians.[22]

**DUTIES AS TO ELECTIONS, REGISTRATION, &c.** The remaining orders of the district commanders were chiefly those issued in the performance of the duties devolved upon them by the Acts of March 23 and July 19, 1867, March 11, 1868, and April 10, 1869, with reference to the elections and proceedings thereby prescribed. These orders constituted and appointed boards of registration and superintendents or commissioners of election, and instructed them as to their duties; provided for due registrations of the qualified voters and revisions of the registry lists; directed elections of delegates to the constitutional conventions, and notified those elected to assemble and act; submitted the constitutions when framed to the popular vote, and at the same time ordered the elections for State officers and members of Congress;

1345 regulated by precise and detailed directions the conduct of such elections, so as to secure a full expression and ensure a fair ballot;[23] announced

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[14] See, for example, G. O. 118, 122, First Mil. Dist., 1869; Do. 6, Id., 1870; Do. 139, Second Id., 1867; Do. 18, Fifth Id., 1869; Do. 6, Id., 1870.

[15] G. O. 58, 122, 136, First Mil. Dist., 1869. Other appropriations for such institutions, as also for the expenses of State Conventions, are contained in the *Special Orders*.

[16] G. O. 42, First Mil. Dist., 1867; Do. 39, Id., 1868; Do. 75, Id., 1869; Do. 3, Second Id., 1867; Do. 64, Id., 1868; Do. 5, Fourth Id., 1867; Do. 23, 34, Fifth Id., 1868; Do. 104, Id., 1869.

[17] G. O. 8, Fourth Mil. Dist., 1867.

[18] G. O. 25, Second Mil. Dist., 1867. [Revoked by a subsequent district commander in Do. 164, Id.] See also Do. 12, Fourth Id., 1867.

[19] G. O. 32, Second Mil. Dist., 1867. [Revoked in Do. 164, Id.]

[20] G. O. 84, Second Mil. Dist., 1868.

[21] G. O. 9, Fourth Mil. Dist., 1867; Do. 3, Id., 1868.

[22] G. O. 75, Fifth Mil. Dist., 1869.

[23] To instance some of these regulations—bar-rooms and the like were required to be closed on the day of election and for some time before and after; the use or exhibition of fire-arms or dangerous weapons at or near the voting places was prohibited; facilities were afforded for challenging votes; the intimidation, directly or indirectly, of voters was guarded against; military interference, unless necessary to repel the armed enemies of the United States or to keep the peace at the polls," (in accordance with the provision of the Act of Congress of Feb. 25, 1865,) was strictly forbidden; and other precautions were taken against possible fraud or violence. See G. O. 61, First Mil. Dist., 1869; Do. 164, Second Id., 1867; Do. 40, 45, 61, Id., 1868; Circ., Id., March 24, 1868; G. O. 74, Third Id., 1867; Do. 57, 58, Id., 1868; Do. 19, Fourth Id., 1868; Do. 55, Id., 1869; S. O. 40, Fifth Id., 1869. In one order, it was directed that no voter should be compelled to work on the public roads, or to attend court as a suitor, juror, or witness, on the day of election, or be subject to arrest on civil process, &c. Do. 61,

the results of the votings;[34] determined the eligibility, in case of question, of persons elected; directed the administering, to civil officers elect, of the oath of office prescribed by Congress; turned over to the new governments the appropriate records, public property and powers, and otherwise facilitated their organization. These orders, many of which involved in their preparation a most careful consideration and great labor, well illustrate the value of the services of the District Commanders in coöperating to bring about the political rehabilitation of the insurgent States.

Such were some of the more salient features of the procedure of Reconstruction. So far as concerns the *military government* exercised during these three critical years,—its efforts to secure an impartial and faithful administration of justice, repress violence and disorder, maintain an efficient police, conserve the public health, relieve the burdens of the unfortunate, protect the
1346 humble classes against unequal laws and oppressive usages, and, while earnestly promoting the restoration of the States, to worthily assert the "paramount authority" of the United States, must, it is believed, fairly outweigh, in the estimate of history, the unfrequent manifestations of arbitrary power on the part of individual officials.

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First Id., 1869. It was further ordered that where a fair vote was prevented by violence, a new election should be held. Do. 61, Second Id., 1868. And it was enjoined that where injuries were inflicted upon persons registering in good faith, the damages should be assessed upon the town or county. Do. 65, Second Id., 1867.

[34] One of these orders, for example—G. O. 19, Fifth Mil. Dist., 1870,—contained tabular statements of the votings in Texas, covering forty-seven pages.

## Part III.—CIVIL FUNCTIONS AND RELATIONS OF THE MILITARY.

1347 In PART I have been considered the law and discipline governing the military in the military state; in PART II has been reviewed the special authority exercised by them, in time of war or like emergency, towards enemies and persons under military government or control. In this third and last division of this treatise will be examined the subject of their *civil* relations and duties as officers and soldiers, and the liabilities, as well as rights, attaching to them as citizens.

PART III will be presented under the following Titles:—

I. Employment of the military in a civil or *quasi* civil capacity.
II. Liability of the military to civil suit or prosecution.
III. Other civil relations of the military.

### I. EMPLOYMENT OF THE MILITARY IN A CIVIL OR QUASI CIVIL CAPACITY.

#### 1. FOR THE PROTECTION OF A STATE FROM DOMESTIC VIOLENCE.

Sec. 4 of Art. IV of the Constitution declares that:—"*The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them,* (against invasion, and,) *on the application of the legislature, or of the executive when the legislature cannot be convened, against domestic violence.*" As observed by the U. S. Supreme Court in
1348 Luther *v.* Borden,[1] "it rested with Congress to determine the means proper to be adopted to fulfill this guarantee." So, presently after the adoption of the Constitution, by the Act of Feb. 28, 1795, the President was empowered to call forth the militia, and later, by that of March 3, 1807, to employ the land and naval forces, for the purposes signified.[2] In PART II it has been seen how the Supreme Court, in Texas *v.* White,[3] justified the action of Congress in providing, in view of this constitutional *guarantee*, for the "reconstruction" of the insurrectionary States by the legislation of 1867. Under the section cited, the *protection* of the United States has, in practice, commonly been invoked by governors of States,[4] in emergencies arising when the legislatures are not in session or cannot be assembled soon enough to take the requisite action.[5] The protection sought is afforded by the President, by ordering a sufficient military force to the disturbed locality with the proper instructions for the repression of the existing violence. No military commander or authority inferior to the President can assume to initiate such orders. The troops are not furnished to the governor as a *posse*, nor can they legally be placed under his command or that of any other State official, civil or military. Though employed in a *quasi* civil capacity and for a local and temporary

[1] 7 Howard, 42.
[2] These statutes are embraced in Sec. 5297, Rev. Sts. And see therewith Sec. 5300.
[3] 7 Wallace, 730.
[4] The constitutional provision does not apply to cases of domestic violence in Territories. DIGEST, 161–2.
[5] 8 Opins. At. Gen., 8.

object, they are still U. S. troops, representing the sovereignty of the United States, and can duly act only under the command and direction of the President and their own officers.[6] As their purpose, however, is to aid in the execution of the laws and the restoration of the peace of the State, their action should in general, as far as practicable, be in concert with the action or views of the State authorities.[7] While they should of course move and operate with promptitude and efficiency, no more military power than is reasonably
1349 required should be resorted to, nor the disorderly element be treated like an enemy in war unless the emergency is such as to demand extreme measures: often a demonstration in force will be sufficient without resort to arms.

It was held by Attorney General Cushing, in the California Vigilance Committee Case,[8] that a mere "obstruction of law" was not enough to base a requisition upon the President for troops, but that a state of "*domestic war*" should practically exist to authorize it. This is a strained view, with which the *practice* has not accorded. "Domestic violence" is not necessarily war or even such a condition as to call for the exercise of martial law. Domestic violence considerably less pronounced than that of the Dorr rebellion, for example, will, it is considered, justify an appeal for military aid, by the authorities of a State, under the Constitution.

### 2. For the Suppression of Insurrection and the Execution of the Laws of the United States.

By Secs. 5297–5299, Title LXIX, Rev. Sts., the President, whenever, in his judgment, it becomes necessary, is further expressly authorized to employ the army, (as also the militia and the navy,) for the suppression of insurrection or rebellion against the Government and the execution of the laws of the United States; as also, specially, for the purpose of maintaining the civil rights of the people of the States, when divested by violent combinations or conspiracies against the laws of the State or of the United States.[9] Under these Sections, the assistance of the military may be resorted to in any instance of such insurrection or lawless combination, from an isolated case of riotous obstruction to a rebellion of the magnitude of the recent civil war. In the instance of a rebellion of this character the army would assume a purely military and hostile attitude as against an enemy, and the law applicable to the situation would be the law of war or martial law treated of in Part II. In cases of lesser disorders the army would be employed more in a *quasi* civil capacity, as a force to keep the public peace, and similarly as when used to suppress "domestic violence" under the provision of the Constitution
1350 heretofore considered; its operations being conducted exclusively under the orders and directions of the President and its immediate commanders.[10]

The "laws of the United States," the "faithful execution" of which the army may properly be employed to enforce under Sec. 5298, Rev. Sts., would

[6] See G. O. 15, of 1894, quoted under the next head; also par. 490, A. R. of 1895.

[7] See, in this connection, an interesting pamphlet by Col. E. Otis, 20th Infantry, entitled "The Army in connection with the Labor Riots of 1877."

[8] 8 Opins., 14–15.

[9] See 16 Opins. At. Gen., 162; 17 Id., 242, 333.

[10] The view of the author, as expressed here and on the preceding pages, as to the command and disposition of the U. S. military in the contingencies indicated has been adopted in the following recent order, (G. O. 15 of May 25, 1894,) issued by the Major General Commanding the Army:—

"The following instructions are issued for the government of department commanders:

"Whenever the troops may be lawfully employed, under the orders of the President, to suppress 'insurrection in any State, against the government thereof,' as provided

probably be mainly such laws as those which relate to the conduct of the federal elections, the government and protection of the Indians, the regulation of immigration, the protection of the public lands from unlawful intrusion or settlement, the collection of taxes or excises, the transportation of the mails, the regulation of commerce, the observance of neutrality and rights of neutrals. And with such laws are to be classed treaties recognizing rights of foreigners in this country, &c. On the occasion of the recent strike, of July, 1894, it was mainly for the execution of Sec. 3995, Rev. Sts., prohibiting the obstructing and retarding of the due carriage of the mails on the railways, and incidentally of the provisions of the Act of July 2, 1890, c. 647, "to protect trade and commerce against unlawful restraints," &c., that the national forces were employed by the President.[11]

1351 The active interposition of the military under Sections 5297–5299, Rev. Sts., is required by Sec. 5300 to be preceded by a proclamation of the President commanding "the insurgents to disperse and retire peaceably to their respective abodes within a limited time."[12] In practice the term "insurgents" has been treated as including all persons unlawfully combining, conspiring, &c., as indicated in Secs. 5298 and 5299. In most cases the publication of the proclamation in connection with an array or mobilization of troops will do away with the necessity of a resort to force.[13]

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in section 5297 of the Revised Statutes; or to 'enforce the execution of the laws of the United States,' when 'by reason of unlawful obstruction, combinations, or assemblages of persons' it has 'become impracticable, in the judgment of the President, to enforce, by the ordinary course of judicial proceedings, the laws of the United States,' as provided in section 5298 of the Revised Statutes, the 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 and his military subordinates. They cannot be directed to act under the orders of any civil officer. The commanding officers of the 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 any order or request received by them from a marshal or any other civil officer."

[11] See G. O., H. Q. A., of July 24, 1894. See this subject as presented in par. 487, A. R. of 1895.

[12] The more recent instances of the proceeding required by Sec. 5300 are those of the proclamations of May 22, 1873, (as to dirorders in Louisiana;) of May 15, 1874, (as to Arkansas;) of Sept. 15, 1874, (Louisiana;) of Dec. 21, 1874, (Mississippi;) of Oct. 17, 1876, (South Carolina;) of Oct. 7, 1878, (New Mexico;) of May 3, 1882, (Arizona;) of July 31, 1884, (as to the irruption of persons into the Oklahoma lands in the Indian Territory;) of Nov. 7, 1885, (as to violence and dirorders in Washington Territory, directed against the Chinese population;) of Feb. 9, 1886, (as to unlawful obstructions and combinations at Seattle and elsewhere in the same Territory;) and of July 15, 1892, (on the occasion of the Coeur d' Alene riots in Idaho.)

[13] Here may be noted the recent order—G. O. 23 of July 9, 1894—issued from the Headquarters of the Army, on the occasion of the employment, under Sec. 5298, of the federal military in the suppression of the unlawful obstructions and combinations consequent upon the strike above mentioned, as follows:—

"The following instructions are published for the government of the Army:

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, is a public enemy.

Troops called into action against such a mob are governed by the general regulations of the Army and 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 the fire of musketry and artillery or by use of the bayonet and saber, or by both, and at what stage of the operations each or either mode of attack shall be employed.

This tactical question must neocssarily be decided by the immediate commander of the troops, according to his best judgment of the situation and the authorized drill regulations.

In the first stage of an insurrection, lawless mobs are frequently commingled with great crowds of comparatively innocent people, drawn there by curiosity and excitement,

### 3. As a Posse Comitatus.

1352 **PRACTICE UNDER ACT OF 1789.** It was provided in s. 27 of the Judiciary Act of Sept. 24, 1789,[14] that the marshal appointed for a judicial district "*shall have power to command all necessary assistance in the execution of his duty.*" This provision was at an early period construed as vesting, *by implication*, in U. S. marshals and their deputies an authority to call upon the military forces of the United States as a *posse* to assist them in the execution of the process of the U. S. courts,[15] and this authority was resorted to in numerous cases where without it the laws would have failed to be effectually or promptly enforced. Instructions were repeatedly issued from the Attorney General's Office and the War Department, and by military commanders, as to the right of marshals to require the assistance of the military in cases of necessity, as to the duty of the military to obey their requisitions, and as to the behaviour of the latter when serving on a *posse*. It was enjoined that officers and soldiers so serving should act in subordination to and as directed by the marshal in making arrests, &c., but should use only such force as was necessary and apposite to the object, and should confine themselves strictly to the duties attaching to the special service, initiating no proceeding and assuming no authority beyond the same. But while thus coöperating with and acting under the civil official, the inferiors of the detachment were to observe the principle of military subordination and obey the orders of their immediate military superiors, as on occasions of purely military duty.[16]

1353 **Limitation of power to summon.** The power to summon the military on a *posse comitatus*, under the Act of 1789, was limited to the marshal or his deputy. No other U. S. civil functionary,—as an officer of the customs or internal revenue officer, for example,—has been empowered to exercise a like authority.

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and ignorant of the great danger to which they are exposed. Under such circumstances the commanding officer should withhold the fire of his troops, if possible, until timely warning has been given to the innocent to separate themselves from the guilty.

Under no circumstances are the troops to fire into a crowd without the order of the commanding officer, except that single sharpshooters, selected by the commanding officer, 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 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 are not called upon to consider how great may be the losses inflicted upon the public enemy, except to make their blows so effective as to promptly suppress all resistance to lawful authority, and to stop the destruction of life the moment lawless resistance has ceased. Punishment belongs not to the troops, but to the courts of justice."

[14] Now embraced in Sec. 787, Rev. Sts.

[15] 16 Opins. At. Gen., 162; 17 Id., 242, 333; Digest, 162, 593.

[16] See the law and instructions as laid down and communicated in the following papers, opinions and orders: Instructions from Atty. Gen. Evarts to the Marshal of the No. Dist. of Fla., of Aug. 20, 1868; 6 Opins. At. Gen., 471; 13 Id., 451; 16 Id., 162; G. O. 96 of 1876; Communication from Headquarters of the Army to Maj. Gen. Meade, Comdg. Dept. of the South, Aug. 25, 1868; G. O. 65, Dept. of the Cumberland, 1868; Circ. Id., Oct. 5, 1868; Circ., Id., March 11, 1870; Do., Dept. of Va., March 4, 1870; G. O. 29, Dept. of the Mo., 1870; Do. 3 Id., 1874; Do. 2, Dept. of Texas, 1870; Do. 54, 75, Dept. of the South, 1874; Do. 29, Dept. of the Gulf, 1874; Digest, 593–4. The only substantial point of difference between the instructions of the Attorney General and those of the military authorities appears to be that the former indicate that the marshal is authorized absolutely to require the assistance of the miliary when and in such force as may in his opinion be necessary, (see Instructions Atty. Gen. Evarts;) while the latter in effect declare that it is for the officer commanding the troops summoned to decide whether the service required is lawful or necessary. (Communication to Maj. Gen. Meade, *ante;* G. O. 29, Dept. of the Mo., 1870.) The former is the correct view.

The power is also one that cannot legally be exercised by sheriffs or other *State* officials, who, though they might be authorized to summon members of the army as citizens, could not legally call upon them in their armed and military capacity as officers and soldiers of the United States land forces.[17] The army as such can constitutionally take no part in preserving the peace of States, or in executing the laws of the States, otherwise than as it may be employed to protect the States against domestic violence under the provision of the Constitution above considered,[18] or to suppress insurrection under Title LXIX, Rev. Sts.

**EFFECT OF THE LEGISLATION OF 1878.** But the power derived from the Act of 1789 has been abruptly divested by a recent statute, and practically exists no longer. This statute is a provision of the Act of June 18, 1878, c. 263, which in s. 15, declares that—"*From and after the passage of this Act it shall not be lawful to employ any part of the Army of the United States*
1354 *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.*"[19]

This legislation, evolved as it was out of a temporary political antagonism on the question of the extent of the authority of the President to employ the military to preserve order at elections in the States,[20] remains, now that the occasion for its enactment has passed, a mere impediment to the constitutional exercise of the executive power of the nation.[21] In the remoter West especially it has proved a serious embarrassment to the efficient execution of the process of the U. S. courts. Where, indeed, there exists a *combination* to resist the enforcement of the laws, the President may proceed to avail himself of the army, as authorized and prescribed in Secs. 5298–5300, heretofore considered. But for making arrests in individual cases, of persons charged with offences against the United States, the U. S. marshal, although the military stationed in the vicinity may be the only force adequate to effectuate such arrests, is not in general empowered to avail himself of their assistance under the existing law.[22]

**Excepted cases—Express statutory authority for employment of military for civil purposes.** The Act of 1878 excepts, as has been seen, from its operation, those cases in which the employment of a military force "as a *posse comitatus*, or otherwise, for the purpose of executing the laws," may be "*expressly authorized*" by the Constitution or by statute. While in the Constitution such express authority is nowhere vested in terms, the same *is* conveyed in sundry sections of the Revised Statutes, as follows:—Sec. 1984, authorizing a resort to the land forces for aid in arresting persons offending
1355 against the laws for the protection of civil rights; Sec. 1989, further authorizing the President to employ the land forces in the execution of the provisions of Title XXIV, relating to civil rights;[23] Sec. 1991, requiring

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[17] The armed force for them to summon, if any, is the *militia*. See instances in Raush *v.* Ward, 44 Pa. St., 289; Curtis *v.* Allegheny Co., 1 Philad., 237.

[18] See instructions of Atty. Gen. Evarts, above noted; also DIGEST, 162, 164, 593–4.

[19] Compare, as *in pari materia*, the Acts of June 23, 1879, c. 35, s. 6; and May 4, 1880, c. 81, s. 2.

[20] It is singular that the Act of 1878 did not in terms repeal the provision of the Act of Feb. 25, 1865, incorporated in Sec. 2002, Rev. Sts., which in effect expressly authorizes the employment of the U. S. military "to keep the peace at the polls" at elections in the States. On the contrary, it left such provision in full force. See text, *post*.

[21] Mr. Garfield said of this Act, in the debate on its passage, (45th Cong., 2d Sess., Record, p. 3845,)—"It puts the command of the Army into the hands of Congress."

[22] See 16 Opins. At. Gen., 162; 17 Id., 71, 242, 333; 19 Id., 293, 570.

[23] See 19 Opins. At. Gen., 570.

military persons to aid in enforcing the law abolishing peonage in New Mexico; Sec. 2002 authorizing the use of the military to keep the peace at elections; Secs. 2118 and 2147, authorizing him to employ the military to remove persons from Indian lands or the Indian country who are there contrary to law; Secs. 2150, 2151 and 2152, authorizing him to employ the army to prevent the introduction of unauthorized persons or things into the Indian country, to destroy distilleries set up therein, to make certain seizures,[24] to apprehend persons being illegally in such country as well as criminal Indians, to put an end to hostilities between Indian tribes, &c.; Sec. 2460, authorizing the President to employ the military to aid in preserving the timber belonging to the United States in Florida;[25] Sec. 4792, requiring military officers commanding on the coast to aid in the execution of the quarantine laws; Sec. 5275, authorizing the President to employ the army for the custody of extradited persons; Secs. 5287 and 5288, authorizing him to employ them in executing the neutrality laws; Secs. 5297, 5298, and 5299, authorizing him to employ them in suppressing insurrection and unlawful combinations, (considered under a previous head;) Sec. 5316, authorizing him to employ them to prevent the removal of vessels or cargoes seized for condemnation as contraband; Sec. 5577, authorizing him to employ them to protect the rights of discoverers of guano.[26]

1356 Included among the *exceptions* under consideration are also the special statutes expressly authorizing the employment of officers of the army for certain civil duties, such as follows:—Sec. 1225, Rev. Sts., authorizing the President to detail such officers as professors of colleges, &c.; Sec. 2062[27] and the Act of July 13, 1892, c. 164, authorizing or requiring the President to detail such officers as Indian agents; Sec. 2190, authorizing the Secretary of War to direct such officers to aid in taking the census; Secs. 4684, 4685 and 4687, authorizing the President to employ such officers on topographical work, &c., in connection with the Coast Survey; Act of June 11, 1878, providing for the detail of an engineer officer as one of the Commissioners of the District of Columbia; Act of June 23, 1879, authorizing the detail of an officer, not above the rank of captain, "for special duty with reference to Indian education;"[28] Acts of June 28, 1879, and July 5, 1884, authorizing the appointment of three engineer officers on the "Mississippi River Commission" and the "Missouri River Commission," respectively, and the detail of other such officers for service

[24] See 18 Opins. At. Gen., 546.

[25] In connection with this Section, (2460,) see Act of March 3, 1807, c. 46, s. 1, included with this class of statutes in G. O. 26 of 1894, *post*.

[26] See par. 487, A. R. of 1895. G. O. 26, H. A., of 1894, in calling the attention of officers to these statutes, concludes as follows—"Officers of the Army will not permit the use of the troops under their command to aid the civil authorities as a *posse comitatus* or in execution of the laws, except as authorized in the foregoing enactments. If time will admit, the application for the use of troops for these purposes must be forwarded, with a statement of all the material facts in the case, for the consideration and action of the President; but, in cases of sudden and unexpected invasion, insurrection, or riot, endangering the public property of the United States, or in cases of attempted or threatened robbery or interruption of the United States mails, or other equal emergency so imminent as to prohibit communication by telegraph, officers of the Army may, if they think a necessity exists, take such action before the receipt of instructions from the seat of Government as the circumstances of the case and the law under which they are acting may justify. In every such case they will promptly report their action and the circumstances requiring it to the Adjutant General for the information of the President." [Now incorporated in par. 489, A. R. of 1895.]

[27] See 15 Opins. At. Gen., 405.

[28] See DIGEST, 164–5, and note.

therewith; Act of June 16, 1880, authorizing the detail of two officers of the Ordnance corps to serve with the Geological survey; Act of October 1, 1890, authorizing the assignment of officers (and transfer of enlisted men) for duty with the Weather Bureau of the Agricultural Department; Act of March 1, 1893, constituting the California Debris Commission, to consist of officers of the corps of Engineers of the Army.

In all such excepted cases, the military in general, or the particular officers (or enlisted men) indicated, may still be employed for the purpose of the execution of the designated law, notwithstanding the general prohibition of 1878.

1357 4. FOR THE EXECUTION OF THE LAWS RELATING TO INDIANS AND THE INDIAN COUNTRY.

**(1) AS TO INDIANS NOT ON RESERVATIONS.** It is the policy of the government to assemble all the Indian tribes and bands upon lands reserved for the purpose, and, with a view to their location and maintenance upon such lands, treaties have been from time to time entered into with them, and appropriations are annually made by Congress. Indians omitting or refusing to enter into treaties or to locate upon reservations, and remaining at large, are in general to be regarded as in a state of actual or *quasi* hostility, and may be treated by the military authorities, under the orders of the President, either as hostile or merely not friendly, as circumstances may dictate. In the latter relation, the attitude of the military toward them is to be one of watchfulness and precaution; in the former they are public enemies, and the *laws of war*, so far as practicably or reasonably applicable, will govern the army in its operations and proceedings against or with regard to them.[29]

**(2) AS TO RESERVATION INDIANS AND THE INDIAN COUNTRY IN GENERAL—The law applicable.** It is to such Indians and their country that the statutes heretofore indicated specially apply; *viz.* Secs. 2118, 2140, 2147, 2150, 2151, 2152, Rev. Sts., which authorize the employment of the military in the *civil* duty of removing trespassers from the Indian country, in apprehending persons found there in violation of law and conveying them to the civil authorities, in preventing the unauthorized introduction of spirituous liquors therein, in making seizures of property and arrests of criminals, &c.

1358 **What is Indian country.** What is to be regarded as Indian country is now well established by the decisions of the courts and rulings of the law officers, as consisting of—"(1) Indian Reservations occupied by Indian tribes; and (2) Other districts so occupied to which the Indian title has not been extinguished."[30] The question whether Indian title has or not

[29] "Outside of the well defined limits of their Reservations, all Indians are under the original and exclusive jurisdiction of the military authorities." G. O. 20, Div. of the Pacific, 1870. And see Circular, Dept. of the Columbia, Nov. 16, 1870, publishing communications from Commissioner of Indian Affairs concurred in by the Secretary of War. As to the application of the law to hostilities with Indians, see 14 Opins. At. Gen., 249, cited on p. 14 *ante* [?]; also, (as to what constitutes *war* with Indians,) Allre *v.* U. S., 1 Ct. Cl., 238; Marks *v.* U. S., 28 Ct. Cl., 147.

[30] G. O. 97 of 1877. Or as it has been more recently defined by the Supreme Court in *Ex parte* Crow Dog, 109 U. S., 556,—"All the country to which the Indian title has not been extinguished within the limits of the United States, whether within a reservation or not." And see further, on this subject, Am. Fur Co. *v.* U. S., 2 Peters, 358; U. S. *v.* Forty-three Gals. of Whiskey, 93 U. S., 188; Bates *v.* Clark, 85 U. S., 204; U. S. *v.* Seveloff, 2 Sawyer, 311; *In re* Carr, 3 Id., 318; U. S. *v.* Leathers, 6 Id., 17; U. S. *v.* Sturgeon, Id., 29; U. S. *v.* Martin, 8 Id., 473, and 14 Fed., 817; 14 Opins. At. Gen., 290, 327; 19 Id., 512; G. O. 98 of 1873; Do. 40 of 1874; Do. 97 of 1877; DIGEST, 450.

been extinguished as to any district will of course mainly depend upon the treaty or treaties entered into with the tribe.[31] Before making arrests of persons or seizures of property, as being illegally within Indian country, (not included in a reservation,) officers of the army will properly inform themselves as to whether the district is Indian country in fact; otherwise they may become subject, as in the case of Bates *v.* Clark,[32] to a civil suit and judgment for damages.

**Removal of tresspassers under Secs. 2118, 2147, R. S.** Authority to remove intruders from a public reservation when necessary for the protection of property of the United States is a measure of public self-defence which would exist in the absence of statutory provision. Under the above Sections relating to the removal of persons who are in the Indian country in violation of law, the military may be employed summarily to remove therefrom persons who are there for the purpose of making settlements on the land, or carrying on traffic in violation of the laws regulating intercourse with the Indians, or for any other illegal or unauthorized purpose, or who, as speculators, outlaws, vagabonds, &c., are simply commorant there contrary to the provisions of an existing treaty with the tribe or without the permission of the agent or
1359 officer in charge.[33] And the order of the President or Secretary of War directing such removal will be "an adequate protection" to the officers and soldiers who may perform the service.[34] The above statutes, considered in connection with Secs. 2150 and 2151, are regarded as contemplating the mere *removal* of persons as intruders, and the *apprehending* of persons with a view to action by the civil authorities, as distinct proceedings,—so that the military may be employed simply to remove without apprehending. Whether persons are or not in the Indian country in violation of law is a question to be determined by the executive authorities charged with the custody and protection of the Indians and the execution of Indian treaties. "The courts will not review their decision in these matters."[35] It has been held, generally, by the Attorney General that—"the Commissioner of Indian Affairs and his subordinate, the Indian Agent, have full discretion to remove from the Indian reservation any person not of the tribe of Indians entitled to remain thereon, and can not be interfered with by mandamus or injunction of any court;" and "in so doing the agent may use, by direction of the President, any military force necessary for the purpose."[36]

**Apprehension of persons under Secs. 2150 and 2151, R. S.** The authority and duty of officers of the army under these Sections, and the necessity for observing strictly their terms, are pointedly illustrated by the rulings of the U. S. Circuit Court for the Ninth Circuit in the cases of *In re* Carr[37] and Waters *v.* Campbell,[38] and of the same Court for the Eighth Circuit in U. S. *v.* Crook.[39]

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[31] See the communication of the Secretary of the Interior, published in G. O. 97 of 1877, as to a certain district formerly Indian country but restored to the public domain by the operation of treaties with the Sioux and other tribes.

[32] 95 U. S., 204.

[33] 6 Opins. At. Gen., 665; 16 Id., 268, 451; 15 Id., 601; 19 Id., 511; G. O. 72 of 1870; Do. 16 of 1880; Do. 83 of 1884; DIGEST, 163. Where trespassers have intruded in a body, especially when their intrusion is concerted or organized, formal notice to them to quit is sometimes given before resorting to military force. See, in this connection, the two recent proclamations of the President, of April 17 and Aug. 7, 1885.

[34] 14 Opins. At. Gen., 453.

[35] U. S. *v.* Sturgeon, 6 Sawyer, 30.

[36] 20 Opins., 245, 247.

[37] 3 Sawyer, 316.

[38] 5 Sawyer, 17. And see Barclay *v.* Goodale, 3 Id., 318.

[39] *Ex rel.* Standing Bear and twenty-five others, 5 Dillon, 453.

In the two former of these cases, it was held, in regard to the action
1360 of such officers under Sec. 2151—(1) that as the officer, in making the arrests authorized, acts in a *civil* capacity, his proceeding should be justified by affidavit or affidavits, (made by himself or other person or persons,) in accordance with the provision of Art. IV of the Amendments of the Constitution, which declares that "no warrants shall issue but upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the person or things to be seized;" (2) that the officer is in no event empowered to detain a person arrested longer than five days before commencing to remove him to the custody of the civil authorities, and that, if he has no means of removing or commencing to remove his prisoner within that period, he must discharge him; (3) that during the five days, or during the process of removal, he can confine or restrain the prisoner only so far as may be necessary to his safe-keeping and cannot put him to labor or subject him to military discipline. In the case of *In re* Carr, a proceeding upon *habeas corpus*, the prisoner was held entitled to be discharged from the custody of the officer because he had been held more than five days—in fact "nearly ninety days"—before an attempt was made to remove him. In Waters *v.* Campbell, an action for false imprisonment, the officer was held liable in $2000 damages, for the reason that, in the absence of facilities for removing his prisoner, he had detained him fifty-six days before removal, and, in detaining him, had required him to do "fatigue duty" of the same character as that performed by the soldiers at the post. The court held that while the party, for the purposes of custody, could legally be placed in the guard-house, he "ought not, being a non-military person—a citizen merely under arrest upon the charge of having committed a non-military crime—to have been compelled to work during his confinement or to perform any duty unless it was to take care of his person."

In the case of U. S. *v.* Crook,—a proceeding instituted for the release on *habeas corpus* of certain Ponca Indians, apprehended by the military under Sec. 2150,—the provision of this Section, requiring the removal of apprehended persons "by the nearest convenient and safe route to the civil authorities of the judicial district, &c., to be proceeded against in due course of law," was ably interpreted by Dillon J. These Indians had left without authority the Indian Territory in which they had been placed, and betaken themselves to the
1361 Omaha Indian Reservation. It was held that, upon their apprehension by the military under Sec. 2150, they "should have been brought to Omaha and turned over to the U. S. Marshal and Attorney," and that, as this course was not pursued, but it was attempted to remove them back to the Indian Territory against their consent, they were entitled to be discharged from military custody as illegally restrained of their liberty.[40]

[40] To quote from the opinion of the court:—When troops are employed under Sec. 2150, "they must exercise the authority in the manner provided by the section. * * * The duty of the military authorities is here very clearly and sharply defined, and no one can be justified in departing therefrom, especially in time of peace. * * * In time of peace no authority civil or military exists for transporting Indians from one section of the country to another without the consent of the Indians, nor to confine them to any public reservation against their will; and where officers of the government attempt to do this, and arrest and hold Indians who are at peace with the government, for the purpose of removing them to and confining them on a reservation in the Indian Territory, they will be released on *habeas corpus*." The Court add, (p. 467 [?],)—"In what Gen. Crook has done in the premises, no fault can be imputed to him. He was simply obeying the orders of his superior officers." And see the further reference to Gen. Crook's position in the case, on page 454 [?].

**Seizures of Property under Sec. 2150, R. S.** When the military are employed under this section to make seizures of property for a violation of a provision of Title XXVIII, Rev. Sts., or other statute, or of a treaty, the fact of the seizure made should be forthwith reported to the U. S. District Attorney, and, as soon thereafter as is reasonably practicable, the property should be "placed in the custody of the proper civil officer," (as U. S. Marshal or officer of the customs,) *not* held by the military to abide official adjudication.[42] That the military could not properly retain the property is illustrated by the Attorney General, as follows:—"The residence of the military forces is constantly liable to change, and that change may be sudden and to distant points, outside of the jurisdiction of the court where the rightfulness of the seizure is required by law to be determined. The property seized or its proceeds, from the nature of the proceeding, must be so secured as to be constantly subject to the direct commands, orders, and decrees of the proper court, and in such hands that a failure to obey such orders or decrees can be directly
1362 and immediately punished by the court. Were the custody of the property left in the hands of the military forces, the danger of misunderstanding and collision between the civil and military authorities would be incurred. The possibility that the property might suddenly be carried beyond the jurisdiction of the court would be involved."[43]

**(3) RELATIONS OF THE MILITARY TO INDIAN AGENTS.** The military, as employed in the Indian country, under the special orders or general instructions of the President, are employed in great part as a force *auxiliary* to the Indian Agents, detachments of the army being frequently stationed upon or near Indian reservations in order to render to such Agents the needful cooperation and assistance when required and legally authorized to be rendered. They should "act in harmony" with such Agents and the officers of the Interior Department, and be careful not to interfere in any manner with the details of the administration of the Indian Bureau.[44] Where, in compliance with their orders or instructions, they make arrests or seizures under the statutes above specified, or act—as in general they may—as a reserve police for the protection of public property or the keeping of order on a reservation, they will often and properly do so at the instance of an Agent who has first become apprized of the occasion for action; the commanding officer, unless specially ordered, not usually taking the initiative where there is an Agent present.[45] It need hardly be added that the military cannot legally be employed in aid of the authority of an Indian Agent, where such employment would be within the prohibition of the Act of 1878 above considered.

**(4) SPECIAL AUTHORITY OF OFFICERS OF THE ARMY WHEN ACTING AS INDIAN AGENTS.** It was provided by a statute of 1834, incorporated in Sec. 2062, Rev. Sts., that "The President may require any
1363 military officer of the United States to execute the duties of an Indian Agent;"[46] and it was held by the Attorney General that under this Section, considered in connection with Sec. 1224, Rev. Sts., the President might, in his discretion, "assign a military officer to execute the duties of Indian

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[42] 18 Opins. At. Gen., 544.

[43] Id., p. 546–7.

[44] G. O. 2, Div. of the Missouri, 1891. And see, in general, as to "the action of troops operating in the Indian country," the valuable Circular, No. 2, Dept. of the Mo., 1889. (Gen. Merritt.)

[45] See G. O. 20, Div. of the Pacific, 1870; Circ., Dept. of the Mo., May 22, 1876; also 15 Opins. At. Gen., 601.

[46] That this agency is a *civil office*—Sec. 2662 in effect ingrafting an exception upon the provision of Sec. 1222, prohibiting the holding of civil office by officers on the active list of the army—see 14 Opins. At. Gen., 573.

Agent, if this could be done without separating the officer from his company, regiment, or corps, or otherwise interfering with the performance of his military duties." But it was further held that, (under Sec. 2059, Rev. Sts.,) the President might transfer an Indian agency "to the vicinity of a military post should it be contemplated to require a military officer to perform the duties of agent."[46]

By more recent legislation on this subject, the Act of July 13, 1894, c. 164, it is declared—"That from and after the passage of this Act, the President shall detail officers of the army to act as Indian Agents at all Agencies where vacancies from any cause may hereafter occur, who, while acting as such Agents, shall be under the orders and direction of the Secretary of the Interior,—except at agencies where, in the opinion of the President, the public service would be better promoted by the appointment of a civilian." Under this statute an army officer now detailed as an Indian Agent will be, *as such*, exclusively under the direction of the Interior Department and Indian Office, and will be governed by the laws pertaining to Indian Agents in general,[47] and by the regulations issued under Sec. 2058, Rev. Sts.[48] His principal duties will be to maintain the efficiency of the police and keep the peace at his Agency, to promote the administration of justice through the tribal courts, to prevent any illegal intercourse or trade with the Indians, especially the trade in spirituous liquors, to prevent depredations, such as the cutting or removal of timber, hay, &c., on the Reservation, to remove therefrom trespassers and all unauthorized persons, to maintain existing treaties[49] and agreements with the tribe or tribes under his charge, to induce the Indians to engage in useful labor, and generally to watch over their interests and promote their welfare as wards of the nation.[50] If a military force is placed under his command, he will be, as to such force, under the orders of his military superiors, and in its disposition will be governed by the laws already considered relating to the employment of the army for civil purposes. He will perform his duties with regard to individuals of a tribe as well as toward the tribe as a whole,[51] and will be careful not to overstep the limits of his jurisdiction.[52] Where he gives bond for the faithful discharge of his office,[53] he will not in general be held responsible for the negligence of subordinates unless he could have prevented the same by reasonable diligence.[54] As a disbursing officer he and his sureties will be held liable for public money paid to an employee not authorized to be employed by him;[55] but in an action on his bond for a failure to account for property alleged to have come into his hands, the government, where it has lost nothing by such failure, can recover nominal damages only.[56]

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**Jurisdiction of criminals.** An officer of the army serving as Indian Agent may sometimes be called upon to take action, under Sec. 2139, 2150, or 2152, Rev.

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[46] 15 Opins., 405.

[47] The Act of May 17, 1882, requires the Commissioner of Indian Affairs to furnish Indian Agents with printed copies of all the Statutes relating to their duties.

[48] Published in the volume entitled "Regulations of the Indian Office," revised to March 12, 1894.

[49] Such treaties are to be liberally interpreted. The Kansas Indians, Wallace, 737.

[50] See U. S. *v.* Hurshman, 53 Fed., 543, cited *post*.

[51] U. S. *v.* Earl, 17 Fed., 95.

[52] See La Chapelle *v.* Bubb, 62 Fed., 545.

[53] For form of Agent's bond, see the above Regulations, p. 233. Its condition is that he shall carefully discharge the duties of his office, and faithfully disburse all public moneys and account for all public funds and property coming into his hands or placed in his charge.

[54] U. S. *v.* Young, 44 Fed., 168.

[55] U. S. *v.* Sinnott, 26 Fed., 84.

[56] U. S. *v.* Young, *ante*.

Sts., or other provision, with reference to the apprehension or disposition of persons charged with homicide or other crime or offence, committed upon an Indian reservation. The existing law, Act of March 3, 1885,[57] (on the subject of the jurisdiction of crimes, &c., committed by Indians,) provided that in a case of the commission by an Indian within a Territory of the offence of
1365 murder, manslaughter, rape, assault with intent to kill, arson, burglary or larceny, the Territorial court shall have jurisdiction; and in a case of the commission of such an offence by an Indian within an Indian reservation in a State, the jurisdiction shall be in a court of the United States. This leaves the jurisdiction of such crimes when committed in a State, but not on a reservation, to the State courts.

As to other offences not specified in this Act, (as robbery, mayhem, and assault and battery,) the jurisdiction would remain as under the pre-existing law.[58] If the crime was committed in a Territory, the jurisdiction would be in a U. S. court, unless the United States had surrendered the jurisdiction to the tribe; if in a State, it would be in a State court, unless the crime was committed on a reservation exclusive jurisdiction over which had been retained by the United States or ceded to the tribe under treaty.[59] In cases of crimes committed by *whites* in the Indian country, the jurisdiction, under Sec. 2145 and 2146, Rev. Sts., would be in the U. S. courts unless otherwise provided by statute or treaty.[60]

In an instance of any of the above offences, committed by a person under his charge or control, it will be the duty of the officer acting as Agent to coöperate with the Territorial sheriff or U. S. marshal in securing the arrest of the offender. In the event of an assault, or of a killing, committed against the Agent himself, (or against an Indian policeman, or an Indian deputy marshal, *posse comitatus*, or guard,) or in case of his or their being obstructed in the execution of duty by threats or violence on the part of an Indian, the U. S. District Court, "exercising criminal jurisdiction where the offence was committed," is invested with jurisdiction of the case, by the Act of June 9, 1888—a statute affording material protection to an Indian Agent. In a case of an offense of this class committed against any one of the persons
1366 above mentioned other than himself, it would also properly devolve upon the Agent to assist in securing the apprehension of the offender with a view to his trial and punishment.

As to the function of an Indian Agent in contributing to the administration of justice through the *tribal courts*, or "Courts of Indian Offences," reference will properly be made to the "Regulations of the Indian Office, 1894," which are full and explicit on this subject.

**Introducing intoxicating liquor into the Indian country.** Sec. 2139, Rev. Sts., forbidding and making punishable the introduction of "ardent spirits" into the Indian country, and the selling, &c., to Indians, of "any spirituous liquors or wine," has been amended by the Act of July 23, 1892, c. 234, which adds "ale" and "beer" to the liquors prohibited, specifies the procedure to

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[57] Held constitutional in U. S. *v.* Kagama, 118 U. S., 375. And see Gon-shay-ee, Petitioner, 130 U. S., 343. See this Act as published in G. O. 38 of 1886, with revocatic a regulation in conflict therewith.

[58] See Sec. 2146, Rev. Sts.

[59] See U. S. *v.* Rogers, 4 Howard, 567: *Ex parte* Crow Dog, 109 U. S., 556; U. S. *v.* Yellow Sun, 1 Dillon, 271; *Ex parte* Reynolds, 5 Dillon 394; U. S. *v.* Sa-coo-da-cot, 1 Abb., 377; State *v.* Doxtater, 47 Wis., 278; U. S. *v.* Shanks, 15 Minn., 369; Rubideaux *v.* Vallie, 12 Kans., 28; 17 Opins. At. Gen., 460; 18 Id., 138.

[60] U. S. *v.* Rogers, *ante;* U. S. *v.* Bridleman, 7 Sawyer, 243. As to the jurisdiction of crimes committed in the Indian Territory and the Territory of Oklahoma, see "Regulations of the Indian Office" § 578, 579.

be pursued in cases of arrests of offenders, and provides that persons arrested "shall, unless discharged upon examination, be held to answer and stand trial before the court of the United States having jurisdiction of the offence." A previous enactment of July 4, 1884, c. 180, had provided that nothing in Sec. 2139, or in Sec. 2140, should be a bar to the prosecution of any officer, soldier, employee, &c., of the army, who should "barter, donate, or furnish in any manner whatsoever, liquors, wines, beer, or any intoxicating beverage whatsoever to any Indian." That is to say, the fact that a person is connected with the army does not dispense with his being specifically *licensed*, to authorize his introducing or furnishing liquor as above.

This authority must proceed from the Secretary of War. No military commander or officer is empowered to license a trader or other person to traffic with the Indians.[61] In the recent case of United States *v.* Hurshman,[62] it was held to be indictable, under Sec. 2139, to sell liquor to an Indian of the Nez Perces tribe, although he was at the time an enlisted soldier. It was conceded by the court that "consistently with the maintenance of military discipline, there can be no control by officers of the Department of the Interior of soldiers while on duty or during their terms of enlistment. But"—it is added—

"when an Indian enlists in the military service, the officers of Indian
1367 affairs are only partially relieved of their charge concerning him, and but temporarily deprived of power to control his person. While he is in the army, said officers continue to be charged with the duty of caring for his family and property and interests as a member of his tribe, and upon his discharge from the army their right to control him will be fully restored. * * * Neither the Indians themselves, the officers of the army, who induce them to enlist, or officers of the Interior Department who consent to it, have any power to change the laws; and no act of either, affecting for the time being the actual situation of an Indian, can change his status from that of a ward of the nation."

Under the existing law on the present subject—Sec. 2139, Rev. Sts., as above amended—the jurisdiction of offences is exclusively in the U. S. courts. And this jurisdiction, it has been held, is not affected, although the liquor is furnished to the Indian outside of any reservation and within the territory of a State.[63]

**(5) EXCEPTIONAL CASES OF OFFICERS IN CHARGE OF INDIANS.** Where an officer of the army—not as an Indian agent but in his military capacity—is placed in charge of captured or surrendered Indians held upon a reservation as *prisoners of war*, he exercises an exceptional authority not strictly within the scope of the general statute law above considered. This authority is a modified form of military government under the laws of war, and is, strictly, without limitation except in so far as it may be restricted by those laws or the orders of military superiors. In his government, however, the officer will properly not resort to the summary proceedings peculiar to a war status except in extreme cases, and where a difficulty can be disposed of under the existing statute law applicable to reservation Indians, he will dispose of it accordingly rather than by a resort to the discipline of camps. The discipline which he will exercise will in general consist in preserving peace

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[61] 16 Opins. At. Gen., 403.

[62] 53 Fed., 543. (November, 1892.)

[63] U. S. *v.* Holliday, 3 Wallace, 307; U. S. *v.* Shaw-mux, 2 Sawyer, 364; U. S. *v.* Burdick, 1 Dak., 142. "No State can by either its constitution or other legislation withdraw the Indians within its limits from the operation of the laws of Congress regulating trade with them." U. S. *v.* Holliday.

and good order, in bringing offenders to trial and punishment by their own tribunals or the proper civil court, in preventing Indians from leaving the
1368 reservation without authority, in enforcing such health regulations as circumstances may require, and in seeing that the provision made by Congress for the care and maintenance of the Indians is efficiently and equitably executed.[64]

**(6) RELATION IN GENERAL OF THE MILITARY TOWARD PEACEABLE INDIANS.** It remains to remark that the relations of the military with the friendly Indians should be distinguished by a particular and scrupulous justice, humanity and discretion, for the reason that the former specially represent to the latter the power of the United States. For an officer or soldier to fail in his duty toward such Indians is a peculiarly serious offence, since it materially compromises the government and sensibly impairs its authority over this class of its subjects, and moreover tends to induce them to lapse into hostility. In a case, in the Department of the Columbia,[65] of an aggravated injury inflicted by a soldier upon an Indian, the offence was characterized by the Department Commander, (Gen. Canby,) as a graver one than if committed by a civilian, because—as it was expressed—"the Army has been made, under the direction of the President, an important agent in the execution of the laws regulating intercourse with the Indian tribes, and such acts by soldiers are not only violations of the statute but gross breaches of discipline and of trust."

### 5. For the Removal of Intruders from Military Reservations.[66]

The enactment of 1878 above cited restricted the employment of the military "*for the purpose of executing the laws*," but not otherwise. It did not therefore affect the general authority of the President *as Commander-in-chief* to use the army for the removal of trespassers and intruders from the military reservations or posts under his command, this not being properly an execution of a law, but a form of conservating and protecting the public property in his
1369 charge and exercising an ordinary and reasonable *police power* over the same. The authority of the President to employ the military forces for this purpose exists as fully as does the authority, expressly—as we have seen—conferred by *statute* for the removal of intruders from the Indian lands or country. Its existence and exercise from an early period have been repeatedly recognized and sanctioned in legal opinions and General Orders.[67]

Such authority extends to the expulsion of squatters or other trespassers entering upon and occupying the land, whether or not under a claim of title, as well as of all persons coming within the reservation for illegal traffic or other unauthorized and improper purpose, to the prejudice of military discipline or the detriment of the public interests. In removing the person his property may be removed with him. But no unnecessary force should be employed in the process, nor should the use of force be continued after the removal has been effectually accomplished.[68] And where convenient and practicable, a reason-

[64] See Memo. of Agreement between the Secretary of War and the Secretary of the Interior as to the Apache Indians on the San Carlos Reservation, dated July 7, 1883.

[65] G. O. 10, Dept. of the Columbia, 1871.

[66] As to what is a *military reservation*, and as to the power of the President to reserve lands for military purposes, see DIGEST, 510–12, and note authorities there cited.

[67] 1 Opins. At. Gen., 164, 471, 475, 703; 2 Id., 574; 3 Id., 268, 566; 4 Id., 407, 489; 7 Id., 534; 9 Id., 106, 476, 521; 10 Id., 70, 184; G. O. 62, 74, of 1869; Do. 26 of 1883; Do. 216, Fifth Mil. Dist., 1869. And see Army Regs., par. 138.

[68] "Due caution should be observed, however, that, in executing this duty, there be no unnecessary or wanton harm done to persons or property." 9 Opins. At. Gen., 476.

able notice to quit, and remove property if any, will properly be given before force is resorted to.[69]

This duty of conservation and police is one devolving upon the U. S. military. The peace officers of an adjoining town or district are not empowered, in the absence of the authority of U. S. statute, to enter upon a military reservation and arrest intruders. Such authority is believed to have been given in but a single instance, that of the Act of Congress of June 4, 1888, c. 342, which provides that "whenever called upon by the proper military authorities, the City of San Francisco shall be permitted to send any part of its police force to
1370 arrest trespassers, intruders, and disorderly persons upon" the Reservation of the Presidio of San Francisco.

**ATTITUDE OF THE MILITARY TOWARD THE CIVIL COMMUNITY WHEN NOT AUTHORIZED TO BE EMPLOYED AS HERETOFORE INDICATED.** Except as and when employed and ordered under the statutes and authority above specified, the U. S. military are not empowered to intervene or act *as such* on any occasion of violation of local law or civil disorder, or in the arrest of civil criminals. While officers or soldiers of the army may individually, in their capacity of citizens, use force to prevent a breach of the peace or the commission of a crime in their presence,[70] they cannot, (except as above,) legally take part, in their military capacity, in the administration of civil justice or law. Their attitude, therefore, toward the civil community and the civil authorities, at a period of riot or lawless disturbance should in general be a strictly neutral one: whatever the temptation or occasion, they should remain simply passive until required by the President, through their immediate commanders, to act. A zealous officer is sometimes induced, especially when serving on a western frontier, to intervene at least for the arrest of a criminal whom the civil authorities are apparently powerless to reach, and who, in the absence of any interposition on the part of the military, will probably escape legal punishment. Such intervention, however, will in general be unauthorized by law, and subject the officer and the members concerned of his command to actions for false arrest and imprisonment.[71]

## II. LIABILITY OF THE MILITARY TO CIVIL SUIT OR PROSECUTION.

**GENERAL PRINCIPLES OF AMENABILITY—Subordination of military to civil.** It is not unfrequently enunciated as a general principle that the military authority is subordinate to the civil.[72] This, however, is not
1371 to be understood as implying that the military state *as such* is not fully governed by its own code, or that the army, in time and on the theatre of war, is liable to be controlled by other than military orders. What is chiefly meant by the proposition is that officers and soldiers of the army do not become

[69] As to the authority of the Secretary of War to grant to a civilian a revocable *license* to enter upon and occupy the soil of a military reservation, in contradistinction to a usufructuary interest in the land as property, (which can be granted only by the authority of Congress,) the student is referred to the Title—"Public Property," in the DIGEST, pp. 623–633, where the general subject will be found to be fully illustrated. And see 19 Opins. At. Gen., 628; Cir. No. 12, (H. A.,) 1891.

[70] Burdett *v.* Abbott, 4 Taunt., 449; Simmons § 1097–1100. And see *ante*, Ch. XXV—"Twenty-Fourth Article."

[71] See DIGEST, 164.

[72] Dow *v.* Johnson, 100 U. S., 169; San Francisco Sav. Union *v.* Irwin, 28 Fed., 708, (citing U. S. *v.* Lee, 106 U. S., 196;) *Ex parte* McRoberts, 16 Iowa, 601; Rawle on the Const., 161; Halleck, Int. Law, 303; 6 Opins. At. Gen., 415, 417, 451; Tytler, 153; Willes, C. J., in Frye *v.* Ogle, 1 McArthur, 344; Clode, M. L., 144–5; O'Brien, 26–28; DIGEST, 50. And compare the declarations of the Continental Congress on this subject, in 2 Jour., 68, 232, 572; 3 Id., 77, 211, 243, as cited under the "Fifty-Ninth Article," ch. XXV

relieved of their civil obligations by assuming the military character, but, as citizens or civilian inhabitants of the country, remain liable, equally with other civilians, to the jurisdiction of the civil courts for offences against the local laws, as well as for wrongs done or responsibilities incurred toward individuals.[73] On the other hand, the soldier is equally *entitled*, in a proper case, to the benefit of the civil law—has, as it is expressed by Samuel,[74] "a property" in the same. Thus the military law does not "abrogate, or derogate from" the general law of the land,[75] but is in fact in harmony with it.[76]

**Exemption from arrest.** By Sec. 1237, Rev. Sts.,[77] enlisted men are expressly exempted from arrest on civil process, except for certain debts contracted before enlistment. The statute law does not extend this exemption to officers.[78] The general principle, however, of public policy, that public officers shall not be subject to such arrest when engaged in the performance of their official duties, extends to and protects officers of the army equally with other officials.[79] But neither the statutory exemption nor principle indicated extends to arrest on *criminal* process.[80]

1372 **Double amenability.** That a military person may be amenable both to the military and the civil jurisdiction for the same act, is a further principle which has heretofore been remarked upon with reference especially to conduct of a criminal character. We have seen that where the acts constituting a military offence involve also an offence against the laws of the United States or of the State, the officer or soldier may be brought to trial both by a court-martial for the offence against the Articles of war and by a civil tribunal for the civil crime, the offences not being "same" but distinct; the court which first assumes jurisdiction, by the arrest of the offender or otherwise, being the one to be permitted first to pass upon the case.[81] In the same manner a military person may be liable to a civil suit on account of a trespass, &c., for which he has been tried or may be triable by a court-martial as a breach of military discipline. Thus an officer liable to military trial for an illegal punishment or other unauthorized treatment of a soldier, or for the unauthorized seizure of the property of a citizen, may, either before or after such trial, be sued in damages for the injury or loss to the individual.

**Official and discretionary acts.** It is also a general principle, applicable to officers of the army equally with other public officers, that such officials are not to be made civilly responsible for the consequences of the ordinary and regular discharge of their official duties.[82] Were it otherwise, "no man," as was observed by the court in a leading English case,[83] "would accept office on these terms." It is a further principle, similarly applicable, that where

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[73] "The soldier is still a citizen, and as such is always amenable to the civil authority." State *v.* Sparks, 27 Texas, 632. The fact that a party is an officer in the public service of the United States is not sufficient, as a ground of *comity* or *public policy*, to induce a State court not to entertain a suit against him. Wilson *v.* Mackenzie, 7 Hill, 100.

[74] Page 183.

[75] U. S. *v.* Cashiel, 1 Hughes, 556.

[76] 1 Bishop, C. L. § 46.

[77] The original of this provision was an enactment of March 16, 1802.

[78] McCarthy *v.* Lowther, 3 Kelly, 397; *Ex parte* Harlan, 39 Ala., 565; Moses *v.* Mellett, 3 Strobh., 210.

[79] U. S. *v.* Kirby, 7 Wallace, 483; Coxon *v.* Doland, 2 Daly, 66.

[80] See authorities cited in last note.

[81] On this subject, see authorities cited under "Double Amenability," *ante*, vol. I, ch. VIII.

[82] 5 Opins. At. Gen., 759; Wilkes *v.* Dinaman, 7 Howard, 89; Shackford *v.* Newington, 46 N. H., 415; Barton *v.* Fulton, 40 Pa. St., 157; Fenwick *v.* Gibbs, 2 Desau., 629; Stewart *v.* Southard, 17 Ohio, 402.

[83] Gidley *v.* Ld. Palmerston, 2 Brod. & Bing., 286.

such officers are invested with *discretion* as to the matter of the performing of an official act, they cannot be held to account for such performance in the same manner as if their function were *ministerial* only, but their acts, though mistaken, are in general to be presumed to be authorized and legal.[84]

1373 **FORMS OF CIVIL AMENABILITY.** The above general principles having been adverted to, we proceed to consider the subject of the amenability of military persons to civil suit or prosecution under the following heads—1. Amenability to the United States; 2. Amenability to other military persons; 3. Amenability to civilians.

**1. AMENABILITY TO THE UNITED STATES—Criminal liability.** This is incurred where the party becomes chargeable—(1) either with the commission of a crime of one of the classes known as crimes against the operations of the government, crimes against justice, acts of official misconduct, &c.,[85] made punishable in Title LXX of the Revised Statutes or otherwise; (2) or with the commission of one of the more familiar crimes, such as murder, manslaughter, larceny, arson, &c., similarly made punishable when committed in a place over which the United States has exclusive jurisdiction,[86] or in respect to public property;[87] (3) or with the commission of treason.

1374 **Civil liability.** As a general rule of law, all public officers are liable to the United States for any pecuniary loss to the same which may be incurred by them in the course of the discharge of their public duties.[88] This principle is especially applied in practice to cases of disbursing officers who have become chargeable with deficits of public money or failure to account for public property entrusted to them for a public purpose. Where bonded officers, they may in general be sued either with their bondsmen or separately.

As has been noticed in treating of the Sixtieth Article of War,[89] the laws enacted for the safe-keeping and proper disposition of the public moneys[90] are especially strict and specific, making officers personally liable for amounts lost in their charge, and constituting their acts legal embezzlement when perhaps the loss may have resulted from no fault of their own but from some incident, (such as the failure of a bank in which their funds had been regularly de-

[84] See Kendall *v.* Stokes, 3 Howard, 97; Wilkes *v.* Dinsman, 7 Id., 89; Allen *v.* Blunt, 3 Story, 742; Durand *v.* Hollins, 4 Blatch., 451; Druecker *v.* Salomon, 21 Wis., 621.

Compare here the cases in which it has been held by the Supreme Court that public officers cannot be required, through a writ of mandamus or injunction, to perform acts as to the doing or not doing of which they are invested with an official discretion—*i. e.* acts which are not purely ministerial. Marbury *v.* Madison, 1 Cranch, 137; U. S. *v.* Seaman, 17 Howard, 230; U. S. *v.* Guthrie, Id., 284; Gaines *v.* Thompson, 7 Wallace, 347; The Secretary *v.* McGarrahan, 9 Wallace, 298; Litchfield *v.* The Register & Receiver, Id., 575; Marquez *v.* Frisbie, 101 U. S., 473. And see *Ex parte* Reeside, Brunner, 571; U. S., ex rel. Warden *v.* Chandler, 2 Mackey, 527; U. S. *v.* Whitney, 5 Id., 370; U. S. *v.* Bayard, Id., 428.

[85] Such as counterfeiting, perjury, extortion, accepting bribes, &c.

[86] As by Secs. 5339, 5341, 5345, 5346, 5348, 5356, 5385, Rev. Sts. See, as leading cases of this class of crimes, U. S. *v.* Carr, 1 Woods, 484, a case of the killing by a soldier of another soldier at Fort Pulaski, in 1872; U. S. *v.* Travers, 2 Wheeler, Cr. C., 490, a case of a killing of one marine by another at the Charlestown Navy Yard, in 1814; U. S. *v.* Cornell, 2 Mason, 91, a case of the killing by a soldier of another soldier at Fort Wolcott, Newport, in 1810; also U. S. *v.* Clark, 31 Fed., 710, and U. S. *v.* King, 34 Fed., 302, similar cases at Fort Wayne and Fort Hamilton, respectively—all considered, as to the matter of their justification and defence, in vol. I, ch. XVII, "Requirements of Military Discipline." And see the similar case of Kelly *v.* U. S., 27 Fed., 616; State *v.* Kelly, 76 Me., 331.

[87] See Secs. 5439, 5456, 5488, 5490, 5491, 5492, 5495, 5496, Rev. Sts., and Act of March 3, 1875, making punishable embezzlement, larceny, &c., of public funds or other property.

[88] Cooley, Prins. of Const. Law, 123.

[89] *Ante*, Ch. XXV.

[90] See Ch. Six of Title LXX, Rev. Sts.

posited,) which could not have been foreseen or guarded against.[92] But by legislation of 1866, (Sec. 1059, Rev. Sts.,) the Court of Claims was empowered by Congress to hear and determine claims of disbursing officers for "relief from responsibility, on account of capture or otherwise," for public funds while in their charge; and under this provision that Court has allowed claims of disbursing officers to be credited with amounts of funds taken from them by robbery or theft without fault or negligence on their part,[93] as also with funds lost by the failure of a bank,[93] and by fire.[94] In cases not coming within this provision disbursing officers will have in general no other recourse except to apply to Congress for a special act for their relief.

Whether an officer can be made personally responsible for losses of public money incurred by his *subordinates* will depend upon the official relation which, under the existing law, they bear to him or to the United States. If
1375 they are his own appointees or employees, or merely clerks, &c., acting as his assistants, he will in general legally be liable for their deficits: if they are, equally with himself, distinctive officers of the United States, appointed or commissioned by a common superior, the mere fact that they may exercise their functions under his direction will not, (in the absence of any law or regulation to the contrary,) render him pecuniarily responsible for their shortcomings, but they will themselves, on their bonds or otherwise, be personally holden for their respective losses.[95]

The civil liability of an officer to the United States for public funds may sometimes be conveniently enforced by way of a counter-claim or offset interposed on the part of the government in a case in which he has himself instituted suit in the Court of Claims for moneys claimed to be due him as pay, allowances, &c. Marked cases of such counter-claims adjudged against officers of the army are to be found in the recent decisions of that court.[96]

**2. AMENABILITY TO OTHER MILITARY PERSONS**—For acts as members of courts-martial. It is a general principle of law that a judicial officer cannot be made liable in an action for damages for any judgment, however erroneous, that he may have rendered, provided he had jurisdiction of the case.[97] So, while the members of a court-martial may be made thus liable to an officer or soldier tried thereby, where the court was without jurisdiction, or its proceedings or sentence were otherwise unauthorized and illegal,[98]—for error merely in their rulings or judgment they are not subject to a civil action.[99] Where indeed the judgment of the court is clearly shown to have been actuated by *malice*—as by personal hostility or injurious prejudice—a member or members implicated may be held liable in damages though the court had juris-
1376 diction of the case; but this would be a rare condition. Suits against members of courts-martial have not been frequent. In the old and

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[92] See U. S. *v.* Freeman, 1 W. & M., 45.

[93] Scott *v.* U. S., 18 Ct. Cl., 1; Broadhead *v.* U. S., 19 Id., 125; Wood *v.* U. S., 25 Id., 98.

[94] Hobbs *v.* U. S., 17 Ct. Cl., 189.

[94] Hoyle *v.* U. S., 21 Ct. Cl., 300.

[95] Compare 14 Opins. At. Gen., 268, 474, 485, as to the liabilities to the United States, for public moneys disbursed, &c., of the Commissioner of the Freedmen's Bureau and his subordinates.

[96] See, for example, Miller *v.* U. S., Montgomery *v.* U. S., and Runkle *v.* U. S., 19 Ct. Cl., 338, 370, 396.

[97] Druecker *v.* Saimon, 21 Wis., 621. And see Milligan *v.* Hovey, 3 Bissell, 13; Tyler *v.* Pomeroy, 8 Allen, 484.

[98] Thus, to cite an extreme case, if an accused dies under the infliction of an illegal sentence, the members of the court will be "liable to be hanged." Warden *v.* Bailey, 4 Taunt., 77.

[99] See Vanderheyden *v.* Young, 11 Johns., 150.

often-cited English case of Frye *v.* Ogle,—a suit by a naval officer against the president of a naval court-martial by which he had been tried,—the plaintiff recovered £1,000 damages, the court being adjudged to have exceeded and abused its authority in a most arbitrary manner.[100] In the later case, however, of Mann *v.* Owen,[1] in which an officer of the British army sued the president of a court-martial, (which had sentenced him to be dismissed,) on the ground that it had no jurisdiction,—having tried him, under the Article corresponding to our present Art. 62, for an act which he claimed was not within the purview of such Article,[2]—the civil court held otherwise and gave judgment for the defendant. In the case of Jekyll *v.* Moore,[3] the officer who preferred the charges sued the president of the court-martial by which they were tried, the ground of action being that the court, in "fully and honorably" acquitting the accused, had reflected upon the charges as "malicious." But this was held by the civil court to be *not* an abuse of power on the part of the court-martial, but an exercise of an authority sanctioned by military law, and the action was not sustained. In the further English case of Home *v.* Bentinck,[4] it was held that an alleged injurious statement in the opinion of a court of inquiry furnished no ground for an action of libel, by the officer claiming to be injured, against the president of the court; the opinion, rendered as it was to the proper military superior, being a privileged communication.

In this country, the principle of the liability to damages of the members of a court-martial acting without jurisdiction was recognized in a few early 1377 cases.[5] In the later and more important case of Milligan *v.* Hovey[6] and others where the action was brought by a *civilian* who had been sentenced to death against the members of the military commission which tried him, (and the officers who caused his arrest, &c.,) judgment was given for the plaintiff on the ground that the proceedings of the commission had previously been held void for want of jurisdiction by the U. S. Supreme Court.[7] In view, however, of the fact that the defendants had acted in good faith under the orders of the President and that their proceedings had been approved by him, (evidence of which was admitted in mitigation of damages,) the actual damages awarded by the jury were merely nominal.

It has been noticed by Griffiths[8] that the fact that the court, in taking the action which has given rise to the suit, consulted and proceeded upon the opinion of its judge advocate, cannot affect the question of its legal liability. This is true; the fact, however, is one which a court would be entitled to have considered as showing good faith, upon the question of the *quantum* of damages.

**For executing an illegal sentence of a military court.** That an officer who executes the sentence of a military tribunal which was without jurisdiction, or whose proceedings or judgment were otherwise illegal so that the sentence is invalidated, is a trespasser, and liable to an action for damages on the

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[100] McArthur, 229, 344; Tulloch, 92; Franklyn, 26. In Moore *v.* Bastard, 4 Taunt., 70, the officer recovered £300 in a suit against the president of his court-martial for an illegal and arbitrary assumption of authority. [At the date of this case and that of Frye *v.* Ogle, courts-martial or their presidents exercised some of the powers now exercised by commanding officers.]

[1] 9 Barn. & Cres., 595.

[2] See the reference to this case under the "Sixty-Second Article" in Ch. XXV.

[3] Bos. & Pull., (N. R.) 341.

[4] 2 Brod. & Bing., 130.

[5] See Shoemaker *v.* Nesbit, 2 Rawle, 201; Duffield *v.* Smith, 3 S. & R., 590.

[6] 3 Bissell, 13.

[7] In *Ex parte* Milligan, 4 Wallace, 2.

[8] Page 42. And see O'Brien, 222, 223.

part of the person sentenced, has been asserted by the courts in several cases. Suits of this kind, however, have been rare. To render the officer liable it is not indeed necessary that he should have acted with any personal *animus* against the accused. But in the absence of such *animus*, and where it appears that the defendant, though acting illegally, simply discharged what he believed to be an official duty, "vindictive" damages will not be awarded.[10]

1378 For wrongs and injuries in general. Actions have not unfrequently been instituted, (more frequently, however, in England than in this country,) by officers or soldiers against superior officers for wrongs alleged to have been done them by such acts as—unauthorized arrest and imprisonment, malicious prosecution before a military court, preferring of false charges, libel in an official report, and illegal punishment or unjustifiable violence.

In cases of alleged *unauthorized arrest and confinement*, the civil courts have in general refused to afford relief except where the act was absolutely illegal,[11] or where absence of probable cause, (in making the arrest, initiating the proceeding, &c.,) and the existence of malice, on the part of the defendant, have been established by the evidence.[12] Where the plaintiff has failed to show these elements, the case has been regarded as one of purely military right or liability, which could properly be disposed of only by a court-martial, and the civil action has not been sustained. As remarked by the court in Dawkins *v.* Ld. Rokeby,[13] "cases involving questions of military discipline and military duty alone are cognizable only by a military tribunal, and not by a court of law." Or, as it is more briefly expressed in another report of the same case,[14] "military matters between military men are for military tribunals to determine." Civil courts indeed have always evinced a disinclination to enter upon controversies of this nature.[15]

1379 In cases of this class arising in time of *war* stricter proof of absence of probable cause or malice will in general be required than in cases occurring in time of peace.[16]

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[9] Wise *v.* Withers, 3 Cranch, 331; Dynes *v.* Hoover, 20 Howard, 65; Fisher *v.* McGirr, 1 Gray, 45; Bell *v.* Tooley, 11 Ire., 605; White *v.* McBride, 4 Bibb, 62; Hutton *v.* Blaine, 2 S. & R., 78.

[10] See Milligan *v.* Hovey, 3 Bissell, 13.

[11] As an instance of an officer without merits recovering damages because of an illegality in the mere form of his imprisonment, see Lieut. Allen's Cases. Simmons § 752, 780. The fact, however, that he was without merits, having been duly convicted of crime, was held materially to affect his claim to damages. Id.

[12] Sutton *v.* Johnstone, 1 Term, 493; Freer *v.* Marshall, 4 Fost. & Fin., 485; Keighly *v.* Bell, Id., 763; Dawkins *v.* Ld. Rokeby, Id., 806; Boughton *v.* Jackson, 18 Q. B., 378; Lieut. Blake's Case, 2 M. & S., 428. The most essential point to establish is the absence of probably cause, since from this the element of malice may generally be implied. Sutton *v.* Johnstone.

[13] 8 Law Rep. 271.

[14] 4 Fost. & Fin., 837. And to a similar effect, see Keighly *v.* Bell, Id., 736; Freer *v.* Marshall, Id., 485; In the matter of Poe, 5 B. & Ad., 681; *In re* Mansergh, 1 B. & S., 400; Dawkins *v.* Paulet, 5 L. R., 94.

[15] "I cannot help observing upon the extreme impropriety of this court, a civil court, unacquainted with military matters, coming to a conclusion upon matters which military men know best." Willes J. in Dawkins *v.* Rokeby. And see other cases cited in last note; also Tyler *v.* Pomeroy, 8 Allen, 484. In the recent case of Holbrow *v.* Cotton, 9 Quebec L. R., 105, (an action of slander brought by a militia soldier against his commanding officer for charging him with stealing an article of military property,) the court say: "All matters of complaint of a purely military character are to be confined to the military authorities. Military discipline and military duty are cognizable only by a military tribunal, and not by a court of law."

[16] Warden *v.* Bailey, 4 Taunt., 66; Sutton *v.* Johnstone, 1 Term, 493. And see Tyler *v.* Pomeroy, 8 Allen, 484.

Malice may sometimes be inferable from a *protracted arrest*. In certain cases, however, of this class in which the ground of action was an arrest and confinement for an *unreasonable period* (several months) without trial, judgment was given for defendant where it appeared that the act was not "wanton or oppressive;"—as where the defendant had himself no power to convene a court;[17] or where the delay was caused by the absence of witnesses or an exigency of the service.[18] So, the defendant was held not liable where a delay of two months to discharge a prisoner, after he had been acquitted, was occasioned by the failure of a superior to take final action upon the proceedings.[19] In other cases, however, where *malice* clearly appeared, the plaintiff recovered damages for an unreasonably protracted arrest without trial. Thus in Hannaford *v.* Hun,[20] where the plaintiff, when finally tried by court-martial, received only a reprimand, he recovered £300 damages. In Wall *v.* Macnamara,[21] a case of aggravated treatment under a protracted confinement, indicating a specially evil *animus*, the plaintiff was awarded £1,000.

As to the act of *preferring false and malicious charges*, or engaging in a malicious prosecution,—this, in Cobbett's case, was held to constitute a valid cause of action.[22] But charges against an officer or soldier, made to a
1380 superior, not maliciously and causelessly but in good faith and the discharge of an official duty, are *privileged communications*, for which the preferring officer cannot be held legally amenable though the charges themselves be not finally sustained. It is not enough that they are not true; they must be wilfully untrue.[23]

So, a *complaint* against an officer, addressed to a competent superior, for the purpose of obtaining proper redress for a wrong done, constitutes no ground for a civil action. Thus where a creditor of an army officer made an application to the Secretary of War, with the view of enlisting his influence toward requiring the officer to pay his just debts, and stated therein facts derogatory to the officer, not however for the purpose of slandering him but of securing reparation, such complaint was held to be, not a libel, but a privileged communication.[24]

So of any *official report* made by an inferior to a superior officer, in which the acts of a third are injuriously reflected upon:—such a report, when made in good faith and in the execution of a duty, is held to be a *privileged communication* and one upon which an action for damages cannot be based.[25] On the other hand, in a case[26] where a statement in regard to the misconduct

[17] Keighly *v.* Bell, 4 Fost. & Fin., 763.

[18] Lieut. Blake's Case, 2 M. & S., 428.

[19] See Warden *v.* Bailey, 4 M. & S., 400. The mere fact that the party was *acquitted* does not establish that the prosecution was without probable cause.

[20] 2 C. & P., 148.

[21] 1 Term, 536. And see Swinton *v.* Molloy, Id.

[22] Proceedings upon charges by Wm. Cobbett against Capt. Powell and other officers of the 54th Foot—Opinion of Law Officers, London, 1809.

[23] Dickson *v.* Earl of Wilton, 1 Fost. & Fin., 419; Dickson *v.* Combermere, 3 Id., 527; Keighly *v.* Bell, 4 Id., 763; Mitchell *v.* Kerr, Rowe, 537. And see G. C. M. O. 19 of 1886.

[24] Fairman *v.* Ives, 5 Barn. & Ald., 642; Rex *v.* Bayley, Bac. Abr., "Libel," A., 2.

[25] Dawkins *v.* Ld. Paulet, 9 B. & S., 768, 5 Q. B., 94. And see Home *v.* Ld. Bentinck, 2 Brod. & Bing., 130; Oliver *v.* Ld. Bentinck, 3 Taunt., 456; Beatson *v.* Skene, 5 Hurl. & Norm., 837; Gardner *v.* Anderson, 22 Int. Rev. Rec., 41; 11 Opins. At. Gen., 142; 15 Id., 378; 415. It is scarcely necessary to add that, as held in the English cases, all *evidence* given before a court-martial or court of inquiry is "absolutely privileged." Dawkins *v.* Ld. Rokeby, 8 Q. B., 55; Same *v.* Prince Edward of Saxe Weimar, 1 Q. B. D., 499.

[26] Harwood *v.* Green, 3 C. & P., 141—£50 damages awarded.

and incapacity of a master of a transport ship was made by an officer of the navy, not by a report addressed to the Government, but by an informal and unofficial publication, this mode of communication was held not privileged, but ground for an action for libel. In the leading American case of Maurice *v.* Worden, where the Superintendent of the Naval Academy was sued for an alleged libel in officially reporting to the Navy Department the gross mis-

1381 conduct of a subordinate, and judgment was given for the defendant, it was held by the Supreme Court of Maryland,[27] that such a communication was "privileged to the extent that the occasion of making it rebuts the presumption of malice, and throws upon the plaintiff the *onus* of proving that it was not made from duty but from actual malice, and without reasonable and probable cause."

**Illegal punishment or unjustifiable violence.** An action will not lie against an officer for an exercise, upon a subordinate, of discipline severe in itself, provided it be sanctioned by military usage; otherwise where the severity is not thus sanctioned. Thus a naval commander was held not liable to damages for ordering a midshipman to the mast-head, this being a disciplinary punishment justified by the usage of the service.[28]

In several English cases, however, heavy damages have been awarded for illegal or excessive flogging inflicted upon inferiors by the command of superior officers.[29] In Barwis *v.* Keppel,[30] where a regimental commander disapproved the sentence adjudged by a court-martial upon a sergeant as not being in his opinion sufficiently severe, and thereupon imposed a more severe one of his own, it was held that from such illegal act malice was to be presumed, which would have rendered the defendant liable in damages, except that for another reason the court was without jurisdiction of the offence. In the most marked English case of this class, that of Joseph Wall, commandant of the garrison and governor of Goree, in Africa, this official, for causing the death of a sergeant by inflicting upon him summarily without trial, and without reasonable cause, eight hundred lashes, was, twenty years afterwards, brought to trial in England, sentenced to death and executed.[31]

1382 In the American service, while officers of the army have not unfrequently been brought to trial *by court-martial* for inflicting illegal punishment, or using unnecessary violence toward inferiors,[32] the instances of civil suits, as well as criminal proceedings, based upon such causes of action have been rare. In the leading case of Dinsman *v.* Wilkes,[33] in which an officer of the navy was sued by a marine upon whom he had imposed a corporal punishment, it was held by the Supreme Court that where in such a case the officer, (as the defendant in this case was found to have done,) acts within his discretionary powers and without malice, he is not amenable to civil proceed-

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[27] 54 Md., 257.

[28] Leonard *v.* Shields, 1 McArthur, 159.

[29] See the cases of Col. Bailey, Capt. Tonyn, and the officers of the Devon militia cited in the report of Warden *v.* Bailey, 4 Taunt., 70. See also Grant *v.* Shard, 4 Taunt., 84, where a superior, for striking an inferior officer and calling him a "stupid person" because he had failed to communicate an order as directed, was adjudged to pay £20 to the inferior.

[30] 2 Wilson, 314.

[31] 28 Howell, S. T., 51. Compare the case cited by Samuel (p. 272), of Major McKenzie, convicted by a criminal court of homicide in causing a mutineer to be "blown from a gun."

[32] See Vol. I, Chapter XX, p. 678—"Disciplinary Punishments."

[33] 7 Howard, 89; 12 Id., 390.

ings.[34] In a case of another naval officer alleged to have exceeded his disciplinary authority in assaulting and imprisoning a subordinate *at sea*, an action of trespass was held to be maintainable in a State Court.[35]

But, as heretofore indicated, civil courts are reluctant to entertain this class of questions, which, except in a clear case of legal liability, belong rather to the province of the military authorities and tribunal.

**Cause of action resulting from negligence.** Where, in the performance of duty, an officer or soldier, unintentionally but through negligence, does any considerable injury to another officer or soldier, or to his property, the latter has his action for damages against the former in the same manner as would a civilian. Thus where a soldier, on skirmish drill, so negligently discharged his musket as to wound another soldier, he was adjudged liable for damages in a suit instituted on account of the injury.[36]

3. **AMENABILITY TO SUITS BY CIVILIANS—Liability for abuse or excess of authority.** It is a general principle that the Government is
1383 not legally liable for unauthorized wrongs or injurious acts done by its officers (or soldiers) to or against civilians, though occurring while engaged in the discharge of their official duties.[37] It is the officer (or soldier) therefore who is personally amenable where he exceeds or abuses his authority, and thus commits a wrongful act to the injury of a civilian.[38] And the absence of an intent to violate law cannot affect the question of liability, though it may be material to the question of the *quantum* of damages. The English courts have been especially disposed to indemnify the citizen in this class of cases. The often-cited English cases of Mostyn *v.* Fabrigas and Comyn *v.* Sabine, and Capt. Gambier's and Admiral Palliser's cases, were early instances in which military or naval commanders were held liable in damages to civilians for personal injury or the seizure of private property, although the transcending of authority was apparently the result of zeal in the discharge of a sup-
1384 posed duty.[39] The later cases of Cooke *v.* Maxwell,[40] and Glynn *v.* Hous-

[34] Here may be noted the case of Freer *v.* Marshall, 4 Fost. & Fin., 485, in which a private sued his regimental commander for maliciously causing his discharge from the regiment. It was adjudged that he could not maintain his suit, inasmuch as the commander had by law the power to discharge at discretion, and had here also reasonable ground for the action taken, so that malice on his part could not be presumed.

[35] Wilson *v.* Mackenzie, 7 Hill, 95.

[36] Weaver *v.* Ward, Hobart, 134.

[37] Carpenter *v.* U. S., 45 Fed., 341; Gibbons *v.* U. S., 8 Wallace, 269; U. S. *v.* Lee; 106 U. S., 196; *In re* Ayers, 123 U. S., 501–2; 19 Opins. At. Gen., 24. And see U. S. *v.* Maxwell Land Grant Co., 21 Fed., 19.

This principle has recently, (1891,) been affirmed in Head *v.* Porter, 48 Fed., 481, a suit brought by a patentee against an officer in charge at the Springfield Armory for infringement of his patent in the manufacture of breech-loading fire-arms. The defendant's plea that "all his acts in relation thereto were done under the orders of the Secretary of War and his superior officers, he having acted only as the agent of the government and under its authority," and that it was the United States and not he that should be held liable, was overruled by the court.

[38] "For a malicious exercise by a military officer of lawful authority, or for acts of a military officer, (or court,) in excess of authority, though done in good faith, toward those in the military service, and *a fortiori* toward those who are not, where the civil laws are in full force, the person injured" may "obtain redress in the ordinary way against the wrongdoer." Tyler *v.* Pomeroy, 8 Allen, 485.

[39] Cowper, 161–181. Mostyn and Sabine were military governors of Monorca and Gibraltar. The former was adjudged to pay £3000 to a native Minorquin whom he had imprisoned without due cause and banished from the island; the latter £500 for executing an illegal sentence of flogging against a civil employee. Capt. Gambier had £1000 damages awarded against him for exceeding his authority in pulling down the buildings of certain sutlers who sold liquor to the navy in Nova Scotia. The representatives, however, of Admiral Boscawen, under whose orders he acted, assumed the

ton,[41] were of a similar character. An early and leading American case of the same class is that of Smith *v.* Shaw,[42] in which a military commander, who had caused to be arrested and held for trial by court-martial a civilian who was not in fact subject to the military jurisdiction, was adjudged to be amenable to damages for the tort. Here are also to be classed the suits instituted against military commanders, provost marshals, or other officers who during the late war made arrests with a view to trial by military commission, or executed the sentences of such commissions, in cases of persons held not to be subject to the jurisdiction of these tribunals.[43] A more recent case of damages awarded against an officer of our army who had acted in entire good faith though illegally, is that of Bates *v.* Clark,[44] in which a captain of infantry was adjudged a trespasser for seizing liquor in a region supposed by him to be Indian country which was not so in fact. In a further case,—Waters *v.* Campbell,[45]—heretofore remarked upon, damages were recovered by a civilian against a captain of the army, who, when acting in good faith in the line of duty, had held the plaintiff in arrest for a longer period than was authorized by the existing statute law.

In general, in the absence of statutory authority, a commanding officer
1385 would not be authorized in confining, temporarily and for safe keeping, a civilian offender in the guard house at a military post. But where the offence was clear, and no appreciable injury was done the party, he would recover no more than nominal damages, if any.[46]

**Liability for acts in suppressing riots.** Inasmuch as such acts would in general give rise rather to criminal than to civil proceedings, this liability will be considered under the Title of—"Amenability to Criminal Prosecution in State Courts," *post.*

**Liability of inferior when acting under orders—Relative amenability of superior and inferior.** The material question has not unfrequently been raised as to how far an inferior officer or soldier, sued or prosecuted on account of an act done by him in his military capacity, may justify under an order given him by a military superior. Of course where the authority of the superior is complete it shields all who duly act under him.[47] An inferior in duly executing a valid authority or order is protected much as is a sheriff by his precept, and if he proceeds upon probable cause and without malice, will in general be

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defence of the suit and paid the damages adjudged. The cause of action against Admiral Palliser was the unauthorized destroying of fishing boats on the coast of Labrador. With these cases see Sutherland *v.* Murray, 1 Term, 538, in which a colonial judge of Minorca recovered £5000 damages against the military governor for improperly suspending him from office. In Swinton *v.* Molloy, where the captain of a ship unadvisedly imprisoned the purser three days "without injury and then released him," he was held liable by Lord Mansfield for his "incautious though upright conduct." 1 Term, R., 537.

[40] In this case the plaintiff, an American, recovered £1000 damages from Colonel Maxwell, Governor of Sierra Leone, who had seized his factory on the Congo, upon suspicion of its being used in the slave trade. Stocqueler, Hist. Brit. Army, 190.

[41] 2 Man. & Gr., 337. This was an action against the military governor of Gibraltar for a false arrest and imprisonment imposed upon a civilian who had been mistaken for another person. Damages £50.

[42] 12 Johns., 257.

[43] See Skeen *v.* Monkheimer, 21 Ind., 1; Griffin *v.* Wilcox, 27 Id., 391; Johnson *v.* Jones, 44 Ills., 142; *In re* Kemp, 16 Wis., 359; Milligan *v.* Hovey, 3 Bissel, 18. And see Bean *v.* Beckwith, 18 Wallace, 510, a case of a provost marshal who made an arrest in Vermont without adequate authority.

[44] 95 U. S., 204.

[45] 5 Sawyer, 22.

[46] See Thompson *v.* The Stacey Clarke, 54 Fed., 534.

[47] Teagarden *v.* Graham, 31 Ind., 422.

justified though he commit error.[48] But where the order of the superior is *illegal*, how far, if at all, can it serve as a defence to the subordinate who, ignorant of its illegality, executes it in good faith? At *military* law, indeed, the inferior, bound as he is at his peril to obey all orders not palpably illegal upon their face, may, if brought to trial for an act committed in obedience to an order, apparently legal but illegal in fact, plead in defence his obligation to obey, and such defence will in general be accepted as a sufficient answer to the charge.[49] In some *civil* cases a similar view has been taken; the order of the superior when apparantly regular and valid being held to protect the inferior because he was bound to obey it.[50] In some other civil cases the inferior
1386 is considered to be justified on the ground that he is, under the circumstances, acting under duress or a *quasi* compulsion, much as a wife is supposed to act by the compulsion of her husband.[51] But in the great majority of the adjudications it has been held that an order which is in fact illegal—which commands the doing of an act which is unlawful or legally unauthorized—can, however regular, proper, or just it may appear on its face, protect *no one* concerned in the performance; that the superior who gives it and causes its execution, and the inferior who actually executes it as ordered, will both, or either, be liable in damages as for a trespass to any person aggrieved,[52] That the illegal order may have proceded from the highest authority of the government—may have been in fact given directly by the President as Commander-in-chief—cannot render it of any greater efficacy in protecting the subordinate who acts upon it.[53]

In this class of cases, however, the inferior, if he has acted in good faith, will ordinarily be charged with but slight or normal damages.[54] On the other hand the superior, if sued, will, as the principal offender, be held to a stricter accountability[55] and made liable for all such acts of the inferior or inferiors of the command, by whom his orders were executed, as were within the scope of such orders.[56] A superior, however, cannot be made responsible
1387 for the personal negligence of a subordinate in executing an order,[57] or

[48] Despan *v.* Olney, 1 Curtis, 306; Wilkes *v.* Dinsman, 7 Howard, 89; Hawley *v.* Butler, 54 Barb., 490; Ruan *v.* Perry, 3 Caines, 120.

[49] See DIGEST, 28—"The Twenty-First Article."

[50] See Riggs *v.* State, 3 Cold., 85; Trammell *v.* Bassett, 24 Ark., 499; Taylor *v.* Jenkins, Id., 337. These indeed were cases occurring in time of *war*, when the obligation of the inferior to obey is more imperative than in peace. See Bates *v.* Clark, 95 U. S., 204.

[51] McCall *v.* McDowell, Deady, 233; Witherspoon *v.* Woody, 5 Cold., 149. But see U. S. *v.* Greiner, 4 Philad., 396.

[52] Harmony *v.* Mitchell, 1 Blatchford, 356; Clay *v.* U. S. Devereux, 25; Holmes *v.* Sheridan, 1 Dillon, 351; Bates *v.* Clark, 95 U. S., 204; U. S. *v.* Carr, 1 Woods, 480; Com. *v.* Blodgett, 12 Met., 56; U. S. *v.* Greiner, 4 Philad., 396; Skeen *v.* Monkhelmer, 21 Ind., 4; Griffin *v.* Wilcox, 27 Id., 391; State *v.* Sparks, 27 Texas, 632; Koonce *v.* Davis, 72 No. Ca., 218; Stanley *v.* Schwalby, 85 Texas, 348. So, at criminal law, a shooting without sufficient cause, (as for disrespectful words merely,) by one soldier of another, resulting in the death of the latter, at the order of an officer, is "murder both in the officer and the soldier." U. S. *v.* Carr, 1 Woods, 480.

[53] Little *v.* Barreme, 2 Cranch, 179; U. S. *v.* Buchanan, 8 Howard, 105; Elfort *v.* Bevins, 1 Bush, 460; Richardson *v.* Crandall, 47 Barb., 335; Griffin *v.* Wilcox, 27 Ind., 391; Cooley, Prins. Const. Law, 119, 157. And see Head *v.* Porter, 48 Fed., 481, cited *ante*.

[54] State *v.* Sparks, 27 Texas, 632. It may be otherwise, however, in a criminal case. Thus where a soldier fires and takes life in obedience to an unlawful order, the homicide is not reduced to manslaughter, but is murder. U. S. *v.* Carr, 1 Woods, 480.

[55] Trammell *v.* Bassett, 24 Ark., 499; State *v.* Sparks, 27 Texas, 617.

[56] Ela *v.* Smith, 5 Gray, 122; Taylor *v.* Jenkins, 24 Ark., 337.

[57] See Regina *v.* Hutchinson, 9 Cox, 555; State *v.* Sutton, 10 R. I., 159—cases of homicide caused by negligence on the part of subordinates in executing orders.

for acts done by the latter on his own responsibility.[58] If, indeed, he expressly ratifies the same by his own action, he will be liable.[59]

In justifying himself by the order of a superior, in a civil suit instituted against him, the inferior need not show that the order was a *written* one: a verbal order if explicit will be of equal effect.[60] Nor need he exhibit the commission of his superior or prove his appointment as such: it will be sufficient to show that the superior publicly acted and was recognized in the capacity ascribed.[61]

**Liability for mode of executing an order.** An order may be legal, but its mode of execution the reverse. Thus, in the case of an arrest, only the proper degree of force should be employed; otherwise the officer or soldier executing it becomes civilly amenable.[62] So an unduly severe or inappropriate confinement may, of itself or with other circumstances, constitute ground of action. Thus a civil prisoner is not in general to be subjected to the same restraint or exactions as a soldier,[63] nor a political prisoner to the same as a criminal.[64] So, holding a prisoner confined for an unreasonable or illegal period will render the responsible official liable to suit.[65]

1388 **Measure of damages.** Upon this point, already noticed, it need only be added that where, in a suit by a civilian against an officer, or soldier, damages are awarded to the plaintiff, the *quantum* of the same will depend mainly upon the *animus* of the defendant as developed by the testimony.[66] Where it appears that, though under a mistake as to the law or facts of the case, he acted in the honest discharge of what he reasonably believed to be his duty, the damages should in general be no more than compensatory, *i. e.* enough to cover the actual loss or injury to the plaintiff. Where it is shown that the defendant acted maliciously, *i. e.* with an intent to injure or other malevolent motive, or wantonly, the damages may properly be exemplary or punitive.[67] Courts will indeed set aside verdicts awarding excessive damages. Thus, in the early case of McConnell *v.* Hampton,[68] (1815,) where the jury awarded $9,000 as damages to a civilian, against a military commander by whom he had been unjustifiably arrested, confined and brought to trial by court-martial for alleged giving information to the enemy, &c., the court set aside the verdict as unreasonable and excessive. In the more recent case of Waters *v.* Campbell,[69] referred to under a previous head, it was ruled by the court that the damages given, $3,500, were excessive, and that there must be a new trial on this ground

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[58] Nicholson *v.* Mounsey, 15 East, 383.

[59] Smith *v.* Shaw, 12 Johns., 257.

[60] Pollard *v.* Baldwin, 22 Iowa, 328.

[61] Rex *v.* Gardner, 2 Camp., 513; Lebanon *v.* Heath, 47 N. H., 359. Hardage *v.* Coffman, 24 Ark., 256. "This rule of evidence applies with more force to military than to civil officers. Soldiers in many cases are placed under the command of officers of whom they know nothing; they are continually being changed from one command to another; and should they be required to produce the commissions of their commanding officers, or even to prove that they had ever been commissioned, they could rarely indeed sustain a plea of justification for any act done in obedience to orders." Jones *v.* Johnson, 24 Ark., 260.

[62] McCall *v.* McDowell, Deady, 233.

[63] Waters *v.* Campbell, 5 Sawyer, 17 *ante*.

[64] McCall *v.* McDowell, *ante*.

[65] Hawley *v.* Butler, 48 Barb., 10; *In re* Carr, 3 Sawyer, 316; Waters *v.* Campbell, *ante*.

[66] Wall *v.* McNamara, 1 Term, 537.

[67] Walker *v.* Crane, 13 Blatchford, 1; Milligan *v.* Hovey, 3 Bissell, 14; McCall *v.* McDowell, Deady, 233; Holmes *v.* Sheridan, 1 Dillon, 351; Bates *v.* Clark, 95 U. S., 209.

[68] 12 Johns., 234.

[69] 5 Sawyer, 22.

unless the plaintiff consented to a reduction of the same to $2,000, which he thereupon did.

The relative proportion of damages properly adjudged where a superior who issued an order, (held to be illegal or unauthorized,) and an inferior who executed it, are sued together, has been indicated above.

**Liability for injuries in time of war.** For an act done *jure belli*, or for the exercise of a belligerent right, an officer or soldier cannot be called
1389 to account in a civil proceeding.[70] Thus an officer is not properly liable to a suit for the seizure or destruction, in an adequate emergency of war, or in the course of the performance of military duty in war, of the private property of individual citizens.[71] So it has been held that a soldier was not liable to prosecution for shooting and killing, under proper orders, a "bushwhacker" or guerilla, in the late war, in Tennessee.[72] The existence, however, of war will not,—as heretofore indicated under PART II—justify wanton trespasses upon the persons or property of civilians, or other injuries not sanctioned by the laws or usages of war,[73] nor will it justify wrongs done by irresponsible unauthorized parties.[74] For such acts the offending officer or soldier may be made liable in damages. But in general, in time of war, a greater discretion is conceded to commanders, and to military persons executing orders.[75] Obliged as they are to act promptly upon emergencies,[76] it would not be fair to hold them to the same strict accountability before the courts as for acts in disregard of private right in time of peace.

1390 **Liability on public contracts.** An action will not lie against an officer of the army on a contract duly made by him for the United States in an official and representative capacity.[77] He is not personally bound upon such a contract, but the United States only, and recourse can be had thereon to the United States alone; a suit in the Court of Claims being the usual form of

[70] Com. *v.* Dolland, 1 Duvall, 182; Doyle *v.* Armstrong, 2 Id., 533; Price *v.* Poynter, 1 Bush, 387; Bell *v.* L. & N. R. R. Co., Id., 404; Safford *v.* Mercer, 42 Ga., 556; Ford *v.* Surget, 46 Miss., 130; Coolidge *v.* Guthrie, 8 Am. L. Reg. (N. S.) 22; 1 Opins. At. Gen., 255. The common law will not "undertake to rejudge acts done *flagrante bello* in the face of the enemy." Tyler *v.* Pomeroy, 8 Allen, 484. "Ever since the case of Dow *v.* Johnson, 100 U. S., 158, the doctrine has been settled in the courts that, in our late civil war, each party was entitled to the benefit of belligerent rights, as in the case of public war, and that, for an act done in accordance with the usages of civilized warfare, under and by military authority of either party, no civil liability attached to the officers or soldiers who acted under such authority." Freeland *v.* Williams, 131 U. S., 416.

[71] Harmony *v.* Mitchell, 1 Blatchford, 549; Do., 13 Howard, 115; Holmes *v.* Sheridan, 1 Dillon, 351; Yost *v.* Stout, 4 Cold., 205; Thomasson *v.* Glisson, 4 Heisk., 615; Drehman *v.* Stifel, 41 Mo., 184; Bryan *v.* Walker, 64 No. Ca., 141; Koonce *v.* Davis, 72 Id., 218; Broadway *v.* Rhem, 71 No. Ca., 195.

[72] *Ex parte* Hurst, 2 Flippin. 510.

[73] Hough *v.* Hoodless, 35 Ills., 166; Christian Co. Ct. *v.* Rankin, 2 Duv., 502; Terrill *v.* Rankin, 2 Bush, 453; Lewis *v.* McGuire, 3 Id., 202; Dills *v.* Hatcher, 6 Id., 606; Rigga *v.* State, 3 Cold., 85; Merritt *v.* Mayor, 5 Id., 95; Bowles *v.* Lewis, 48 Mo., 32; Williamson *v.* Russel, 49 Id., 185.

[74] Worthy *v.* Kinamon, 44 Ga., 297, Hogue *v.* Penn., 3 Bush, 663; Branner *v.* Feikner, 1 Heisk., 228; Cochran *v.* Tucker, 3 Cold., 186.

[75] Sutton *v.* Johnstone, 1 Term, 493; Wall *v.* McNamara, Id., 536; Olmstead's Case, Brightly, 9; Hefferman *v.* Porter, 6 Cold., 391.

[76] In war, "military commanders must act to a great extent upon appearances. As a rule they have but little time to take and consider testimony before deciding." U. S. *v.* Diekelman, 92 U. S., 527.

[77] Macbeath *v.* Haldimand, 1 Term, 172; Rice *v.* Chute, 1 East, 579; Crowell *v.* Crispin, 4 Daly, 100; Worsley, Civil Remedies for Military Offences, p. 6.

That even U. S. Courts will not enjoin executive officers of the government from performing public contracts, see 1 Opins. At Gen., 681; 2 Id., 178; 3 Id., 667. [State courts of course cannot do so. 15 Id., 524; 16 Id., 257; DIGEST, 247.]

proceeding. Nor can an officer be sued upon a contract of the Government which it is simply his part to execute. Thus a paymaster whose business it is to pay certain troops or employees cannot be sued by an individual for his pay or wages.[78] An officer is liable to an individual who is a party to or is interested in a public contract, only where he has acted without authority or exceeded his authority under or in regard to the same, thus making himself personally responsible:[79] here, as in other cases of tortious acts of public officers, the government cannot be made liable, but resort must be had to proceedings against the officer.[80]

It may be remarked that where the Head of an Executive Department of the Government enters, as he may legally do,[81] into a contract with an officer of the army, (or navy,) as, for example, with one who is the patentee of an invention of which the Government desires to avail itself, the relation and liability to the United States of the officer are precisely such as would be those of a *civilian* contractor in similar circumstances.

1391 **Liability of officer as garnishee.** Nor can an officer of the army, (or other public officer,) be sued as garnishee or trustee, for or on account of public money in his official possession. Money in the hands of a disbursing officer for disbursement remains public funds till actually paid over to the person or persons entitled to receive it as due them. To allow it to be attached would be to divert the moneys of the United States from the specific purposes for which they have been appropriated by Act of Congress, and, while a violation of law, would also seriously embarrass, and so far suspend, the operations of the Government. A government cannot properly be placed in the position of a stakeholder between parties to whom it owes money and their assignees or creditors. Thus, upon a principle of public policy as well as law, proceedings against public officers by way of garnishment, trustee process, or foreign attachment, as the form is variously designated, are not legitimate and will not be sustained by the courts.[82]

**Liability under writ of habeas corpus—Form of return.** Military officers are not unfrequently made respondents in civil proceedings by the service upon them of writs of *habeas corpus*, sued out by or in behalf of enlisted men or military prisoners claiming to be discharged from the military service or from military custody, on the ground of illegal enlistment or absence of jurisdiction or authority over them on the part of the military authorities. *State* courts, as it was finally adjudged and settled, in 1871, by the Supreme Court of the United States,[83] have no power whatever to discharge such persons when duly held by the authority of the United States. Should any State or municipal tribunal issue the writ in such a case, while the officer in charge of the petitioner and upon whom service is made is not, strictly, required to make any return or

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[78] See Carter *v.* Hall, Starkie, 361, in which it was held that a purser's steward could not recover his pay by a suit against the purser.

[79] Richardson *v.* Crandall, 47 Barb., 335; Crowell *v.* Crispin, 4 Daly, 100; 2 Opins., At. Gen., 661.

[80] Johnson *v.* U. S., 2 Ct. Cl., 391; U. S. *v.* Maxwell Land Grant Co., 21 Fed., 19; 12 Opins. At. Gen., 397.

As to the effect of the statutes regulating the making and execution of contracts for the army, the authority of officers concerned in the same, &c., see DIGEST, 275–307, Title—"Contract."

[81] Burns *v.* U. S., 4 Ct. Cl., 113; Do., 12 Wallace, 246; 20 Opins. At. Gen., 329.

[82] Buchanan *v.* Alexander, 4 Howard, 20. And see Averill *v.* Tucker, 2 Cranch, C. C., 544; Derr *v.* Lubey, 1 McArthur, 187; 1 Opins. At. Gen., 604; 3 Id., 605, 718; 5 Id., 560, 759; 10 Id., 120; 13 Id., 566; DIGEST, 428.

[83] Tarble's Case, 13 Wallace, 497—affirmed in the recent case of Robb *v.* Connolly, 111 U. S., 632–634. And see *In re* Robb, 9 Sawyer, 582–588. The case of Tarble is cited in full in DIGEST, 433–434, and note.

response to the same, he will yet, as a matter of comity, always properly do so,
so far as to advise the court that he holds the petitioner by the authority
1392 of the United States, as an enlisted soldier, military convict, &c.,—setting
forth in brief the status of the individual. He will decline, however, in respectful terms to produce the body of the petitioner before the court, on the ground stated of its want of jurisdiction over the subject-matter.[84] On the return day of the writ, he will properly appear and present his return, whereupon the court will in general as a matter of course dismiss the proceeding. Should the State court assume jurisdiction and commit the officer for contempt, he will forthwith sue out a writ of *habeas corpus* for his own release in the U. S. Circuit or District Court. If the State authorities attempt to take the soldier from military custody, they should be prevented by the use of such military force as may be necessary for the purpose.

Where, on the other hand, an officer of the army is served with a writ of *habeas corpus* issuing from a court of the *United States*, he will make full return to the same, setting forth all the facts of the case and the authority under which the petitioner is held, and on the return day will appear with the body of the petitioner before the court to abide by its order thereupon.[85]

**Defence and indemnification by the government of officer sued, &c.** As has been already remarked, an action will not in general properly lie against a public officer in his representative capacity,[86] and where he is sued *in such capacity*, or as a *nominal defendant* in a case in which the United States is the party in interest, it will properly devolve upon the Government to assume the defence of the case and bear the expenses of the proceeding.[87]

Where a public officer is sued on account of an alleged wrong or injury
committed in the discharge of official duty, the general rule is that he
1393 must provide for his own defence,[88] the question of indemnification for
his expenses, or for damages recovered against him, being left to be determined by the law and facts as developed in the investigation.

Where military persons have been or are about to be sued or prosecuted on account of acts done in the performance of their duties, their proper course, if believing and desiring that their defence should be assumed by the United States, is to apply for counsel, (reporting the facts,) as prescribed by par. 1057 of the Army Regulations, to the Secretary of War, who, if deeming the application reasonable, will, under the existing law, refer the question, whether counsel can legally or properly be employed in the case by the United States, to the Department of Justice. Upon the Attorney General as the head of that Department, on its establishment by the Act of June 22, 1870, c. 150,[89] was exclusively devolved the authority to provide for the defense of public officers in civil proceedings. Whether he will decide to do so in any particular case will in general mainly be determined by the amount of "*interest*," pecuniary or otherwise, which the United States may have in the case or the questions in-

[84] See par. 1061, Army Regulations; 13 Opins. At. Gen., 451.

[85] See forms of return in Appendix.

[86] 6 Opins. At. Gen., 7, referring to a replevin suit commenced against a public officer for property as in his possession, where the possession was in fact that of the United States.

[87] 5 Opins. At. Gen., 397. "To avoid any doubt about the method of payment of the expenses of these officers, it is better in all cases that when they are the nominal defendants in suits brought against them in the official discharge of their duties, they should be subpoenaed on the part of the government, who is the party in interest, to appear as witnesses." Circ. No. 3, (H. A.,) 1887.

[88] 5 Opins. At. Gen., 397; 6 Id., 77, 220.

[89] See s. 17 of that Act, as incorporated in Secs. 189, 366, Rev. Sts.

volved therein,[90] considerations of justice to the individual being also taken into account.[91]

For indemnification for any damages other than nominal that he may be required to pay, as also for the expenses of his defence where not assumed by the United States, the officer will in general have no recourse except to Congress.[92] That body has from time to time passed special Acts for the
1394 relief of officers of the army or navy, who have been subjected to pecuniary losses on account of suits for acts done in the honest discharge of duty.[93]

**AMENABILITY TO CRIMINAL PROSECUTION IN STATE COURTS.** Except where the act was committed upon a reservation or other premises within the exclusive jurisdiction of the United States, an officer or soldier is liable, for a criminal offence against the local law, to prosecution in the courts of the State or Territory, in the same manner as is a civilian. His being in the military service of the United States affects in no degree his amenability to such prosecution; nor is it affected by the fact that he was at the time of the offence engaged in the performance of military duty, if in such performance he exceeded his authority or was culpably negligent.[94]

The principal occasions and acts upon or for which a military person may render himself liable to indictment in the local criminal courts have already been noticed in Chapter XXV, of PART I, (in reviewing the separate Articles of war,) and elsewhere, and need not be recapitulated. Prosecutions of officers and soldiers for crimes in State courts are not indeed of frequent occurrence.

**For an exceeding of authority—A recent illustration.** What would properly be the criminal liability of an officer of the army for an exceeding or abuse of authority is illustrated in the recent case of Commonwealth *v.* Hawkins and Streator. In this case, which originated during the strike in Pennsylvania, in July 1892, and which was tried in the Court of Common Pleas of that State, the defendants were officers of *militia* indicted for assault
1395 and battery, committed by way of summary punishment, without trial, upon the person of one Iams, a private of their command, by hanging

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[90] See Secs. 361, 363, 364, 366, 367, Rev. Sts.; DIGEST, 310. And compare 6 Opins. At. Gen., 77. The question will also be practically affected by the state of the *appropriation* available for the purpose.

[91] Attorney General Black, in 9 Opins. At. Gen., 52, observes as follows:—"When an officer of the United States is sued for doing what he was required to do by law, or by the special orders of the Government, he ought to be defended by the Government. This is required by the plain principles of justice as well as by sound policy." It has therefore "been the uniform practice of the Federal Government, ever since its foundation, to take upon itself the defence of its officers who are sued or prosecuted for executing its laws." And he cites many instances of such practice. He further holds, (p. 53,) that where such an officer carries on his own defence without appealing to the government pending the cause, he has a just claim for the sum that he may be "out of pocket," though he is "not to be allowed any unreasonable or extravagant expenses." And see 12 Id., 368.

[92] See 6 Opins. At. Gen., 77; 14 Id., 71.

[93] Thus, by the Act of Feb. 11, 1880, the Secretary of the Treasury is directed to pay to Capt. J. B. Campbell, U. S. A., the amount of the judgment and costs in the case of Waters *v.* Campbell, (U. S. Circuit Ct., 5 Sawyer, 17, hereinbefore referred to,) "said judgment"—it is added—"having been obtained against him, and costs incurred by him, while acting in the line of his duty as Captain, &c."

Later, by the Act of August 5, 1882, c. 390, making appropriations for the Navy Department, &c., the sum of seven hundred and fifty dollars was appropriated "for legal expenses incurred by Rear Admiral John L. Worden, in defending the suit of Bernard Maurice against him for alleged damages caused by the official acts of said Admiral Worden in the discharge of his duty while Superintendent of the Naval Academy in 1872."

[94] See military cases referred to, *ante*, p. 967 [?]—"Manslaughter."

him up by the thumbs and subjecting him to have his head shaved and be drummed out of camp. Under the peculiar rulings of the judge the jury rendered a verdict of acquittal. The offence of Iams, on account of which these punishments were inflicted, had consisted, not in a resort to violence or a doing of any overt act, but in the speaking of words only. The words used were foolish, unmilitary and intemperate, and, (in expressing sympathy for a person of the class which the militia was intended to oppose and restrain, who had attempted to take the life, by shooting, of the manager of a manufacturing company against which the strike was mainly aimed,) indicated a refractory spirit. But there was at the time no mutiny or attempt at mutiny in the command, nor any insubordination or disorder whatever; nor did the utterance of Iams produce any breach of the peace or other disturbance. Yet because the militia had been called out by the Governor to act as a *posse* in aid of the sheriff of Allegheny county, and to assist in maintaining the peace and suppressing a formidable riot, the judge charged the jury that the officers and men of the command were "*subject to the same general principles of law by which any army in actual war is governed*," were "*governed by the same rules that would prevail in case of actual war*," and that the punishments imposed, not being shown to have been actuated by malice or ill will toward the individual, were authorized and legal. Indeed the jury was charged that inasmuch as Streator, the commander of the regiment and principal defendant, was actuated only by proper motives, it was "*very important that he should not be found guilty!*"

In the opinion of the author this view was exaggerated and unsound. The misconduct of Iams was not of marked gravity, nor did it produce any appreciable effect. He did not attempt to avoid arrest, and might readily have been held and brought to trial, and, upon conviction, been awarded a penalty adequate to his offence. The course taken by his superiors was not justified by necessity or by the requirements of military discipline. It was opposed to military law and precedent, and in the army would not have been sanctioned or excused. Had the defendants been army officers, their conviction by the State court and consequent reasonable punishment would have been accepted as legal and just.

1396 **For a killing, &c., in suppressing a riot.** The English civil courts and authorities, in passing upon the conduct of public officials in the presence of riots,—as in the cases of the Gordon riots of 1780[95] and the Bristol riots in 1831,[96]—while affirming that the firing by the military upon a mob can be justified "only on proof of extreme necessity,"[97] have however held such officials to a legal responsibility for the due suppression of lawless assemblages.[98] So military officers who have failed to act with due vigor when called upon to disperse such gatherings and protect property from their violence, have

[95] Parliamentary History, vol. xxi, p. 688.

[96] Rex *v.* Pinney, 5 Car. & Payne, 254; Rex *v.* Kennett, Id., 282. And see Reg. *v.* Neale, 9 Id., 431.

[97] See Worsley, Juridical Society Papers, vol. 3, p. 3; also Case of Porteous, Prendergast, 165.

[98] See Rex *v.* Kennett, *ante*, and other cases above cited. "It is one result of the law, as laid down by the foregoing authorities, that a military officer refusing or failing, on a proper occasion, to bring into action against a riotous or an insurrectionary mob, the force under his command, would be guilty of an indictable offence at common law, and might be prosecuted accordingly for breach of duty, independently of his liability to military censure." Prendergast, 177–8.

The status, however, of officers under the British law differs here from the position of officers of our own army in similar circumstances, in that, under the former, "the primary duty of preserving public order rests with the civil power," and the officer com-

been severely disciplined by the military authorities.[99] In this country the sentiment has gained strength that prompt and decided action on the part of the military in dealing with a riotous assemblage, is the only rational
1397 or effectual course,[100] and the courts would doubtless in most cases justify an officer or soldier in the shooting down, in the discharge of his duty, of a leader of a mob engaged in an aggravated breach of the peace and defiance of the laws. One reason why there have been so few prosecutions in our State courts on account of the consequences of firing upon rioters, probably is that the statutes of a considerable number of the States, in recognition indeed of a common law principle,[1] expressly disclaim the holding liable of officials and others concerned in such firings. Thus, in the statutes of Massachusetts,[2] New Hampshire,[3] Rhode Island,[4] New Jersey,[5] Ohio,[6] Virginia,[7] West Virginia,[8] Missouri,[9] Wisconsin[10] and Oregon,[11] it is declared that where, in the suppression of a riot, a rioter or other person, (even a mere spectator,) is killed or injured, the magistrates or officers duly engaged, or persons assisting, in the suppression, or in the dispersing or apprehending of the rioters, shall be "held guiltless," or—as it is sometimes expressed—"held guiltless and justified in law," or "held guiltless and absolutely indemnified." In the statute of Connecticut,[12] the language is—shall be "discharged from all
1398 civil or criminal liability therefor;" in that of Vermont[13]—"shall not be liable in a civil or criminal proceeding." In the statutes of California[14] and Idaho,[15] "homicide" is declared to be justifiable when committed

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manding the military is in general placed "under the orders of a magistrate." [Thring—"Summary of the law of riot and insurrection," Manual of Military Law, ch. xiii.] But with us it is now rare that the military serves as a *posse comitatus:* in general it acts by the direction of the President under the immediate orders of its own commanders. Thus, in the suppression of an insurrection or unlawful assemblage, a commanding officer of our army would in general be vested with a greater discretion while at the same time charged with a higher responsibility than would such an officer in the British practice.

[99] See the account given by Hough (P.) 581–4 of the trials by court-martial of Col. Brereton and Captain Warrington for their shortcomings on the occasion of the riot at Bristol, (October, 1831.) Captain Warrington was sentenced to be cashiered. Col. Brereton, under the criminating evidence adduced, committed suicide.

[100] "It is better to anticipate more dangerous results by energetic intervention at the inception of a threatened breach of the peace, than by delay to permit the tumult to acquire such strength as to demand for its suppression those urgent measures which should be reserved for great extremities." 2 Wharton, Criminal Law § 1555. See G. O. 23 of 1894, cited on p. 1351, where a riotous mob is characterized (though the term is legally incorrect,) as *a public enemy.*" On the occasion of the Railway Strike of July, 1894, a blow with the sword administered to a leader of the obstructionists at Livingston, Montana, inflicting a slight wound, by the Captain commanding the detachment of U. S. troops, contributed most materially to putting an end to the existing formidable obstruction and opening the Northern Pacific Railroad to the transportation of the U. S. mails and the free transit of passengers.

[1] See Chitty, Cr. Law, vol. 3, p. 486; 1 Wharton, Id. § 407.

[2] Public Laws, p. 1163–4.

[3] General Laws, p. 588.

[4] Public Statutes, p. 670.

[5] Revision of Statutes, p. 979.

[6] Revised Statutes, Sec. 6895.

[7] Code, p. 378.

[8] Code, p. 897.

[9] Revised Statutes, Sec. 3770.

[10] Annotated Statutes, p. 2269–70.

[11] General Laws, p. 872.

[12] General Statutes, Sec. 1504. And it is similarly specially provided in regard to the *militia* in Sec. 3139.

[13] Revised Laws, Sec. 4224.

[14] Penal Code § 197.

[15] Revised Statutes, Sec. 6570.

by any person in lawfully suppressing a riot, "or," as it is added in the enactment of the latter State, "in lawfully keeping or preserving the peace." In a few of the States the laws even contain an explicit prohibition of the use of *blank cartridges* by the militia in dealing with rioters. Thus in Indiana,[16] it is provided that no officer of militia shall, "under any pretence, or in compliance with any order, fire," (*i. e.* cause to be fired by his command,) "blank cartridges on a mob under penalty of being cashiered by sentence of court-martial." In the Revised Statutes of Missouri,[17] the laws treating of the militia contain the significant provision—"Blank cartridges shall never be used except on drill."

In view of such legislation and of the sentiment which it reflects, it is probable that members of the army, employed by the President under Sec. 5298, Rev. Sts.,[18] for example, and concerned in the killing or wounding of persons engaged in a strike, or other unlawful assemblage, in obstruction of the execution of the laws of the United States, would be held by the State courts to have but performed a public duty, and be charged with no more liability than would the State militia under similar circumstances. The general rule of proceeding of troops so employed, whether regulars or militia, and which the courts would, it is believed, approve and ratify, should simply be—1st. To present themselves forthwith at the front with such an appearance and manifestation of arms and discipline and authority as to overawe and restrain the lawless assemblage before them; 2d. If overt acts of violence and obstruction are persisted in, to disperse the actors with the bayonet;[19] 3d. To fire upon them where the bayonet proves ineffectual.

1399 There is now in force no statute of Congress under which an officer or soldier of the army, prosecuted or sued in a State court, on account of an act performed in the line of his duty, or in a military capacity, can have the proceedings *removed* to a court of the United States.

## III. OTHER CIVIL RELATIONS OF THE MILITARY.

**EFFECT IN GENERAL OF THE MILITARY STATUS.** Not only in time of war, but frequently also in time of peace, the officers and soldiers of the army are so isolated by the exigencies and obligations of the military service that they are not in a position to exercise the common rights of the citizen and do not become subject to his burdens.

**RESTRICTION OF CIVIL RIGHTS BY U. S. STATUTE.** They are also debarred from exercising certain of such rights by express legislation of Congress. Thus, by Sec. 1222, Rev. Sts., officers of the army on the active list are inhibited from holding "*any civil office;*" their commissions being "vacated" upon their accepting or exercising such office.[20] By Sec. 1223, Rev. Sts.,

1400 all officers of the army, whether active or retired, are specially precluded from holding diplomatic or consular office; the accepting or holding of

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[16] Revision of 1894, Sec. 7373.

[17] Revised Statutes, Sec. 6981.

[18] *Ante,* page 864.

[19] "As a general rule the bayonet alone should be used against mixed crowds in the first stages of a revolt." G. O. 23 of 1894, cited on p. 1351.

[20] As to the construction and effect of this statute, see cases in DIGEST, tit. "Civil Office;" also 18 Opins. At. Gen., as to the acceptance by Col. Gilmore, Corps of Engineers, of a certain municipal office in Philadelphia. In Circ., No. 4, (H. A.,) 1890, it is ruled by the Secretary of War as follows—"Any office created by State statutes is, within the spirit of the law quoted above, a civil office, and an officer of the Army on the active list cannot lawfully accept or hold such an office whether in State military organizations or otherwise."

Exceptions from the operation of Sec. 1222 can of course be authorized only by Congress. See an instance of such an exception, in a case of an engineer officer, author-

such office being declared equivalent to a resignation of the military office, which thereupon becomes vacant.[21] By Sec. 1224, Rev. Sts., officers of the army are precluded from being employed on civil works or internal improvements, and from engaging in the service of an incorporated company, if such employment shall involve a separation from their regiments, &c., or "otherwise interfere with the performance of their military duties proper."[22] By Sec. 1860, Rev. Sts., as amended by the Act of March 3, 1883, all military persons, except retired officers, are prohibited from being elected to or holding civil offices or appointments in Territories.[23] By the same Section it is declared that no military person "shall be allowed to vote in any Territory by reason of being on service therein, unless such Territory is, and has been for six months, his permanent domicile." And by Secs. 1996, 1998, Rev. Sts., *deserters* are placed under a disability to hold office under the United States, or exercise other rights of citizenship.[24]

**RESTRICTION BY STATE LAWS.** So, the constitutions or laws of some of the States disqualify military officers in whole or in part from *holding office* under the State;[25] or restrict their right to *vote* by declaring in effect that they shall not gain a residence or habitation, for that purpose, merely by being stationed therein. In the absence of such provisions, a *retired* officer or
1401 soldier may hold such office; and *any* officer or soldier may vote if only he has resided in, or inhabited, the State, county, &c., for the requisite period. While, as a general rule, an officer or soldier on the active list of the army neither acquires nor loses a residence by reason of his military status, but retains a residence in the State in which, if in any, he was domiciled at the time of his entering the army, yet the fact that he is in the military service does not disqualify a person from obtaining a residence or from changing his domicil.[26] But being, while on the active list, always subject to orders as to the

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ized by Joint Res. of Feb. 28, 1883. The Act of June 11, 1878, requiring that one of the three Commissioners, who constitute the local government of the District of Columbia, shall be an officer of the Engineer Corps of the Army, has engrafted a permanent exception upon the original statute.

As to a *retired* officer of the army, it has been held by the Attorney General, (19 Opins., 283,) that such an officer is "not ineligible to hold an appointment to a civil office." A similiar view was taken by the Court of Appeals of New York, (People *v.* Duane, 121 N. Y., 367,) in holding that Gen. Duane, late Chief of Engineers, U. S. A., retired, did not hold a federal office, in the sense of a statute of New York which provided that an "Aqueduct Commissioner" should not hold a "federal office." Recently, by the Act of July 31, 1894, Congress has declared retired officers of the Army and Navy, generally, to be eligible to any public office to which they may be elected, or appointed by the President with the concurrence of the Senate. This action followed the admission without objection, by the House of Representatives, to a seat to which he had been elected in that body, of Brig. Gen. D. E. Sickles, a retired officer.

[21] See Badeau *v.* U. S., 130 U. S., 439; 19 Opins. At. Gen., 609.

[22] In 19 Opins., 600, it is remarked by the Attorney General that a leave of absence, granted for the express purpose of enabling an officer to engage in the service of an incorporated company, would be a "clear evasion of the statute and unwarranted."

[23] The case of Hill *v.* Territory, 2 Wash. Ter., 147, holding that a retired officer of the army was disqualified, under Sec. 1860, R. S., from holding the civil office of County Treasurer, in Washington Territory, was decided in 1882, prior to the date of the amendment excepting retired officers from the application of the original statute.

[24] That proof of a *conviction* of desertion is necessary to debar a deserter from exercising the right of suffrage, see *ante*, p. 646.

[25] See Const. of Illinois, Art. IV § 3; Const. of Indiana, Art. 2 § 9; Rev. Sts., New York, Ch. V, Tit. II § 5.

[26] Amee *v.* Duryea, 6 Lansing, 155. Here it was held that it was as competent for a soldier as for any citizen to abandon one domicil and acquire another, and that the purchasing or renting by a soldier of a dwelling house, at a locality other than that of his late residence, and his removing to this dwelling with his family and living with them there, constituted evidence of such a change of domicil. And see Wood *v.* Fitzgerald, 3 Or., 568; Hunt *v.* Richards, 4 Kans., 549; G. O. 13, First Mil. Dist., 1868,

period of his stay at any post or station, he cannot, in the majority of cases, exercise the volition or entertain the intention necessary to the selection and acquisition of a legal residence.[27] By the laws, however, of some of the States a mere *habitancy* for a certain period is all that is necessary to entitle the person to exercise the right of suffrage.

**LIABILITY TO TAXATION.** An officer or soldier of the army is of course liable to be taxed for such *real estate* as he may possess, in the State, &c., in which it may be situate. As to *personal property*, he is in general, whether active or retired, liable to be taxed therefor like any citizen, the fact of his being in the military service not affecting his obligation in this regard[28]—except when stationed at a military post under a status of jurisdiction yet to be noticed. It is not essential that he should have a permanent residence to subject him to local taxation, personal property taxes being legally imposable upon mere *inhabitants*, or upon property *as such* held at the place, irrespective of the *status* of the owner.

Whether an officer, &c., stationed at a military post is legally liable to
1402 be taxed for his personalty, will depend upon the question whether the State is empowered to exercise jurisdiction over the locality. The effect, in this connection, of a surrender of its jurisdiction by a State to the United States will be considered presently.

**Exception.** But in no event can a State or municipality legally tax the pay or allowances of an officer or soldier of the army, or the arms, uniform, equipments, horses, &c., incident to his rank and office, or required or intended to be employed by him in the military service. This, upon the fundamental principle that no lesser sovereignty or authority can restrict or interfere with the means or instruments by or through which the Government of the United States is administered. "The authorities of a State," as the law is declared by Atty. Gen. Black,[29] "cannot impose a tax upon the salary of a federal officer, or upon the compensation paid by the United States to any person engaged in their service." Or, as it is held by the Supreme Court,—"Taxation by a State cannot act upon the instruments, emoluments, &c., which the United States may use and employ as necessary and proper means to execute their sovereign powers." [30]

**EFFECT OF BEING STATIONED AT A PLACE, WITHIN A STATE, OVER WHICH THE UNITED STATES EXERCISES EXCLUSIVE JURISDICTION.** Where exclusive jurisdiction over a military reservation or post situated within a State is vested in the United States, either by its having expressly reserved the same upon the admission of the State, or by means of the subsequent cession of its own jurisdiction by the State, (or—what is equivalent—the consent of the State to the purchase of the land by the United States,) the persons stationed or commorant upon the premises become isolated, both territorially and as respects their civil relations. In a political sense, the land is no longer a part of the soil of the State, nor are the occupants inhabitants of the State. They are severed from the enjoyment of the rights, and from subjection to the liabilities, of the citizens of the State as entirely as if they were residents of a foreign country. They have no

[27] Graham *v.* Com., 51 Pa. St., 258; Tayloe *v.* Reading, 4 Brewst., 439. And see Circ., No. 5, (H. A.,) 1886.

[28] See 14 Opins. At. Gen., 27, 199.

[29] 9 Opins., 477.

[30] Dobbins *v.* Comrs. of Erie Co., 16 Peters, 435. And see Savings Bk. *v.* Colte, 6 Wallace, 605; 7 Opins. At. Gen., 578; Opin. of At. Gen. Hoar, of April 7, 1870; Cooley, Const. Lims., 600–1; DIGEST, 734–5.

1403 more right to vote in the State, to send their children to the public schools, to use the public libraries, to be protected by the police or fire department, &c., than have the citizens of another State. Such opportunities of this class—the use of the public schools or libraries, for example—as may be extended to them are extended as privileges, not as rights. On the other hand, they cannot legally be taxed by the State or municipality for their personal property held on the premises, or be required to perform militia duty, or to serve on juries, or to furnish labor on the roads, &c., in the State. Nor are they subject to the civil or criminal process of the local courts except in so far as the right to execute the same may legally have been reserved to the State; as where—as has been not unusual, and in order that the reservation or place may not serve as an *asylum* for criminals, debtors, &c., the State has reserved the right to execute *within* the premises process issued by its courts on account of criminal offences committed or causes of action initiated *without* the same. In all other cases such persons are subject to the jurisdiction and processes only of the United States courts and authorities.[31] This is the status not only of the officers and soldiers stationed at the post but of the civil employees and persons permitted to reside upon the reservation.[32]

1404 Where indeed the State legislature has gone further, and, in professing to surrender jurisdiction to the United States, has reserved to itself a *general concurrent* jurisdiction over the premises, the grant is not one of exclusive jurisdiction within the sense or meaning of the Constitution.[33] In such case the qualification so far nullifies the grant that the amenability of the military and other persons indicated to the local jurisdiction remains practically unchanged, and the *effect* above described upon their *status* is not produced.

The distinction, it may here be noted, has been taken by the Supreme Court, in a case decided in 1885,[34] between the effect of a *consent*, such as is contemplated by the Constitution, given by a State to the purchase of land within its limits by the United States, and that of a *cession* of jurisdiction by the State over such land. In the former case an exclusive jurisdiction is vested in the United States absolutely and unconditionally. In the latter only such jurisdiction is vested as is granted, and the State may attach to its grant any condition "not inconsistent with the effective use of the property" by the

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[31] It need hardly be remarked that military persons, where not specially excepted, are liable to any general tax imposed by Congress. Thus, if their incomes are within the statute, they are as liable to the income tax imposed by the Act of August 27, 1894, as they were to that imposed by the Act of June 30, 1864. So a post canteen which sells manufactured tobacco, or liquors, is liable, like a club, to the internal revenue tax, if any, imposed upon such sales or for licenses to make the same. See Circ., War Dept., of Dec. 8, 1888.

[32] On the general subject of this exclusive jurisdiction—how it is acquired and what is its effect—see the following authorities: U. S. *v.* Cornell, 2 Mason, 60; U. S. *v.* Davis, 5 Id., 356; U. S. *v.* Travers, 2 Wheeler, C. C., 490; U. S. *v.* Tierney, 1 Bond, 571; Eliot *v.* Van Voorst, 3 Wallace, Jr., 299; Sharon *v.* Hill, 24 Fed., 726; U. S. *v.* Clark, 31 Fed., 710; U. S. *v.* Bateman, 34 Fed., 86; U. S. *v.* King, Id., 302; Com. *v.* Clary, 8 Mass., 72; Mitchell *v.* Tibbetts, 17 Pick., 298; Opinion of Justices, 1 Met., 580; State *v.* Dimick, 12 N. H., 194; State *v.* Kelly, 76 Maine, 331; People *v.* Godfrey, 17 Johns., 225; People *v.* Lane, Edmonds, 116; Com. *v.* Young, Bright, 302; Sinks *v.* Reese, 19 Ohio St., 306; *In re* O'Connor, 37 Wis., 379; Painter *v.* Ives, 4 Neb., 122; 2 Story Const. § 1225, 1227; 1 Kent. Com., 403–4; 1 Hall, Jour. of Jur., 53; 6 Opins. At. Gen., 577; 7 Id., 628; 8 Id., 30, 102, 387. 418; 14 Id., 33, 199; 16 Id., 468; 17 Id., 1; 20 Id., 242, 298, 611; G. O. 8, Dept. of Texas, 1884; also the recent case of Fort Leavenworth R. R. Co. *v.* Lowe, 114 U. S., 525.

[33] 8 Opins. At. Gen., 419; 20 Id., 611; Fort Leavenworth R. R. Co. *v.* Lowe, 114 U. S., 525; and other cases cited in last note.

[34] Fort Leavenworth R. R. Co. *v.* Lowe, 114 U. S., 525.

United States; and, the grant thus qualified being *accepted*, the condition becomes legal and operative. Thus, in the case referred to, the State of Kansas, in ceding to the United States "exclusive jurisdiction" over the Fort Leavenworth reservation, retained for itself the right to tax the property, on the reservation, of a railroad company. The United States not dissenting from the condition, it was held by the Court that the company was liable to the State for the taxes imposed. So a State, in making such a cession, might reserve the right to tax private property held at the post. It is probable, however, that the Government would not accept a grant burdened with such a condition, but would reject it—as it has heretofore rejected grants coupled with reservations incompatible with the exercise of exclusive jurisdiction, such as the reservation of "concurrent jurisdiction," on the part of the State.[33]

1405 It may be noted that where the United States has not, either by an original reservation in admitting the State, or by means of a cession from the State, or a consent to purchase given by its legislature, became vested with exclusive jurisdiction over a military reservation or post, such jurisdiction does not attach to it by the mere fact that it is the owner of the land, or that the same has been duly set apart as a reservation, or been occupied, (for however long a time,) as a military fort or post.[36] In the absence of exclusive jurisdiction vested as above, the land remains part of the territory of the State, and writs and processes of the State courts may be executed thereon in the same manner and with the same effect as on any other premises within the State limits. To duly vest such jurisdiction, the action of the sovereign, the State, remains essential.

**Such a status non-existent in a Territory.** We have been treating of the peculiar status of military persons in a locality within a *State*, exclusive jurisdiction over which has been vested in the United States. It remains to remark that such a status, political or jurisdictional, cannot exist where the place—the military post or reservation—is situate in a *Territory*. A Territory, unlike a State, is not a sovereignty.[37] "It is not within the jurisdiction of any particular State," but is "within the power and jurisdiction of the United States."[38] All "territory within the jurisdiction of the United States, not included in any State, must necessarily be governed by or under the authority of Congress."[39] As it is expressed by the Supreme Court[40]—"The power of Congress over the Territories of the United States is general and plenary, arising from and incidental to the right to acquire the territory itself, (derived from the treaty-making power and the power to declare and carry on war,) and from the power given by the Constitution to make all needful rules and regulations respecting the territory or other property

1406 belonging to the United States." Congress is thus "supreme" over the Territories.[41] In the words again of the same tribunal[42]—"A Territory is a political organization, wholly dependent upon Congress, and subject to its absolute supervision and control. * * * It is a political community organized by Congress, all whose powers are created by Congress, and all whose acts are subject to Congressional supervision." The Act of Congress

[35] See 7 Opns. At. Gen., 634; 8 Id., 418; 20 Id., 242, 298, 611. And note, in this connection, Co. of Cherry *v.* Thacher, 32 Neb., 350.

[36] U. S. *v.* Stahl, 1 Woolworth, 192; Do., McCahon, 206; *Ex parte* Sloan, 4 Sawyer, 331; Clay *v.* State, 4 Kans., 49; U. S. *v.* Penn., 4 Hughes, 491.

[37] Talbott *v.* Silver Bow Co., 139 U. S., 446.

[38] Mormon Church *v.* United States, 136 U. S., 43.

[39] National Bank *v.* Co. of Yankton, 101 U. S., 133.

[40] Mormon Church *v.* United States, *ante*.

[41] Mormon Church *v.* United States, *ante;* Murphy *v.* Ramsey, 114, U. S. 15, 44.

[42] Talbott *v.* Silver Bow Co., *ante*.

organizing a Territory is the "organic law" of the Territory, which "takes the place of a Constitution as the fundamental law of the local government."[43] Subject to this organic law, and to the "right of Congress to revise, alter and revoke, at its discretion," the local legislature is "entrusted with the enactment of the entire system of municipal law."[44] Congress indeed may itself directly legislate for a Territory, but, as a general rule, after organizing a Territory, it leaves the details of the local legislation to the territorial legislature.[45] After erecting the courts for a Territory in the organic Act, it may and usually does leave it to the local legislature to define their jurisdiction.[46]

Thus the authority of the judges and magistrates, as well as of all the other civil officials, of a Territory, emanates either immediately or medlately from Congress; and, as a general rule, in the absence of any provision in the organizing Act or other U. S. statute exempting officers and soldiers of the army from the jurisdiction and authority of the local courts and officials, they will be amenable thereto in the same manner and to the same extent as are the civilian inhabitants,[47] where such amenability may not interfere with the
1407 due performance of their military functions, and except in so far as this liability may be affected by an existing state of war. The fact that they may be stationed and abiding at a post on a military reservation will not, (as it would were such post within a State and exclusive legislation over it had been ceded to the United States,) affect the question of their legal amenability.[48] In a constitutional sense there can be no such thing as "exclusive jurisdiction" in a Territory.

And, unless exempted as above, such officers and soldiers will be subject to be *taxed* by the Territorial authorities for their property, (except such as may be instrumental for or incidental to the performance of their military duties,) equally as are civilians. As it is observed by the Supreme Court[49]—"Under the general territorial system, as expressed in the various organic Acts, the power of taxation" possessed by a Territory "is absolute save as restricted by the Constitution or constitutional enactments." But Congress, it may be supposed, would not ratify any legislation of a Territory which subjected the *personnel* of the army to oppressive taxation.

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[43] National Bank *v.* Co. of Yankton, *ante.*

[44] Hornbuckle *v.* Toombs, 18 Wallace, 655.

[45] National Bank *v.* Co. of Yankton, *ante.*

[46] Hornbuckle *v.* Toombs, *ante.*

[47] See G. O. 30 of 1878, publisbing an opinion of Judge Advocate General Dunn, approved by the Secretary of War, to the effect that a Territorial Justice of the Peace may exercise jurisdiction in cases of military persons stationed on a military reservation in the Territory. An opinion *contra*, of Hoyt, J., of the District Court of Washington Territory, published in Circulsr No. 21, Dept. of the Columbia, 1885, appears to proceed upon a confounding of Territories with States as to the matter of "exclusive jurisdiction."

[48] "The distinction between the federal and State jurisdictions under the Constitution of the United States, has no foundation in the Territorial governments; and consequently no such distinction exists, either in respect to the jurisdiction of their courts or the subjects submitted to their cognizance." Neither the syatem of government or of laws of a Territory "is subject to the constitutional provisiona in respect to State and Federal jurisdiction." Benner *v.* Porter, 9 Howard, 242.

[49] Talbott *v.* Silver Bow Co., 139 U. S., 448.

# APPENDIX.

## I.

1411 ORDINANCE OF RICHARD I—A. D. 1190.

[" Chiefly meant to prevent disputes between the soldiers and sailors, in their voyage to the holy land." Grose, Hist. Eng. Army, vol. 2, p. 63.]

" Richard, by the grace of God, King of England, Duke of Normandy and Aquitaine, and Earl of Anjou, to all his subjects about to proceed by sea to Jerusalem, greeting. Know ye, that we, with the common consent of fit and proper men, have made the enactments underwritten. Whoever shall slay a man on ship-board, he shall be bound to the dead man and thrown into the sea. If he shall slay him on land he shall be bound to the dead man and buried in the earth. If any one shall be convicted, by means of lawful witnesses, of having drawn out a knife with which to strike another, or shall strike another so as to draw blood, he shall lose his hand. If, also, he shall give a blow with his hand, without shedding blood, he shall be plunged in the sea three times. If any man shall utter disgraceful language or abuse, or shall curse his companion, he shall pay him an ounce of silver for every time he has so abused him. A robber who shall be convicted of theft shall have his head cropped after the manner of a champion,[1] and boiling pitch shall be poured thereon, and then the feathers of a cushion shall be shaken out upon him, so that he may be known, and at the first land at which the ship shall touch, he shall be set on shore. Witness myself, at Chinon."

[1] Champions hired to fight legal duels, in cases of murder and homicide, had their hair clipped close to their heads. (Note by Samuel.)

## II.

1412 ARTICLES OF WAR OF RICHARD II—A. D. 1385.

These are the Statutes, Ordonnances and Customs, to be observed in the Army, ordained and made by good consultation and deliberation of our most Excellent Lord the King Richard, John Duke of Lancaster, Seneschall of England, Thomas Earl of Essex and Buckingham, Constable of England, and Thomas de Mowbray, Earl of Notingham, Mareschall of England, and other Lords, Earls, Barons, Banneretts, and experienced Knights, whom they have thought proper to call unto them; then being at Durham the 17th Day of the Month of July, in the ninth Year of the Reign of our Lord the King Richard II.

I. FIRSTLY. That all manner of persons, of what nation, state, or condition they may be, shall be obedient to our lord the King, to his constable and mareschall, under penalty of everything they can forfeit in body and goods.

II. ITEM, that none be so hardy as to touch the body of our Lord, nor the vessel in which it is contained, under pain of being drawn, hanged and beheaded.

III. ITEM, that none be so hardy as to rob and pillage the church, nor to destroy any man belonging to holy church, religious or otherwise, nor any woman, nor to take them prisoners, if not bearing arms; nor to force any woman, upon pain of being hanged.

IV. ITEM, that no one be so hardy to go before, or otherwise than in the battail to which he belongs, under the banner or pennon of his lord or master, except the herbergers, whose names shall be given in by their lords or masters to our constable and mareschall, upon pain of losing their horses.

V. ITEM, that no one take quarters, otherwise than by the assignment of the constable and mareschall and the herbergers; and that, after the quarters are assigned and delivered, let no one be so hardy as to remove himself, or quit his quarters, on any account whatsoever, under pain of forfeiture of horse and armour, and his body to be in arrest, and at the King's will.

VI. ITEM, that every one be obedient to his captain, and perform watch and ward, forrage, and all other things belonging to his duty, under penalty of losing his horse and armour, and his body being in arrest to the mareschall, till he shall have made his peace with his lord or master, according to the award of the court.

1413 VII. ITEM, that no one be so hardy as to rob or pillage another of money, victuals, provisions, forage, or any other thing, on pain of losing his head; nor shall any one take any victuals, merchandise, or any other thing whatsoever, brought for the refreshment of the army, under the same penalty; and any one who shall give the names of such robbers and pillagers to the constable and mareschall, shall have twenty nobles for his labor.

VIII. ITEM, no one shall make a riot or contention in the army for debate of arms, prisoners, lodgings, or any other thing whatsoever, nor cause any party or assembly of persons, under pain (the principals as well as the parties) of losing their horses and armour, and having their bodies in arrest at the King's will, and if it be a boy or page he shall lose his left ear. Any person conceiving himself aggrieved shall make known his greviance to the constable and mareschall, and right shall be done him.

IX. ITEM, that no one be so hardy as to make a contention or debate in the army on account of any grudge respecting time past, or for any thing to come; if in such contest or debate any one shall be slain, those who were the occasion shall be hanged; and if any one shall proclaim his own name, or that of his lord or master, so as to cause a rising of the people, whereby an affray might happen in the army, he who made the proclamation shall be drawn and hanged.

X. ITEM, that no one be so hardy as to cry "havok,"[1] under pain of losing his head, and that he or they that shall be the beginners of the said cry shall likewise be beheaded, and their bodies afterwards be hanged up by the arms.

XI. ITEM, that no one make the cry called mounté,[2] or any other whatsoever in the army, on account of the great danger that may thereby happen to

[1] "*Havok*" was the word given as a signal for the troops to disperse and pillage. [Note by Grose.]

[2] "*Mounté*," *i. e. montez*—to horse. Probably this was either a mutinous cry, calling on the cavalry to taek horse and leave the army, or might be the method of calling to arms from a supposed approach of the enemy and was what would now be called raising a false alarm. [Note by Grose.]

the whole army; which God forbid! and that on pain, if he be a man at arms, or archer on horseback, of losing his best horse; and if he be an archer on foot or boy he shall have his left ear cut off.

XII. ITEM, if in any engagement whatsoever an enemy shall be beat down to the earth, and he who shall have thus thrown him down shall go forwards in the pursuit, and any other shall come afterwards, and shall take the faith or parole of the said enemy, he shall have half of the said prisoner, and he who overthrew him the other half; but he who received his parole shall have the keeping of him, giving security to his partner.

XIII. ITEM, if any one takes a prisoner, and another shall join him,
1414 demanding a part, threatening that otherwise he will kill him (the prisoner), he shall have no part, although the share be granted to him; and if he kills the said prisoner he shall be in arrest to the mareschall without being delivered till he has satisfied the party, and his horses and armour shall be forfeited to the constable.

XIV. ITEM, that no man go out on an expedition by night or by day, unless with the knowledge and by the permission of the chieftain of the battall in which he is, so that they may be able to succour him should occasion require it, on pain of losing horse and armour.

XV. ITEM, that for no news or affray whatsoever that may happen in the army, any one shall put himself in disarray in his battail, whether on an excursion or in quarters, unless by assignment of his chieftain, under pain of losing horse and armour.

XVI. ITEM, that every one pay to his lord or master the third of all manner of gains of arms; herein are included those who do not receive pay, but only have the benefit of quarters, under the banner or pennon of arms of a captain.

XVII. ITEM, that no one be so hardy as to raise a banner or pennon of St. George, or any other, to draw together the people out of the army, to go to any place whatsoever, under pain, that those who thus make themselves captains shall be drawn and hanged, and those who follow them be beheaded, and all their goods and heritages forfeited to the King.

XVIII. ITEM, that every man of what estate, condition, or nation he may he, so that he be of our party, shall bear a large sign of the arms of St. George before. and another behind, upon peril that if he be hurt or slain in default thereof, he who shall hurt or slay him shall suffer no penalty for it; and that no enemy shall bear the said sign of St. George, unless he be a prisoner, upon pain of death.

XIX. ITEM, that if any one shall take a prisoner, as soon as he comes to the army, he shall bring him to his captain or master, on pain of losing his part to his said captain or master; and that his said captain or master shall bring him to our lord the King, constable or mareschall, as soon as he well can, without taking him elsewehere, in order that they may examine him concerning news and intelligence of the enemy, under pain of losing his third to him who may first make it known to the constable or mareschall; and that every one shall guard, or cause to be guarded by his soldiers, his said prisoner, that he may not ride about at large in the army, nor shall suffer him to be at large in his quarters, without having a guard over him, lest he espy the secrets of the army, under pain of losing his said prisoner; reserving to his said lord the third of the whole, if there is not a partner in the offence; and the second part to him that shall first take him; and the third part to the constable. On the like pain, and also of his body being in arrest, and at the king's will, he shall not suffer his said prisoner to go out of the army for his ransome, nor for any other cause, without leave of the King, constable, and mareschall, or the commander of the battalion in which he is.

1415 XX. ITEM, that every one shall well and duly perform his watch in the army, and with the number of men at arms and archers as is assigned him, and that he shall remain the full limited term, unless by the order or permission of him before whom the watch is made, on pain of having his head cut off.

XXI. ITEM, that no one shall give passports or safe conduct to a prisoner nor any other, nor leave to any enemy to come into the army, on pain of forfeiture of all his goods to the King, and his body in arrest and at his will; except our lord the King, Monsieur de Lancaster, seneschall, the constable, and marshall: and that none be so hardy as to violate the safe conduct of our lord the king, upon payne of being drawn and hanged, and his goods and heritage forfeited to the King; nor to infringe the safe conducts of our said lord of Lancaster, seneschall, constable, and mareschall, upon pain of being beheaded.

XXII. ITEM, if any one take a prisoner, he shall take his faith, and also his bacinet, or gauntlet, to be a pledge and in sign that he is so taken, or he shall leave him under the guard of some of his soldiers, under pain, that if he takes him, and does not do as is here directed, and another comes afterwards, and takes him from him (if not under a guard) as is said, his bacinet or right gauntlet in pledge, he shall have the prisoner, though the first had taken his faith.

XXIII. ITEM, that no one be so hardy as to retain the servant of another, who has covenanted for the expedition, whether soldier, man at arms, archer, page or boy, after he shall have been challenged by his master, under pain that his body shall be in arrest till he shall have made satisfaction to the party complaining, by award of the court, and his horses and armour forfeited to the constable.

XXIV. ITEM, that no one be so hardy to go for forage before the lords or others, whosoever they may be, who mark out or assign the places for the foragers; if it is a man at arms, he shall lose his horses and harness to the constable, and his body shall be arrested by the marischal, and if it is a valet or boy, he shall have his left ear cut off.

XXV. THAT none be so hardy as to quarter himself otherwise than by the assignment of the herbergers, who are authorized to distribute quarters, under like penalty.

XXVI. ITEM, that every lord whatsoever cause to be delivered to the constable and marischal the names of their herbergers, under penalty, that if any one goes forward and takes quarters, and his name is not delivered in to the constable and mareschall, he shall lose his horses and armour.

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"The Rules and Ordonnances of War" of Henry V are printed in Upton's "De Studio Militari," and in Grose's Antiquities of England and Wales, vol. 1, p. 34. The military code of Henry VIII is said to be preserved, in MS, in the College of Arms, London.

## III.

## 1416 CODE OF ARTICLES OF KING GUSTAVUS ADOLPHUS OF SWEDEN. (1621.)[1]

ARTICLES AND MILITABY LAWES TO BE OBSERVED IN THE WARRES.

*Imprimis.* No commander nor private Souldier whatsoever, shall use any kind of Idolatry, Witchcraft, or Inchanting of Armes, whereby God is dishonored, upon pain of death.

2. If any shall blaspheme the name of God, either drunk or sober, the thing being proven by two or three witnesses, he shall suffer death without mercy.

3. If any shall seem to deride or scorne God's Word or Sacraments, and bee taken in the fact, hee shall forthwith bee convented before the Commissioners Ecclesiasticall, to be examined, and being found guilty, he shall be condemned by the Court of Warre to lose his head: but if they were spoken through haste or unadvisedly, for the first offence hee shall bee in yrons fourteen days, and for the second, be shot to death.

4. If any shall swear in his anger by the name of God, being convicted, shall pay halfe a moneth's pay unto the poor: Or if any bee found drinking, or at any other evil exercise, he shall forfeit half a moneth's pay, and at the next assembly of prayer or preaching he shall be brought upon his knees before the whole assembly, and there crave pardon of Almighty God.

5. To the end that God's Word be by no means neglected, Our will is, that publike prayers bee said every morning and evening throughout the whole Camp, at one time, in every several Regiment, they being called thereunto by the sound of the General's or Marshal's Trumpets, and the Drums of every private Company and Regiment.

6. Whatsoever Minister shall neglect his time of prayer, except a lawfull occasion hinders him, he shall for every time being absent, pay half a moneth's pay.

7. Whatsoever Souldier shall neglect the time of prayer, and is thereof advised by his Captain, he shall lie in prison 24 hours, except a lawfull occasion hindered.

8. If any Minister be found drunk or drinking at such time as he should preach, or read prayer, for the first offence he shall be gravely admonisht by the Commissioners Ecclesiasticall, and for the second fault be banisht the Leaguer.

9. Every Holy-day and every Sabbath-day at least, shall bee kept solemn with preaching in a place convenient, before and after noon; this
1417 also to bee done twice every week, if the time will permit; if there be any holy-daies to come in the following week, the Minister shall after such Sermons or Prayers publikely bid them: who so shall neglect the time appointed (unlesse he have some lawful let or occasion) shall be punished as aforesaid.

10. All merchants and sellers of commodities whatsoever, so soon as they hear the Token or call to bee given, shall immediately shut up their doors, and so keep them during the said time of Prayer and Sermon; they that presume in that season to sell any thing, shall make forfeit of all things so sold, whereof the one half to goe to the Generall, and the other halfe to the next Hospitall; over and above which, the offender shall for one whole day be put in prison.

11. All drinkings and feastings shall in the time of Prayer bee given over, upon pain of punishment, as is before mentioned in the seventh Article; if any Souldier herein offends, he shall forfeit half his week's pay to the poor; and if he be an Officer hee shall forfeit what shall be awarded.

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[1] Translated and printed in Ward's "Animadversions of Warre," London, 1639.

12. For the explaining of this Article formerly exprest: If there bee none to complaine of these abuses, then shall the Minister himself give notice thereof unto the Colonell or Captain, and if he shall suffer such abuses to goe unpunished, then shall he give the Generall notice thereof, who shall doe him right.

13. All Priests and Ministers that are to be in our Camp or Leaguer, shall be appointed by the Bishop of the same Diocesse or Land from whence the Souldiers come whom he is to be among: no Colonell nor Captain shall take what Minister he shall think good, but shall be content with whom the Bishop shall appoint him.

14. To the intent that all Church businesse, as well in the field as otherwhere, may have an orderly proceeding; We ordain, That there be one Ecclesiasticall Consistory or Commission in our Leaguer, the Presidente or chiefe person whereof shall bee Our own Minister, when We ourselves are personally present in the field. In Our absence shall the chiefe Minister to the Generall be the man; his fellow-Commissioners or ordinary Assessors shall be the chiefe Ministers to every Regiment of Horse and Foot; unto whom We give full power and authority to be Judges in all Church affaires, according to the Law of God and holy Church; what shall be by them decreed, shall be of as great force and strength, as if it were determined in any other Consistorie whatsoever.

15. No Captain shall have liberty to take any Minister without the consent of his Colonell, and of the Consistory. Neither again shall he discharge any, but by permission of the Consistory, he having there first shewed that Minister not to be worthie of his Charge.

16. If any Minister be found ill inclined to drunkenness or otherwise; then may his Colonell or Captain of Horse of Foot complain of him in the Consistory; and if his fellow-Ministers find him guilty, then may they discharge him of his place. In such complaints, shall the whole Consistory and the President severely also reprehend him, that others of the same calling may take example thereby, and be warned of such grosse errors, and give good example unto others.

17. For that no government can stand firmly, unlesse it be first rightly grounded; and that the Lawes be rightly observed; We, the King of, &c., 1418 doe hereby make known unto all our Souldiers and Subjects, as well Nobles as others; that in our presence they presume not to doe any unseemly thing: but that every one give us our due honour, as we ought to receive; who presume to doe the contrary, shall hee punished at our pleasure.

18. Next shall our Officers and Souldiers be obedient unto our Generall and Field-Marshal, with other our Officers next under them, in whatsoever they shall command belonging unto our service, upon paine of punishment as followeth.

19. Whosoever behaves not himself obediently unto our great Generall, or our Ambassador coming in our absence, as well as if we our selves were there in person present, shall be kept in irons or in prison until such time as he shall be brought to his answer, before a Councell of Warre, where being found guilty, whether it were wilfully done or not, he shall stand to the order of the Court, to lay what punishment upon him they shall thinke convenient, according as the person and fact is.

20. And if any shall offer to discredit these great Officers by word of mouth or otherwise, and not be able by proof to make it good, hee shall be put to death without mercy.

21. Whosoever offers to lift up any manner of Armes against them, whether hee doth them hurt or not, shall be punished by death.

22. If any offers to strike them with his hand, whether hee hit or misse, he shall lose his right hand.

23. If it falls out that our great Generall in any feast, drinking, or otherwise, doth offer injury to any Knight, Gentleman or other, which stands not with their honour to put up; then may they complain to the Commissioners for the Councell of Warre, where hee shall answer them, and bee censured by them according to the quality and importance of the fact.

24. As it is here spoken of our Generall; so also it is of all other our great Officers, as Field-Martiall, Generall of the Ordnance, Generall of the Horse, Serjeant-Major Generall, Quarter-Master Generall, and Muster-Master; all which, if they commit any such offence through envie or other by-respect, they shall answer it before the Court of Warre, as is before mentioned.

25. As every Officer and Souldier ought to be obedient unto our Generall and other great Officers; so shall they in the under Regiments be unto their Colonell, Lieftenant-Colonell, Serjeant-Major, and Quarter-Master, upon paine of the same punishment before mentioned.

26. If any Souldier or Officer serving either on horse-back or foot, shall offer any wrong or abuse unto his superior Officer either by word or deed, or shall refuse any duty commanded him, tending unto our service, he shall be punisht according to the importance of the fact.

27. If any Colonell, Lieftenant-Colonell, Serjeant-Major, or Quarter-Master, shall command any thing not belonging unto our service, he shall answer to the complaint before the Court.

28. In like manner if any inferiour Officer elther of horse or foote does challenge any common Souldier to be guilty of any dishonest action; the Souldier finding himself guiltless, may lawfully call the said Officer to make proofe of his words before the Court as his equall.

29. If any Souldier either of horse or foote shall offer to strike his Officer that shall command him any duty for our service, he shall first lose his
1419 hand, and be then turned out of the Quarter. And if it be done in any Fort or place beleagured after the watch is set, he shall lose his life for it.

30. And if he doth hurt to any of them, whether it be in the field or not, he shall be shot to death.

31. If any such thing falls out within the compasse of the Leaguer or the place of Garrison, in any of the Souldiers lodgings where many of them meete together, the matter shall be inquired into by the Officers of the Regiment, that the beginner of the fray may be punished according to desert.

32. He who in the presence of our Generall shall draw his sword, with purpose to doe mischief with it, shall lose his hand for it.

33. He who shall in anger draw his sword while his Colours are flying, either in Battell or upon the March, shall be shot to death; if it be done in any strength or fortifyed place, he shall lose his hand, and be turned out of the Quarter.

34. He who shall presume to draw his sword upon the place where any Court of Justice is holden, while it is holden, shall lose his life for it.

35. He that drawes his sword in any strength or Fort to doe mischiefe therewith, after the watch is set, shall lose his life for it.

36. No man shall hinder the Provost Marshall Generall, his Lieftenant or servants, when they are to execute anything that is for our service; who does the contrary, shall lose his life.

37. Leave is given unto the Provost Marshall Generall to apprehend all whatsoever that offend against these our Articles of Warre. All other offenders he may likewise apprehend by his owne authority.

38. If the Provost Marshall Generall shall apprehend any man by his owne authority; he may keep him either in prison or in irons, but by no means doe execution upon him after the Court of Warre is ended, without first giving the Generall notice thereof.

39. The Provost Marshals of every Regiment, have also the same priviledge under their owne Regiment and Company, that the Provost Marshall Generall hath in the Leaguer.

40. Every Serjeant Major commanding in the whole Leaguer what appertains to his Office, shall be obeyed by every man with bis best endeavour.

41. Whatsoever is to be published or generally made knowne shall be proclaimed by sound of Drumme and Trumpet, that no man may pretend ignorance in it; they who after that shall be found disobedient, shall be punished according to the quality of the fact.

42. No Souldier shall thinke himselfe too good to work upon any peece of Fortification, or other place where they shall be commanded for our service upon paine of punishment.

43. Whosoever shall do his Majesties businesse slightly or lazily, shall first ride the wooden horse, and lie in prison after that, with bread and water, according as the fact shall be adjudged more or lesse hainous.

44. All Officers shall dillgently see that the Souldiers plye their worke, when they are commanded so to doe; he that neglects his duty therein shall be punished according to the discretion of the Court.

45. All Souldiers ought diligently to honour and obey their Officers, and especially being by them commanded upon service; but if at any time they
1420 can on the contrary discover that they are commanded upon a service which is to our prejudice any manner of way; then shall that souldier

not obey him what charge soever he receives from him, but is presently to give notice of it.

46. No Colonell or Captaine shall command his souldiers to doe any unlawful thing; which who so does, shall be punished according to the discretion of the Judges. Also if any Colonell or Captaine or other Officer whatsoever, shall by rigour take any thing away from any common souldier, he shall answer for it before the Court.

47. No man shall goe any other way in any Leaguer wheresoever, but the same common way laid out for every man, upon paine of punishment.

48. No man shall presume to make any Alarme in the quarter, or to shoot off his Musket in the night time, upon paine of death.

49. He that, when warning is given for the setting of the watch by sound of Drumme, Fife, or Trumpet, shall willfully absent himself without some lawful excuse; shall be punisht with the wooden horse, and be put to bread and water, or other pennance, as the matter is of importance.

50. He that is taken a sleepe upon the watch, either in any strength, trench, or the like, shall be shot to death.

51. He that comes off his watch where he is commanded to keepe his Guard, or drinkes himselfe drunke upon his watch or space of Sentinell, shall be shot to death.

52. He that at the sound of Drumme or Trumpet repaires not to his Colours, shall be clapt in irons.

53. When any march is to be made, every man that is sworn shall follow his Colours; who ever presumes without leave to stay behind shall be punished.

54. And if it be upon mutiny that they doe it, be they many or be they few, they shall die for it.

55. Who ever runnes from his Colours, be he Native or Forreiner, and does not defend them to the uttermost of his power so long as they be in danger, shall suffer death for it.

56. He that runnes from his Colours in the field shall dye for it; and if any of his Comrades kill him in the meane time time he shall be free.

57. Every man is to keep his own ranck and file upon the march, and not to put others from their orders; nor shall any man cast himselfe behind, or set himselfe upon any waggon, or horse-back; the offenders to be punished according to the time and place.

58. Whatever Regiment shall first charge the enemy and retire afterwards from them before they come to dint of sword with them, shall answer it before our highest Marshals Court.

59. And if the thing be occasioned by any Officer, he shall be publikely disgraced for it, and then turned out of the Leaguer.

60. But if both Officers and Souldiers bee found faulty alike, then shall the officers be punished as aforesaid. If it bee in the Souldiers alone, then shall every tenth man be hanged; the rest shall bee condemned to carry all the filth out of the Leaguer, until such time as they performe some exploit that is worthy to procure their pardon, after which time they shall bee cleer of their former disgrace. But if, at the first, any man can by the testimony of ten men prove himselfe not guilty of the cowardize, he shall goe free.

1421 61. When any occasion of service is, hee that first runs away, if any man kill him, hee shall be free; and if at that time he escape, and be apprehended afterwards, he shall be proclaimed Traitor, and then put out of the Quarter; after which, whosoever killeth him, shall never be called to account for it.

62. If any occasion be to enter any Castle, Towne or Sconce by assault or breach, he who retires from the place before hee hath been at handy blowes with the enemy, and hath used his sword, so farre as it is possible for him to doe service with it, and beforehe bee by main strength beaten from it by the enemy, shall be punished as the Court shall censure him.

63. Whatsoever Ensigne-bearer shall flye out of any place of Battery, Sconce or Redout, before hee hath endured three assaults, and receive no rellefe, shall be punished as before.

64. Whatsoever Regiment, Troop or Company refuseth to advance forwards to charge the enemy, but out of fear and cowardize stayes behind their fellows, shall be punished as before.

65. Whatsoever Regiment, Troop or Company is the beginner of any mutiny shall be punished as is before mentioned; the first authour to die for it, and the next consenter to bee punished according to the discretion of the Court.

66. If any Regiment, Troop or Company shall flye out of the Field or Battell. then shall they three several times (six weeks being betwixt every time) answer for it before the Court, and if there it can be proved that they have done ill, and have broken their Oath, they shall be proclaimed Traitors, and all their goods shall be confiscated, whether they bee present to answer it before the Court or not: if they bee absent they shall bee allotted so many daies as wee shall appoint them for liberty to come in to answer it before the Court, where, if they cleer themselves, well and good; if not, they shall have so many dales to retire themselves after which, if they be apprehended, then shall they be punisht according as the Court shall doom them.

67. Whatsoever Regiment, Troop or Company shall treat with the enemy, or enter into any conditions with them whatsoever (without our leave, or our Generals, or chief Commander in his absence) whatsoever officer shall doe the same, shall be put to death for it, and all his goods shall bee confiscated; of the souldiers every tenth man shall be hanged, and the rest punished, as aforesaid.

68. Whosoever presuming to do the same, and shall be taken therewith, shall bee proceeded withall like those that flye out of the field; their goods also shall be confiscate.

69. If any that then were in company with such, can free themselves from being partakers in the crime, and can prove that they did their best to resist it; then shall they be rewarded by us according as the matter is of importance.

70. Whoever, upon any strength, holds discourse with the enemy, more or lesse, without our leave, our Generals, or the Governour of the place; shall die for it.

71. If it bee proved that they have given the enemy any private intelligence, by letter or otherwise, without our leave as aforesaid; shall die for it.

72. They that give over any strength unto the enemy, unlesse it be for
1422 extremity of hunger or want of Ammunition; the Governour, with all the Officers, shall die for it; all the souldiers shall be lodged without the quarters, without any Colours, they shall be made to carry out all the filth of the Leaguer; thus to continue untill some noble exploit of them be performed, which shall promerit pardon for their former cowardize.

73. Whatsoever souldiers shall compell any Governour to give up any Strength, shall lose their life for it: those, either officers or Souldiers, that consent unto it, to be thus punished; the Officers to die all, and the Souldiers every tenth man to be hanged: but herein their estate shall be considered, if they already have suffered famine and want of necessaries for their life, and bee withall out of hope to bee relieved, and are so pressed by the enemy, that of necessity they must within a short time give up the Peece, endangering their lives thereby, without all hope of reliefe: herein shall our Generall, with his Councell of Warre, either cleer them, or condemne them according to their merit.

74. If any number of Souldiers shall, without leave of their Captain, assemble together for the making of any convention, or taking of any councell amongst themselves; so many inferiour Officers as be in company with them shall suffer death for it, and the souldiers be so punished as they that give up any Strength. Also at no time shall they have liberty to hold any meeting amongst themselves, neither shall any Captain permit it unto them; he that presumeth to suffer them shall answer it before our highest Court.

75. If any being brought in question amongst others, shall call for help of his own Nation or of others, with intention rather to bee revenged than to defend himself; he shall suffer death for it, and they that come in to help him shall be punished like Mutiners.

76. Whosoever giveth advice unto the enemy any manner of way, shall die for it.

77. And so shall they that give any token, signe or Item unto the enemy.

78. Every man shall be contented with that Quarter that shall be given him either in the Town or Leaguer; the contrary doer to be accounted a Mutiner.

79. Whoever flings away his Armes, either in field or otherwhere, shall be scourged through the Quarter, and then be lodged without it, be enforced to make the streets clean until they redeem themselves by some worthy exploit doing.

80. He that selleth or pawneth his armes or any kind of ammunition whatsoever, or any Hatchets, Spades, Shovels, Pickaxes, or other the like necessary instruments used in the field, shall be, for the first and second time, beaten through the Quarters, and for the third time, punish'd as for other theft: he

also that buieth or taketh them upon pawn, be he souldier or be he victualler, he shall first lose his money, and then bee punished like him that sold them.

81. He that wilfully breaketh any of his Armes or Implements aforesaid, shall again pay for the mending of them, and after that be punish'd with bread and water, or otherwise, according to the discretion of the Court.

82. Hee that after warning to the contrary, shall either buy or sell, shall first lose all the things so sold or bought, and then be punished for his disobedience, as is aforesaid.

83. No man that once hath been proclaimed Traitor, either at home
1423 or in the field, or that hath been under the hangman's hands, shall ever bee endured again in any Company.

84. No Duell or Combat shall be permitted to bee fought either in the Leaguer or place of Strength: if any offereth to wrong others, it shall bee decided by the Officers of the Regiment; he that challengeth the field of another shall answer it before the Marshal's Court. If any Captain, Lieutenant, Ancient, or other inferiour officer, shall either give leave or permission unto any under their command, to enter combat, and doth not rather hinder them, shall be presently cashiered from their charges, and serve afterwards as a Reformado or common souldier; but if any harm be done he shall answer it as deeply as he that did it.

85. Hee that forceth any woman to abuse her, and the matter bee proved, hee shall die for it.

86. No Whore shall be suffered in the Leaguer; but if any will have his own wife with him, he may; if any unmarried woman bee found, hee that keeps her may have leave lawfully to marry her, or else be forced to put her away.

87. No man shall presume to set fire on any Town or Village in our Land: if any doe, he shall be punished according to the importancy of the matter, so as the Judges shall sentence him.

88. No Souldier shall set fire upon any Town or Village in the enemies' Land, without he be commanded by his Captain: neither shall any Captain give any such command unlesse hee hath first received it from us or our Generall: who so doth the contrary, he shall answer it in the Generals Councell of Warre according to the importance of the matter; and if it be proved to be prejudiciall unto us, and advantagious for the enemy he shall suffer death for it.

89. No Souldier shall pillage anything from our subjects upon any March, Strength, Leaguer, or otherwise howsoever, upon pain of death.

90. He that beats his Host or his household servants, the first and second time hee shall be put in yrons, and made to fast with bread and water according as the wrong is that he hath done, if the harme be great, hee shall be pnnish'd thereafter, according to the discretion of the Court.

91. None shall presume to do wrong to any that brings necessaries to our Leaguer, Castle or Strength whatsoever, or to cast their goods down off their Horses, and take away their Horses perforce; which who so doth shall die for it.

92. They that pillage or steal either in our Land or in the enemies, or from any of them that come to furnish our Leaguer or Strength, without leave, shall bee punish'd as for other theft.

93. If it so please God that we beat the enemy, either in the field or in his Leaguer, then shall every man that is appointed follow the chase of the enemy, and no man give himselfe to fall upon pillage, so long as it is possible to follow the enemy, and until such time as he be assuredly beaten; which done, then may their quarters be fallen upon, every man taking what he findeth in his owne quarters; neither shall any man fall to plunder one in anothers quarters, but rest himselfe contented with that which is assigned him.

94. If any man give himselfe to fall upon the pillage before leave be given him so to doe, then may any of his Officers kill him. Moreover, if any
1424 misfortune ensue upon their greedinesse after the spoyle, then shall all of them suffer death for it; and, notwithstanding there comes no damage thereupon, yet shall they lye in Irons for one moneth, living all that while upon bread and water, giving all the pillage so gotten unto the next hospitall. He that plunders another quarter, shall also have the same punishment.

95. When any Fort or place of Strength is taken in, no man shall fall upon the spoyle before that all the places in which the enemy is lodged be also taken in, and that the Souldiers and Burgers have layed downe their Armes, and that the quarters be dealt out and assigned to every body; who so does the contrary, shall be punished as before.

96. No man shall presume to pillage any Church or Hospitall, although the Strength be taken by assault; except he be first commanded, or that the Souldiers and Burgers be fled thereinto and doe harme from thence; who dares the contrary, shall be punished as aforesaid.

97. No man shall set fire upon any Hospitall, Churche, Schoole, or Mill, or spoyle them any way, except he be commanded; neither shall any tyrannize over any Churchman, or aged people, men or women, maides or children, unless they first take arms against them, under paine of punishment at the discretion of the Judges.

98. No souldier shall abuse any Churches, Colledges, Schooles or Hospitalls; or offer any kind of violence to Ecclesiasticall persons, nor in any way be troublesome with pitching or inquartering upon them, or with exacting of contribution from them; no souldier shall give disturbance or offence to any person exercising his sacred function or Ministry, upon paine of death.

99. Let the billet and lodgings in every City be assigned to the Souldiers, by the Burge-masters or chiefe Head-burroughes; and let no Commander presume to meddle with that office; no commander or common souldier shall either exact or receive of the Townesmen or Citizens anything, besides what the King or his Generall in his absence hath appointed to be received.

100. No Citizen nor Countryman shall be bound to allow unto either Souldier or Officer anything but what is contained in the King's Orders, for contributions and enquarterings; (viz.) nothing beslde house-roome, fire-wood, candle, vinegar and salt, which is yet to be understood that the inferiour Officers, as Serjeants and Corporalls, and those under them, as also all common Souldiers, shall make shift with the common fire and candle of the house where they lie, and do their businesse by them.

101. If so be that Colonels and other Commanders have any servants or attendants, they shall not be maintained by the Citizens or Yeomandry, but by their own Masters.

102. No Commander shall take any house or lodging in his protection, or at his owne pleasure give a ticket of freedome, when such tickets are not expressly desired of him, nor shall he receive any bribe or present to mend his owne commons withall, under any colour or pretext whatsoever. If any man desire a personall safeguard, let him be contented with that which is appointed in the King's Orders.

103. To Commanders and Souldiers present, let the usuall allowance be offered by the Citizens, but let no care be taken for such as are away.

104. New-levied Souldiers are to have no allowance before they be entertained at the Muster.

1425 105. Nothing is to be allowed the Souldiers in any house but in the same where he is billited; if they take anything otherwhere by force, they are to make it good.

106. If either Officer, Souldier, or Sutler be to travell through any Country, the people are not to furnish them with Waggons, Posthorse, or victuals but for their ready money, unless they bring a Warrant either from the King or the Generall.

107. No Souldier is to forsake his Colours, and to put himself under the entertainment of any other Colonell or Garrison, or to ramble about the Countrey, without he hath his Colonel's Pass, or his that is in his stead: who so doth, it shall bee lawfull for any man to apprehend him, and send him prisoner to the next garrison of the King's, where he shall be examined, and punished accordingly.

108. Whosoever have any lawfull Passes, ought by no means to abuse the benefit of them, or practise any cheats under the pretence of them. If any be found with any pilfery, or to have taken any man's cattell or goods; it shall be lawfull for the Countrey-people to lay hands upon them, and to bring them to the next garrison; speciall care being had, that if the prisoner hath any letters of moment about him, they be speedily and safely delivered.

109. Our Carriers or Posts, though they have lawfull Passes to travell withall, yet shall they not ride their Post-horses, which they hire, beyond the next Stage. And if they shall take away any horse from one or other, to tire out with hard riding, and beyond reason; they shall be bound to return the horse again, or to make satisfaction for him. The same order shall take place too, when any Regiment or Troops of ours shall remove from one Quarter to another; namely, when they shall hire Postillions or baggage-Waggons for the carriage of their Valises, Armes or Ammunition.

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110. The houses of the Princes or Nobillty which have no need to borrow our Guard to defend them from our enemy, shall not be pressed with souldiers.

111. Moreover, under a great penaltie, it is provided, that neither Officers nor Souldiers shall make stay of, or arrest the Princes Commissaries or Officers, or any Gentlemen, Councellors of State, Senators or Burgers of any Cities, or other countrey-people; nor by any fact of violence shall offend them.

112. Travellers, or other passengers going about their businesse into any Garrisons or places of Muster, shall by no means bee stayed, injured, or have contribution laid upon them.

113. Our Commanders shall defend the countrey-people and Ploughmen that follow their husbandry, and shall suffer none to hinder them in it.

114. No Commander or common souldier whatsoever, either in Town of Garrison, or place of Muster, shall exact anything upon Passengers, nor shall lay any Custome or Toll upon any Merchandize imported or exported; nor shall any bee a hindrance to the Lord of the place, in receiving his due Customes or Toll-gathering; but to further them.

115. If any of our Officers having power of Command, shall give the Word for any Remove or March to some other Quarter; those souldiers either of Horse or Foot that privily lurk behind their fellows shall have no power
1426 to exact part of the contributions formerly allotted for their maintenance in that place; but shall severally be punished rather for their lingering behind the Army.

116. Whatsoever is not contained in these Articles, and is repugnant to Military Discipline, or whereby the miserable and innocent country may against all right and reason be burdened withall, whatsoever offence finally shall be committed against these orders, that shall the severall Commanders make good, or see severally punished unlesse themselves will stand bound to give further satisfaction for it.

117. According to these Articles, let every man governe his businesse and actions, and learne by them to take heed in comming into lurch or danger.

118. If any Souldier happens to get free-booty in any Castle, City, Towne, Fort, Strength, or Leaguer; and moreover whatsoever Ordnance, Munition for Warre, and victuals is found there, shall be left for our use, the rest shall be the Souldiers, only the tenth part thereof shall they give to the sicke and maimed Souldiers in the Hospitalls. All prisoners shall first be presented to us, amongst which if there bee any man of note, whom we desire to have unto our selves, wee promise in lieu thereof honestly to recompence the taker of him, according to the quality of the person; other prisoners of inferiour ranke may the takers keep unto themselves, whom by our leave or our Generalls they may put to their ransome and take it to themselves, but without leave they may not ransome them upon paine of death.

119. If any bee found drunken in the enemies Leaguer Castle, or Towne, before the enemy hath yielded himself wholly up to our mercy, and laid downe his Armes; whosoever shall kill the said drunken Souldier shall be free for it; always provided that good proofe be brought that hee was drunken; and if that Souldier escape for that time with his life, and that it can appear that some dammage or hindrance hath come unto our service by his drunkennesse, then wheresoever he be apprehended he shall die for it; but if no hurt ensued thereof, yet shall be put in irons for the space of one month, living upon his pittance of Bread and Water.

120. All our Souldiers shall duely repaire unto the generall musters upon the day and houre appointed; nor shall any Colonell or Captaine either of Horse or Foot, keepe backe his Souldiers from being mustered at the time when our Muster-masters shall desire to vlew them; if any refuse, he shall be taken for a Mutiner.

121. No Colonell nor Captaine shall lend any of their Souldiers to another upon the Muster-dayes for the making up of their numbers compleat; he that thus makes a false Muster, shall answer it at the Marshalls Court, where being found guilty he shall be proclaimed Traitor; after which being put out of the Quarter, his Colours shall flie no more.

122. If any Souldier hires out himselfe for money to runne the Gate-
1427 lope[1] three several times, he shall be beheaded, and if any Captaine shall so permit or counsell his Souldier to doe the same, he shall be actually cashiered.

[1] Running the Gatc-lope or Purgatory, is, when he that hath done the fault, is to run between the Regiment standing halfe on one side, and halfe on the other, with whips or bastinadoes in their hands, to lash and cudgel the offender, which punishment many a shameless souldier will be hired to undergo for drinke or money. (Note by Ward.)

123. If any Horseman borrowes either Horse, Armour, Pistols, Saddle, Sword, or Harnesse to passe Muster withall, so much as is borrowed shall be escheated, and himselfe after that turned out of the Leaguer, as likewise he shall that lent it him; the one halfe of the Armes forfeited shall goe to the Captaine, and the other halfe unto the Parforce.

124. If it can be proved that any Horseman hath wilfully spoyled his Horse; hee shall be made Traitor, lose his Horse and bee turned out the Quarter.

125. All Souldiers both of Horse and Foot shall be taken on at a free Muster, but not by any private Captaine; neither shall their pay goe on before they be mustered by our Muster-masters.

126. No Souldier either of Horse or Foot shall be cashiered by his Colonell, Captaine, or other inferiour officer; nor shall they who being taken on at a free Muster, have their men sworne to serve (if it please God) until the next Muster, except it be upon a free Muster, at which time the Muster-masters, and his Colonell may freely give him his Passe.

127. If any forreine Souldiere shall desire his passe in any Towne of Garrison after the enemy be retired he may have it; but by no means whilst there is any service to be done against the enemy.

128. If any Souldier or Native subject, desires to bee discharged from the warres, he shall give notice thereof unto the Muster-masters; who if they finde him to bee sicke, or maimed, or that he served twenty yeares in our warres, or hath beene ten severall times before the enemy, and can bring good witnesse thereof, he shall be discharged.

129. If any Colonell or Captaine, either of Horse or Foot does give any Passe otherwise than is before mentioned, he shall be punished as for other Fellonies; and he who hath obtained the same Passe, shall lose three moneths pay, and be put in prison for one moneth, upon bread and water.

130. No Colonell or Captaine either of Horse or Foot shall give leave to his Souldiers to goe home out of the Field, without leave of our Generall, or chiefe Commander; whosoever does the contrary, shall lose three moneths pay, and be put in prison for one moneth, upon Bread and Water.

131. No Captaine either of Horse or Foote shall presume to goe out of any Leaguer or place or Strength to demand his pay, without leave of the Generall or Governour; who so doth, shall be cashired from his place, and put out of the quarters.

132. No Captaine either of Horse or Foot shall hold backe any of his souldiers meanes from him; of which if any complaine, the Captaine shall answer it before the Court, where being found guilty, he shall be punisht as for other Felony; also if any mischance ensue thereupon, as that the Souldiers mutine, be sicke, or endure hunger, or give up any Strength; then shall he answer for all those inconveniences, that hereupon can or may ensue.

133. If any Captaine lends money unto his souldiers which he desires should be paid againe; that must be done in the presence of the Muster-masters, that our service be no way hinderèd or neglected.

1428 134. If upon necessity the case sometimes so falls out in the Leaguer, that pay bee not always made at the due time mentioned in the Commissions, yet shall every man in the meane time be willing to further our service, seeing they have victuals sufficient for the present, and that they shall so soone as may bee receive the rest of their means, as is mentioned in their Commission.

135. Very requiste it is, that good justice be holden amongst our Souldiers, as well as amongst other our Subjects.

136. For the same reason was a King ordained by God to be the Soveraigne Judge in the field as well as at home.

137. Now therefore in respect of many occasions which may fall out, his single judgment alone may bee too weak to discerne every particular circumstance; therefore it is requisite that in the Leaguer, as well as otherwhere, there be some Court of Justice erected for the deciding of all controversies; and to be carefull in like manner, that our Articles of warre be of all persons observed and obeyed so farre forth as is possible.

138. We ordained therefore that there be two Courts in our Leaguer: a high Court and a lower Court.

139. The lower Court shall be amongst the Regiments both of Horse and Foot, whereof every Regiment shall have one among themselves.

140. In the Horse-Regiments the Colonell shall be President, and in his absence the Captaine of our owne Life-guards; with them are three Captains to be joyned, three Lieutenants, three Cornets, and three Quarter-masters that so

together with the President they may be to the number of thirteene at the leaste.

141. In a Regiment of Foot the Colonell also shall be President, and his Lieutenant Colonell in his absence; with them are two Captains to be joyned, two Lieutenants, two Ensignes, foure Serjeants, and two Quarter-masters; that together with the President they may be thirteene in number also.

142. In our highest Marshall Court, shall our Generall be President; in his absence our Field Marshall; when our Generall is present, his associates shall be our Field Marshall first, next him our General of the Ordnance, Serjeant Major Generall, Generall of the Horse, Quarter-Master-General; next to them shall sit our Muster-Masters and all our Colonells, and in their absence their Lieutenant Colonells, and these shall sit together when there is any matter of great importance in controversie.

143. Whensoever this highest Court is to be holden they shall observe this order; our great Generall as President, shall sit alone at the head of the Table, on his right hand our Field-Marshall, on his left hand the Generall of the Ordnance, on the right hand next our Serjeant-Major-Generall on the left hand againe the Generall of the Horse, and then the Quarter-Master-General on one hand, and the Muster-Master-Generall on the other; after them shall every Colonell sit according to his place as here followes; first, the Colonell of our Life Regiment, or of the Guards of our owne person; then every Colonell according to their places of antiquity. If there happen to be any great men in the Army of our subjects, that be of good understanding, they shall cause them to sit next these Officers; after these shall sit all of the Colonells of strange Nations, every one according to his antiquity of service.

1429 144. All these Judges both of higher and lower Courts, shall under the blue Skies thus swear before Almighty God, that they will inviolably keep this following oath unto us: *I. R. W.* doe here promise before God upon his holy Gospell, that I both will and shall Judge uprightly in all things according to the Lawes of God, of our Nation, and these Articles of Warre, so farre forth as it pleaseth Almighty God to give me understanding; neither will I for favour nor for hatred, for good will, feare, ill will, anger, or any gift or bribe whatsoever, judge wrongfully; but judge him free that ought to be free, and doom him guilty, that I finde guilty; as the Lord of Heaven and Earth shall help my soule and body at the last day, I shall hold this oath truly.

145. The Judges of our highest Court shall take this their oath in the first Leaguer, where our Campe shall be pitched; our Generall, and the rest appointed to set with him shall repair to the place where we shall appoint, before his Tent, or otherwhere; where an officer appointed by us shall first take his oath, and then the others oathes also.

146. When the President of our lower Courts shall heare this aforesaid oath read before them, then shall they hold up their hands, and sweare to keep it; in like manner, so often as any Court is to be holden in any Regiment, the aforesaid oath shall be read before all them that sit in judgment with him, who shall also hold up their hands and promise to keep the oath aforesaid.

147. In our highest Court, there shall he one Sworne Secretary appointed, who shall make a diligent record of all the proceedings that shall fall out, either in any pitcht Battell, Skirmish, Leaguer, or any other peece of service whatsoever; he shall take the note, both of the day, place, and houre, with all other circumstances that shall happen; he shall also set his hand unto all sentences signed by our Generall; he shall have also two Clerkes or Notaries under him, who shall ingrosse all these passages, and keepe a true Register of all enterprises that our Generall with his Counsell of Warre shall give order to have done; and likewise of what letters be either written or received.

148. In our highest Court there shall be one Vice-president, who shall command the Serjeant at Armes, whose office is to warne in all the Judges of the Court, that they may there appeare at the time and place appointed, and also to give the same notice both unto the Plaintife and Defendant.

149. In all lower Courts, also, there shall be one sworne Clerke or Secretary who shall likewise hold the same order that is mentioned in our highest Court.

150. Our highest Court shall be carefull also to heare and judge all criminall actions, and especially cases of conspiracy or treason practised or plotted against us, or our Generall either in word or deed; secondly, if any gives out dishonourable speeches against our Majesty; thirdly, or consulteth with the enemy to betray our Leaguer, Castle, Towne, Souldiers, or Fleet any way whatsoever; fourthly, If any there be partakers of such treason or treachery, and reveale it not; fifthly, or any that hath held correspondency or intelligence

with the enemy; sixthly, if any hath a spite or malice against us or our Country; seventhly, if any speake disgracefully, either of our owne Generalls person or endeavours; eighthly, or that intendeth treachery against our Generall or his Under-Officers; or that speaketh disgracefully of them.

1430 151. All questions in like manner happening betwixt Officers and their Souldiers, if they suspect our lower Court to be partiall anyway, then may they appeale unto our highest Court, who shall decide the matter.

152. If a Gentleman or any Officer be summoned to appeare before the lower Court, for any matter of importance that may touch his life, or honour; then shall the same be decided by our higher Court.

153. All civill questions shall be in controversie in our lower Court, if the debt or fine extends unto five hundred Dollars or seventy-five pounds or above; if the party complains of injustice they may thence appeale unto the higher Court, if so be they can first prove the injustice.

154. All other occasions that may fall out, be they civill, or be they criminall; shall first come before the lower Court where they shall be heard and what is there by good evidence proved, shall be recorded.

155. Any criminall action, that is adjudged in our lower Court, we command that the sentence be presented unto our Generall; we will not have it presently put in execution, untill he gives command for it in our absence. But our selves being in person there present, will first take notice of it, and dispose afterwards of it, as we shall think expedient.

156. In our higher Court, the Generall Parforce, or his Lieutenant shall be the Plaintife, who shall be bound to follow the complaint diligently, to the end he may the better informe our Councellors who are to doe Justice; if it be a matter against ourselves, then shall our owne Advocate defend our action before our Court.

157. The same power the Parforce of every Regiment shall have in our lower Court, which Parforce shall be bound, also to give notice of every breach of these Articles of warre, that the infringer may be punished.

158. Whatsoever fine is by the aforesaid Judges determined according to our Articles of warre, and escheated thereupon, shall be divided into three parts. Our owne parte of the fine we freely bestow upon the several Captains either of Horse or Foot, which is forfeited by their Officers and Souldiers; and the forfeiture of every Captain, we bestow upon their Colonell; and the forfeiture of every Colonell we give unto our Generall. The other two parts, belonging either to the party to whom it is adjudged, or to the Court, those leave we undisposed, the point of Treason onely excepted; and this gift of ours unto our Officers, is to be understood to indure so long as the Army be in field, upon any strength or worke, and till they come home againe, after which time, they shall come under the law of the land like the other inhabitants.

159. Whensoever our highest Court is to sit, it shall be two houres before proclaimed through the Leaguer, that there is such an action criminall to be there tried, which is to be decided under the blue skies: but if it be an action civill, then may the court be holden within some tent, or otherwhere; then shall the souldiers come together, about the place where the Court is to be holden, no man presuming to come too neere the table where the Judges are to sit; then shall our Generall come foremost of all, and the other his associats, two and two together, in which order, they all comming out of the Generalls tent, shall set themselves down in the Court, in the order before appointed; the Secretaries place shall be at the lower end of the table, where he shall

1431 take diligent notice in writing of all things declared before the Court; then shall the Generall Parforce begin to open his complaint before them, and the contrary party shall have liberty to answer for himself, untill the Judges be thoroughly informed of the truth of all things.

160. If the Court be to be holden in any house or tent, they shall observe the same order in following the Generall in their degrees, where they shall also sit as is afore mentioned.

161. The matter being thoroughly opened and considered upon, according to the importance of it, and our whole Court agreeing in one opinion; they shall command their sentence concerning the same action, to be publikely there read in the hearing of all men, always reserving his Majesties further will and pleasure.

162. In our lower court they shall also hold the same order; saving that the particular Court of every Regiment, shall be holden in their owne quarters.

163. In this lower Court, they shall alwayes observe this order; namely, that the President sits at the bords end alone, the Captaines, Lieutenants, and

Ensignes on either side; so many Inferior Officers also upon each side, that so they may the better reason upon the matter amongst themselves; Last of all, shall the Clerk or Secretary sit at the lower end of the Table; the one party standing upon one hand, and the other upon the other.

164. So soon as the sentence is given the President shall rise up and all that sit with him, but doom being given by our Generall, that one of the parties must lose his head, hand, or the like; then shall they command the Parforce to take him away to Prison, which done, the Parforce shall send unto the Minister, to desire him to visit the Party, and to give him the Communion; but if the doom be passed in any lower Court, it shall be signified up unto the Generall in our absence, who shall either pardon the fact or execute the sentence.

165. No superiour Officer, Colonel or Captain, either of Horse or Foot, shall sollicit for any man that is lawfully convicted by the Court, either for any crime, or for not observing of these Articles of Warre; unlesse it be for his very neere kinsman, for whom nature compells him to intercede; otherwise the solliciter shall be held as odious as the delinquent and cashiered from his charge.

166. Whosoever is minded to serve us in these Warres, shall be obliged to the keepin of these Articles. If any out of presumption, upon any Strength, in any Leaguer, in the field, or upon any worke, shall doe the contrary, be he Native or be he Stranger, Gentleman or other, Processe shall be made out against him for every time, so long as he serves us in these warres in the quality of a Souldier.

167. These Articles of warre we have made and ordained for the welfare of our Native Countrey, and doe command that they be read every moneth publickly before every Regiment, to the end that no man shall pretend ignorance. We further will and command all, whatsoever Officers higher or lower, and all our common souldiers, and all others that come into our Leaguer amongst the souldiers, that none presume to doe the contrary hereof upon paine of rebellion, and the incurring of our highest displeasure; For the firmer confirmation whereof, we have hereunto set our hand and seale.

SIGNED IN THE LEAGUER ROYALL.

## IV.

## 1432 EXTRACT FROM THE "ENGLISH MILITARY DISCIPLINE" OF JAMES II. (1686.)

### Of Councels of War or Courts Martial.

In an Army the Councel of War is always to Meet at the Generals Quarters or Tent, and none are called to it but the Lieutenant-Generals, the Major-Generals, the Brigadiers, and the Colonels or Commanders of Bodies when the Matters concern their Regiments.

Private Councels of War or Courts Martial in a Garison are either Held at the Governours House, at the Main Guard, or where the Governour orders. In a Camp, At the Colonels Tent, who causes Notice to be given to the Captains to be present.

When all are met, The Governour or Colonel, or he who is to Sit as President, takes his place at the head of the Table, the Captains Sit about according to their Seniority (that is to say) The First Captain on the Right Hand of him that Presides, the Second on the Left, and so of the rest. And the Town-Major or the Aid-Major or Quarter-Master of the Regiment, who in the absence of the Judge-Advocate discharges his Office, is to Sit in his Place at the lower end of the Table.

The Lieutenants, Sub-Lieutenants and Ensigns have right to enter into 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.

If the Councel be Called to Deliberate on some Matter of Consequence, The President having Opened it to the Court, Asks their Opinions.

The youngest Officer gives his Opinion first, and the rest in order till it come to the President who speaks last. The Opinions of every one being set down in Writing, the Result is drawn conformable to the Plurality of Votes which is Signed by the President onely.

If the Councel of War, or Court-martial be held to judge a Criminal, the President and Captains having taken their places, and the Prisoner being brought before them, And the Informations read, The President Interrogates the Prisoner about all the Facts whereof he is accused, and having heard his Defence, and the Proof made or alleged against him, He is ordered to withdraw, being remitted to the Care of the Marshal or Jaylor. Then every one judges according to his Conscience, and the Ordinances or Articles of War. The Sentence is framed according to the Purality of Votes, and the Criminal being brought in again, The Sentence is Pronounced to him in the name of the Councel of War, or Court Martial.

When a Criminal is Condemned to any Punishment, the Provost Martial
1433 causes the Sentence to be put in Execution; And if it be a publick Punishment, the Regiment ought to be drawn together to see it, that thereby the Soldiers may be deterred from offending. Before a Souldier be punished for any infamous Crime, he is to be publickly Degraded from his Arms, and his coat stript over his ears.

A Councel of War or Court Martial is to consist of Seven at least with the President, when so many Officers can be brought together; And if it so happen that there be not Captains enough to make up that Number, the inferiour Officers may be called in.

V.

1434 ARTICLES OF WAR OF JAMES II. (1688.)

RULES AND ARTICLES FOR THE BETTER GOVERNMENT OF HIS MAJESTIES LAND-FORCES IN PAY.

ART. I.

All Officers and Soldiers (not having just Impediment) shall diligently frequent Divine Service and Sermon, in such Places as shall be appointed for the Regiment, Troop, or Company, wherein they serve; and such as 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 private Soldiers, they shall for every such First Offence forfeit each man Twelve Pence, to be deducted out of their next Pay; And for the Second Offence, shall forfeit Twelve Pence, and be laid in Irons for Twelve Hours; and for every like offence afterwards, shall suffer and pay in like manner.

ART. II.

If any Sutler or Seller of Ale, Beer, Wine, or any sort of Drinks, Bread, Victuals, or other Commodities or Merchandise whatsoever, attending His Majesties Forces, shall during the time of Divine Service, or Sermon, set any such thing to sale, he shall forfeit the full value thereof, for the use of the Poor.

ART. III.

Whosoever shall use any unlawful Oath or Execration (whether Officer or Soldier) shall incur the Penalties exprest in the first Article.

ART. IV.

If any Officer or Soldier 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 Bored through with a Red-hot Iron.

ART. V.

If any Officer or Soldier shall Abuse or Profane 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.

1435 And whosoever 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.

ART. VI.

All Officers of what Quality or Condition soever, shall take the following Oath, which shall be Administered to them, by such Person or Persons, and in such Places as His Majesty, His General, Lieutenant General, or Commander in Chief of the Forces for the time being, shall appoint.

THE OATH OF FIDELITY TO BE TAKEN BY EVERY OFFICER AND SOLDIER IN THE ARMY.

I, A. B., Do Swear to be true and faithful to my Sovereign Lord King JAMES, and to His Heirs and Lawful Successors; and to be Obedient in all things to

His General, Lieutenant General, or Commander in Chief of His Forces, for the time being, And will behave myself obedlently towards my Superior Officers in all they shall command me for His Majesty's Service. And I do further Swear, That I will be a true, faithful, and obedient Servant and Soldier, every way performing my best Endeavours for His Majesty's Service, Obeying all Orders, and Submitting to all such Rules and Articles of War, as are or shall be Established by His Majesty; and I do likewise Swear, That I believe, That it is not lawful upon any Pretence whatsoever, to take Arms against the King; and that I do Abhor that Traiterous Position of taking Arms by His Authority against His Person, or against those that are Commissioned by Him. *So help me God.*

ART. VII.

No Officer or Soldier shall use any Traiterous Words against the Sacred Person of the King's Most Excellent Majesty upon Pain of Death.

ART. VIII.

Whosoever shall hold correspondence with any Rebel or Enemy of His Majesty, or shall give them Advice or Intelligence either by Letters, Messages, Signs, or Tokens, or in any manner of way whatsoever, shall suffer Death. And whatever Regiment, Troop, or Company shall Treat with such Rebels or Enemies, or enter into any Condition with them without His Majesties Leave, or Leave of the General, Lieutenant General, or of the Chief Commander in his absence; and the officers of such Regiment, Troop, or Company who are found guilty shall die for it; and of the Soldiers who shall consent thereunto, every tenth Man by Lot shall be Hanged, and the rest punished at the Discretion of the General Court-Martial; But whatsoever Officers or Soldiers can prove that they did their utmost to resist and avoid such a Treaty, and were no Partakers of the Crime, they shall not only go free, but shall also be Rewarded for their Constancy and Fidelity.

ART. IX.

Whosoever shall go about to Entice or Persuade either Officer or Soldier
1436 to join or engage in any Traiterous or Rebellious Act, either against the Royal Person of the King or Kingly Government, shall suffer Death for it; And whoever shall not reveal to his Superior Officer such a conspiracy as 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.

ART. X.

If any Officer or Soldier shall behave himself disrespectfully towards the General, Lieutenant General, or other Chief Commander of the Army, or speak words tending to his Hurt or Dishonor, he shall be punished according to the Nature and Quality of the Offence by the Judgment of the General Court-Martial.

ART. XI.

Whosoever shall presume in the Presence of the General, Lieutenant General, or other Commander in Chief, to draw his Sword with a purpose to do any Officer, or any of his fellow Soldiers mischief, shall suffer such Punishment as a Court-Martial shall think fit to inflict upon him for the said Offence.

ART. XII.

Whoever shall presume to violate any Safe Conduct or Protection given by His Majesty, the General, Lieutenant General, or other Commander in Chief (knowing the same) shall suffer Death, or such other punishment as shall be inflicted on him by the General Court-Martial.

ART. XIII.

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 shall think fit. And if any number of Soldiers shall presume to

assemble to take Councel amongst themselves for the demanding their Pay, any Inferior Officers accessory thereunto, shall suffer Death for it, as the Heads and Ring-leaders of such Mutinous and Seditious Meetings; And the Soldiers shall be punished either with death or otherwise at the Discretion of the 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 such other Punishment as the General Court-Martial shall think fit.

ART. XIV.

No Officer or Soldier shall utter any words tending to Sedition or Mutiny upon pain of suffering such Punishment as shall be inflicted on him by a Court-Martial.

And whosoever shall hear any Mutinous or Seditious Words spoken, and shall not with all possible speed reveal the same to his Superiour Officers, shall be punished as a Court-Martial shall think fit.

ART. XV.

If any Inferior Officer or Soldier shall refuse to obey his Superior Officer, or shall quarrel with him, he shall be Cashiered, or suffer such Punishment as a Court-Martial shall think fit.

1437 But if any Officer or Soldier 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 Superior Officer upon any pretence whatsoever, he shall suffer Death, or such other Punishment as the General Court-Martial shall think fit.

ART. XVI.

Every Soldier 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 Circumstance and Aggravation of the Fact.

ART. XVII.

All murders and wilful killing of any Person shall be punished with Death.

ART. XVIII.

All Robbery and Theft committed by any Person in or belonging to the Army, shall be punished with Death, or otherwise as the Court-Martial upon consideration of the Circumstances shall think fit.

ART. XIX.

Whoever shall in danger 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.

ART. XX.

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 Licence, shall suffer such Punishment as shall be inflicted on him by a Court-Martial.

ART. XXI.

No person shall extort Free quarter, or shall commit any Waste, or spoll or deface Walks of Trees, Parks, Warrens, Fishponds, Houses, or Gardens, tread down, or otherwise destroy Standing Corn in the Ear, or shall put their Horses into Medows without Leave from their Superior Officer, upon pain of Severe Punishment; But if any Officer or Soldier shall exact Money, or 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 Commander in Chief, he shall suffer Death for it.

ART. XXII.

Whoever shall run from his Colours, or doth not defend them to the utmost of his Power, shall suffer Death.

1438 ART. XXIII.

If any Officers or Soldiers, Regiment, Troop, or Company, or Commanded Party, shall not behave themselves in Fight against an Enemy as they ought to do, they shall suffer such Punishment as the General Court-Martial shall inflict.

ART. XXIV.

When it shall please God that his Majesty's Forces shall beat the Rebels, or Enemy, every Man shall follow his Officer in the Chase; but whoever shall presume to Pillage or Plunder till the Rebels, or Enemy be entirely beaten, he shall suffer Death, or such other Punishment as shall be pronounced against him by the General Court-Martial; and the Pillage so gotten shall be forfeited to the use of the sick and maimed Soldiers.

ART. XXV.

In What Place soever it shall please God that the Rebels or Enemy shall be subdued or overcome, all the Ordnance, Ammunition and Victuals that shall be there found, shall be secured to his Majesties use, and for the better Relief of the Army; and one-tenth part of the Spoil shall be laid apart towards the Relief of the sick and maimed Soldiers.

ART. XXVI.

All Officers whose Charge it is shall see the Quarters kept clean and neat upon pain of severe Punishment.

ART. XXVII.

No Officer shall lie out all Night from the Camp or Garison without his Superior Officer's Leave, upon pain of being punished for it as a Court-Martial shall think fit; Nor shall any Soldier or Officer go any By-way to the Camp, or other than the Common Way laid out for all, upon pain of being punished as aforesaid.

ART. XXVIII.

No Soldier shall presume to make any alarm in the Quarters by shooting off his Musket 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 inflict.

ART. XXIX.

No Soldier shall in anger draw his Sword in any Camp, Post, or Garison, upon pain of suffering such Punishment as a Court-Martial shall inflict upon him for the same.

ART. XXX.

When warning is given for Setting the Watch, by Beat of Drum, or Sound of Trumpet, if any Soldier shall absent himself without reasonable Cause, he shall be punished by Riding the Wooden Horse, or otherwise at the Discretion of the Commander.

1439 And whoever shall fail at the Beating of a Drum, or sound of a Trumpet, or upon an Alarm given, to repair to his Colours, with his Arms decently kept, and well fixed (unless there be an evident necessity to hinder him from the same) he shall either be put in Irons for it, or suffer such other Punishment as a Court-Martial shall think fit.

ART. XXXI.

Whoever makes known the Watchword without Order, or gives any other Word but what is given by the Officer, shall suffer Death, or such other punishment as the General Court-Martial shall think fit.

ART.. XXXII.

A Centinel who shall be 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 the General Court-Martial shall 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 the General Court-Martial shall think fit.

And if any Soldier employed 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; of if he enter into any House, and there or elsewhere be found sleeping or drunk, whilst he should have been upon Service, he shall suffer Death, or such other Punishment as shall be inflicted upon him by the General Court-Martial.

ART. XXXIII.

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 the General Court-Martial shall inflict.

If any shall presume to beat or abuse his Host, or the Wife, Child, or Servant of his Host, where he is Quartered, he shall be put in Irons for it: And if he do it a second time, he shall be further punished; and the party wronged shall in both Cases have amends made him.

And whoever shall force a Woman to abuse her (whether she belong to the Enemy, or not) and the fact be sufficiently proved, shall suffer Death for it.

ART. XXXIV.

No Soldier 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.

Nor shall any Officer or Soldier presume to send a Challenge to any other Officer or Soldier to fight a Duel; neither shall any Soldier or Officer upraid another for refusing a Challenge; And we do acquit and discharge all men that have Quarrels offered, or Challenges made to them, of all Disgrace, or opinion of Disadvantage, since they but do the Duties of Soldiers who ought to subject themselves to Discipline; and they that provoke them, shall
1440 be proceeded against as Breakers of Discipline, and Enemies to Our Service: And whoever shall offend in either of these Cases, if it be an Officer, he shall be Cashiered; and if a private Soldier, 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 willingly or knowingly suffer either Soldiers or Officers to go forth to a Duel, he shall be punished for it by the Sentence of a Court-Martial.

And all Officers of what Condition soever, have power to part and quell all Quarrels, Frays, or sudden Disorders between Soldiers and Officers, tho' of another Company, Troop or Regiment, and to commit the disorderly Persons to Prison, until their proper Officers be acquainted therewith.

Whoever shall resist such an Officer (though of another Company, Troop, or Regiment) or draw his Sword upon him, shall be severely punished as the General Court-Martial shall appoint.

And 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 die afterwards of any Wound there received, yet if they be Officers, they shall be cashiered; and if common Soldiers, they shall be punished with Riding the Wooden Horse, or suffer such other Punishment as a Court-Martial shall direct.

And lastly, in all Cases of Duels, the Seconds, and Carriers of Challenges, shall be taken as Principals, and punished accordingly.

ART. XXXV.

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 his Majesty, the General, or other Commander in Chief of his Majesties Forces.

ART. XXXVI.

If any Soldier be sick, wounded, or maimed in his Majesties 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 Soldiers, and his Wages or Pay shall go on and be duly paid till it do's appear that he can be no longer serviceable in the Army, and then he shall be sent by Pass to his Countrey, with Money to bear his Charges in his Travel, or such other Provision shall be made for him, as his Majesty shall direct.

ART. XXXVII.

All Commissions granted by his Majesty, the General, or Commander in Chief of his Majesties Forces, to any Officer in Pay, shall be brought to the Commissary of the Musters, and Secretary at War, who are to receive and Enter the same in a Book fairly written; and no Commission-Officer shall be allowed in Muster, without a Commission from his Majesty, or the Commander in Chief for the time being, and the same Entered with the Commissary-General of the Musters, or his Deputies, and Secretary at War.

1441 ART. XXXVIII.

No Commission Officer after Enrollment and being Mustered, shall be Dismissed or Cashiered without order from his Majesty, the General or Commander in Chief for the time being, or a General Court-Martial: But the Captains with the approbation of their Colonels, or of the Governour of the Garison where they are, may discharge any Non-Commission Officer, or Private Soldier when they find cause, taking other Non-Commission Officers or Soldiers in their Places; Provided that such Colonel or Governour shall forthwith certifie the Commissary General of the Muster, That (by their approbation) such Non-Commission Officers or Soldiers were discharged, and others taken into their Places respectively. And in Quarters and Garisons where they are only single Troops or Companies, the Captains certificates are forthwith to be sent and accepted by the Commissary-General, expressing the Day of each Non-Commission Officers or Soldiers Discharge or Death, and who has been entertained in his Place.

ART. XXXIX.

All Captains shall use their utmost Endeavours to have their Troops and Companies compleat and full, and no Soldiers Duty, either of Horse or Foot, shall be done by any other than the Soldier himself; But in case of Sickness or Disability, or other necessary Cause, his Captain may dispence with his absence, without obliging him to find another to Serve in his stead.

ART. XL.

If any Trooper or Dragoon shall lose or spoil his Horse, or any Foot Soldier 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 at his own Charge, with as good as were lost; 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 re-furnished.

Nor shall any Soldier 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 the General Court-Martial. And where Arms, or other Necessaries aforesaid shall be pawned, they are to be forfeited, and seized on for his Majesties use.

ART. XLI.

All Officers and Soldiers, and also the Muster-Master, not duly observing these Orders and Instructions, and every of them respectively, shall be Cashiered, or liable to such other Punishments as his Majesty, or Commander in Chief of the Forces, or a Court-Martial shall appoint.

ART. XLII.

None shall presume to spoil, sell, or convey away any Ammunition delivered unto him, upon pain of suffering death, or such other punishment as the General Court-Martial shall think fit.

1442 ART. XLIII.

No Officer, Provider or Keeper of the Victuals or Ammunition for his Majesties Forces shall imbezel or willingly spoil or give a false Account of any part thereof to whom he is to make his Account, upon pain of suffering Death, or such other Punishment as the General Court-Martial shall think fit.

ART. XLIV.

No Commissary or Victualler shall bring or furnish unto the Camp any unsound or unsavory Victuals of what kind soever, whereby sickness may grow in the Army, or the Service be hindred; and if upon Examination before the General Court-Martial he shall be found guilty, he shall suffer such Punishment as they shall direct.

ART. XLV.

No Officer or Soldier shall be a Victualler in the Army upon pain of being punished at discretion.

ART. XLVI.

No Victualler or seller of Beer, Ale, or Wine belonging to the Army, shall Entertain any Soldier in his House, Booth, Tent or Hutt after the Warning-Piece, Tattoe or Beat of the Drum at night, or before the Beating of the Revellles in the morning; Nor shall any Soldier within that time be any where but upon his Duty, or in his Quarters, upon pain of Punishment both to the Soldier and Entertainer at the Discretion of a Court-Martial.

ART. XLVII.

The Commission-Officers of every Regiment may hold a Court-Martial for that Regiment upon all necessary Occasions.

The Provost-Martial of every Regiment shall have the same priviledge 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.

ART. XLVIII.

Such who are Judges in a General Court-Martial or in a Regimential Court-Martial, shall hold the same Rank in those Courts as they do in the Army for Orders sake, and they shall take an Oath for the due Administration of Justice according to these Articles, or (where these Articles do not assign any special Punishment) according to their consciences, the best of their Understandings, and the Custom of War in the like Cases; and shall demean themselves orderly in the hearing of Causes, and before giving of Sentence every Judge shall dellver 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 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 Sentence.

1443 ART. XLIX.

At a General Court-Martial there shall be a Clerk who is to be sworn to make true and faithful Records of all the Proceedings of that Court, and there shall be also such other Officers appointed both for that, and also for the Regimen-

tal Court-Martial as shall be necessary; and the General Court-Martial may appoint and limit the Fees of the Provost-Martial-General as they shall think fit.

ART. L.

All controversies either between Soldiers and their Captains or other Officers, or between Soldier and Soldier relating to their Military Capacities, shall be summarily heard and determined at the next Court-Martial of the Regiment.

ART. LI.

If in any Matter which shall be Judged in any of the aforesaid Regimental Courts-Martial either or the Parties shall find himself aggrieved, he may appeal to the 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.

ART. LII.

In all Criminal Causes which concern the Crown, His Majesties Advocate-General or Judge-Advocate of the Army, shall inform the Court and prosecute on his Majesties behalf.

ART. LIII.

No Officers or Soldiers shall presume to hinder the Provost-Martial, his Lieutenant or Servant in the Execution of their Office upon pain of Death or such other Punishment as a Court-Martial shall think fit; And all Captains, Officers and Soldiers shall do their utmost to apprehend and bring to punishment all Offenders, and shall assist the Officers of His Majesties Army or Forces therein, especially the said Provost-Martial, His Lieutenant and Servants; and if the Provost-Martial or his Officers require the assistance of any Officer or Soldier 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.

ART. LIV.

If any Officer or Soldier who shall presume to draw his Sword in any place of judicature while the Court is sitting, he shall suffer such punishment as shall be inflicted on him by a Court-Martial. And the Provost-Martial of his Majesties Army is hereby empowered and directed by his own authority to apprehend such Offenders.

ART. LV.

If any Soldier being committed for any Offence shall break Prison,
1444 the said Provost-Martial-General shall by his own Authority apprehend him, and the Offender shall suffer Death.

ART. LVI.

If any Fray shall happen within the Camp or place of Garison in any of the Soldiers Lodgings, or where they meet, it shall be inquired into by the Officers of the Regiment, and the Beginners and pursuers thereof punished according to the quality of the Offence.

ART. LVII.

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.

ART. LVIII.

If any Colonel or Captain shall force or take any thing away from a private Soldier, such Colonel or Captain shall be punished according to the quality of the Offence, by the Judgment of a General Court-Martial.

And if a Soldier shall be wronged, and shall not appeal to the Court, or his Superiour Commander, but take his own Satisfaction for it, he shall be punished by the Judgment of a Court-Martial.

ART. LIX.

If any Soldier die, no other shall take or spoil his Goods, upon pain of restoring double the value to him to whom they belong, and of such further Punishments as a Court-Martial shall think fit. But the Captain of the Company of which such a Soldier was, 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 die the Chief Commander shall take care of reserving his Estate in like manner.

ART. LX.

No Provost-Martial shall refuse to receive or keep a Prisoner committed 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 Offence for which the Prisoner was apprehended deserv'd Death, the Provost-Martial failing to receive and keep him as aforesaid shall be liable to the same Punishment.

ART. LXI.

If any Person be committed by the Provost-Martial's own Authority without other Command, he shall acquaint the General or other Chief
1445 Commander with the Cause within twenty-four hours, and the Provost-Martial shall thereupon dismiss him unless he have Order to the contrary.

ART. LXII.

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.

ART. LXIII.

Whatever is to be published or generally made known, shall be done by Beat of Drum, or the sound of Trumpet, That no man may pretend Ignorance thereof: And if afterwards any one shall be found disobedient or transgressing what is so Published, he shall be punished according to these Articles, or the quality of the Fact.

ART. LXIV.

All other faults, misdemeanours and Disorders not mentioned in these Articles, shall be punished according to the Laws and Customs of War, and 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 Offence by these Articles, and the Laws and Customs of War.

## VI.

1446 THE FIRST BRITISH MUTINY ACT. (1689.)

An Act for punishing Officers or Soldiers who shall Mutiny or Desert their Majestyes Service.

Whereas the raising or keeping a standing Army within this Kingdome in time of peace unlesse it be with consent of Parlyament is against Law. And whereas it is judged necessary by their Majestyes and this present Parlyament That dureing this time of Danger severall of the Forces which are now on foote should be continued and others raised for the Safety of the Kingdome for the common defence of the Protestant Religion and for the reducing of Ireland.

And whereas noe man may be forejudged of Life or Limbe, or subjected to any Kinde of punishment by Martiall Law, or in any other manner than by the judgment of his Peeres, and according to the Knowne and Establlshed Laws of this Realme. Yet, nevertheless, it being requisite for retaineing such Forces as are or shall be raised dureing this exigence of Affaires in their Duty an exact Discipline be observed. And that Soldiers who shall Mutiny or Stirr up Sedition, or shall desert Their Majestyes Service be brought to a more exemplary and speedy Punishment than the usuall forms of Law will allow:

Bee it therefore Enacted by the King and Queenes most Excellent Majestyes by and with the Advice and Consent of the Lords Spirituall and Temporall and Commons in this present Parlyament assembled, and by authoritles of the same. That from and after the Twelfth day of Aprill in the yeare of our Lord One thousand six hundred eighty-nine every person being in Their Majestyes Service In the Army, and being mustered and In pay as an Officer or Soldier who shall at any time before the Tenth day of November in the yeare of our Lord One thousand six hundred eighty-nine, excite, cause, or joyne in any mutiny or sedition in the Army, or shall desert Their Majestyes Service in the Army, shall suffer death or such other punishment as by a Court Martiall shall be inflicted.

3. And it is hereby further enacted and declared, That Their Majestyes, or the Generall of their Army for the time being, may by vertue of this Act have full power and authoritie to grant Commissions to any Lieftenants, Generall or other Officers, not under the degree of Collonels, from time to time to call and assemble Court-Martialls for punishing such offences as aforesaid.

4. And it is hereby further enacted and declared, That noe Court-Martiall which shall have power to inflict any punishment by vertue of this Act for the offences aforesaid shall consist of fewer than thirteene, whereof none to be under the degree of Captaines.

5. Provided alwayes, That no field Officer be tryed by other than field Offi-
1447 cers. And that such Court Martial shall have power and authoritie to administer an oath to any witness in order to the examination or tryall of the offences aforesaid.

6. Provided alwayes, That nothing in this Act contained shall extend or be construed to exempt any officer or soldier whatsoever from the ordinary processe of Law.

7. Provided alwayes, That this Act, or anything therein contained shall not extend or be any wayes construed to extend to or concerne any of the Militia Forces of this Kingdome.

8. Provided alsoe, That this Act shall continue and be in force untill the said Tenth day of November in the said yeare of our Lord One thousand six hundred eighty-nine and noe longer.

9. Provided always, and bee it enacted, That in all tryalls of offenders by Courts Martiall to be held by vertue of this Act, where the offence may be punished by Death, every Officer present at such tryall, before any proceeding be had thereupon, shall take an oath upon the Evangelists before the Court

(and the Judge Advocate or his Deputy shall, and are hereby respectively authorized to administer the same) In these words, that is to say:—

"You shall well and truly try and determine according to your evidence the matter now before you between Our Soveraigne Lord and Lady the King and Queene's Majestyes and the Prisoner to be tried. "So helpe you God."

10. And noe Sentence of Death shall be given against any offender in such case by any Court Martiali uniesse nine of thirteene Officers present shall concur therein. And if there be a greater number of Officers present, then the judgement shall passe by the concurrence of the greater part of them soe sworne, and not otherwise; and noe Proceedings, Tryall, or Sentence of Death shall be had or given against any Offender, but betweene the hours of eight in the morning and one in the afternoone.

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The British Articles of War of 1718, promulgated by the Crown under the Act of 4 Geo. I, c. 4, (see *ante*, Vol. I, p. 7,) are given "in substance" in Tindal's Rapin's History of England, vol. IV, book XXVII, p. 559, and are extracted in the Journal of the Military Service Institution for June, 1886.

## VII.

## 1448 BRITISH ARTICLES OF WAR OF 1765, IN FORCE AT THE BEGINNING OF OUR REVOLUTIONARY WAR.

RULES AND ARTICLES FOR THE BETTER GOVERNMENT OF OUR HORSE AND FOOT GUARDS, AND ALL OTHER OUR FORCES IN OUR KINGDOMS OF GREAT BRITAIN AND IRELAND, DOMINIONS BEYOND THE SEAS, AND FOREIGN PARTS.

SECTION I.—*Divine Worship.*

GEORGE *R.*

ART. I.

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 wilfully 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.

ART. II.

Whatsoever Officer or Soldier shall use any unlawful Oath or Execration, shall incur the Penalties expressed in the First Article.

ART. III.

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.

ART. IV.

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 other 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.

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ART. V.

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 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.

ART. VI.

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 II.—*Mutiny.*

ART. I.

Whatsoever Officer or Soldier shall presume to use traiterous or disrespectful Words against the Sacred Person of his Majesty, or any of the 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.

ART. II.

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.

ART. III.

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 Pretence whatsoever, shall suffer Death, or such other Punishment as by a Court-martial shall be inflicted.

ART. IV.

Any Officer, Non-commissioned Officer, or Soldier, who being present at any Mutiny or Sedition, does not use his utmost Endeavour to suppress 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 the Offence.

ART. V.

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
1450 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.—*Of Inlisting Soldiers.*

ART. I.

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 shall 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 Generals 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.

ART. II.

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 inlisted; or Commanding officer, where no Field Officer of the Regiment is in *Great Britain.*

SECTION IV.—*Musters.*

ART. I.

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 his Deputies, assemble the Regiment, Troop, or Company under his Command, in the next convenient place for their being mustered.

ART. II.

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 in-
1451 ferior 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.

ART. III.

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.

ART. IV.

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.

ART. V.

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 suffer such other Penalty as by the Act of Parliament is for that Purpose inflicted.

ART. VI.

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 the Muster-rolls, shall be displaced from his Office, and suffer such other Penalty as by the Act of Parliament is inflicted.

ART. VII.

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.

1452 SECTION V.—*Returns.*

ART. I.

Every Officer who shall knowingly make a false Return to Us, to the Commander in Chief of our Forces, or to any 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 Arms, Ammunition, Clothing, or other Stores thereunto belonging, shall by a Court-martial be cashiered.

ART. II.

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.

ART. III.

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.

ART. IV.

It is Our Pleasure, That exact Returns of the State of Our Garrisons at *Gibraltar* and *Port Mahon*, and of Our Regiments, Garrisons, and Independent Companies in *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 VI.—*Desertion.*

ART. I.

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.

ART. II.

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.

1453 ART. III.

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.

ART. IV.

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 VII.—*Quarrels and Sending Challenges.*

ART. I.

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.

ART. II.

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.

ART. III.

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.

ART. IV.

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 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.

1454 ART. V.

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 have only acted in Obedience to Our Orders, and done their Duty as good Soldiers, who subject themselves to Discipline.

SECTION VIII.—*Suttling.*

ART. I.

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 Revellies, or upon *Sundays*, during Divine Service or Sermon, on the Penalty of being dismissed from all future Suttling.

ART. II.

All Officers, Soldiers, and Suttlers, shall have full Liberty to bring into any of Our Forts or Garrisons, any Quantity or Species of Provisions, 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.

ART. III.

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.

ART. IV.

No Governors, or Officers, commanding in any of Our Garrisons, Forts, or Barracks, shall either themselves exact exhorbitant 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 IX.—*Quarters.*

ART. I.

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
1455 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.

ART. II.

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 such Accounts, and certifying the same as is above directed, shall be cashiered.

ART. III.

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 publick 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.

ART. IV.

If, after publick Proclamation to be made, the Inhabitants shall notwithstanding suffer the Non-commissioned Officers and Soldiers to contract Debts beyond what the Money issued out, 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.

ART. V.

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
1456 otherwise ill-treating of their Landlords, or of exterting 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 Proof thereof, be punished by a General Court-martial, as if he himself had committed the Crimes or Disorders complained of.

SECTION X.—*Carriages.*

The Commanding Officer of every Regiment, Troop, 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 Persons under his Command to beat or abuse the Waggoners, 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 XI.—*Of Crimes Punishable by Law.*

ART. I.

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 and assisting to the Officers of Justice in apprehending such Person or Persons, the Officer or Officers so offending shall be cashiered.

ART. II.

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
1457 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 XII.—*Of Redressing Wrongs.*

ART. I.

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.

ART. II.

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 XIII.—*Of Stores, Ammunition, &c.*

ART. I.

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 Our Provisions, Forage, Arms, Clothing, Ammunition, or other Military Stores, to be spoiled or damaged, the said Officer, Storekeeper, 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 Acts of Parliament is inflicted.

ART. II.

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.

1458 ART. III.

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 corporal Punishment, as his crime shall deserve.

ART. IV.

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 intrusted for the Payment of the Men under his Command, or for inlisting 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.

ART. V.

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.

SECTION XIV.—*Of Duties in Quarters, in Garrison, or in the Field.*

ART. I.

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.

ART. II.

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.

ART. III.

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.

ART. IV.

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 ap-
1459 pointed 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.

ART. V.

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 corporal Punishment as shall be inflicted by the Sentence of a Court-martial.

ART. VI.

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.

ART. VII.

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.

ART. VIII.

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.

ART. IX.

Any Person belonging to Our Forces employed in Foreign Parts who, by discharging of Fire Arms, drawing of Swords, beating of Drums, or by any other Means whatsoever, shall occasion false Alarm 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*, shall be punished at the Discretion of a General Court-martial.

ART. X.

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.

1460 ART. XI.

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.

ART. XII.

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.

ART. XIII.

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.

ART. XIV.

Any Person belonging to Our Forces employed in Foreign Parts, 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.

And whosoever shall be found guilty of the said Offence in *Great Britain* or *Ireland*, shall be punished at the discretion of a General Court-martial.

ART. XV.

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* or *Ireland*, shall be punished at the Discretion of a General Court-martial.

ART. XVI.

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, Cornfields, Enclosures, 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.

1461 ART. XVII.

Whosoever of Our Forces employed in Foreign Parts shall force a Safeguard, shall suffer Death.

ART. XVIII.

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.

ART. XIX.

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.

ART. XX.

All Public Stores taken in the Enemies Camp, Towns, Forts or Magazines, whether of Artillery, Ammunition, Clothing, Forage, or Provisions, shall be secured for Our Service; for the Neglect of which Our Commanders in Chief are to be answerable.

ART. XXI.

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.

ART. XXII.

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 Commissioned Officers, Non-commissioned 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.

ART. XXIII.

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.

ART. XXIV.

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 Ranks 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
1462 composed only of their own Corps, according to the Commissions by which they are mustered in the said Corps.

ART. XXV.

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 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.

ART. XXVI.

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.

ART. XXVII.

When Our Regiments 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 XV.—*Administration of Justice.*

ART. I.

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 tried, nor be under the Degree of a Field Officer.

ART. II.

A General Court-martial, held in Our Garrison of *Gibraltar*, Island of *Minorca*, or in any other Place beyond the Seas, shall not consist of less than Thirteen Commissioned Officers; nor shall the President of such General Court-martial be the Commander in Chief, or Governor of the Garrison, where the Offender shall be tried, nor under the Degree of a Field Officer, unless where a Field Officer cannot be had, in which Case the Officer next in Seniority to to the Commander, not being under the Degree of a Captain, shall preside at such Court-martial.

ART. III.

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 1463 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 Regiment 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.

ART. IV.

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.

ART. V.

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.

ART. VI.

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*
1464 *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 by His Majesty, the General, or Commander in Chief; neither will I, 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.*

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.*

ART. VII.

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.

ART. VIII.

All Persons who give Evidence before a General Court-martial, are to be examined upon Oath; nor shall any Sentence of Death be given against any offender by any General Court-martial, unless Nine Officers present shall concur therein: And if there be more than Thirteen, then the Judgment shall pass by the Concurrence of Two-thirds of the Officers present.

ART. IX.

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.

ART. X.

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 General or Commander in Chief, 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 be received thereupon.

ART. XI.

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 or Foot, We direct, That the Courts-martial
1465 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.

ART. XII.

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.

ART. XIII.

No Regimental Court-martial shall consist of less than Five Officers, excepting in Cases where that 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.

ART. XIV.

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.

ART. XV.

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 such General or Commander in Chief, who shall by Our Authority appoint the same to be held; 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.

ART. XVI.

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.

ART. XVII.

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;
1466 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.

ART. XVIII.

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.

ART. XIX.

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 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.

ART. XX.

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 the Sentence of a Court-martial.

ART. XXI.

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 Colonnel

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 Officer who committed them, on the Penalty of his being punished for his Disobedience or Neglect, at the Discretion of a Court-martial.

ART. XXII.

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.

ART. XXIII.

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 XVI.—*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 Commissary General, otherwise they will not be allowed of at the Musters.

SECTION XVII.—*Concerning the Effects of Deceased Officers and Soldiers.*

1467 ART. I.

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 in Quarters, and Interment, receive the Overplus, if any be, to his or their Use.

ART. II.

When any Non-commissioned Officer or Private Soldier shall happen to die, or to 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 autorized 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, 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 XVIII.—*Artillery.*

ART. I.

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.

ART. II.

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 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.

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SECTION XIX.—*American Troops.*

1468 ART. I.

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, or acting in Conjunction with Our *British* Forces, 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 of Our *British* Troops.

ART. II.

Whereas, notwithstanding the Regulations which We were pleased to make for setting the Rank of Provincial 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 Presidents 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 XX.—*Relating to the aforegoing Articles.*

ART. I.

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 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.

1469 ART. II.

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 *Gibraltar*, Island of *Minorca*, Forts 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 Clapping 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.

ART. III.

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.

*G. R.*

## VIII.

## 1470 THE MASSACHUSETTS ARTICLES OF WAR.

[Adopted by the Provisional Congress of Massachusetts Bay, April 5, 1775.]

Whereas the lust of power which of old oppressed, persecuted and exiled our pious and virtuous ancestors from their fair possessions in Britain, now pursues with ten-fold severity us, their guileless children, who are unjustly and wickedly charged with licentiousness, sedition, treason and rebellion; and being deeply impressed with a sense of the almost incredible fatigues and hardships our venerable progenitors encountered, who fled from oppression for the sake of civil and religious liberty for themselves and their offspring, and began a settlement here on bare creation at their own expense; and having seriously considered the duty we owe to God, to the memory of such invincible worthies, to the King, to Great Britain, our country, ourselves, and posterity, do think it our indispensable duty, by all lawful ways and means in our power, to recover, maintain, defend, and preserve the free exercise of all those civil and religious rights and liberties, for which many of our forefathers fought, bled and died, and to hand them down entire for the free enjoyment of the latest posterity. And whereas the keeping of a Standing Army in any of these Colonies in times of peace, without the consent of the Legislature of that Colony in which such Army is kept, is against law. And whereas such an Army, with a large Naval force, is now placed in the Town and Harbour of Boston, for the purpose of subjecting us to the power of the British Parliament. And whereas we are frequently told by the tools of the Administration, dupes to Ministerial usurpation, that Great Britain will not in any degree relax in her measures until we acknowledge her "right of making laws binding upon us in all cases whatever," and that if we persist in our denial of her claim, the dispute must be decided by Arms, in which it is said by our enemies "we shall have no chance, being undisciplined, cowards, disobedient, impatient of command, and possessed of that spirit of revelling which admits of no order, subordination, rule, or government."

And whereas the Ministerial Army and Fleet now at Boston, the large reinforcement of Troops expected, the late Circular Letter to the Governours upon the Continent, the general tenour of intelligence from Great Britain and the hostile preparations making here, as also from the threats and repeated insults of our enemies in the Capital Town, we have reason to apprehend that the sudden destruction of this Province is in contemplation if not determined upon.

And whereas the great law of self-preservation may suddenly require
1471 our raising and keeping an Army of observation and defence, in order to prevent or repel any further attempt to force the late cruel and oppressive Acts of the British Parliament, which are evidently designed to subject us and the whole Continent to the most ignominious slavery. And whereas, in case of raising and keeping such an Army, it will be necessary that the Officers and Soldiers in the same be fully acquainted with their duty, and that the Articles, Rules and Regulations thereof be made as plain as possible; and having great confidence in the honour and public virtue of the inhabitants of this Colony that they will readily obey the Officers chosen by themselves, and will cheerfully do their duty when known, without any such severe Articles and Rules, (except in capital cases,) and cruel punishments as are usually practised in Standing Armies, and will submit to all such Rules and Regulations as are founded in reason, honour and virtue. It is, therefore,

*Resolved*, That the following Articles, Rules and Regulations for the Army, that may be raised for the defence and security of our lives, liberties, and estates, be, and are hereby earnestly recommended to be, strictly adhered to, by all Officers, Soldiers, and others concerned, as they regard their own honour and the publick good.

*Article 1st.* 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; and such as wilfully absent themselves, or being present behave indecently or irreverently, shall, if Commissioned Officers be brought before a Regimental 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 one Shilling to be deducted out of his wages; for the second offence he shall not only forfeit one shilling, 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 to the use of the sick Soldiers of the Troop or Company to which the Offender belongs.

*Article 2d.* Whatsoever Non-Commissioned Officer or Soldier shall use any unlawful oath or execration, shall incur the penalties expressed in the preceding Article; and if a Commissioned Officer be thus guilty of profane cursing and swearing, he shall forfeit and pay for each and every such offence four Shillings, lawful money.

*Article 3d.* Any Officer or Soldier who shall begin, excite, or cause any mutiny or sedition, or join in such mutiny, in the Regiment, Troop, or Company to which he belongs, or in any other regiment, Troop, or Company of the Massachusetts forces, either by Land or Sea, or in any Party, Post, Detachment, or Guard, on any pretence whatever, shall suffer such punishment as by a General Court Martial shall be ordered.

*Article 4th.* Any Officer or Soldier who shall behave himself with contempt or disrespect towards the General or Generals, or Commanders-in-Chief of the Massachusetts Forces, or shall speak words tending to his or their hurt or dishonor, shall be punished according to the nature of his offence, by the judgment of a General Court Martial.

*Article 5th.* Any Officer, Non-Commissioned Officer, or Soldier, who, 1472 being present at any mutiny or sedition, does not use his utmost endeavors to suppress the same, or coming to the knowledge of any mutiny does not, without delay, give information thereof to his Commanding Officer, shall be punished by order of a General Court Martial, according to the nature of his offence.

*Article 6th.* Any Officer or Soldier who shall strike his Superiour 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 whatever, or shall disobey any lawful commands of his Superiour Officer, shall suffer such punishment as shall be, according to the nature of his offence, ordered by the sentence of a General Court Martial.

*Article 7th.* Any Non-Commissioned Officer or Soldier who shall desert, or, without leave from his Commanding Officer, absent himself from the Troop or Company to which he belongs, or from any detachment of the same, shall, upon being convicted thereof, be punished according to the nature of his offence, at the direction of a General Court Martial.

*Article 8th.* Whatever Officer or Soldier shall be convicted of having advised or persuaded any other Officer or Soldier to desert, shall suffer such punishment as shall be ordered by a sentence of a General Court Martial.

*Article 9th.* All Officers of what condition soever shall have power to part and quell all quarrels, frays and disorders, though the persons concerned should belong to another Regiment, Troop, or Company, and order Officers to be arrested, or Non-Commissioned Officers or Soldiers to be confined and imprisoned till their proper Superiour Officer shall be made acquainted therewith; and whoever shall refuse to obey such Officer, (though of an inferiour rank,) or shall draw his sword upon him, shall be punished at the discretion of a General Court Martial.

*Article 10th.* No Officer or Soldier shall use any reproachful or provoking speeches or gestures, nor shall presume to send a challenge to any person to fight a duel, nor shall second, promote, or carry any challenge; and whoever shall knowingly and wilfully suffer any person whatsoever to go forth to fight a duel, or shall second any such conduct, shall be deemed as a principal; and whatsoever Officer or Soldier shall upbraid another for refusing a challenge, shall be considered as a challenger, and all such offenders, in any of these or the like cases, shall be punished at the discretion of a General Court Martial.

*Article 11th.* Every Officer commanding in quarters, 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 any person, or committing any kind of riots to the disquieting of the inhabitants of this Continent, 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 soon as the offender's wages shall enable him or them, shall, upon due proof thereof, be punished, as ordered by a General Court Martial, in such manner as if he himself had committed the crimes or disorders complained of.

*Article 12th.* If any Officer should think himself to be wronged by
1473 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 or Commander-in-Chief of the Massachusetts Forces, in order to obtain justice, who is hereby required to examine into the complaint and see that justice be done.

*Article 13.* If any inferiour 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 complaint, 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 a General Court Martial.

*Article 14th.* 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, Arms, or Provisions, or other Military Stores delivered out to him to be employed in the service of this Colony, shall, if an Officer, be reduced to a Private Soldier; and, if a Private Soldier, shall suffer such punishment as shall be ordered by a Regimental Court Martial.

*Article 15th.* All Non-Commissioned Officers or 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 by the sentence of a Regimental Court Martial.

*Article 16th.* No Officer or Soldier shall be out of his quarters or camp, without leave from the Commanding Officer of his Regiment, upon penalty of being punished according to the nature of his offence, by order of a Regimental Court Martial.

*Article 17th.* Every Non-Commissioned Officer and Soldier shall retire to his quarters or tent at the beating the retreat; in default of which he shall be punished according to the nature of his offence, by order of the Commanding Officer.

*Article 18th.* 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 penalty of being punished, according to the nature of his offence, by the sentence of a Regimental Court Martial.

*Article 19th.* Whatsoever Commissioned Officer shall be found drunk upon his guard, party, or other duty under Arms, shall be cashiered for it; any Non-Commissioned Officer or Soldier so offending shall suffer such punishment as shall be ordered by the sentence of a Regimental Court Martial.

*Article 20th.* Whatever Centinel shall be found sleeping upon his post, or shall leave it before he shall be regularly relieved, shall suffer such punishment as shall be ordered by the sentence of a General Court Martial.

*Article 21st.* Any person belonging to the Massachusetts Army, who, by discharging of Fire-Arms, beating of Drums, or by any other means
1474 whatever, shall occasion false alarms in camp or quarters, shall suffer such punishment as shall be ordered by the sentence of a General Court Martial.

*Article 22d.* Any Officer or Soldier, who shall, without urgent necessity, or without leave of his Superiour Officer, quit his platoon or division, shall be punished according to the nature of his offence, by the sentence of a Regimental Court Martial.

*Article 23d.* No Officer or Soldier shall do violence, or offer any insult or abuse, to any person who shall bring Provisions or other necessaries to the

camp or quarters of the Massachusetts Army; any Officer or Soldier so offending shall, upon complaint being made to the Commanding Officer, suffer such punishment as shall be ordered by a Regimental Court Martial.

*Article 24th.* Whatever Officer or Soldier shall shamefully abandon any post committed to his charge, or shall speak words inducing others to do the like in time of an engagement, shall suffer death immediately.

*Article 25th.* Any person belonging to the Massachusetts Army who shall make known the watchword to any person who is not entitled to receive it, according to the rules and discipline of war, 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 a General Court Martial.

*Article 26th.* Whosoever belonging to the Massachusetts Army shall relieve the enemy with Money, Victuals, or Ammunition, or shall knowingly harbour and protect an enemy, shall suffer such punishment as by a General Court Martial shall be ordered.

*Article 27th.* Whosoever belonging to the Massachusetts Army shall be convicted of holding correspondence with, or giving intelligence to the enemy, either directly or indirectly, shall suffer such punishment as by a General Court Martial shall be ordered.

*Article 28.* All Publick Stores taken in an enemy's camp, whether of Artillery, Ammunition, Clothing, or Provisions, shall be secured for the use of the Massachusetts Colony.

*Article 29th.* If any Officer or Soldier shall leave his post or colors in time of an engagement, to go in search of plunder, he shall upon being convicted thereof before a General Court Martial, suffer such punishment as by said Court Martial shall be ordered.

*Article 30th.* If any Commander of any Post, Intrenchment, or Fortress, shall be compelled by the Officers or Soldiers under his command, to give it up to the enemy or to abandon it, the Commissioned Officers or Soldiers who shall be convicted of having so offended shall suffer death or such other punishment as may be inflicted on them by the sentence of a General Court Martial.

*Article 31st.* All sellers and retailers to a camp, and all persons whatsoever serving with the Massachusetts Army in the field, though not enlisted Soldiers, are to be subject to the Articles, Rules and Regulations of the Massachusetts Army.

*Article 32d.* No General Court Martial shall consist of a less number than thirteen, none of which shall be under the degree of a Field Officer; and the President of each and every Court Martial, whether General or Regimental, shall have power to administer an oath to every witness, in order to the trial of offenders; and the Members of all Courts Martial shall be duly sworn
1475 by the President, and the next in rank on the Court Martial shall administer the oath to the President.

*Article 33d.* 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 rank according to their commissions, by which they are mustered in the said Corps.

*Article 34th.* All the Members of a Court Martial are to behave with calmness, decency, and impartiality, and in the giving of their votes are to begin with the youngest or lowest in commission.

*Article 35.* No Field Officers shall be tried by any person under the degree of a Captain; nor shall any proceeding or trial 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 36th.* The Commissioned Officers of every Regiment may, by the appointment of their Colonel or Commanding Officer, hold Regimental Courts Martial for the inquiring 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 until the Commanding Officer (not being a Member of the Court Martial,) shall have confirmed the same.

*Article 37th.* No Regimental Court Martial shall consist of less than five Officers, except in case when that 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 38th.* Any Officer commanding in 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 39th.* 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 penalty of being punished at the discretion of said Court Martial.

*Article 40th.* To the end that offenders may be brought to justice, 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 proper authority.

*Article 41st.* 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 42d.* No Officer commanding a Guard, or a Provost Martial, shall refuse to receive or keep any prisoner committed to his charge by any Officer belonging to the Massachusetts Forces; which Officer shall, at the same time, deliver an account in writing, signed by himself, of the crimes with which the said prisoner is charged.

1476 *Article 43d.* 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 the sentence of a General Court Martial.

*Article 44th.* Every Officer, or Provost Martial, to whose charge prisoners shall be committed, is hereby required, within twenty-four hours of such confinement, or as soon as he shall be released from his guard, to give in writing to the Colonel of the Regiment, to whom the prisoner belongs, (when 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 General Court Martial.

*Article 45th.* 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 superiour power, he shall be cashiered for it.

*Article 46th.* Whatsoever Commissioned Officer shall be convicted before a General Court Martial of behaving in a scandalous, infamous manner, such as is unbecoming an Officer and a Gentleman, shall be discharged from the service.

*Article 47th.* All Officers, Conductors, Gunners, Matrosses, Drivers, or any other person whatever, receiving pay or hire in the service of the Massachusetts 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 the Massachusetts Troops.

*Article 48th.* 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 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.

*Article 49th.* 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 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.

*Article 50th.* No Court Martial shall order any offenders to be whipped, or receive more than thirty-nine stripes for any one offence.

*Article 51st.* 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 Regiment; and such person shall account with such Officers for all fines received and the application thereof.

*Article 52d.* All members sitting in Courts Martial shall be sworn by the President of such Courts, which President shall himself be sworn by the Officer in said Court next in rank; the oaths to be administered previous to their proceeding to the trial of any offender, in form following, viz:

You A. B., swear that you well and truly try, and impartially
1477 determine the cause of the prisoner now to be tried according to the Rules for regulating the Massachusetts Army, so help you God.

*Article 53d.* All persons called to give evidence in any case 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 form following, viz:

You swear that the evidence you shall give in the case in hearing, shall be the truth, the whole truth, and nothing but the truth, so help you God.

## IX.

1478 ## AMERICAN ARTICLES OF WAR OF 1775.

[Enacted June 30, 1775.]

*Whereas* His Majesty's most faithful subjects in these colonies are reduced to a dangerous and critical situation by the attempts of the British minister to carry into execution by force of arms several unconstitutional and oppressive acts of the British parliament for laying taxes in America, to enforce the collection of those taxes, and for altering and changing the constitution and internal police of some of these colonies, in violation of the natural and civil rights of the colonies;

*And whereas* hostilities have been actually commenced in Massachusetts Bay by the British troops under the command of General Gage, and the lives of a number of the inhabitants of that colony destroyed; the town of Boston not only having been long occupied as a garrisoned town in an enemy's country, but the inhabitants thereof treated with a severity and cruelty not to be justified even towards declared enemies;

*And whereas* large reinforcements have been ordered, and are soon expected; for the declared purpose of compelling these colonies to submit to the operation of the said acts; which hath rendered it necessary, and an indispensable duty, for the express purpose of securing and defending these colonies, and preserving them in safety against all attempts to carry the said acts into execution, that an armed force be raised sufficient to defeat such hostile designs, and preserve and defend the lives, liberties and immunities of the colonists; for the due regulating and well ordering of which;

*Resolved*, That the following Rules and Articles be attended to and observed by such forces as are or may hereafter be raised for the purpose aforesaid;

ARTICLE I. That every officer who shall be retained, and every soldier who shall serve in the continental army, shall, at the time of his acceptance of his commissiou or inlistment, subscribe these rules and regulations. And that the officers and soldiers, already of that army, shall also, as soon as may be, subscribe the same; from the time of which subscription every officer and soldier, shall be bound by those regulations. But if any of the officers or soldiers, now of the said army, do not subscribe these rules and regulations, then they may be retained in the said army, subject to the rules and regulations under which they entered into the service, or be discharged from the service, at the option of the commander-in-chief.

II. It is earnestly recommended to all officers and soldiers, diligently to
1479 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 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 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.

III. Whatsoever non-commissioned officer or soldier shall use any profane oath or execration, shall incur the penalties expressed in the foregoing article; and if a commissioned officer be thus guilty of profane cursing or swearing, he shall forfeit and pay for each and every such offence, the sum of four shillings, lawful money.

IV. Any officer or soldier, who shall behave himself with contempt or disrespect towards the general or generals, or commanders in chief of the continental forces, or shall speak false words, tending to his or their hurt or

dishonor, shall be punished according to the nature of his offence, by the judgment of a general court-martial.

V. 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 pretence whatsoever, shall suffer such punishment, as by a general court-martial shall be ordered.

VI. Any officer, non-commissioned officer, or soldier, who being present at any mutiny or sedition, does not use his utmost endeavors to suppress the same, or coming to the knowledge of any mutiny, or intended mutiny, does not, without delay, give information thereof to the commanding officer, shall be punished by order of a general court-martial, according to the nature of his offence.

VII. 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 commands of his superior officer, shall suffer such punishment as shall, according to the nature of his offence, be ordered by the sentence of a general court-martial.

VIII. Any non-commissioned officer, or soldier, who shall desert, or without leave of his commanding officer, absent himself from the troop or company to which he belongs, or from any detachment of the same, shall, upon being convicted thereof, be punished according to the nature of his offence, at the discretion of a general court-martial.

IX. Whatsoever officer, or soldier, shall be convicted of having advised or persuaded any other officer or soldier, to desert, shall suffer such punishment, as shall be ordered by the sentence of a general court-martial.

X. All officers, of what condition soever, shall 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 order officers to be arrested, or non-commissioned officers, or soldiers, to be confined and imprisoned,
1480 till their proper superior officers shall be acquainted therewith; and whoever 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.

XI. No officer or soldier shall use any reproachful or provoking speeches or gestures to another, nor shall presume to send a challenge to any person to fight a duel: And whoever shall, knowingly and willingly, suffer any person whatsoever to go forth to fight a duel, or shall second, promote, or carry any challenge, shall be deemed as a principal; and whatsoever officer or soldier shall upbraid another for refusing a challenge, shall also be considered as a challenger; and all such offenders, in any of these or such like cases, shall be punished at the discretion of a general court-martial.

XII. Every officer, commanding in quarters 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 any complaint being made to him, of officers or soldiers beating, or otherwise ill-treating any person, or of committing any kind of riot, to the disquieting of the inhabitants of this continent; 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 the offender's wages shall enable him or them, shall, upon due proof thereof, be punished as ordered by a general court-martial, in such manner as if he himself had committed the crimes or disorders complained of.

XIII. 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 or commander in chief of the continental forces, in order to obtain justice, who is hereby required to examine into said complaint and see that justice be done.

XIV. 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 general court-martial.

XV. 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, arms, or provisions, or other military stores, delivered out to him, to be employed in the service of this continent, shall, if an officer, be reduced to a private sentinel; and if a private soldier, shall suffer such punishment as shall be ordered by a regimental court-martial.

XVI. 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 on him or them by the sentence of a regimental court-martial.

XVII. No officer or soldier shall lie out of his quarters or camp,
1481 without leave from the commanding officer of the regiment, upon penalty of being punished according to the nature of his offence, by order of a regimental court-martial.

XVIII. 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 order of the commanding officer.

XIX. 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 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 penalty of being punished according to the nature of his offence, by the sentence of a regimental court-martial.

XX. Whatsoever commissioned officer shall be found drunk on his guard, party, or duty, under arms, shall be cashiered for it; any non-commissioned officer or soldier so offending, shall suffer such punishment as shall be ordered by the sentence of a regimental court-martial.

XXI. Whatsoever sentinel shall be found sleeping upon his post, or shall leave it before he shall be regularly relieved, shall suffer such punishment as shall be ordered by the sentence of a general court-martial.

XXII. Any person belonging to the continental army, who, by discharging of fire-arms, beating of drums, or by any other means whatsoever, shall occasion false alarms, in camp or quarters, shall suffer such punishment as shall be ordered by the sentence of a general court-martial.

XXIII. 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 regimental court-martial.

XXIV. No officer or soldier shall do violence, or offer any insult, or abuse, to any person who shall bring provisions, or other necessaries, to the camp or quarters of the continental army; any officer or soldier so offending, shall, upon complaint being made to the commanding officer, suffer such punishment as shall be ordered by a regimental court-martial.

XXV. Whatsoever officer or soldier shall shamefully abandon any post committed to his charge, or shall speak words inducing others to do the like, in time of an engagement, shall suffer death immediately.

XXVI. Any person belonging to the continental army, 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.

XXVII. Whosoever belonging to the continental army, shall relieve the enemy with money, victuals, or ammunition, or shall knowingly harbor or protect an enemy, shall suffer such punishment as by a general court-martial shall be ordered.

XXVIII. Whosoever belonging to the continental army, shall be
1482 convicted of holding correspondence with, or giving intelligence to, the enemy, either directly or indirectly, shall suffer such punishment as by a general court-martial shall be ordered.

XXIX. All public stores taken in the enemy's camp or magazines, whether of artillery, ammunition, clothing, or provisions, shall be secured for the use of the United Colonies.

XXX. If any officer or soldier shall leave his post or colors, in time of an engagement, to go in search of plunder, he shall, upon being convicted thereof

before a general court-martial, suffer such punishment as by the said court-martial shall be ordered.

XXXI. If any commander of any post, intrenchment, or fortress, shall be compelled, by the officers or soldiers under his command, to give it up to the enemy, or to abandon it, the commissioned officer, non-commissioned 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 general court-martial.

XXXII. All suttlers and retailers to a camp, and all persons whatsoever, serving with the continental army in the field, though not inlisted soldiers, are to be subject to the articles, rules, and regulations of the continental army.

XXXIII. No general court-martial shall consist of a less number than thirteen, none of which shall be under the degree of a commissioned officer; and the president shall be a field officer: And the president of each and every court-martial, whether general or regimental, shall have power to administer an oath to every witness, in order to the trial of offenders. And the members of all courts-martial shall be duly sworn by the president, and the next in rank on the court-martial, shall administer the oath to the president.

XXXIV. 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 their commissions by which they are mustered in the said corps.

XXXV. All the members of a court-martial, are to behave with calmness, decency, and impartiality; and in giving their votes, are to begin with the youngest or lowest in commission.

XXXVI. 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.

XXXVII. 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 punishment, 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) shall have confirmed the same.

XXXVIII. No regimental court-martial shall consist of less than five officers excepting in cases where that number can not 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.

1483 XXXIX. Every officer, commanding in any fort, castle, or barrack, 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.

XL. 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 proceeding, on the penalty of being punished at the discretion of the said court-martial.

XLI. To the end that offenders may be brought to justice; 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 proper authority.

XLII. 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.

XLIII. 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 continental 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.

XLIV. 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 general court-martial.

XLV. 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 the commander in chief, their names, their crimes, and the names of the officers who committed them, on the penalty of being punished for his disobedience or neglect, at the discretion of a general court-martial.

XLVI. 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.

XLVII. 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.

XLVIII. All officers, conductors, gunners, matrosses, drivers or any other persons whatsoever, receiving pay or hire, in the service of the continental 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 the continental troops.

XLIX. For differences arising amongst themselves, or in matters relat-
1484 ing 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 the other corps.

L. 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 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.

LI. That no persons shall be sentenced by a court-martial to suffer death, except in the cases expressly mentioned in the foregoing articles; nor shall any punishment be inflicted at the discretion of a court-martial, other than degrading, cashiering, drumming out of the army, whipping not exceeding thirty-nine lashes, fine not exceeding two months pay of the offender, imprisonment not exceeding one month.

LII. 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 regiment; and such person shall account with such officer for all fines received, and the application thereof.

LIII. All members sitting in courts-martial shall be sworn by the president of said courts, which president shall himself be sworn by the officer in said court next in rank:—The oath to be administered previous to their proceeding to the trial of any offender, in form following, viz.

"You A. B. swear that you will well and truly try, and impartially determine the cause of the prisoner now to be tried, according to the rules for regulating the continental army. So help you God."

LIV. All persons called to give evidence, in any case, 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 case now in hearing, shall be the truth, the whole truth, and nothing but the truth. So help you God."

LV. Every officer commanding a regiment, troop, or company, shall, upon notice given to him by the commissary of the 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.

LVI. Every colonel, or other field officer, or officer commanding any corps, to which there is no field officer, 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 serv-

ice; 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 should require it, of which oc-
1485 casion the field officer present with, and commanding the regiment or independent corps, is to be judge.

LVII. At every muster the commanding officer of each regiment, troop, or company then present, shall give to the commissary of musters certificates signed by himself, signifying how long such officers, non-commissioned officers, and soldiers, who shall not appear at the said muster, have been absent, and the reason for their absence; which reasons, and the time of absence, shall be inserted in the muster rolls, opposite to the respective names of such absentees: The said certificates shall, together with the muster rolls, be by the said commissary transmitted to the general, and to this or any future Congress of the United Colonies, or committee appointed thereby, within twenty days next after such muster being taken; on failure whereof, the commissary so offending shall be discharged from the service.

LVIII. Every officer who shall be convicted before a general court-martial of having signed a false certificate, relating to the absence of either officers, non-commissioned officer or private soldier, shall be cashiered.

LIX. 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 moreover forfeit all such pay as may be due to him at the time of conviction for such offence.

LX. Any commissary who shall be convicted of having taken any gift or gratuity on the mustering any regiment, troop, or company, or on the signing the muster rolls, shall be displaced from his office, and forfeit his pay, as in the preceding article.

LXI. 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.

LXII. Every officer who shall knowingly make a false return to the commander in chief of the American forces, or to any his superior officer, authorized to call for such returns, of the state of the regiment, troop, independent company, or garrison under his command, or of arms, ammunition, clothing, or other stores thereunto belonging, shall by a court-martial be cashiered.

LXIII. The commanding officer of every regiment, troop, independent company, or garrison, in the service aforesaid, shall, in the beginning of every month, remit to the commander in chief of said forces, 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 the 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.

LXIV. 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.

1486 LXV. All officers commanding in the camp, or in any 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 a reasonable price, as they shall be answerable for their neglect.

LXVI. No officer commanding in any camp, 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 lay any duty or impositions upon, or be interested in the sale of such victuals, liquors, or other necessaries of life, which are brought into the camp, garrison, fort, or barracks, for the use of the soldiers, on the penalty of being discharged from the service.

LXVII. That 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.

LXVIII. When any commissioned officer shall happen to die, or be killed in the service of the United Colonies, 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 to the office of the secretary of the Congress, or assembly of the province in which the corps is stationed or shall happen to be at the time of the death of such officer; 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.

LXIX. When any non-commissioned officer or private soldier, shall happen to die, or be killed in the service of the United Colonies, 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, and transmit the same, as in the case above provided for, in order that the same may be secured for, and paid to their respective representatives.

### Additional Articles.

[Enacted Nov. 7, 1775.]

*Resolved*, That the following additions and alterations or amendments, be made in the Rules and Regulations of the continental army.

1. All persons convicted of holding a treacherous correspondence with, or giving intelligence to the enemy, shall suffer death, or such other punishment as a general court-martial shall think proper.

2. All commissioned officers found guilty by a general court-martial of any fraud or embezzlement, shall forfeit all his pay, be *ipso facto* cashiered, and deemed unfit for further service as an officer.

3. All non-commissioned officers and soldiers, convicted before a regimental court-martial of stealing, embezzling or destroying ammunition, provision, tools, or anything belonging to the public stores, if a non-commissioned officer, to be reduced to the ranks, and punished with whipping, not less than
1487 fifteen, nor more than thirty-nine lashes, at the discretion of the court-martial; if a private soldier with the same corporeal punishment.

4. In all cases where a commissioned officer is cashiered for cowardice or fraud, it be added in the punishment, that the crime, name, place of abode, and punishment of the delinquent be published in the newspapers, in and about the camp, and of that colony from which the offender came, or usually resides; after which it shall be deemed scandalous in any officer to associate with him.

5. 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 party, post, detachment or guard, on any pretence whatsoever, shall suffer death, or such other punishment, as a general court-martial shall direct.

6. Any officer or soldier, who shall desert to the enemy, and afterwards be taken, shall suffer death, or such other punishment as a general court-martial shall direct.

7. Whatsoever commissioned officer shall be found drunk on his guard, party, or other duty under arms, shall be cashiered and drummed out of the army with infamy, any non-commissioned officer or soldier, so offending, shall be sentenced to be whipt, not less than twenty, nor more than thirty-nine lashes, according to the nature of the offence.

8. Whatsoever officer or soldier, placed as a sentinel, shall be found sleeping upon his post, or shall leave it before he shall be regularly relieved, if a commissioned officer, shall be cashiered, and drummed out of the army with infamy; if a non-commissioned officer or soldier, shall be sentenced to be whipt, not less than twenty, nor more than thirty-nine lashes, according to the nature of the offence.

9. No officer or soldier shall lie out of his quarters or camp, without leave from the commanding officer of the regiment, upon penalty, if an officer, of being mulcted one month's pay for the first offence, and cashiered for the second; if a non-commissioned officer or soldier, of being confined seven days on

bread and water for the first offence; and the same punishment and a forfeiture of a week's pay for the second.

10. 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.

11. All public stores takes in the enemy's camp or magazines, whether of artillery, ammunition, clothing, or provisions, shall be secured for the use of the United Colonies: and all commissioned officers, found guilty, by general court-martial, of embezzling the same, or any of them, shall forfeit all his pay, be *ipso facto* cashiered, and deemed unfit for farther services as an officer. And all non-commissioned officers and soldiers, convicted before a regimental court-martial of stealing or embezzling the same, if a non-commissioned officer, shall be reduced to the ranks, and punished with whipping, not less than fifteen, nor more than thirty-nine lashes, at the discretion of the court-martial; if a private soldier, with the same punishment.

12. If any officer or soldier shall leave his post or colours, in time of an engagement, to go in search of plunder, he shall, if a commissioned officer, be cashiered, and drummed out of the army with infamy, and forfeit all
1488 share of plunder; if a non-commissioned officer or soldier, be whipped, not less than twenty, nor more than thirty-nine lashes, according to the nature of the offense, and forfeit all share of the plunder taken from the enemy.

13. Every officer commanding a regiment, troop, or company, shall, upon notice given to him by the commissary of the 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, on penalty of his being cashiered, and mulcted of his pay.

14. At every muster, the commanding officer of each regiment, troop or company there present, shall give to the commissary of musters, certificates signed by himself, signifying how long such officers, non-commissioned officers and soldiers, who shall not appear at the said muster, have been absent, and the reason of their absence, which reasons and the time of absence, shall be inserted in the muster rolls, opposite the names of such absentees: and the surgeons or their mates, shall at the same time give to the commissary of musters a certificate signed by them, signifying the state of health or sickness of those under their care, and the said certificate shall, together with the muster rolls, be by the said commissary transmitted to the general, and to this or any future Congress of the United Colonies, or committee appointed thereby, within twenty days next after such muster being taken, on failure whereof, the commissary so offending, shall be discharged from the service.

15. Every officer who shall be convicted before a general court-martial, of having signed a false certificate relating to the absence of either officer, non-commissioned officer, or private soldier; and every surgeon or mate, convicted of signing a false certificate, relating to the health or sickness of those under his care, shall be cashiered.

16. All officers and soldiers who shall wilfully, or through negligence, disobey any general or special orders, shall be punished at the discretion of a regimental court-martial, where the offense is against a regimental order, and at the discretion of a general court-martial, where the offense is against an order given from the commander in chief, or the commanding officer of any detachment or post, and such general court-martial can be had.

## X.

1489 AMERICAN ARTICLES OF WAR OF 1776.

[Enacted September 20, 1776.]

*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.

*Art. 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 $\frac{1}{4}$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.

*Art. 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.

*Art. 4.* Every chaplain who is commissioned to a regiment, company, troop, or garrison, and shall absent himself from the said regiment, company, 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 months' pay, besides the loss of his pay during his absence, or be discharged, as the said court-martial shall judge most proper.

SECTION II.

*Art. 1.* Whatsoever officer or soldier shall presume to use traiterous 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-com-
1490 missioned officer or soldier, he shall suffer such punishment as shall be inflicted upon him by the sentence of a court-martial.

*Art. 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.

*Art. 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.

*Art. 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.

*Art. 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.

*Art. 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.

*Art. 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.

1491 SECTION IV.

*Art. 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.

*Art. 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.

*Art. 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.

*Art. 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.

*Art. 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.

*Art. 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.

*Art. 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.

*Art. 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
1492 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.

*Art. 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 of such returns, shall be punished according to the nature of his crime, by the judgment of a general court-martial.

SECTION VI.

*Art 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.

*Art. 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 offense, at the discretion of a court-martial.

*Art. 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.

*Art. 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.

*Art. 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.

*Art. 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.

*Art. 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.

1493 *Art. 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 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.

*Art. 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.

*Art. 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.

*Art. 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.

*Art. 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.

*Art. 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.

*Art. 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 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 offender's pay shall enable him or them, shall, upon
1494 proof thereof, be punished, by a general court-martial, as if he himself had committed the crimes or disorders complained of.

## SECTION X.

*Art. 1.* Whenever any officer or soldier shall be accused of a capital crime, or of having used violence, or committed any offense 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.

*Art. 2.* No officer shall protect any person from his creditors, on the pretense of his being a soldier, nor any non-commissioned officer or soldier who does not actually do all his 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.

*Art. 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.

*Art. 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.

*Art. 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, 1495 suffered any of the provisions, forage, arms, clothing, ammunitions, 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.

*Art. 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.

*Art. 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.

*Art. 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.

*Art. 5.* 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.

## SECTION XIII.

*Art. 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.

*Art. 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.

*Art. 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.

*Art. 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
1496 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.

*Art. 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.

*Art. 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.

*Art. 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.

*Art. 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.

*Art. 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.

*Art. 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 offense, by the sentence of a court-martial.

*Art. 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.

*Art. 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.

*Art. 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.

*Art. 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.

1497 *Art. 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.

*Art. 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.

*Art. 17.* Whosoever, belonging to the forces of the United States, employed in foreign parts, shall force a safe-guard, shall suffer death.

*Art. 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.

*Art. 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.

*Art. 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.

*Art. 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.

*Art. 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.

*Art. 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.

*Art. 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
1498 own corps, according to the commissions by which they are mustered in the said corps.

*Art. 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.

*Art. 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.

*Art. 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.

*Art. 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.

*Art. 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 of-

fenders 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 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
1499 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."

*Art. 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.

*Art. 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.

*Art. 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."

*Art. 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.

*Art. 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.

*Art. 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.

*Art. 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.

*Art. 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.

*Art. 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.

*Art. 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
1500 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.

*Art. 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.

*Art. 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.

*Art. 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.

*Art. 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.

*Art. 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.

*Art. 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 offense 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.

*Art. 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.

*Art. 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.

*Art. 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, 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.

1501 *Art. 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 equippage, 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.

*Art. 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.

*Art. 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 of the other troops in the service of the United States.

*Art. 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 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 the other corps, taking their rank according to the dates of their respective commissions, and no otherwise.

## SECTION XVII.

*Art. 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,
1502 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.

*Art. 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.

*Art. 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.

*Art. 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.

*Art. 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 expedi-

tion 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 he approved or not.

*Art. 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,
1503 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.

*Art. 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.

# XI.

## AMERICAN ARTICLES.

Enacted May 31, 1786.

*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.

Art. 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.

Art. 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 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.

Art. 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.

1505 Art. 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.

Art. 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.

Art. 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."

ART. 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.

ART. 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.

ART. 9. Whenever an oath or affirmation shall be administered by a court-martial, the oath or affirmation shall be in the following form:

1506 "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."

ART. 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 of the same.

ART. 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 afternooon, except in cases which, in the opinion of the officer appointing the court, require immediate example.

ART. 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.

ART. 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.

ART. 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.

ART. 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.

ART. 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.

ART. 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.

ART. 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.

ART. 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.

ART. 20. Whatever commissioned officer shall be convicted before a
1507 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.

ART. 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 offense.

ART. 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.

ART. 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.

ART. 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 of 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.

ART. 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 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 question.

ART. 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
1508 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.

ART. 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 goals 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.

## XII.

1509 AMERICAN ARTICLES OF WAR OF 1806.

[Enacted April 10, 1806.]

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.

ART. 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.

ART. 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.

ART. 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.

ART. 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.

ART. 6. Any officer or soldier who shall behave himself with contempt
1510 or disrespect toward his commanding officer, shall be punished, according to the nature of his offense, by the judgment of a court-martial.

ART. 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.

ART. 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 offence.

ART. 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.

ART. 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 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.

ART. 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.

1511 ART. 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.

ART. 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.

ART. 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.

ART. 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.

ART. 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

[1] By Sec. 11, Ch. 42, Act of August 3, 1661, the oath of enlistment and reënlistment may be administered by any commissioned officer of the army.

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.

ART. 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.

ART. 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.

ART. 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
1512 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 nature of his crime, by the judgment of a general court-martial.

ART. 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.

ART. 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.

ART. 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.

ART. 23. Any officer or soldier who shall be convicted of having advised 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.

ART. 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.

ART. 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.

ART. 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.

ART. 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.

1513 ART. 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 disadvan-

tage 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.

ART. 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.

ART. 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.

ART. 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.

ART. 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.

ART. 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 aforsesaid, 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.

ART. 34. If any officer shall think himself wronged by his Colonel, 1514 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.

ART. 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.

ART. 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.

ART. 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.

ART. 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.

ART. 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.

ART. 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.

ART. 41. 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.

1515 ART. 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 offence, by the sentence of a court-martial.

ART. 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.

ART. 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.

ART. 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.

ART. 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.

ART. 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 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 discretion of a regimental court-martial.

ART. 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.

ART. 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.

ART. 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.

ART. 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.

ART. 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 or ammunition, or who shall quit his post or colors to plunder and pillage, every such offender, being duly convicted
1516 thereof, shall suffer death, or such other punishment as shall be ordered by the sentence of a general court-martial.

ART. 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.

ART. 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.

ART. 55. Whosoever, belonging to the armies of the United States in foreign parts, shall force a safeguard, shall suffer death.

ART. 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.

ART. 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.

ART. 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.

ART. 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.

ART. 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.

ART. 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.

ART. 62. If, upon marches, guards, or in quarters, different corps of the army shall happen to join, or to do duty together, the officer highest in
1517 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.

ART. 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 to 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.

ART. 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.

ART. 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.

ART. 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.

ART. 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.

ART. 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.

ART. 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
1518 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."

ART. 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.

ART. 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, de-

termine the relevancy or validity, and decide accordingly; and no challenge to more than one member at a time shall be received by the court.

ART. 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.

ART. 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."

ART. 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.

ART. 75. No officer shall be tried but by a general court-martial,
1519 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.

ART. 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.

ART. 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.

ART. 78. Non-commissioned officers and soldiers, charged with crimes, shall be confined until tried by a court-martial, or released by proper authority.

ART. 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.

ART. 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.

ART. 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.

ART. 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.

ART. 83. Any commisioned officer convicted before a general court-martial of conduct unbecoming an officer and a gentleman, shall be dismissed the service.

ART. 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.

ART. 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.

ART. 86. The commanding officer of any post or detachment, in which
1520 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.

ART. 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.

ART. 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.

ART. 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.

ART. 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.

ART. 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.

1521 ART. 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.

ART. 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.

ART. 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.

ART. 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.

ART. 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.

ART. 97. The officers and soldiers of any troops, whether militia or
1522 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.

ART. 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.

ART. 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.

ART. 100. The President of the United States shall have power to prescribe the uniform of the army.

ART. 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.

SEC. 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.

SEC. 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.

XIII.

1523 AMERICAN ARTICLES OF WAR OF 1874.

[As Enacted June 22, 1874.]

SEC. 1342, (Rev. Sts.)—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.

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.

ART. 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.

ART. 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 person, 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.

ART. 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.

ART. 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.

ART. 6.—Any officer who takes money, or other thing, by way of grati-
1524 fication, 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.

ART. 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.

ART 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.

ART. 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.

ART. 10.—Every officer commanding a troop, battery, or company, is charged with the arms, accouterments, ammunition, clothing, or other military stores belonging to his command, and is accountable to his colonel in case of their being lost, spoiled, or damaged otherwise than by unavoidable accident, or on actual service.

ART. 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.

ART. 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 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.

ART. 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.

1525 ART. 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 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.

ART. 15.—Any officer who, willfully 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.

ART. 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.

ART. 17.—Any soldier who sells or, through neglect, loses or spoils his horse, arms, clothing, or accouterments, shall suffer such stoppages, not exceeding one-half of his current pay, as a court-martial may deem sufficient for repairing the loss or damage, and shall be punished by confinement or such other corporal punishment as the court may direct. [Amended 1892. See page 1542, *post*.]

ART. 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.

ART. 19.—Any officer who uses contemptous 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.

ART. 20.—Any officer or soldier who behaves himself with disrespect toward his commanding officer shall be punished as a court-martial may direct.

ART. 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.

ART. 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.

ART. 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.

ART. 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,
1526 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.

ART. 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.

ART. 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 punishment as a court-martial may direct.

ART. 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 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.

ART. 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.

ART. 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.

ART. 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.

ART. 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.

ART. 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.

ART. 33.—Any officer or soldier who fails, except when prevented by sickness or other necessity, to repair, at the fixed time, to the place
1527 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.

ART. 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.

ART. 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.

ART. 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.

ART. 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.

ART. 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 shall suffer such punishment as a court-martial may direct. No court-martial shall sentence any soldier to be branded, marked or tattooed.

ART. 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.

ART. 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.

ART. 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.

ART. 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.

ART. 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.

ART. 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.

ART. 45.—Whosoever relieves the enemy with money, victuals, or ammunition, or knowingly harbors or protects an enemy, shall suffer death, or such punishment as a court-martial may direct.

1528 ART. 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.

ART. 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.

ART. 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; 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.

ART. 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.

ART. 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 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.

ART. 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; and in time of peace, any punishment, excepting death, which a court-martial may direct.

ART. 52.—It is earnestly recommended to all officers and soldiers diligently to attend divine service. Any officer who behaves indecently or 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.

ART. 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 frofeited for such offenses shall be applied as therein provided.

ART. 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
1529 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.

ART. 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.

ART. 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.

ART. 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.

ART. 58.—In time of war, insurrection, or rebellion, larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault and buttery 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.

ART. 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 wilfully 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.

ART. 60.—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

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

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

1530 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

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

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

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

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

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

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,

Shall, on conviction thereof, be punished by fine or imprisonment, 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.

ART. 61. Any officer who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service.

ART. 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.

1531 ART. 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.

ART. 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.

ART. 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.

ART. 66.—Soldiers charged with crimes shall be confined until tried by court-martial, or released by proper authority.

ART. 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.

ART. 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.

ART. 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.

ART. 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.

ART. 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 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.

ART. 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.

1532 ART. 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.

ART. 74.—Officers who may appoint a court-martial shall be competent to appoint a judge-advocate for the same.

ART. 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.

ART. 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.

ART. 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.

ART. 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.

ART. 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.

ART. 80.—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.

ART. 81.—Every officer commanding a regiment or corps shall, subject to the provisions of article eighty, be competent to appoint, for his own regiment or corps, courts-martial, consisting of three officers, to try offenses not capital.

ART. 82.—Every officer commanding a garrison, fort, or other place, where the troops consist of different corps, shall, subject to the provisions of article eighty, be competent to appoint, for such garrison or other place, courts-martial, consisting of three officers, to try offenses not capital.

ART. 83.—Regimental and garrison courts-martial, and field-officers detailed to try offenders, shall not have power to try capital cases or commissioned officers, or to inflict a fine exceeding one month's pay, or to imprison or put to hard labor any non-commissioned officer or soldier for a longer time than one month.

ART. 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 doubt 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; 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." [Amended, 1892. See page 1000, *post.*]

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ART. 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 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."

ART. 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.

ART. 87.—All members of a court-martial are to behave with decency and calmness.

ART. 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.

ART. 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.

ART. 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.

ART. 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.

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ART. 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."

ART. 93.—A court-martial shall, for reasonable cause, grant a con-
1534 tinuance 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.

ART. 94.—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.

ART. 95.—Members of a court-martial, in giving their votes, shall begin with the youngest in commission.

ART. 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.

ART. 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.

ART. 98.—No person in the military service shall be punished by flogging, or by branding, marking, or tattooing on the body.

ART. 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.

ART. 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.

ART. 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.

ART. 102.—No person shall be tried a second time for the same offense.

ART. 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. [Amended, 1890. See pp. 998, *post*.]

ART. 104.—No sentence of a court-martial shall be carried into execution until the whole proceeding shall have been approved by the officer ordering the court, or by the officer commanding for the time being. [Amended, 1892. See page 1000, *post*.]

ART. 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 case of guerilla 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 ex-
1535 cepted 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.

ART. 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.

ART. 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.

ART. 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.

ART. 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.

ART. 110.—No sentence of a field-officer, detailed to try soldiers of his regiment, shall be carried into execution, until the whole proceedings shall have been approved by the brigade commander, or, in case there be no brigade commander, by the commanding officer of the post. [Amended, 1892. See page 1000, *post*.]

ART. 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.

ART. 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.

ART. 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.

ART. 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.

ART. 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.

ART. 116.—A court of inquiry shall consist of one or more officers, 1536 not exceeding three, and a recorder, to reduce the proceedings and evidence to writing.

ART. 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."

ART. 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 be permitted to examine and cross-examine them, so as fully to investigate the circumstances in question.

ART. 119.—A court of inquiry shall not give an opinion on the merits of the case inquired of unless specially ordered to do so.

ART. 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.

ART. 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.

ART. 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.

ART. 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.

ART. 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 said officers of the regular or volunteer forces of the United States.

ART. 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.

ART. 126.—In case of the death of any soldier, the commanding officer of his troop, battery, or company shall immediately secure all his effects
1537 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.

ART. 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.

ART. 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.

SEC. 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 encampments 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.

## XIV.

1538 ADDITIONAL STATUTORY PROVISIONS OF THE EXISTING LAW, (1895,) IN THE NATURE OF ARTICLES OF WAR.

*Attachment of Witnesses.*—SEC. 1202, R. S. 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.

*Appointment of Reporter.*—SEC. 1203, R. S. 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 short-hand. The reporter shall, before entering upon his duty, be sworn or affirmed, faithfully to perform the same.

*Restoration of dismissed officer.*—SEC. 1228, R. S. No officer of the Army who has been or may be dismissed from the service by the sentence of a general court-martial, formally approved by the proper revlewing authority, shall ever be restored to the military service, except by a re-appointment confirmed by the Senate.

*Dropping of officer from rolls for desertion.*—SEC. 1229, R. S. The President is authorized to drop from the rolls of the Army for desertion, any officer who is absent from duty three months without leave; and no officer so dropped shall be eligible for re-appointment. And no officer in the military or naval service shall, in time of peace, be dismissed from service, except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof.

*Trial of officer dismissed by order.*—SEC. 1230, R. S. 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.

*Authority of Supt., Mil. Academy as to courts-martial.*—SEC. 1326, R. S. The Superintendent of the Military Academy shall have power to convene general courts-martial for the trial of cadets, and 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.

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1539 *The three Sections next following relate to Offences committed at the Military Prison at Fort Leavenworth.*—SEC. 1359, R. S. Any officer who shall suffer a convict to escape, or shall in any way consent to his escape, or shall aid him to escape, or in an attempt to escape, shall be dismissed from the service, and suffer such other punishment as a court-martial may inflict.

SEC. 1360, R. S. Any soldier or other person employed in the prison, who shall suffer a convict to escape, or shall in any way consent to his escape, or shall aid him to escape, or in an attempt to escape, shall, upon conviction by a court-martial, be confined therein not less than one year.

SEC. 1361, R. S. All persons under confinement in said military prison undergoing sentence of court-martial, shall be liable to trial and punishment by court-martial under the Rules and Articles of War for offences committed during the said confinement.

*Amenability of Marine Corps.*—SEC. 1621, R. S. The Marine Corps, * * * when detached for service with the Army, by order of the President, * * * shall be subject to the Rules and Articles of War prescribed for the government of the Army.

*Militia courts-martial.*—SEC. 1658, R. S. Courts-martial for the trial of militia shall be composed of militia officers only.

*Forfeiture of citizenship by desertion.*—SECS. 1996, 1998, R. S. 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 deemed to have voluntarily relinquished and forfeited his right of citizenship, as well as his right to become a citizen; and such person shall be forever incapable of holding any office of trust or profit under the United States, or of exercising any rights of a citizen thereof.

*Disposition of records of inferior courts-martial.*—ACT OF MARCH 3, 1877, c. 102, s. 1. Hereafter the records of the regimental, garrison, and field officers' 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.

*Competency of accused as a witness.*—ACT OF MARCH 16, 1878, c. 37. In the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offences, 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 not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him.

*Limitation in cases of desertion—Amendment of Art. 103.*—ACT OF APRIL 11, 1890, c. 78. *Be it enacted, &c.*, That the one hundred and third article of the Rules and Articles of War be, and the same is hereby, amended by adding thereto the following words:

1540 "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 offence, 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."

*Maximum Punishments.*—ACT OF SEPT. 27, 1890, c. 998. Whenever by any of the Articles of War for the government of the Army the punishment on conviction of any military offence 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 code of *maximum punishments* prescribed by the President under this Act is published in G. O. 16 of 1895, set forth *post.*]

## XV.

## 1541 THE ACT OF OCTOBER 1, 1890, ESTABLISHING THE SUMMARY COURT.

An Act to promote the administration of justice in the Army.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That hereafter in time of peace all enlisted men charged with offenses now cognizable by a garrison or regimental court-martial shall, within twenty-four hours from the time of their arrest, be brought before a summary court, which shall consist of the line officer[1] second in rank at the post or station or of the command of the alleged offender, and at stations where only officers of the staff are on duty the officers second in rank shall constitute such court, who shall have power to administer oaths and to hear and determine the case, and when satisfied of the guilt of the accused party adjudge the punishment to be inflicted. There shall be a summary court record-book or docket kept at each military post, and in the field at the headquarters of the 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 post or other commander: *Provided,* That when but one commissioned officer is present with a command he shall hear and finally determine such cases as require summary action: *Provided further,* That the President be, and he hereby is, authorized to prescribe specific penalties for such minor offenses as are now brought before garrison and regimental courts-martial: *Provided, further,* That any enlisted man charged with an offense and brought before such summary court may, if he so desires, object to a hearing and determination of his case by such court and request a trial by court-martial, which request shall be granted as of right, and when the court is the accuser the case shall be heard and determined by the post commander, or by regimental or garrison court-martial: *And provided further,* That post and other commanders shall, 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 reports shall be filed in the office of the judge-advocate of the department.

SEC. 2. That it shall be lawful for 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.

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[1] *Sic* in the roll.

## XVI.

1542 THE ACT OF JULY 27, 1892, AMENDING CERTAIN ARTICLES OF WAR, AND CHANGING THE PROCEDURE OF COURTS-MARTIAL, &C.

An Act to amend the Articles of War, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That articles seventeen, eighty-four, one hundred and four, and one hundred and ten, of section thirteen hundred and forty-two of the Revised Statutes of the United States, be, and the same are hereby, amended to read as follows:

"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."

"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 doubt 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.'"

"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."

"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."

SEC. 2. That 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.

1543 SEC. 3. 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 Sixty-second Article of War.

SEC. 4. That judge-advocates of departments and of courts-martial, and the trial officers of summary courts, are hereby authorized to administer oaths for the purpose of the administration of military justice, and for other purposes of military administration.

SEC. 5. That the commanding officers authorized to approve the sentences of summary courts shall have the power to remit or mitigate the same.

SEC. 6. That this act shall take effect sixty days after its passage.

## XVII.

## 1544 EXECUTIVE ORDER, PRESCRIBING LIMITS OF PUNISHMENT BY SENTENCE OF COURT-MARTIAL, IN CASES OF ENLISTED MEN, UNDER THE AUTHORITY OF THE ACT OF SEPTEMBER 27, 1890.

GENERAL ORDERS, No. 16.

HEADQUARTERS OF THE ARMY,
ADJUTANT GENERAL'S OFFICE,
*Washington, March 25, 1895.*

By direction of the Secretary of War, the following Executive order will take effect twenty days from the date hereof, and is published for the information and guidance of all concerned:

EXECUTIVE MANSION,
*March 20, 1895.*

The Executive order dated February 26, 1891, 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. 21, 1891, Headquarters of the Army, is amended so as to prescribe as follows:

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.

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 of desertion when joined in by two or more
1545 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:

| Offences. | 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. |

| Offences. | Limits of punishment. |
|---|---|
| UNDER 17TH ARTICLE OF WAR—Continued. | |
| 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. | |
| Refusing 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. |
| UNDER 31ST ARTICLE OF WAR. | |
| Lying out of quarters | Forfeiture of $2; corporal, $3; sergeant, $4. |
| UNDER 32D ARTICLE OF WAR. | |
| *Absence without leave*—[1] | |
| Less than one hour | Forfeiture of $1; corporal, $2; sergeant, $3; 1st sergeant or non-commissioned officer of higher grade, $4. |
| From one to six hours[2] | Forfeiture of $2; corporal, $3; sergeant, $4; 1st sergeant or non-commissioned officer of higher grade, $5. |
| From six to twelve hours | Forfeiture of $3; corporal, $4; sergeant, $6; 1st sergeant or non-commissioned officer of higher grade, $7. |
| From twelve to twenty-four hours | Forfeiture of $5; corporal, $6; sergeant, $7; 1st sergeant or non-commissioned officer of higher grade, $10. |
| From twenty-four to forty-eight hours | 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. |
| From two to ten days | Forfeiture of $10 and ten days' confinement at hard labor; for non-commissioned officer, reduction in addition thereto. |
| From ten to thirty days | Forfeiture of $20 and one month's confinement at hard labor; for non-commissioned officer, reduction in addition thereto. |
| From thirty to ninety days | Three months' confinement at hard labor and forfeiture of $10 per month for same period; for non-commissioned officer, reduction in addition thereto. |
| For ninety or 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, &c., to the place of parade*— | |
| For reveille or retreat roll-call and 11 p. m. inspection. | Forfeiture of $1; corporal, $2; sergeant, $3; 1st sergeant, $4. |
| For guard detail | Forfeiture of $5; corporal, $8; sergeant, $10. |
| For fatigue detail<br>For dress parade<br>For the weekly inspection<br>For target practice<br>For drill<br>For guard mounting (by musician)<br>For stable duty | Forfeiture of $2; corporal, $3; sergeant, $5. |
| UNDER 38TH ARTICLE OF WAR. | |
| *Drunkenness*— | |
| 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 company cook | Forfeiture of $20. |

[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.
[2] Including first and excluding last.

| Offences. | Limits of punishment. |
|---|---|
| UNDER 38TH ARTICLE OF WAR—Continued. | |
| *Drunkenness*—Continued. | |
| On extra or special duty | Forfeiture of $12. For non-commissioned officer, reduction and forfeiture of $20. |
| At drill | |
| At target practice | |
| At parade | |
| At inspection | |
| At inspection of company guard detail | |
| At stable duty | |
| 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. |
| 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 cases of | Dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for six months. |
| Disobedience of orders, involving wilful 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 or hospital cook | Forfeiture of $10. |
| Introducing liquor into post or camp 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 ten 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. |
| 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 $6, 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 wilfully 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.

| Offences. | Limits of punishment. |
|---|---|
| UNDER 62D ARTICLE OF WAR—Continued. | |
| 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 | 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.

SECTION 1. When a soldier shall be convicted of an offence the punishment for which, as authorized by Article II of this order or the custom of the service, does not exceed that which an inferior court-martial may award, the punishment so authorized may be increased by one-half for every previous conviction of one or more offences within eighteen months preceding the trial and during the current enlistment; provided that the increase of punishment for five or more previous convictions shall not exceed that thus authorized when there are four previous convictions, and that when one or more of such five or more previous convictions shall have been by general court-martial, or when such convictions shall have occurred within one year preceding the trial, the limit of punishment shall be dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for three months.

When the conviction is of an offence punishable under Article II of this order or the custom of the service with a greater punishment than an inferior court-martial can award, but not punishable with dishonorable discharge, the sentence may, on proof of five or more previous convictions within eighteen months and during the current enlistment, impose dishonorable discharge and forfeiture of all pay and allowances in addition to the authorized confinement, and when this confinement is less than three months it may be increased to three months.

When a non-commissioned officer is convicted of an offence not punishable with reduction, he may, if he shall have been convicted of a military offence within a year and during the current enlistment, be sentenced to reduction, in addition to the punishment already authorized.

SEC. 2. In every case when an offence on trial before a court-martial is of a character admitting of the introduction of evidence of previous convictions, and the accused is convicted, the court, after determining its findings, will be opened for the purpose of ascertaining whether there is such evidence, and, if so, of hearing it. These convictions must be proved by the records of
1550 previous trials, or by duly authenticated orders promulgating the same, except in the cases of conviction by summary court, when a duly authenticated copy of the record of said court shall be deemed sufficient proof. Charges forwarded to the authority ordering a general court-martial, or submitted to a summary, garrison, or regimental court, must be accompanied by the proper evidence of such previous convictions as may have to be considered in determining upon a sentence.

ARTICLE IV.

When a soldier shall, on one arraignment, be convicted of two or more offences, 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 offences 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. Offences 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 summary court shall not be confined in the guardhouse, 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.

The following substitutions for punishments named in Article II of this order are authorized at the discretion of the court:

Two days' confinement at hard labor for one dollar forfeiture; 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. Whenever the limit herein prescribed for an offence or offences may be brought within the punishing power of inferior courts-martial, as defined by the 83d Article of War, by substitution of punishment under the provisions of this article, the said courts have jurisdiction of such offence or offences.

ARTICLE VIII.

Non-commissioned officers above the rank of corporal shall not, if they
1551 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.

GROVER CLEVELAND.

By command of Lieutenant-General SCHOFIELD:

GEO. D. RUGGLES,
*Adjutant General.*

## XVIII.

1552 AN ACT of the Congress of the "Confederate States of America," *entitled*, "An Act to organize Military Courts to attend the Army of the Confederate States in the Field and to define the Powers of said Courts."

*The Congress of the Confederate States of America do enact*, That courts shall be organized, to be known as military courts,[1] one to attend each army corps in the field, under the direction of the President. Each court shall consist of three members, two of whom shall constitute a quorum, and each member shall be entitled to the rank and pay of a colonel of cavalry, shall be appointed by the President, by and with the advice and consent of the Senate, and shall hold his office during the war, unless the court shall be sooner abolished by Congress. For each court there shall be one judge advocate, to be appointed by the President, by and with the advice and consent of the Senate, with the rank and pay of a captain of cavalry, whose duties shall be as prescribed by the Rules and Articles of war, except as enlarged or modified by the purposes and provisions of this act, and who shall also hold his office during the war, unless the court shall be sooner abolished by the Congress; and in case of the absence or disability of the judge advocate, upon the application of the court, the commander of the army corps to which such court is attached may appoint or detail an officer to perform the duties of judge advocate during such absence or disability, or until the vacancy, if any, shall be filled by the President.

SEC. 2. Each court shall have the right to appoint a provost marshal to attend its sittings and execute the orders of the court, with the rank and pay of a captain of cavalry; and also a clerk, who shall have a salary of one hundred and twenty-five dollars per month, who shall keep the record of the proceedings of the court, and shall reduce to writing the substance of the evidence in each case, and file the same in the court. The provost marshal and the clerk shall hold their offices during the pleasure of the court. Each member and officer of the court shall take an oath well and truly to discharge the duties of his office to the best of his skill and ability, without fear, favor, or reward, and to support the Constitution of the Confederate States. Each member of the court, the judge advocate, and the clerk shall have the power to administer this.

SEC. 3. Each court shall have power to adopt rules for conducting busi-
1553 ness and for the trial of causes, and to enforce the rules adopted, and to punish for contempt, and to regulate the taking of evidence, and to secure the attendance of witnesses, and to enforce and execute its orders, sentences, and judgments, as in cases of courts-martial.

SEC. 4. The jurisdiction of each court shall extend to all offences now cognizable by courts-martial under the Rules and Articles of war and the customs of war, and also to all offences defined as crimes by the laws of the Confederate States or of the several States, and, when beyond the territory of the Confederate States, to all cases of murder, manslaughter, arson, rape, robbery, and larceny, as defined by the common law when committed by any private or officer in the army of the Confederate States against any other private or officer in the army or against the property or person of any citizen or other person within the army: *provided*, said courts shall not have jurisdiction of offenders above the grade of colonel. For offences cognizable by courts-martial, the court shall, on conviction, inflict the penalty prescribed by the Rules and Articles of war, and in the manner and mode therein mentioned; and for offences not punishable by the Rules and Articles of war, but punishable by the laws of the Confederate States, said court shall inflict the penalties prescribed by the laws of the Confederate States; and for offences against which penalties are not prescribed by the Rules and Articles of war, nor by

[1] Note the constitution, &c., of these more permanent courts in connection with Chapter V, Vol. I, p. 52, 54—"Nature of the court-martial: a temporary tribunal," &c.

the laws of the Confederate States, but for which penalties are prescribed by the laws of a State, said court shall inflict the punishment prescribed by the laws of the State in which the offence was committed: *provided*, that in cases in which, by the laws of the Confederate States or of the State, the punishment is by fine or by imprisonment, or by both, the court may, in its discretion, inflict any other punishment less than death; and for the offences defined as murder, manslaughter, arson, rape, robbery, and larceny by the common law, when committed beyond the territorial limits of the Confederate States, the punishment shall be in the discretion of the court. That when an officer under the grade of brigadier-general, or private, shall be put under arrest for any offence cognizable by the court herein provided for, notice of his arrest and of the offence with which he shall be charged shall be given to the judge advocate by the officer ordering said arrest, and he shall be entitled to as speedy a trial as the business before said court will allow.

SEC. 5. Said courts shall attend the army, shall have appropriate quarters within the lines of the army, shall be always open for the transaction of business, and the final decisions and sentences of said courts in convictions shall be subject to review, mitigation, and suspension, as now provided by the Rules and Articles of war in cases of courts-martial.

SEC. 6. That during the recess of the Senate the President may appoint the members of the courts and the judges advocate provided for in the previous sections, subject to the confirmation of the Senate at its session next ensuing said appointments. [Approved October 9, 1862.]

The above legislation was added to and amended by subsequent Acts, of which the principal were the following:—

*Act of May 1, 1863*, authorizing such "military courts" for the military departments.

1554 *Act of Feb. 3, 1864*, authorizing the President to transfer judges from one such military court to another.

*Act of Feb. 6, 1864*, authorizing commanders of corps and departments to detail field officers as members of military courts whenever any of the judges thereof should be "disqualified by consanguinity or affinity, or unable from sickness or other unavoidable cause, to attend said courts."[1]

*Act of Feb. 13, 1864*, establishing a military court in "North Alabama," for a limited period.

*Act of Feb. 16, 1864*, authorizing the President in his discretion "to appoint a military court to attend any division of cavalry in the field, and also one for each State within a military department."

*Act of Feb. 17, 1864*, providing that when two or more army corps, each having a military court, are united in the same army, the jurisdiction of each court shall extend to the whole army; providing for the exchanging and transferring of judges of different courts; and subjecting to the jurisdiction of such courts "all offenders below the grade of lieut.-general."

*Act of Feb. 17, 1864*, empowering military courts (and courts-martial) to summon citizens as witnesses, and providing that a citizen disobeying a summons of such court should be subjected to the same penalties as a witness disobeying an order of the District Court of the Confederate States, or arrested by military force and brought before the military court, to be held in close confinement till he should consent to testify.[2]

*Act of June 14, 1864*, repealing the provision of the original Act allowing the "military courts" to appoint their clerks and marshals, and making it the duty of the Secretary of War to detail persons to act as such from the officers, non-commissioned officers and privates of the army unable to perform field duty.

[1] Note this provision in connection with Chapter XIV, Vol. I, p. 336–7—"Relationship."
[2] Note this provision in connection with Chapter XVII, Vol. I, p. 466–7—"Contempts."

## XIX.

1555 AN ACT of the Congress of the "Confederate States of America," entitled "AN ACT to suspend the privilege of the Writ of Habeas Corpus in certain cases."[1]

Whereas the Constitution of the Confederate States of America provides, in article first, section nine, paragraph three, that "the privilege of the writ of habeas corpus shall not be suspended, unless when, in case of rebellion or invasion, the public safety may require it:" and whereas the power of suspending the privilege of said writ, as recognized in said article first, is vested solely in the Congress, which is the exclusive judge of the necessity of such suspension: and whereas in the opinion of the Congress, the public safety requires the suspension of said writ in the existing case of the invasion of these States by the armies of the United States: and whereas the President has asked for the suspension of the writ of habeas corpus, and informed Congress of conditions of public danger which render the suspension of the writ a measure proper for the public defence against invasion and insurrection: Now, therefore,

*The Congress of the Confederate States of America do enact*, That during the present invasion of the Confederate States, the privilege of the writ of habeas corpus be and the same is hereby suspended; but such suspension shall apply only to the cases of persons arrested or detained by order of the President, Secretary of War, or the general officer commanding the Trans-Mississippi Military Department, by the authority and under the control of the President. It is hereby declared that the purpose of Congress in the passage of this act is to provide more effectually for the public safety, by suspending the writ of habeas corpus in the following cases, and no others:

First—Of treason, or treasonable efforts or combinations to subvert the government of the Confederate States.

Second—Of conspiracies to overthrow the government, or conspiracies to resist the lawful authorities of the Confederate States.

Third—Of combining to assist the enemy, or of communicating intelligence to the enemy, or giving him aid and comfort.

Fourth—Of conspiracies, preparations and attempts to incite servile insurrection.

Fifth—Of desertions or encouraging desertions, of harboring deserters and of attempts to avoid military service; provided, that in cases of palpable wrong and oppression by any subordinate officer, upon any party who does not legally owe military service, his superior officer shall grant prompt relief to the oppressed party, and the subordinate shall be dismissed from office.

1556 Sixth—Of spies and other emissaries of the enemy.

Seventh—Of holding correspondence or intercourse with the enemy, without necessity, and without the permission of the Confederate States.

Eighth—Of unlawful trading with the enemy, and other offences against the laws of the Confederate States, enacted to promote their success in the war.

Ninth—Of conspiracies, or attempts to liberate prisoners of war held by the Confederate States.

Tenth—Of conspiracies, or attempts or preparations to aid the enemy.

Eleventh—Of persons advising or inciting others to abandon the Confederate cause, or to resist the Confederate States, or to adhere to the enemy.

Twelfth—Of unlawfully burning, destroying or injuring, or attempting to burn, destroy or injure any bridge or railroad or telegraphic line of communication, or other property, with the intent of aiding the enemy.

Thirteenth—Of treasonable designs to impair the military power of the government, by destroying, or attempting to destroy the vessels or arms, or munitions of war, or arsenals, foundries, workshops or other property of the Confederate States.

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[1] Published, with directions as to its execution, in G. O. 31, A. & I. G. O., Richmond, 1864.

SEC. 2. The President shall cause proper officers to investigate the cases of all persons so arrested or detained, in order that they may be discharged, if improperly detained, unless they can be speedily tried in the due course of law.

SEC. 3. That during the suspension aforesaid no military or other officer shall be compelled, in answer to any writ of habeas corpus, to appear in person or to return the body of any person or persons detained by him by the authority of the President, Secretary of War, or the general officer commanding the Trans-Mississippi department; but upon the certificate under oath of the officer having charge of any one so detained, that such person is detained by him as a prisoner for any of the causes hereinbefore specified, under the authority aforesaid, further proceedings under the writ of habeas corpus shall immediately cease, and remain suspended so long as this act shall continue in force.

SEC. 4. This Act shall continue in force for ninety days after the next meeting of Congress, and no longer.

Approved February 15, 1864.

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## XX.

1557 FORMS OF CHARGES.

### Under Article 3.

Charge. Unauthorized enlistment, in violation of the Third Article of War.

*Specification.* In that A. B., Captain, &c., did enlist into the military service, without the written consent thereto of his parents, one C. D., known to him to be a minor under the age of twenty-one years;

*Or*—did enlist into the military service one C. D., known to him to be a minor under the age of sixteen years;

*Or*—known to him to be an insane person;

*Or*—known to him to be at the time intoxicated;

*Or*—known to him to be a deserter from the said service;

*Or*—known to him to have been convicted of an infamous criminal offence, to wit the offence of _____.

This at (*or* at or near)_____, or or about _____.

### Under Article 5.

Charge. False muster, in violation of the Fifth Article of War.

*Specification.* In that A. B., Captain, &c., at an official muster of, (*describe the command,*) did unlawfully include and muster as a soldier of said command one C. D., known to him to be not a soldier but a civilian.

This at _____, on or about _____.

### Under Article 6.

Charge. Violation of the Sixth Article of War.

*Specification.* In that A. B., Colonel, &c., being mustering officer for the _____ regiment, _____ did, on mustering the same, and in consideration of appending favorable remarks as to the condition of the same, (*or other consideration,*) accept and take by way of gratification, from _____ the sum of _____ dollars.

*Or*—In that A. B., Captain, &c., on signing the muster rolls of his company, and, in consideration of his certifying to the same as correct and true, did accept and take by way of gratification from _____ the sum of _____ dollars.

This at _____, on or about _____.

### Under Article 7.

Charge. Omitting to make a monthly return, in violation of the Seventh Article of War.

1558 *Specification.* In that A. B., Colonel, &c., commanding the_____ regiment _____, did, designedly, (or *through neglect,*) omit to transmit through the proper channels to the War Department at the beginning of the month of _____, an exact official return of his said regiment, specifying the names of the officers then absent from said regiment and from their posts, with the reasons for and the time of their absences, as required by the said Seventh Article of War.

This at _____, on or about _____.

### Under Article 8.

Charge. Making a false return, violation of the Eighth Article of War.

*Specification.* In that A. B., Captain, &c., commanding (*specify the command,*) did make to a superior officer authorized to call for such returns,

to wit, to _____, an official return of the arms belonging to his said command, in which he, the said A. B., &c., did state (*give statement as to number, kind, or condition of arms, &c.;*)—which said statement was false, and known to him, the said A. B., &c., to be false.

This at _____, on or about _____.

UNDER ARTICLE 13.

CHARGE. Signing a false certificate, in violation of the Thirteenth Article of War.

*Specification.* In that A. B., Captain, &c., did sign a certificate appended to the muster-and-pay roll of his company for the months of _____ and _____, to the effect that the said roll exhibited a true statement of his said company; whereas it appeared from said roll that Privates _____ and _____ were present for duty with said company when in fact they were absent from the same; the said certificate being thus in part false.

This at _____, on or about _____.

UNDER ARTICLE 14.

CHARGE. False muster, in violation of the Fourteenth Article of War.

*Specification.* In that A. B., Captain, etc., did sign an official muster roll of his said company for the month of _____, which contained and included the names of C. D., E. F., and G. H., privates and members of said company, as being present for duty with the same, whereas, in fact, the said C. D., E. F., and G. H. were, with the knowledge and connivance of him the said A. B., wholly absent from said company and from military duty.

This at _____, on or about _____.

UNDER ARTICLE 15.

CHARGE. Suffering military stores to be damaged, in violation of the Fifteenth Article of War.

*Specification.* In that A. B., Captain, &c., commanding, &c., did suffer certain military stores belonging to the United States, and in his charge
1559 as such commander, to wit _____, to be seriously damaged, by negligently allowing the same to be exposed to the elements, (*or unguarded, &c.,*) to the loss of the United States of about _____ dollars.

This at _____, on or about _____.

UNDER ARTICLE 16.

CHARGE. Wasting ammunition in violation of the Sixteenth Article of War.

*Specification.* In that A. B., Private, &c., having had certain ammunition, to wit_____rounds of cartridges duly issued to him by_____, for use in the military service, did negligently waste the same by firing away the said cartridges without orders or sufficient cause.

This at _____, on or about _____.

UNDER ARTICLE 17.

CHARGE. Selling clothing, in violation of the Seventeenth Article of War.

*Specification.* In that A. B., Private, &c., did sell to one_____, (or *to a person whose name is unknown,*) certain of his clothing, to wit, one overcoat of the value of_____, issued to him for use in the military service.

This at _____, on or about _____.

UNDER ARTICLE 18.

CHARGE. Being interested in sales, in violation of the Eighteenth Article of War.

*Specification.* In that A. B., Captain, &c., commanding the garrison of _____, did, for his private advantage, become pecuniarily interested, to the extent of one-third of the profits, with one C. D., in the sales of liquors allowed to be brought by the said C. D. into said garrison, for the use of the soldiers.

This at _____, on or about _____.

UNDER ARTICLE 19.

CHARGE. Disrespect to the President of the United States, in violation of the Nineteenth Article of War.

*Specification.* In that A. B., Captain, &c., did, publicly, in the presence of civilians and soldiers, use contemptuous and disrespectful words of and against _____, the President of the United tSates, by saying—(*give language in full or in substance.*)

This at _____, on or about _____.

UNDER ARTICLE 20.

CHARGE. Disrespect toward his commanding officer, in violation of the Twentieth Article of War.

*Specification.* In that A. B., Captain, etc., did behave with desrespect toward his commanding officer, Colonel C. D., etc., by saying to him—(*give language used, and, if in the presence of other officers or of soldiers, so state*).

1560 *Or*—by saying or of in regard to him—(*give language or substance, and, if in the presence of other officers, etc., so state*).

*Or*, by—(state *acts* or *conduct* manifesting disrespect).

This at _____, on or about _____.

UNDER ARTICLE 21.

CHARGE. Offering violence against his superior officer, in violation of the Twenty-first Article of War.

*Specification.* In that A. B., Private, &c., did offer violence against his superior officer, Captain C. D., &c., then being in the execution of his office, by threatening him, and attempting to strike him, with his musket.

This at _____, on or about _____.

CHARGE. Disobedience of Orders, in violation of the Twenty-first Article of War.

*Specification.* In that A. B., Captain, etc., having received from his superior and commanding officer C. D., Colonel, etc., a lawful command and order, requiring him to—(*State what the order required*); *or*—a lawful command and order in writing, expressed as follows, namely—(*give the written order in full*); did, nevertheless, deliberately refuse (or *wholly neglect*) to obey said order.

This at _____, on or about _____.

UNDER ARTICLE 22.

CHARGE. Beginning a mutiny, in violation of the Twenty-second Article of War.

*Specification.* In that A. B., a Sergeant of Company _____, did begin a mutiny in said Company by inducing and causing the members of said Company to stack arms, and to refuse to Captain C. D., the commanding officer of the Company, to do any further duty until one E. F., a member of the Company, then confined in the guard house, should be released by the said Captain.

This at _____, on or about _____.

CHARGE. Joining in a mutiny in violation of the Twenty-second Article of War.

*Specification.* In that A. B., a private of the _____ Regiment of _____, upon a mutiny having been begun and excited in said regiment against the authority of the post commander, Captain C. D., _____ upon the occasion of the confinement in the guard-house, by the order of said post commander, of E. F., a private of said regiment, did join in the said mutiny, and, in combination with sundry other members of said regiment assembled on the parade-ground, did stack arms, and though ordered by said commander to return to his quarters, did, with his associates, refuse to disperse or do any further duty until the said E. F. should be released from his confinement.

This at _____, on or about _____.

CHARGE. Joining in a sedition, in violation of the Twenty-second Article of War.

1561 *Specification.* In that A. B., a Private of the_____Regiment of_____upon a member of said regiment having been arrested for drunken and disorderly conduct and confined in the town jail by the civil authorities of the town of_____, did join with other members of the regiment and sundry citizens in an attempt to break into the jail and release said prisoner, and did assault and beat the police officers and others of the said civil authorities, and other disorders did then and there commit, till restrained by means of a detachment of_____sent from the post of_____, and compelled to return to his quarters.

This at _____, on or about _____.

UNDER ARTICLE 23.

CHARGE. Failing properly to endeavor to suppress a mutiny, in violation of the Twenty-third Article of War.

*Specification.* In that A. B., Captain, Co. A, _____U. S. Infantry, being present at a mutiny among the soldiers of his company and of the said regiment, against the authority of the regimental commander, did fail to use his utmost endeavor to suppress the same, but did simply command the men of his own company to return to their quarters, and, on their refusing, took no means to compel their obedience or reduce them to discipline.

This at _____, on or about _____.

CHARGE. Failing to give information of an intended mutiny, in violation of the Twenty-third Article of War.

*Specification.* In that A. B., a Sergeant of Company____, _____ Regiment, U. S. _____, having knowledge that certain members of his company and of said regiment proposed and intended to begin and join in a mutiny, on the following day, against the authority of the regimental commander, did wholly fail and neglect to inform the said commander, or his company commander, of said intended mutiny, so that the same was actually begun without the said officers being enabled to take measures to prevent it.

This at _____, on or about _____.

UNDER ARTICLE 24.

CHARGE. Violation of the Twenty-fourth Article of War.

*Specification.* In that A. B., a Sergeant of Company____, _____ Regiment_____, being engaged in a fray with other members of said company and regiment, and being ordered into confinement by Captain C. D., of the_____Regiment, _____, did refuse to obey such officer, and did draw a weapon, to wit, a pistol, upon him.

This at _____, on or about _____.

UNDER ARTICLE 26.

CHARGE. Sending a challenge, in violation of the Twenty-sixth Article of War.

*Specification.* In that A. B., Captain, &c., did invite C. D., Captain, &c., to a mortal combat with deadly weapons, by sending to him, by the hands
1562 of_____, (*or if otherwise sent, state manner of sending,*) a written challenge, in the words and figures following to wit: (*Give written challenge in full: if the challenge was verbal, give words or substance.*)

This at _____, on or about _____.

CHARGE. Accepting a challenge in violation of the Twenty-sixth Article of War.

*Specification.* In that A. B., Captain, &c., having received from Captain C. D., &c., a challenge to fight with him a duel, did accept said challenge by sending to the said Captain C. D., by the hands of _____, (*or if otherfise sent, state manner of sending,*) a written acceptance of the same in terms as follows, to wit: (*Give written acceptance in full: if the writing is not accessible or the acceptance was verbal, give words or substance if known.*)

This at _____, on or about _____.

UNDER ARTICLE 27.

CHARGE. Violation of the Twenty-seventh Article of War.

*Specification.* In that A. B., Second Lieutenant, &c., being officer of the guard of the Post of _____, and being informed that Captain C. D., &c.,

intended and was about to engage in a duel outside said post, did knowingly and willingly suffer said Captain C. D. to go forth from said post and fight such duel.

This at _____, on or about _____.

CHARGE. Seconding and promoting a duel in violation of the Twenty-seventh Article of War.

*Specification.* In that Captain A. B., &c.,—on the occasion of the challenging by First Lieutenant C. D., &c., of First Lieutenant E. F., &c., to fight with him a duel, and the acceptance of such challenge by the latter, and further at the duel thereupon fought between said officers,—did act as second of said Lieutenant C. D., and as such did carry said challenge and receive said acceptance, and was present at said duel, seconding and promoting the same.

This at _____, on or about _____.

CHARGE. Carrying a challenge, in violation of the Twenty-seventh Article of War.

*Specification.* In that A. B., Second Lieutenant, &c., did carry a communication in writing from Captain C. D., &c., to Captain E. F., &c., well knowing that the same was a challenge from said Captain C. D. to said Captain E. F., to fight with him a duel.

This at _____, on or about _____.

UNDER ARTICLE 28.

CHARGE. Upbraiding another officer for refusing a challenge, in violation of the Twenty-eighth Article of War.

*Specification.* In that A. B., Captain, &c.,—upon First Lieutenant C. D., &c., having declined a challenge sent him by First Lieutenant E. F., &c., and refused to fight with him a duel,—did upbraid said First Lieutenant C. D., by pronouncing him to be a coward.

This at _____, on or about _____.

UNDER ARTICLE 31.

1563 CHARGE. Lying out of quarters, in violation of the Thirty-first Article of War.

*Specification.* In that A. B., Private, &c., did, without leave from his proper superior officer, lie out of his quarters at the post of _____, by remaining during the night at _____.

This at _____, on or about _____.

UNDER ARTICLE 32.

CHARGE. Absence without leave, in violation of the Thirty-second Article of War.

*Specification.* In that A. B., Private, etc., did, without leave from his commanding officer, absent himself from his company, from _____ to _____ (*specifying duration of absence*).

This at _____, on or about (the dates above mentioned).

*Or*—In that A. B., private, etc., having received a pass authorizing him to be absent from his company till _____, did, at the end of said time, neglect duly to return but did remain absent, without leave from his commanding officer, till _____.

This at _____, on or about (the dates above mentioned).

UNDER ARTICLE 33.

CHARGE. Failing duly to repair to parade, in violation of the Thirty-third Article of War.

*Specification.* In that A. B., Captain, &c., though not prevented by sickness or other necessity, did fail to repair to the place of parade of said regiment at the time duly fixed for the parade thereof.

This at _____, on or about _____.

CHARGE. Leaving parade, in violation of the Thirty-third Article of War.

*Specification.* In that A. B., Captain, &c., having duly attended the parade of his regiment, did, without leave from his commanding officer, Colonel _____, commanding said regiment, quit and go from said parade without being dismissed or relieved therefrom.

This at _____, on or about _____.

UNDER ARTICLE 34.

CHARGE. Violation of the Thirty-fourth Article of War.

*Specification.* In that A. B., Private, &c., was found one mile from the camp of his Company, to wit, at _____, without having leave in writing from his commanding officer.

This at _____, on or about _____.

UNDER ARTICLE 35.

CHARGE. Violation of the Thirty-fifth Article of War.

*Specification.* In that A. B., Private, &c., did fail at the beating, (*or sounding,*) of retreat, to retire to his quarters.

This at _____, on or about _____.

UNDER ARTICE 36.

1564 CHARGE. Violation of the Thirty-sixth Article of War.

*Specification.* In that A. B., Private, &c., having been duly detailed upon the duty of_____, did, for the consideration of _____ hire C. D., Private, &c., to perform said duty for him.

*Or*—In that A. B., Private, &c., did allow himself for the consideration of_____, to be hired by C. D., Private, &c., to perform for him the duty of_____, upon which he, the said C. D., had been duly detailed.

This at _____, on or about _____.

UNDER ARTICLE 37.

CHARGE. Allowing the hiring of duty, in violation of the Thirty-seventh Article of War.

*Specification.* In that A. B., Captain, &c., having knowledge of the hiring by Private C. D. of Private E. F., of said company, to perform for him, the said C. D., the duty of_____, upon which he, the said C. D., had been duly detained, did not prevent or forbid such hiring, but did sanction and allow the same.

This at _____, on or about _____.

UNDER ARTICLE 38.

CHARGE. Drunkenness on duty, in violation of the Thirty-eighth Article of War.

*Specification.* In that A. B., Captain, &c., having been duly detailed as officer of the day of the Post of_____, and having entered upon said duty, was found drunk thereon.

This at _____, on or about _____.

*Or*—In that A. B., Private, &c., having been duly detailed as a member of the Post guard, and having entered upon said duty, was found drunk thereon.

This at _____, on or about _____.

UNDER ARTICLE 39.

CHARGE. Sleeping on post, in violation of the Thirty-ninth Article of War.

*Specification.* In that A. B., Private, &c., having been duly detailed as a member of the Post guard, and duly posted as a sentinel at (*give number or description of post*), was found by_____(*officer of the day or officer of the guard*, etc.,) asleep on said post.

This at _____, on or about _____.

CHARGE. Leaving post, in violation of the Thirty-ninth Article of War.

*Specification.* In that A. B., Private, etc., having been duly detailed as a member of the Post guard, and duly posted as a sentinel at (*give number or description of post*), did, before being regularly relieved, leave said post and go to _____ (*state where he went*, etc.).

This at _____, on or about _____.

UNDER ARTICLE 40.

1565 CHARGE. Violation of the Fortieth Article of War.

*Specification.* In that A. B., Private, &c., being duly detailed and acting as one of a guard of prisoners, did, without leave from his proper superior officer and without urgent necessity, quit his said guard.

This at _____, on or about _____.

UNDER ARTICLE 41.

CHARGE. Causing a false alarm in violation of the Forty-first Article of War.

*Specification.* In that A. B., Captain, &c., did, by needlessly and without authority causing the long roll to be sounded, create a false alarm in the camp of his regiment.

This at _____, on or about _____.

UNDER ARTICLE 42.

CHARGE. Misbehavior before the enemy, in violation of the Forty-second Article of War.

*Specification.* In that Major A. B., commanding _____, having been ordered forward with his said command to engage the enemy, did, while said command was advancing and under fire, abandon the same and seek safety at the rear, and did not reappear until the engagement was concluded.

This at _____ on or about _____.

CHARGE. Abandoning a post, in violation of the Forty-second Article of War.

*Specification.* In that Colonel A. B., &c., having been, by his proper superior, Brig. Gen. _____, duly placed in command of the Post of _____, and ordered to defend the same, did, in disregard of his orders and his duty, shamefully abandon his said post to the enemy.

This at _____, on or about _____.

CHARGE. Quitting his post to plunder and pillage, in violation of the Forty-second Article of War.

*Specification.* In that A. B., Private, &c., being on duty with his regiment in the field, did quit his post and colors for the purpose of plunder and pillage, and did commit plunder and pillage of the property of one C. D., a citizen, by forcibly entering the house of said C. D., against his will, and taking therefrom and appropriating money and effects of the said C. D., of the value of _____ dollars.

This at _____, on or about _____.

UNDER ARTICLE 43.

CHARGE. Compelling a surrender, in violation of the Forty-third Article of War.

1566 *Specification.* In that A. B., Captain, &c., being an officer under the command of Colonel C. D., commanding the post of _____ then threatened by the enemy, did, in combination with officers and soldiers of said command, by (*state means employed,*) compel said Colonel C. D. to surrender said post to the enemy.

This at _____, on or about _____.

UNDER ARTICLE 44.

CHARGE. Violation of the Forty-fourth Article of War.

*Specification.* In that A. B., Captain, &c., did make known the watchword to one C. D., a civilian; he the said C. D. not being a person entitled to receive the same, according to the rules and discipline of war.

*Or*—did presume to give to _____ a watchword different from that which he had received.

This at _____, on or about _____.

UNDER ARTICLE 45.

CHARGE. Relieving the enemy, in violation of the Forty-fifth Article of War.

*Specification.* In that A. B. (*describing him*), did relieve the enemy by furnishing to certain soldiers of his army, whose names are unknown, ammunition, to wit, about one hundred pounds of powder.

This at _____, on or about _____.

UNDER ARTICLE 46.

CHARGE. Corresponding with the enemy, in violation of the Forty-sixth Article of War.

*Specification.* In that A. B., _____, did directly hold correspondence with and give intelligence to the enemy, by writing and transmitting secretly through the lines to one C. D., an officer of the enemy's army, a communication in words and figures following, (or, in substance as follows,) to wit:—(*Insert communication—or its substance—containing material information.*)

This at _____, on or about _____.

UNDER ARTICLE 47.

CHARGE. Desertion, in violation of the Forty-seventh Article of War.

*Specification.* In that A. B., Private, &c., having been duly enlisted in the military service of the United States, did desert the same, and did remain absent as a deserter therefrom till arrested at _____, by _____, on _____.

*Or*—having been duly enlisted, etc., and having received a furlough authorizing him to be absent from said service, from _____ to _____, did not at said last date return to said service, but did continue to remain absent with the intent to abandon the same, and did actually remain absent as a deserter therefrom till arrested at _____, by _____, on _____.

This at _____, on or about _____.

UNDER ARTICLE 49.

1567 CHARGE. Desertion, in violation of the Forty-ninth Article of War.

*Specification.* In that A. B., Captain, &c., having duly tendered his resignation as such Captain, did, before having received due notice of the acceptance of the same, quit his post and proper duties, without leave from the proper authority, and with intent to remain permanently absent therefrom.

This at _____, on or about _____.

UNDER ARTICLE 50.

CHARGE. Desertion, in violation of the Fiftieth Article of War.

*Specification.* In that A. B., Private, Company A, First Regiment U. S. Infantry, did, without having been regularly discharged from said company and regiment, enlist himself in the Second Regiment U. S. Cavalry.

This at _____, on or about _____.

CHARGE. Receiving, &c., a deserter, in violation of the Fiftieth Article of War.

*Specification.* In that A. B., Captain, First Regiment U. S. Infantry,—upon one C. D., a Private of the Second Regiment U. S. Cavalry, offering himself to him, the said A. B., for enlistment in said First Infantry, without having been regularly discharged from said Second Regiment of Cavalry,—did, though knowing that he had not been so discharged but was a deserter from said regiment, neglect to confine him or give notice of his offence to the officers of said regiment, but did receive and entertain the said C. D., and suffer him to be enlisted in said First Regiment of Infantry.

This at _____, on or about _____.

UNDER ARTICLE 51.

CHARGE. Persuading to desert, in violation of the Fifty-first Article of War.

*Specification.* In that A. B., Corporal, Company A, First Regiment U. S. Infantry, did advise and persuade C. D., a private of said company and regiment, to desert the U. S. Service; he the said C. D. thereupon deserting said service in company with the said A. B.

This at _____, on or about _____.

UNDER ARTICLE 54.

CHARGE. Violation of the Fifty-fourth Article of War.

*Specification.* In that A. B., Captain, &c., commanding a detachment on the march,—upon complaint being made to him that Private C. D. of his command had ill-treated a citizen,—did neglect to see justice done to the offender and reparation made to the party injured out of a part of the offender's pay or otherwise.

This at _____, on or about _____.

UNDER ARTICLE 55.

1568 CHARGE. Violation of the Fifty-fifth Article of War.

*Specification.* In this that A. B., Private, &c., (not being ordered to do so by a general officer commanding a separate army in the field or other competent authority,) did maliciously destroy, by burning, a stack of hay, the property of one C. D., an inhabitant of the United States.

This at _____, on or about _____.

UNDER ARTICLE 56.

CHARGE. Violation of the Fifty-sixth Article of War.

*Specification.* In that A. B., Private, &c.,—upon C. D., an inhabitant of the country, bringing provisions into the camp of the U. S. forces at _____,—did do violence to said C. D., by assaulting and beating him and seizing upon the said provisions.

This at (*a place "in foreign parts,"*) on or about _____.

UNDER ARTICLE 57.

CHARGE. Forcing a safeguard in violation of the Fifty-seventh Article of War.

*Specification.* In that A. B., Private, &c., did, with other soldiers of his regiment, force a safeguard known to him to have been placed over the house and premises of one C. D., an inhabitant of the country, by overpowering the guard posted for the protection of the same, and violently entering said premises and committing waste and plunder therein.

This at (*a place "in foreign parts,"*) on or about _____.

*Or*—This at (*a place within the United States*) on or about _____, and during rebellion against the supreme authority of the United States.

UNDER ARTICLE 58.

CHARGE. Murder, in violation of the Fifty-eighth Article of War.

*Specification.* In that A. B., Private, &c., did feloniously and with malice aforethought, kill C. D., Private, &c., by shooting him with his rifle.

This, in time of war, at _____, on or about _____.

CHARGE. Manslaughter, in violation of the Fifty-eighth Article of War.

*Specification.* In that A. B., Private, &c., did unlawfully and feloniously kill one C. D., a civilian, by shooting him with a pistol.

This, in time of war, at _____, on or about _____.

CHARGE. Mayhem, in violation of the Fifty-eighth Article of War.

*Specification.* In that A. B., Private, &c., in a personal combat with C. D., Private, &c., did, unlawfully and feloniously, inflict a violent injury upon
1569 and wholly blind one of his eyes, thereby depriving him, the said C D., of the use of that member in battle, and disabling him for active service as a soldier.

This, in time of war, at _____, on or about _____.

CHARGE. Robbery, in violation of the Fifty-eighth Article of War.

*Specification.* In that A. B., Private, &c., did unlawfully and feloniously make an assault upon one C. D., a civilian, and, by means of violence, take from his person property belonging to him, to wit fifty dollars in gold.

This, in time of war, at _____, on or about _____.

CHARGE. Arson, in violation of the Fifty-eighth Article of War.

*Specification.* In that A. B., Private, &c., did unlawfully and feloniously set fire to and burn the dwelling house of one C. D., a civilian.

This, in time of war, at _____, on or about _____.

CHARGE. Burglary, in violation of the Fifty-eighth Article of War.

*Specification.* In that A. B., Private, &c., did unlawfully and feloniously break into and enter, in the night time, the dwelling house of one C. D., a civilian, with intent to commit larceny therein.

This, in time of war, at _____, on or about _____.

CHARGE. Larceny, in violation of the Fifty-eighth Article of War.

*Specification.* In that A. B., Private, &c., did unlawfully and feloniously take and carry away a gold watch, of the value of one hundred dollars, the property of one C. D., a civilian, against the will and consent of him, the said C. D., and with the intent of appropriating the same to his, the said A. B.'s, own use.

This, in time of war, at _____, on or about _____.

CHARGE. Rape, in violation of the Fifty-eighth Article of War.

*Specification.* In that A. B., Private, &c., did unlawfully and feloniously have carnal knowledge of and ravish one C. D., by means of force and against her will and consent.

This, in time of war, at _____, on or about _____.

CHARGE. Assault and battery, in violation of the Fifty-eighth Article of War.

*Specification.* In that A. B., Private, &c., did unlawfully and feloniously assault and beat one C. D., a civilian, by knocking him down with his musket.

This, in time of war, at _____, on or about _____.

UNDER ARTICLE 59.

CHARGE. Violation of the Fifty-ninth Article of War.

*Specification.* In that A. B., Captain, &c., commanding the Post of _____;—when Private C. D., &c., a soldier under his command, was duly accused of having committed a criminal offence, to wit robbery, against the person of
1570 one E. F., a citizen of the State of _____, and an application for the apprehension and delivery to the civil authorities, of the said C. D., had been duly made by the Sheriff of the County of _____, in behalf of said E. F., to him the said A. B., commanding as aforesaid;—he the said A. B. did refuse to deliver over the said C. D. to the civil authorities, or to aid them in apprehending him.

This, in time of peace, at _____, on or about _____.

UNDER ARTICLE 60.

CHARGE. Presenting a fraudulent claim, in violation of the Sixtieth Article of War.

*Specification.* In that A. B., Captain, &c., having duly received from Major _____, Paymaster U. S. Army, at Washington, D. C., his monthly pay for the month of January, 1886, did, notwithstanding, subsequently make and present to Major _____, Paymaster U. S. Army, a second and duplicate pay account and claim for pay for the same month, well knowing that said claim was false and fraudulent.

This at the City of New York, on or about _____.

CHARGE. Making and using a false writing, in violation of the Sixtieth Article of War.

*Specification.* In that A. B., Captain, &c., for the purpose of aiding one C. D., a civil employee of the United States, to obtain the approval and allowance of a claim against the United States, for services rendered as such employee, did make and furnish to said C. D. a writing, in which he certified and stated that said claim was correct and just; he the said A. B., Captain, &c., well knowing that the said claim was fraudulent in that said services had not been rendered as alleged therein, and that said certificate and statement were therefore false.

This at _____, on or about _____.

CHARGE. Forgery, in violation of the Sixtieth Article of War.

*Specification.* In that A. B., Private, &c., for the purpose of obtaining the approval, and payment to him, of a claim against the United States for certain pay and allowances set forth in a certain "final statement" prepared by him, did forge and counterfeit thereon the name and signature of Captain C. D., &c., his company commander, as certifying to the correctness of the same.

This at _____, on or about _____.

CHARGE. False payment, in violation of the Sixtieth Article of War.

*Specification.* In that A. B., Captain, &c., being a disbursing officer of the United States, and as such in possession of public funds of the United States, furnished and intended for the military service thereof; upon the presentation to him as such disbursing officer, by one C. D., a contractor with the United States, or a claim for _____ dollars, as the amount due for certain supplies furnished by said contractor; and upon the signing, and rendering
1571 to the said A. B., by him the said C. D., of a receipt for the said amount, did knowingly deliver to said C. D., in payment of said claim, an amount of said funds less than that for which he had received such receipt, to wit the amount of _____ dollars.

This at _____, on or about _____.

CHARGE. Making and delivering an untrue receipt, in violation of the Sixtieth Article of War.

*Specification.* In that Captain A. B., &c., a disbursing officer of the United States, and as such authorized to make, and deliver to one C. D., a contractor with the United States, a paper certifying the receipt by the United States, through him, the said A. B., &c., of certain property, to wit: _____ furnished by the said C. D., and intended for the military service of the United States, did, with intent to defraud the United States, make, sign, and deliver to the said C. D., a certificate containing statements as to the quantity, (*or value, &c.,*) of said property, without having full knowledge of the truth of said statements, but knowing that the same were in part false.

This at _____, on or about _____.

CHARGE. Embezzlement, in violation of the Sixtieth Article of War.

*Specification.* In that A. B., Captain, &c., being a disbursing officer of the United States, and as such having in his possession public funds of the United States, furnished and intended for the military service thereof, and duly entrusted to his charge for disbursement in and for said service, did wrongfully and in violation of said trust, embezzle, and knowingly and wilfully apply to his own use and benefit, by (*specify the manner, purpose, &c., of the personal application,*) a portion of said funds, to wit the sum of _____ dollars.

This at _____, on or about _____.

CHARGE. Embezzlement, in violation of the Sixtieth Article of War.

*Specification.* In that A. B., Captain, &c., being a disbursing officer of the United States, and being as such authorized to draw for proper purposes official checks upon _____, a public depositary of the United States, in which were deposited public funds furnished and intended for the military service of the United States, did, for a purpose not prescribed or authorized by law, to wit for the payment of a personal debt, withdraw by check a portion of said funds, to wit the sum of _____ dollars: this in violation of Sec. 5488, Revised Statutes.

This at _____, on or about _____.

CHARGE. Misappropriation, in violation of the Sixtieth Article of War.

*Specification.* In that A. B., Captain, &c., being a disbursing officer of the United States, and having as such been supplied with certain funds of the United States, to wit the sum of _____ dollars, furnished for the
1572 military service but for the specific purpose of the erection of public quarters for soldiers at the Post of _____, did knowingly and wilfully misappropriate the said funds by applying a portion of the same to the erection of public stables at said Post.

This at _____, on or about _____.

CHARGE. Wrongful disposition of public property, in violation of the Sixtieth Article of War.

*Specification.* In that A. B., Captain and Assistant Quartermaster, U. S. Army, having in his charge, as such Assistant Quartermaster, certain public horses furnished for the military service of the United States, did wrongfully and knowingly dispose of one of said horses by loaning the same to C. D., a civilian, and allowing him to keep and use the said horse for his personal uses and purposes.

This at _____, during the month of _____, 1886.

CHARGE. Wrongful disposition of public property, in violation of the Sixtieth Article of War.

*Specification.* In that A. B., Private, &c., did, in deserting from the military service, wrongfully dispose of certain ordnance stores belonging to the United States, and furnished to him for use in the military service, to wit, (*specify articles with their values;*) the same being property for which Captain C. D., &c., was accountable.

This at _____, on or about _____.

CHARGE. Purchasing public property in violation of the Sixtieth Article of War.

*Specification.* In that A. B., Private, &c., did knowingly purchase from C. D., Private, &c., property of the United States, to wit one pistol which had been issued to the said C. D., for his use in the military service; he, the said C. D., having no lawful right to sell the same.

This at _____, on or about _____.

UNDER ARTICLE 61.

CHARGE. Conduct unbecoming an officer and a gentleman, in violation of the Sixty-first Article of War.

*Specification.* In that A. B., Captain, &c., having conducted an unsuccessful expedition against hostile Indians, which had failed mainly through his negligence, did make and forward to his commanding officer, Colonel C. D., &c., an official report of said expedition in which were contained certain statements as follows, to wit:—

(*Quote the statements so far as material.*)

Which said statements were wholly, or in great part, false; and were made by him the said A. B. for the purpose of deceiving his said commanding officer as to the matter of the responsibility for the failure of the said expedition.

This at _____, on or about _____.

CHARGE. Conduct unbecoming an officer and a gentleman.

*Specification.* In that A. B., Captain, &c., having become, on _____ (*state the date*), justly indebted to C. D., a civilian, in the sum
1573 of _____ dollars, for articles sold and furnished by said C. D. to him the said A. B., by reason and upon the faith of the express offer and assurance of him, the said A. B., that the same should be fully paid for at the end of the then month, did nevertheless neglect, without due cause or excuse, to pay for the same at that time, and, though repeatedly applied to for payment, for more than one year succeeding; and, upon then, to wit, on _____(*state the date*), being urgently pressed by said C. D. for payment, did evade the same by representing to said C. D. that he was wholly without means for such payment; which said representation was knowingly false, he, the said A. B., being in fact possessed of ample means for the payment of said debt.

This at _____, on the dates above mentioned.

CHARGE. Conduct unbecoming an officer and a gentleman.

*Specification.* In that A. B., Captain, &c., having had a charge preferred against him for drunkenness, by his commanding officer, Colonel C. D., &c., did, on _____ (*state the date,*) in order to induce the withdrawal of said charge, and to escape a trial thereon, make and give to his said commander a written promise and pledge, upon honor, in terms as follows, to wit:—

(*Insert pledge to abstain from spirituous liquors for a certain time stated.*)

Whereupon, in consideration of the said promise and pledge, the said Colonel C. D. did not forward for trial the said charge but withdrew the same; but, nothwithstanding, he the said A. B., Captain, &c., did soon after, to wit on _____, become drunk.

This at _____, on the dates above mentioned.

UNDER ARTICLE 62.

CHARGE. Absence without leave, to the prejudice of good order and military discipline.

*Specification.* In that A. B., Captain, &c., did without authority absent himself from his post, command and duties, for one week, to wit from _____ to _____, 1886.

This at _____, on and between the dates mentioned.

CHARGE. Neglect of duty, to the prejudice of good order and military discipline.

*Specification.* In that A. B., Major, &c., commanding a detachment operating against hostile Indians, and being ordered by his commanding officer, Brigadier General _____, U. S. Army, to pursue and attack a certain body of Indians (*describing them*), did, by unnecessary delays and want of proper precautions, wholly fail to attack said Indians, but did allow them to attack his command to its serious disadvantage and deteriment.

This at _____, on or about _____.

CHARGE. Conduct to the prejudice of good order and military discipline.

*Specification.* In that A. B., First Lieutenant, &c., did in public, in the presence of enlisted men, engage in a noisy and disorderly altercation with another officer, to wit Second Lieutenant C. D., &c., exchanging with him blows and applying to him opprobrious epithets.

1574

This at _____, on or about _____.

CHARGE. Conduct to the prejudice of good order and military discipline.

*Specification.* In that A. B., Major, &c., being a disbursing officer of the United States, did, in violation of Paragraph 590, Army Regulations, gamble and bet at cards for money.

This at _____, on or about _____.

CHARGE. Conduct to the prejudice of good order and military discipline.

*Specification.* In that A. B., Private, &c., U. S. Cavalry, did abuse and maltreat his horse, by needlessly and wantonly striking and beating him on the head and body.

CHARGE. Conduct to the prejudice of good order and military discipline.

*Specification.* In that A. B., Private, &c., being a member of the guard in charge of certain prisoners employed in, (*state upon what or how employed,*) was so careless and neglectful of his duty that one of said prisoners, to wit C. D., &c., was enabled to make his escape.

This at _____, on or about _____.

CHARGE. Fraudulent enlistment, in violation of the Sixty-second Article of War.

*Specification.* In that A. B., by wilfully and falsely representing to C. D., Captain, &c., recruiting officer, that he was twenty-one years of age and had no parent or guardian, whereas in fact he was but eighteen years of age and had a father living, did fraudulently enlist, and procure himself to be enlisted, in the military service of the United States, and did under and by virtue of said false statements and fraudulent enlistment, procure himself to be paid, and did receive, certain pay and allowances from the United States, to wit (*state amount or nature of pay or allowances*).

This at _____, on or about _____.

UNDER ARTICLE 65.

CHARGE. Breach of arrest, in violation of the Sixty-fifth Article of War.

*Specification.* In that A. B., Captain, Company A, ____ Regiment, &c., having been duly arrested and confined to his quarters, by order of his commanding

officer Colonel C. D., &c., did, before being set at liberty, or having his limits enlarged, by his said commander or other competent authority, break his said arrest and confinement by quitting the same and proceeding to assume command of and to drill his said company.[1]

This at _____, on or about _____

1575 UNDER ARTICLE 68.

CHARGE. Failing to make report of a prisoner, in violation of the Sixty-eighth Article of War.

*Specification.* In that A. B., Second Lieutenant, &c., being officer of the guard, and having had committed to his charge, as such, a certain prisoner, to wit one C. D., &c., did wholly fail, within twenty-four hours after such commitment, or after being relieved from his guard, to make to his commanding officer the report in regard to such prisoner required by the said Article.

This at _____, on or about _____.

UNDER ARTICLE 69.

CHARGE. Violation of the Sixty-ninth Article of War.

*Specification.* In that A. B., Second Lieutenant, &c., being officer of the guard, and having had committed to his charge, as such, a certain prisoner, to wit one C. D., &c., did presume, without proper authority, to release the said prisoner;

*Or*—did suffer the said prisoner to escape.

This at _____, on or about _____.

CHARGE. Being a spy.

*Specification.* In that A. B., Captain, &c., being an officer of the Army of _____, a public enemy at war with the United States, did, without authority and secretly, lurk and act as a spy in and about _____, a fortified military post of the armies of the United States, and did there collect material information in regard to the numbers, resources, and operations of said armies, with intent to impart the same to the said enemy.

This, in time of war, at or near the said _____, on or about _____.

CHARGE. Violation of the Laws of War.

*Specification.* In that A. B., Captain, &c., being an officer of the army of _____, an enemy at war with the United States, did unlawfully and without authority penetrate within the lines of the army of the United States, and engage therein in recruiting men for the military service of the said enemy.

This at _____, on or about _____.

CHARGE. Guerilla warfare, in violation of the Laws of War.

*Specification.* In that A. B., at a time of war between the United States and _____, and not being commissioned, enlisted, or employed in the military service of either of said belligerents, but acting independently of the same, did, in combination with sundry other persons similarly acting, engage in unlawful warfare against the inhabitants of the United States, and in the prosecution of such warfare did attack and forcibly enter the dwelling-house of one C. D., a peaceable citizen of the United States, and rob him and his family of money and other property of the value of five hundred dollars, and, upon being resisted by the said C. D., did then and there unlawfully shoot and kill him.

This at _____, on or about _____.

[1] See a case of breach of arrest, thus committed, in G. O. 25, A. & I. G. O., Richmond, 1862. The officer was convicted and cashiered.

## XXI.

### 1576 FORM OF A RECORD OF A TRAIL BY A GENERAL COURT-MARTIAL.

PROCEEDINGS OF A GENERAL COURT-MARTIAL, in the case of First Lieutenant _____, convened by the following Order:—

Special Orders No. ____. } HEADQUARTERS, DEPT. OF_____, _____ 1895.

A General Court-Martial is appointed to meet _____ at 10 o'clock A. M., on Monday, _____, 1895, or as soon thereafter as practicable, for the trial of First Lieutenant _____, and such other persons as may be brought before it.

DETAIL FOR THE COURT.

1. Lieutenant Colonel _____
2. Major _____
3. Captain _____
4. Captain _____
5. First Lieutenant _____

Captain _____,
Judge Advocate.

Upon the final adjournment of the court, the members thereof will return to their proper stations. The travel enjoined is necessary for the public service.

By command of Brigadier General _____.

_____,
Assistant Adjutant General.

---

FIRST DAY.

_____,
_____.

Pursuant to the foregoing Order, the Court assembled at the place, date, and hour therein specified. Present the following Members:—

Lieut. Col._____
Captain_____
Captain_____
First Lieutenant_____

1577 The Judge Advocate, Captain _____, and the Accused, First Lieutenant _____, were also present.

There being no quorum, the members present adjourned to _____ at __ o'clock A. M.

---

SECOND DAY.

_____,
_____.

Pursuant to the foregoing Order and to adjournment the Court reassembled at the said place and date, at the hour of __ o'clock A. M. Present the following Members:—

Lieut. Col._____
Major _____
Captain_____
Captain_____
First Lieut._____

The Judge Advocate, Captain _____, and the Accused, First Lieutenant _____, were also present.

Major _____, the Member absent on the first day, tendered an explanation in writing of his absence which was directed by the Court to be annexed to the Record, marked "Exhibit A."

The Judge Advocate stated that he had appointed, as Reporter for this trial, Mr. _____, who, being introduced, was duly sworn by the Judge Advocate.

The Accused asked leave to introduce, as his Counsel, _____, Esq., Counsellor at Law. The Court assenting, the Counsel appeared and took his seat.

The Order convening the Court was then read by the Judge Advocate, and the Accused was asked if he wished to object to any of the Members. He thereupon, through his Counsel, interposed a challenge to Captain _____, on the ground that he had investigated the case and preferred the charges, and was to be presumed to have formed an opinion on the merit.

The challenged Member, on being called upon by the President of the Court for remarks, stated that while he had in fact preferred the charges after an examination of the evidence, he did not consider that he had formed such opinion as to affect his impartiality.

After argument by the Judge Advocate and Counsel, the Court was cleared for deliberation, the challenged Member, the Accused and the Judge-Advocate withdrawing. On the doors being reopened, it was announced by the President that the challenge was sustained.

The Accused, being asked if he objected to any other Member, replied in the negative.

The Court being reduced below a quorum, the Judge Advocate was instructed to communicate the fact to the Convening Authority.

The Court thereupon adjourned to _____ at __ o'clock A. M.

---

1578 THIRD DAY.

_____

_____

Pursuant to adjournment, the Court reassembled at the said place and date at the hour of ____ o'clock A. M. Present the following Members:

Lieut. Col._____
Major_____
Captain_____
First Lieut._____

The Judge Advocate, Captain _____, and the Accused, First Lieut. _____, with his Counsel, were also present.

The Proceedings of the foregoing day were read and approved.

The following Order, detailing a new Member, was then read by the Judge Advocate.

(*Insert copy of G. O. or S. O.*)

The newly-detailed Member, Captain _____, took his seat upon the Court.

The Accused being asked if he desired to object to said Member, replied in the negative.

The Members of the Court were then severally sworn by the Judge Advocate, and the Judge Advocate was duly sworn by the President of the Court;—all of which oaths were administered in the presence of the Accused.

The Accused was thereupon arraigned upon the following Charges and Specifications:—

(*Insert original Charges, &c., or copy.*)

To the first Charge, ("Disrespect to his Commanding Officer, in violation of the Twentieth Article of War,") and its Specifications, the Accused, through his Counsel, interposed the *Special Plea of Former Trial*,—in that he had been arraigned upon the same before a previous General Court-Martial, had duly pleaded thereto, and the proceedings had thereupon been discontinued by the United States, without fault or act of his.

The Judge Advocate replied that, immediately upon the original arraignment, the Court had been dissolved, for the reason that several of the Mem-

bers had been required for active service in the field; and he contended that, as the proceedings had been carried no farther, there had been no "former trial" in the sense of the 102d Article of War.

The fact in regard to the dissolution of the first Court being conceded, on the part of the Accused, to be as stated,—after argument had upon the Plea, the Court cleared for deliberation, (the Judge Advocate withdrawing,) and on its being reopened, it was announced by the President that the Plea was not sustained.

The Accused, through his Counsel, then *moved to strike out* the Specification to the Second Charge, ("Breach of Arrest, in violation of the Sixty-fifth
1579 Article of War,") on account of indefiniteness and uncertainty; it alleging simply that the Accused, having been confined, &c., did, without authority, "quit his confinement," without setting forth in what the alleged offence of quitting consisted, *i. e.* where he went or what he did; so that he, the Accused, was not apprized by the Specification with what particular act he was charged, or what he was called upon to defend.

The Judge Advocate replied, and the Court was then cleared, the Judge Advocate withdrawing. On reopening, it was announced by the President that the Motion would be granted unless the Judge Advocate should amend the Specification by averring in what act or acts the alleged offence consisted. The Judge Advocate thereupon, by consent of the Court, amended the Specification by adding thereto the words—"by going to, and remaining for one hour at, the quarters of another officer, Captain _____ of said regiment."

The accused thereupon pleaded to the several Charges and Specifications, as follows:

To the 1st Specification, First Charge—Not Guilty.

To the 2d Specification, First Charge—Not Guilty.

To the First Charge—Not Guilty.

To the Specification, Second Charge—Guilty.

To the Second Charge—Guilty.

The President then directed all persons present as witnesses to leave the court-room and not return until severally called upon to testify.

TESTIMONY FOR THE PROSECUTION.

The Judge Advocate thereupon opened the *Testimony for the Prosecution* by calling as a witness Captain _____, who, being duly sworn, testified, in answer to questions by the Judge Advocate, as follows:

*Question.* Please state your name, rank and office.

*Answer.* (*Stating particulars in full.*)

*Question.* Do you know the accused, First Lieutenant _____, and, if so, how long and where have you known him?

*Answer.* I do; I have known him for four years, at _____, and at _____.

*Question.* Do you know his commanding officer, Colonel _____?

*Answer.* I do.

*Question.* Were you present at an interview and conversation between the Accused and his said commanding officer, at _____, on July 1st last?

*Answer.* I was present and heard the conversation.

*Question.* Did not the Accused say to the Colonel_____? (*Stating what was alleged in the Specification as claimed to have been said by Accused.*)

The Accused objected to the question as obviously leading.

The Court, without clearing, sustained the objection.

*Question.* State all that you heard said at that interview.

*Answer.* What I heard was as follows. (*States details of conversation.*)

Direct examination closed.

Cross-examination by the Accused.

1580 *Question.* How near were you to the parties at this conversation?

*Answer.* I was within about ten feet.

*Question.* How did the Accused appear—excited or the reverse?

*Answer.* Somewhat excited, but not violent.

*Question.* Did you consider his manner disrespectful?

The Judge Advocate objected to the question as calling for the opinion of the witness on the merits of the charge.

The Accused, by his Counsel, modified the question as follows:

*Question.* State more precisely what was the manner of the Accused.

*Answer.* His manner was decided, and, as I said, rather excited, but, apart from the words used, not offensive.

Cross-examination closed.

Examination by the Court.

*Question.* What was the manner of Colonel _____ on this occasion?

*Answer.* Short and emphatic.

The examination of the witness being closed, his testimony was read over to him, and pronounced by him to be correctly recorded.

The hour of 3 P. M. having arrived, the Court adjourned to _____ at 9 o'clock A. M.

---

FOURTH DAY.

_____

_____

Pursuant to adjournment, the Court reassembled at the said place and date, and at the hour appointed. Present all the Members, to wit:

Lieut. Col. _____
Major _____
Captain _____
Captain _____
First Lieut. _____

The Judge Advocate, Captain _____, and the Accused, First Lieut. _____, with his counsel, were also present.

The Proceedings of the previous day were read and approved.

Sergeant _____, a witness for the prosecution, being duly sworn, testified, in answer to questions by the Judge Advocate, as follows:

* * * * * * *

Cross-examination by the Accused.

* * * * * * *

The Judge Advocate then introduced, on the part of the prosecution, the *Depositions* of Corporal _____ and Private _____, taken (in order to avoid the necessity for a continuance) under a *Stipulation* entered into between the Judge Advocate and the Accused prior to the assembling of the Court. These Depositions are hereto annexed, marked "Exhibits B" and "C."

The Judge Advocate announced that the prosecution here rested.

TESTIMONY FOR THE DEFENCE.

A. B., a witness on the part of the *Defence*, was then called and, being duly sworn, testified as follows:

*Question.* What is your name, residence and occupation?

1581 *Answer.* My name is A. B., I reside in San Francisco, and I am Captain of the four-master, "Monarch of the Seas."

*Question.* Do you know the Accused, and where and how long have you known him?

*Answer.* I do, and I have known him for three years in San Francisco.

&c. &c. &c.

Cross-examination by the Judge Advocate.

*Question.* Have you not been convicted of manslaughter in the U. S. District Court?

*Answer.* I refuse to answer.

The Judge Advocate stated that he insisted on the question.

The Accused, by his Counsel, objected on the ground that, as the witness declined to answer, the supposed conviction could be proved only by the judicial record.

The Court, without clearing, announced that the objection of the Accused was sustained.

C. D., a witness on the part of the Defence, was then called.

The Judge Advocate objected to the examination of this witness, on the ground that he was an atheist and insensible to the obligation of an oath, and proposed to interrogate him as to his religious belief.

The Accused, by his Counsel excepted to this mode of proof, and read from 1 Greenleaf on Evidence §370, to the effect that the witness could not properly be questioned in regard to his personal faith, but that his incompetency must be established by the testimony of other persons as to his declarations, &c.

After argument the Court was cleared, (the Judge Advocate withdrawing,) and, on its being reopened, it was announced by the President that the exception taken by the Accused was sustained.

The Judge Advocate having no other testimony to offer on the point of competency, the witness was then duly sworn and testified as follows:

* * * * * * *

Private _____, a witness on the part of the Defence, was then duly sworn.

A Member of the Court called attention to the fact that this witness was not in full uniform or clean. The Court, through the President, directed the witness to return to his quarters, clean himself, and report again in a neat and tidy condition and in his proper uniform.

At this stage, the proceedings of the Court were disturbed by a loud and violent altercation between two enlisted witnesses in the adjoining witness-room. At the suggestion of a Member, the Court was cleared for deliberation, the Judge Advocate withdrawing. On its reopening, the disorderly parties were brought before the Court, and called upon to show cause why they should not be punished as for a contempt according to the 86th Article of War. Having no explanation or excuse to offer, they were adjudged by the Court to be confined, each 48 hours, in the Post guard-house.

Private _____, having reported to the Court in a proper condition, then testified, in answer to questions by the Accused, as follows:

* * * * * * *

The Judge Advocate waived cross-examination.

1582 The hour of adjournment, as fixed by the 94th Article of War, having arrived, the Court adjourned to meet on the following day at 8 o'clock A. M.

---

FIFTH DAY.

_____

_____

Pursuant to adjournment, the Court reassembled at the said place and date, and at the appointed hour. Present all the Members, to wit:

Lieut. Col._____
Major _____
Captain_____
Captain_____
First Lieut._____

The Judge Advocate, Captain _____, and the Accused, First Lieut. _____, with his Counsel, were also present.

The Proceedings of the previous session were read and approved.

Brig. Gen. _____, a witness on the part of the Defence, being duly sworn, testified as follows:

*Question by the Accused.* Please state to the Court what you know of the character and services of the Accused as an officer.

*Answer.* * * *

* * * * * * *

The Accused then introduced, without objection on the part of the Judge Advocate, an Official Statement of his service, as furnished from the Adjutant General's Office, and hereto annexed, marked "Exhibit D."

The Accused, by his Counsel, announced that the Defence here rested.

REBUTTING TESTIMONY.

The Judge Advocate, by way of rebutting evidence, then introduced as a witness, E. F., a civilian, who, being duly sworn, testified as follows:

*Question.* State your name, residence, and occupation.

*Answer.* My name is _____, my residence _____, and my occupation _____.

*Question.* Do you know C. D., a witness for the defence, and how long have you known him?

*Answer.* I have known him for ten years past.

*Question.* Do you know his general character for truth and veracity, and if so what is it?

*Answer.* It is very bad.

Cross-examination.

*Question.* How do you know the character of C. D. for veracity?

*Answer.* Mainly from my own knowledge and experience of him—my own transactions with him.

*Question.* Have you heard other persons speak of his want of veracity, and if so what persons?

*Answer.* I may have, but I do not remember what persons.

The accused then moved to strike out all the testimony of E. F., relat-
1583 ing to the veracity of C. D., as not being evidence of *general reputation*, but merely or substantially a statement of the individual opinion of the witness founded on his own personal relations with C. D.

The Judge Advocate replied, and the Court was cleared, the Judge Advocate withdrawing. On reopening, it was announced by the President that the motion was granted.

The testimony on both sides being closed, the Accused, by his Counsel, read to the Court the address, hereto annexed, marked "Exhibit E."

The Judge Advocate then read an Address, hereto annexed, marked "Exhibit F."

The Accused and the Judge Advocate then withdrew, and the Court was cleared and closed for deliberation on its judgment, and after due consideration, found the Accused, First Lieutenant _____ as follows:

Of the 1st Specification, First Charge—Guilty, except as to the words "*rudely and violently*," substituting the words—*in a decided manner.*

Of the First Charge—Not Guilty.

Of the Specification, Second Charge—Guilty, confirming his Plea.

Of the Second Charge—Guilty, confirming his Plea.

And the Court did thereupon[1] sentence him, the said First Lieutenant

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---

The Accused and the Judge Advocate then withdrew, and the Court did thereupon sentence him, the said, &c.

_____, *To be dismissed from the military service of the United States.*

We certify that the above is a correct and true record.[2]

_____
(Signature of President.)

_____
(Signature of Judge Advocate.)

(Exhibits A, B, C, D, E and F,—each on a separate sheet or sheets.)

RECOMMENDATION.

The undersigned Members of the Court, in consideration of the record and services of the Accused in the late war and subsequently, as exhibited by the testimony, do recommend a commutation, by the reviewing authority, of the sentence of dismissal made mandatory by the 65th Article of War.

_____

_____

_____
(Signatures of Members.)

[1] In a case of an enlisted man, where there are previous convictions to be introduced, a form such as the following will properly succeed the record of the finding:—
The Accused and Judge Advocate were then recalled, and the following evidence of *previous convictions* was offered by the latter.

[2] The mere signatures will constitute a sufficient authentication, (par. 954, A. R.,) without the certificate.

1584 PROCEEDINGS ON REVISION.

_____

_____

The Court reassembled, pursuant to the following Order. Present all the Members.

(*Insert copy of Order requiring the Court to reassemble for the correction of its record by supplying a finding to the 2d Specification of the First Charge, omitted in the Record.*)

The Court thereupon proceeded to supply the omission indicated in the Order, by further finding the Accused, First Lieutenant _____, as follows:

Of the 2d Specification, First Charge—Not Guilty.

And the Court thereupon adjourned.

We certify the above to be a correct and true record.

_____

(Signature of President.)

_____

(Signature of Judge Advocate.)

_____

ACTION.

HEADQUARTERS, _____

_____

In the case of First Lieutenant _____, U. S. Army, the proceedings, findings, and sentence are approved, and, in compliance with the 106th Article of War, the record is forwarded for the action of the President.

_____

Brig. Gen. Commanding.

_____

EXECUTIVE MANSION,

_____

The sentence in the foregoing case of First Lieutenant _____, U. S. Army, is confirmed, but, in consideration of the recommendation of the Members of the Court, is commuted to *suspension from rank and command on half pay, for one year.*

_____

President

## XXII.

1585 SUBPŒNA FOR CIVILIAN WITNESS.

UNITED STATES
*v.*
_____ } Subpœna.

The President of the United States, to _____ Greeting:

You are hereby summoned and required to be and appear in person, on the ____ day of _____, 18__, at _____, before a General Court-Martial of the United States (convened by Special Orders No. ____, Headquarters, Department of _____, dated _____, 18__); 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 _____, on _____, 18__

_____

(Official signature of Judge Advocate of the Court.)

SUBPŒNA DUCES TECUM.

Same as above, adding at end as follows:

And you are hereby required to bring with you, to be used as evidence in said case, the following described documents, to wit:

(Specify the documents or papers called for.)

---

RETURN OF SERVICE OF SUBPŒNA.

(To be indorsed on Original.)

_____

_____

I certify that I made service of the within subpœna on_____, the witness named therein, by delivering to him in person a true copy of the same at _____, on the ____ day of _____, 18__

_____

(Signature.)

1586 FORM OF PROCESS OF ATTACHMENT OF WITNESS.

| | |
|---|---|
| UNITED STATES<br>*v.*<br>_____ | Attachment for Witness. |

The President of the United States, to _____ Greeting:

Whereas, at _____, on the ___ day of _____, 18__, a subpœna was duly personally served on _____ of _____, requiring him to be and appear in person to testify as a witness for the _____ in the above-named case, at _____, on the ____ day of _____, 18__, at __ o'clock, __ M., before a General Court-Martial of the United States, duly convened by the order of _____, in and by Special Orders, No. ____, Headquarters, Department of _____, dated _____, 18__;

And whereas the said _____ has disobeyed and wholly failed to comply with the said subpœna;

Now, therefore, by the authority and in pursuance of Section 1202 of the Revised Statutes of the United States, you are hereby commanded and empowered to take and attach the said _____ wherever he may be found within the United States, and forthwith bring him before the said General Court-Martial assembled at _____ aforesaid, then and there duly to testify as a witness in said case, as in and by the said subpœna summoned and required.

Dated at _____ on _____, 18__.

_____

(Official signature of Judge Advocate of the Court.)

1587 FORM OF DEPOSITION, BY STIPULATION.

BEFORE A GENERAL COURT-MARTIAL, convened by Special Order, No. ____, Headquarters, Department of _____, 188__.

UNITED STATES
*v.*
_____ } Stipulation for Deposition.

It is hereby stipulated and agreed by and between the undersigned, _____, the Judge Advocate of the said Court, in said case, and _____, the accused party therein, that the Deposition of _____, a Witness (or Witnesses) for the _____ in said case, now at _____, may be taken by such officer or person as may be designated by the proper authority, upon the Interrogatories hereto annexed and agreed upon by the said parties, and that said Deposition may be read as evidence before the Court in said case, according and subject to the provisions of the Ninety-first Article of War, and subject to such objections to the answers as the rules of evidence may justify. And it is further stipulated and agreed that said Deposition, when complete, shall be transmitted to the President of said Court, and shall be first opened by him in the presence of the Court and of the parties hereto.

Subscribed at _____ on _____.

_____
(Official signature of Judge Advocate.)

_____
(Signature of Accused.)

INTERROGATORIES.

To be propounded to _____, a Witness for the _____ in the above-mentioned case, according to the annexed stipulation:

FIRST INTERROGATORY.

_____

SECOND INTERROGATORY.

_____

THIRD INTERROGATORY.

_____

&c. &c. &c.

THE DEPOSITION.

Of _____, a Witness for the _____ in the above-mentioned case, who, being first duly sworn, makes answer to the
1588 Interrogatories appended hereto and to the foregoing Stipulation, as follows:

ANSWER TO FIRST INTERROGATORY.

_____

ANSWER TO SECOND INTERROGATORY.

_____

ANSWER TO THIRD INTERROGATORY.

_____

&c. &c. &c.

_____
(Signature of the Deponent.)

AUTHENTICATION.

STATE OF_____}
County of_____} *ss.*

I, _____ of _____ a Notary Public, &c. _ duly appointed and qualified, (or a Judge Advocate of a Department or Court-Martial, or trial officer of a Summary Court, specifying the department or court,[1]) do certify that on the ____ day of _____, personally appeared before me, _____, the witness named in the foregoing Stipulation and Deposition, who, having been by me first duly sworn, made response to the annexed Interrogatories in words and figures as in the appended answers set forth and contained, and further, that he thereupon subscribed the said Deposition in my presence.

_____

[Signature of the Notary, or other qualified official, by whom the oath was administered.]

[SEAL, if any.]

---

_____

_____

, _____, the officer designated and directed by _____ to cause to be taken the deposition of the within-named _____, do certify that the same was duly made and taken under oath as hereinbefore set forth and contained.[2]

_____

(Official signature of officer.)

---

[1] If the oath be administered by a judge advocate or trial officer, the formal part at the head of the authentication should be omitted, and the *place* be noted in the body of the certificate after the *date*.

[2] This additional certificate is not an essential: and where the deposition is taken by and sworn to before a judge advocate, &c., may properly be omitted.

## XXV.

## 1589 FORMS OF RETURN TO WRITS OF HABEAS CORPUS

### Form of Return to a Writ of Habeas Corpus, Issued by a State Court.

[Name of the Court.]

In re

_____ } On Habeas Corpus.
_____ } Return of Respondent.

To the Honorable _____, Judge of said Court:

The Respondent in said case, Captain _____, United States Army, upon whom has been served the writ of *habeas corpus* therein issued, respectfully makes return to the same, and states to this Honorable Court that he holds the above-named _____ by the authority of the United States, as a deserter from the Army of the United States, under circumstances as follows, to wit:

That the said _____ was, at _____, on _____, 18__, duly enlisted in the United States military service, as a private soldier of the ____ regiment of _____, for the term of five years from the said date of enlistment;[1]

That, at _____, on _____, 18__, the said _____ deserted from said service and regiment, and did remain unlawfully absent as a deserter therefrom until his aprehension as such, as hereinafter specified.

That, at _____, on _____, 18__, the said _____ was duly apprehended as a deserter from said service and regiment by _____, and thereupon duly committed by said _____ to the custody and charge of this Respondent, then and now commanding the Post of _____;

That a charge for his said desertion, a copy of which is hereto annexed, has been duly preferred against the said _____, with a view to his trial thereon by a General Court-Martial; and that it is proposed to bring him to trial thereon without unreasonable delay, by and before a General Court-Martial convened (*or to be convened*) by (*specify Commander and Order, if any*).

Wherefore, without intending any disrespect to this Honorable Court, but for the reason that he is advised and believes that, under the rulings of the Supreme Court of the United States, this Court is not empowered to order
1590 the release of a prisoner held under and by virtue of the authority of the United States; and in obedience to the order of the President of the United States, of July 18, 1871, as set forth in the General Regulations for the Army of the United States, this Respondent respectfully declines to produce to this Court the body of the said _____, deserter as aforesaid.

Dated at _____, on _____, 18__

_____
(Official signature of Respondent.)

---

### Form of Return to a Writ of Habeas Corpus Issued from a Federal Court.

The same, in general, as in the preceding form, except as to the *concluding paragraph*—for which substitute the following:

In obedience, however, to the said writ, the Respondent herewith produces before this Honorable Court the body of the said _____, for such disposition and orders as by this Court may be deemed to be legally required and appropriate.

_____
(Signature of Respondent.)

Dated at _____, on _____, 18__

---

[1] If the enlistment paper of the soldier is accessible, a copy may well be annexed to the return, as may also an order of arrest, commitment, etc. (if any), or other written evidence going to identify the soldier or illustrate his status. For a form of return by an officer commanding a Military Prison, see case of *In re* Kaulbach, published in G. O. 7, Division of the Pacific, 1885.

## XXVI.

1591 EXTRACTS FROM THE NEW ARMY REGULATIONS OF 1895.

ARTICLE LXXV.—*Courts-Martial.*

917. The order appointing a court-martial will name its members in order of rank, and they will sit according to rank as announced. A decision of the appointing authority as to the number that can be assembled without injury to the service is conclusive.

918. The place of holding a court is designated by the authority appointing it. Courts will be assembled at posts or stations where trial or examination will be attended with the least expense. A member stationed at the place where it sits is liable to duty with his command during adjournment from day to day. Courts will, as far as practicable, hold their sessions so as to interfere least with ordinary routine duties, and when necessary for the sake of immediate example, it will be ordered to sit without regard to hours.

919. A president of the court will not be announced. The officer highest in rank present will act as president.

920. A court-martial has no power to punish its members, but for disorderly conduct a member is liable as for other offenses against military discipline. Improper words used by him should be taken in writing, and any disorderly conduct reported to the appointing authority.

921. When a court sits in closed session the judge-advocate will withdraw, and when legal advice or assistance is required, it will be obtained in open court.

922. The judge-advocate will summon the necessary witnesses for the trial, but will not summon witnesses at the expense of the Government without the order of the court, unless satisfied that their testimony is material and necessary.

923. Judge-advocates of military courts, in issuing process under section 1202, Revised Statutes, to compel the attendance, as witnesses, of persons not in the military service, will formally direct the same to an officer designated by the department commander to execute it. The nearest military commander will furnish the necessary military force for the execution of the process, if force be required. A subpœna may be served by any person.

924. Judge-advocates of courts-martial will, whenever it is possible, send subpœnas through military channels.

1592 925. An officer or enlisted man who receives a summons to attend as a witness before any military court, board, civil court, or other tribunal competent to issue subpœnas, which is sitting beyond the limits of the department where he is serving, will, before starting to obey the summons, forward it through the proper channel to his department commander, that necessary orders, or authority to obey a civil process, may be given. In urgent cases, or when the public interest would be liable to suffer by delay, a post commander may authorize immediate departure, reporting his action and reasons therefor to the department commander.

926. The commanding officer of a post where a general court-martial is convened will, 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.

927. Charges against an enlisted man, forwarded to the authority competent to appoint a general court for his trial, will be accompanied by a statement in the prescribed form setting forth the dates of his present and former enlist-

ments, 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 a part of the record of the trial, but will be returned to the convening authority with the record.

928. 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.

929. In every case where evidence of previous convictions 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. These convictions must be proved by extracts from the records of previous trials, or by duly authenticated orders promulgating the same. The proper evidence of previous convictions by summary court is the copy of the summary court record furnished to company and other commanders, as required by paragraph 932, or one furnished for the purpose, and certified to be a true copy by the post commander or adjutant. When the proof produced is the copy furnished to the company or other commander, 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. Charges forwarded to the authority ordering a general court, or submitted to a summary, garrison, or regimental court, must be accompanied by the proper evidence of previous convictions, when such evidence is admissible.

1593 930. 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.

931. 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 will 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.

932. Charges preferred for offences cognizable by inferior courts will be laid before the post commander, who, if he thinks that the accused should be tried, will cause him to be brought before the summary court, where he will be arraigned and allowed to plead according to prevailing court-martial practice. If an accused neither demands a removal of his case to a regimental or garrison court, nor (he being a non-commissioned officer above the grade of corporal) objects to trial by an inferior court, nor pleads guilty, and the summary court officer is not the accuser, witnesses will be sworn and evidence received—the accused being permitted to testify in his own behalf and make a statement; but the evidence and statement will not be recorded. The summary court, as soon as trial is concluded, will record its findings and sentence in the prescribed record book and submit it to the post commander, who will record therein his approval or disapproval, in part or in whole, with date and signature. Should the post commander be the summary court, the findings and sentence will be recorded in like manner. No other record of the proceedings will be kept, and such trials will not be published in orders. Post commanders will furnish company and other commanders with copies of the summary court record relating to men of their commands, said copies to be certified to be true copies by the post commander or adjutant.

933. When a post commander sits as a summary court, no approval of the sentence is required by law, but he should sign the sentence as post commander and date his signature.

934. Charges submitted for trial by a summary court should be accompanied by evidence of previous convictions, to be furnished when practicable by the officer preferring the charges; or if the evidence is contained in the summary court record book, a reference to it will be sufficient. If this evidence is not submitted or cited, the summary court may take judicial notice of any such evidence which that book contains.

935. 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. The commanding officer, and not the court, will determine when

and what cases shall be brought before it. Delay in the trial of a soldier by summary court does not invalidate the proceedings, but may be considered by the court in awarding sentence.

1594 936. Summary courts are subject to the restrictions named in the eighty-third Article of War. Soldiers against whom charges may be preferred for trial by summary court will not be confined in the guardhouse, 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.

937. Whenever, under the provisions of the summary court act, it becomes necessary to convene a garrison or regimental court, the order appointing it will state the fact that brings the case within the exceptions of the law.

938. Whenever by any of the Articles of War punishment is left to the discretion of the court, it shall not, in time of peace, be in excess of a limit which the President may prescribe. The limits so prescribed are set forth in the Judge-Advocate's Manual, published by authority of the Secretary of War.[1]

939. Sentences imposing tours of guard duty are forbidden.

940. When the sentence of a court-martial prescribes imprisonment, the court will state therein whether the prisoner shall be confined in a penitentiary or at a post, being guided in its determination by the 97th Article of War.

941. General courts may sentence soldiers to confinement in a penitentiary for offences which are thus punishable by some statute of the United States or by a statute or the common law of the State, Territory, or District in which the offences are committed. Department commanders will designate the United States Penitentiary at Fort Leavenworth, Kansas, as the place of execution of such sentences, in cases in which the term of confinement imposed is more than one year. If any State or Territory within a military department has made provision by law for the confinement of such prisoners in its penitentiaries, the department commander, with the approval of the Secretary of War, may designate one as the place of execution of sentence.

942. 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 a place of confinement.

943. 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.

944. 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.

945. The order promulgating the proceedings of a court and the action of the reviewing authority will, when practicable, be of the same date. 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 ap-

1595 ply to sentences of forfeiture of all pay and allowances. A soldier awaiting result of trial will not be paid before the result is known.

946. The authority which has designated the place of confinement, or higher authority, may change the place of confinement of any prisoner under the jurisdiction of such authority.

947. A sentence to confinement, with or without forfeiture of pay, can not 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.

948. 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.

949. 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.

950. The time at which a dishonorable discharge is to take effect, as fixed by a sentence, can not be postponed by the reviewing officer.

951. 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 $120. 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

[1] The official publication is in G. O. 16 of 1895. See *ante*, p. 1001.

sentence in orders, and will not apply to pay which accrued previous to that date.

952. An order remitting a forfeiture of pay operates only on the pay to become due subsequent to the date of the order.

953. Notwithstanding a sentence contemplates payment of a stated sum to a soldier upon his release from confinement, it can not be made unless there is a sufficient balance to his credit after all authorized stoppages are deducted.

954. Every court-martial will keep a complete and accurate record of its proceedings, which will be authenticated in each case by the signatures of the president and judge-advocate, the latter affixing his signature to each day's proceedings.

955. The judge-advocate will transmit the proceedings without delay to the officer having authority to confirm the sentence, who will state at the end of the proceedings in each his decision and orders.

956. The complete proceedings of a garrison or regimental court will be transmitted without delay by the post or regimental commander to department headquarters.

957. When the record of a court exhibits error in preparation, or seemingly erroneous conclusions, the reviewing authority may reconvene the court for a reconsideration of its action, pointing out defects. Should the court concur in the views submitted, it will proceed by amendment to correct its errors, and may modify or completely change its findings. A reopening of the case, by calling or recalling witnesses, is illegal.

1596 958. 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.

959. 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 short-hand, 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.

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

961. 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.

[It is to be noted that Par. 1019 of the Regulations of 1889, specifying certain punishments as legal for enlisted men, is not repeated in these regulations. See page 400, *ante*.]

# CASES AND TRIALS CITED.

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